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Public Version

Statement of Unresolved Issues

Zoetis Inc / Betrola Pty Limited (which owns the Jurox group of companies)

9 March 2022

Introduction

1. On 28 October 2021, we registered an application (the Application) from Zoetis Inc (Zoetis or the Applicant) seeking clearance to acquire 100% of the shares in Betrola Pty Limited, which includes the Jurox Group of companies (together, Jurox) (the Proposed Acquisition).[1]

2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

3. Since registering the Application from Zoetis, we have published:

   3.1 a Statement of Preliminary Issues (SoPI) setting out the issues that we considered important at the start of our investigation in deciding whether or not to grant clearance;[2] and

   3.2 a Statement of Issues (SoI) setting out the potential competition issues that we had identified following our initial investigation.[3]

4. The SoPI and the SoI also provided background information about Zoetis and Jurox as well as the industry in which they operate. These documents are available on our website, along with public versions of the submissions we received following publication of the SoPI and SoI.

5. This Statement of Unresolved Issues (SoUI) sets out the potential competition issues that have not been resolved to date and that we therefore continue to test. This is so that the merging parties and other interested parties have an opportunity to comment and provide us with additional information.

6. In reaching the preliminary views set out in this SoUI, we have considered information provided by the merging parties and other industry participants. We have not yet made any final decisions on the issues outlined below (or any other

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1 A public version of the Application is available on our website at: https://comcom.govt.nz/case-register/case-register-entries/zoetis-inc-betrola-pty-limited-which-owns-the-jurox-group-of-companies.

2 The SoPI dated 12 November 2021 is available at: https://comcom.govt.nz/__data/assets/pdf_file/0023/270383/Zoetis-Betrola-which-owns-Jurox-Statement-of-Preliminary-Issues-12-November-2021.pdf.

3 The SoI dated 23 December 2021 is available at: https://comcom.govt.nz/__data/assets/pdf_file/0023/274154/Zoetis-and-Betrola-which-owns-Jurox-Statement-of-Issues-23-December-2021.pdf.

issues) and our views may change, and new competition issues may arise, as the investigation continues.

7. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **23 March 2022**.

The concerns we have been testing[4]

8. In our SoI we identified unilateral concerns in relation to two markets.[5] These markets were the national markets for the manufacture/importation and wholesale supply of:

   8.1 opioid-based pre-anaesthetics and sedatives for cats and dogs (companion animals); and

   8.2 antidotes for short-term pre-anaesthetic sedatives for companion animals.

9. After further investigation we are still not satisfied that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects in those markets. We have refined the markets after those enquiries. The markets where we have concerns are the national markets for the manufacture/importation and wholesale supply of:

   9.1 butorphanol-based pre-anaesthetics and sedatives for companion animals (the butorphanol sedative market); and

   9.2 antidotes for short-term pre-anaesthetic products for companion animals (the antidote market).

10. Our unresolved concerns in relation to the butorphanol sedative market arise from our current view that:

    10.1 Zoetis and Jurox are close competitors and this competition would be lost with the Proposed Acquisition;

    10.2 the collective constraints remaining post-merger would be insufficient to prevent a substantial lessening of competition;

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4 In the SoI we identified nine areas of overlap where we had no further concerns because the evidence indicated that the merging parties are not close competitors and/or that the merged entity would be constrained by the presence of existing competitors. The markets were for the manufacture/importation and wholesale supply of: oral penicillin treatments for companion animals; injectable penicillin treatments for companion animals; intramammary antibiotic treatments for dry cows; intramammary antibiotic treatments for lactating cows; teat sealants for cows; anthelmintic treatments for sheep; anthelmintic treatments for cattle; oral worming treatments for horses; and nonsteroidal anti-inflammatory drugs for animals. The SoI at [11].

5 The SoI at [5]

10.2.1 there would be only one existing competitor to the merged entity, which may not be sufficient to replace the lost competition;

10.2.2 there is unlikely to be a strong constraint from expansion, potential competition and/or from countervailing power; and

10.2.3 constraint from outside the butorphanol sedative market is unlikely to place a material constraint on the merged entity.

11. Our unresolved concerns in relation to the antidote market arise from our current view that:

11.1 Zoetis and Jurox are close competitors and this competition would be lost with the Proposed Acquisition;

11.2 the collective constraints remaining post-merger would be insufficient to prevent a substantial lessening of competition;

11.2.1 there would be only one existing competitor to the merged entity, which may not be sufficient to replace the lost competition;

11.2.2 there is unlikely to be a strong constraint from expansion, potential competition and/or from countervailing power; and

11.2.3 constraint from outside the antidote market is unlikely to place a material constraint on the merged entity.

12. We are also continuing to consider whether the Proposed Acquisition could substantially lessen competition through:

12.1 coordinated effects in the butorphanol sedative market and antidote market, by allowing the merged entity to reach at least an implicit understanding[6] with the remaining market participants to increase prices or allocate customers; and/or

12.2 conglomerate effects, by giving the merged entity the ability and incentive to engage in anticompetitive bundling that has the effect of foreclosing rivals.

13. We discuss these outstanding concerns in more detail below.

Process and timeline

14. We have agreed with Zoetis an extension of time until **14 April 2022** to decide whether to clear or decline the Proposed Acquisition.

15. The Commission would like to receive submissions and supporting evidence from the Applicant, Jurox and other interested parties on the issues raised in this SoUI. We

[6] This could include behaviour that may not be regarded as a contract, arrangement or understanding for the purpose of assessing whether a cartel prohibited by the Commerce Act 1986 exists.

request responses by close of business on **23 March 2022**, including a public version of any submission.

16. All submissions received will be published on our website with appropriate redactions.[7] All parties will have the opportunity to cross-submit on the public versions of submissions from other parties by close of business on **30 March 2022**.

17. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

The parties

18. Zoetis is a global animal healthcare company that develops, manufactures and distributes healthcare treatments for companion animals (such as cats and dogs) and production animals (such as sheep and cattle).

19. Jurox is an Australia-based animal healthcare company that also develops, manufactures and distributes healthcare treatments for companion and production animals. Jurox's business includes a New Zealand subsidiary, Jurox New Zealand Limited.

Industry background

Anaesthetics and analgesics

20. Zoetis and Jurox both supply a wide range of animal healthcare products in New Zealand. Our focus in the SoUI is on products used as anaesthetics and analgesics (and related antidotes) on companion animals since this is where Zoetis and Jurox compete most closely with one another. Anaesthetic products induce a loss of physical sensation, with or without a loss of consciousness, while analgesics are products that relieve pain but do not cause a complete loss of consciousness, feeling or movement.[8]

21. Within the anaesthetic area, Zoetis considers that products fall into four main areas:[9]

    21.1 general anaesthetic inhalants;

    21.2 general anaesthetics injectables;

    21.3 local anaesthetics; and

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7 Confidential information must be clearly marked (by highlighting the information and enclosing it in square brackets). Submitters must also provide a public version of their submission with confidential material redacted. At the same time, a schedule must be provided which sets out each of the pieces of information over which confidentiality is claimed and the reasons why the information is confidential (preferably with reference to the Official Information Act 1982).

8 See Annexure I of the Application at [2].

9 See *European Commission Schering-Plough/Organon Biosciences* (2007) and separately *Pfizer / Wyeth* (2009).

21.4 pre-anaesthetics and sedatives.

22. All anaesthetics are used to block the perception of pain.

22.1 General anaesthetics work directly on the animal's central nervous system and result in complete unconsciousness. General anaesthetics can be delivered through an injection or inhaled.

22.2 Local anaesthetics block the pain impulses from a particular area reaching the brain and are delivered via injection.

22.3 Pre-anaesthetic and sedative products (which for ease, we refer to together as 'sedatives') are used to calm an animal prior to it being administered with anaesthetic or to restrain it prior to a clinical examination or procedure. Related to these are antidotes, which are used to counteract the effects of sedatives.

23. The two product areas that are most relevant to our assessment of the Proposed Acquisition (since they are where competition concerns arise) are:

23.1 sedatives; and

23.2 antidotes.

Product registration

24. Prior to any animal healthcare product being distributed in New Zealand, it needs to obtain regulatory approval under the Agricultural Compounds and Veterinary Medicines Act 1997 (ACVM).[10] Once a product is registered under the ACVM, it can be legally sold in New Zealand. How the product is sold to end customers depends on whether it can be purchased with or without a prescription. Sedatives for companion animals, and the corresponding antidotes, can only be purchased with a prescription. However, given how the products are used (that is, as part of a procedure or treatment), the prescribing veterinarian will also administer the product to the animal. To this extent, while the end-customer paying for the product is the owner of the animal, it is the administrating veterinarian who will typically select the particular product.

25. Each product will have indications for specific types of animals and treatments. For example, a product might be indicated as an "analgesic and sedative for use in horses, dogs and cats". When a veterinarian uses it for that purpose it is referred to as 'on-label' use. Veterinarians can use products that do not have an indication for the animal they are treating in certain circumstances, which is referred to as 'off-

[10] See https://www.mpi.govt.nz/processing/agricultural-compounds-and-vet-medicines/acvm-overview/authorisation-of-acvm/.

label' use. The ACVM provides a 'risk management-based product-use cascade' (see below) for veterinarians that sets out those circumstances. [11]

> **ACVM guidance for veterinarians**
> **Deciding on treatment - Risk management-based product-use cascade**
> Number 1 products should be your first choice. They've been ACVM risk-assessed for veterinary use.
> 1. On-label use of a New Zealand-authorised (under the ACVM Act) veterinary product.
> 2. Off-label use of a New Zealand-authorised veterinary product.
> 3. Off-label use of a New Zealand-authorised (under the Medicines Act) human medicine.
> 4. Import of an overseas product (veterinary product preferred but human product acceptable).
> 5. Use of a compounded veterinary preparation.

26. The ACVM strongly recommends that veterinarians follow the 'on-label' indications of each animal health care product. The ACVM guidance identifies that an 'on-label' product should be the first choice for veterinarians and they must have a good reason to use an 'off-label' product.[12] One such example might be where there are no 'on-label' products available. The Veterinary Council of New Zealand also states in its Code of Professional Conduct that a veterinarian should use a registered veterinary medicine if one exists before a human equivalent.[13]

27. Not all products registered under the ACVM are sold in New Zealand. Registrations last several years and suppliers with existing registrations make commercial decisions about which products they will actively market and supply to customers in New Zealand. In addition, many suppliers in New Zealand act as distribution agents for manufacturers based in other countries. These agents might have limited control over the production decisions made by overseas manufacturers. This means that there are circumstances where suppliers with active ACVM registrations are not able to readily supply their products in New Zealand.

The relevant markets

28. We define markets in the way that we consider best isolates the key competition issues that arise from a 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 and services that fall outside the market, but which still impose some degree of competitive constraint on the merged entity.

29. Zoetis submitted in the Application that the relevant markets are: [14]

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11 See https://www.mpi.govt.nz/animals/veterinary-medicines-acvm/acvm-guidance-veterinarians/#deciding-on-treatment.

12 For example, see Commerce Commission meeting with [ ]and Commerce Commission meeting with [ ]

13 Vet Council "Code of Professional Conduct" (January 2020) www.vetcouncil.org.nz.

14 The Application at [134] and [155]. This approach follows approaches in previous cases that include: *Boehringer Ingelheim International GmbH and Sanofi S.A.* [2016] NZCC 18 (13 September 2016); *Elanco Animal Health Inc and Bayer AG's animal health business* [2020] NZCC 14 (9 July 2020); *Pfizer Inc –*

29.1 opioid-based pre-anaesthetics and sedatives; and

29.2 antidotes for short-term pre-anaesthetics and sedatives.

30. We have yet to reach any final views on market definition. However, based on the information we have collected to date, we consider that there are two relevant markets impacted by the Proposed Acquisition, namely the national markets for the manufacture/importation and wholesale supply of:

30.1 butorphanol-based pre-anaesthetics and sedatives for companion animals (the butorphanol sedative market); and

30.2 antidotes for short-term pre-anaesthetic products for companion animals (the antidote market).

31. We set out our reasons for our current approach to market definition below.

The butorphanol sedative market

32. In the SoI, we defined a market for opioid-based pre-anaesthetics for companion animals. Based on further analysis, we now consider there is a national market for the manufacture/importation and wholesale supply of butorphanol-based sedatives for companion animals. Butorphanol is an opioid.

33. With regard to the product market, we consider that other products (including products with an opioid active ingredient) are not sufficiently close substitutes for butorphanol-based sedatives on either the supply or the demand side such that they fall within the same market.

33.1 On the demand side, there are no close substitutes for butorphanol-based sedatives for companion animals:

33.1.1 sedatives have a distinct purpose and other anaesthetic or analgesic products are not close substitutes;

33.1.2 opioid sedatives such as butorphanol are used differently to non-opioid sedatives;

33.1.3 butorphanol sedatives have different indications and usage than other opioid-based products; and

33.1.4 butorphanol sedatives indicated for horses or for humans are not typically used to treat companion animals.

33.2 On the supply side, suppliers of other products cannot easily switch to supplying butorphanol sedatives indicated for use on companion animals due

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proposed acquisition of Wyeth Corp (ACCC, 18 November 2009); *Case M.7917 Boehringer Ingelheim / Sanofi Animal Health Business* (DG Comp, 9 November 2016).

to the time and costs involved in developing, manufacturing and marketing a product and obtaining ACVM registration.

Other anaesthetics and analgesics are unlikely to be close substitutes for sedatives

34. Sedatives are prescription-only products that are used to calm an animal prior to it being administered with anaesthetic or to restrain it prior to a clinical examination or procedure.

35. The Applicant considers there are two - four steps in administering anaesthetics to companion animals, namely:

    35.1 optional pre-anaesthetic and/or sedation, administered by injecting into the muscle (intramuscular) or under the skin (subcutaneous);

    35.2 induction, administered intravenously;

    35.3 maintenance, such as with gaseous inhalation; and

    35.4 optional reversal with an antidote.[15]

36. The products used in each step have a particular purpose and are indicated for that purpose. Thus, on the demand side, veterinarians are unlikely to find other anaesthetics and analgesics as a close substitute to a product indicated for use as a sedative.[16]

37. For these reasons, we have limited the relevant market to butorphanol-based sedatives.

Non-opioid sedatives are unlikely to be close substitutes to opioid sedatives

38. Sedatives are administered by injection and contain one of the following active ingredients:

    38.1 butorphanol, which is an opioid; or

    38.2 medetomidine or dexmedetomidine, which are not opioids.

39. In the Application, Zoetis submitted that the relevant market includes only opioid sedatives.[17] However, Zoetis contends that opioids can have significant side effects and there is a growing trend towards non-opioid sedatives to avoid such side effects.

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15 The Application at [134]. For example, an antidote may only be used for certain procedures and we understand that anaesthesia is not reversed in larger operations.

16 Butorphanol products have a specific purpose for sedation, however they can have other indications. For example, Zoetis' Torbugesic can be used as an analgesic for the relief of moderate to severe pain in dogs and cats. We have considered whether the pricing of butorphanol might be indirectly constrained by substitutes for its alternative uses. However, industry participants have consistently provided feedback that butorphanol products are primarily used as sedatives on companion animals. As such we consider any indirect constraint from other uses is likely to be small.

17 The Application at [134-137].

40. Industry feedback so far has indicated that non-opioid sedatives are not a good alternative for opioid sedatives. While opioid sedatives and non-opioid sedatives have the same purpose,[18] veterinarians and competitors have advised that opioid sedatives and non-opioid sedatives are not easily interchangeable with one another.[19] For example, because butorphanol is an opioid, it provides pain relief, whereas non-opioid sedatives, such as a medetomidine-based sedative (or a dexmedetomidine-based sedative) do not.

41. We understand that, rather than used as alternatives, opioid and non-opioid sedatives are regularly used in combination with one another.[20] For example, we understand that butorphanol is used in combination with medetomidine because together they provide synergistic sedative effects, increasing safety and reducing the amount of anaesthetic required.[21]

42. For these reasons, we do not include non-opioid-based sedatives in the relevant market.[22] There may be some limited instances where a veterinarian may find non-opioid sedatives substitutable. We account for this possibility in the competition analysis.

Other opioid products are unlikely to be close substitutes to butorphanol sedatives

43. In the application, Zoetis used a relevant market that included opioid sedative products containing the active ingredient buprenorphine.[23] However, we understand that opioid products containing buprenorphine have different indications as those containing butorphanol and are used for different purposes.[24] For example:

    43.1 several vets advised that buprenorphine primarily acts as an analgesic, providing pain relief, while butorphanol primarily acts as a sedative;[25] and

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18 For example, Zoetis' opioid sedative Torbugesic is indicated as an analgesic and sedative for use in horses, dogs and cats. Zoetis' non-opioid sedative Domitor is indicated as sedative and analgesic for use in the restraint of dogs and cats and can be used as a pre-anaesthetic with all commonly injected or inhaled anaesthetic (as per ACVM).

19 For example, see Commerce Commission meeting with [ ]; Commerce Commission meeting with [ ].

20 Commerce Commission meeting with [ ].

21 Commerce Commission meeting with [ ].

22 As discussed in the SoI, we are satisfied that the merged entity is likely to be constrained in a likely market for non-opioid-based pre-anaesthetics and sedatives for companion animals by the presence of several existing competitors who have an ability to expand. Accordingly, we do not consider the competition within a market for the supply of non-opioid sedatives any further in the SoUI.

23 The Application at [141]-[142].

24 Buprelieve is indicated for the control of postoperative pain associated with surgical procedures in dogs and cats. It is intended that the first dose of buprenorphine is given as part of a premedication regimen prior to general anaesthesia and surgery (as per ACVM).

25 For example, see Commerce Commission meeting with [ ]; and Commerce Commission meeting with [ ].

43.2 a supplier of a buprenorphine product told us that it competes with other products containing buprenorphine and is not used as a pre-anaesthetic or a sedative.[26]

44. Of the merging parties, only Jurox has a buprenorphine product.[27]

Products with alternative indications are not a close substitute for butorphanol-based sedatives indicated for companion animals

45. Zoetis submits that butorphanol sedatives indicated for other animals (including for horses and humans) should be included in the market.[28] Zoetis identified some specific products it considered compete in the sedative market. These are: [29]

45.1 Ceva, with a product called Vetergesic (containing buprenorphine);

45.2 Merck Sharp & Dohme (New Zealand) Limited (MSD), with a product called Dolorex (containing butorphanol); and

45.3 the generic form of Temgesic for humans (containing buprenorphine).[30]

46. As set out in the background section, the ACVM strongly recommends that veterinarians follow the on-label indications of each animal health care product and must have a good reason to use an off-label product. The Vet Council Code of Professional Conduct makes a similar recommendation. If so, products indicated for use in other animals are not likely to be a close substitute for those indicated for companion animals. While it is possible that some veterinarians could ignore this advice, at this point we have received limited evidence that this is common practice.

47. The products that Zoetis identified are unlikely to be close substitutes for the following reasons:

47.1 Vetergesic contains a different active ingredient (buprenorphine) and is indicated for the relief of post-operative pain in a dog or cat (that is, it is not used for sedation);

47.2 Dolorex is indicated for horses; and

47.3 Temgesic is indicated for humans, contains a different active ingredient (buprenorphine) and is used for pain relief (that is, it is not used for sedation).

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26 Email from [ ] to Commerce Commission (31 January 2022).

27 As Zoetis does not supply a buprenorphine product, there is no overlap in the supply of buprenorphine-based products. The Application at Annexure E.

28 The Application and repeated in Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022).

29 The Application at [139] and [141] and repeated in Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022).

30 According to the Medsafe website, buprenorphine products for human use are supplied in New Zealand by Pharmacy Retailing New Zealand trading as Healthcare Logistics and Mundipharma New Zealand Limited.

48. For these reasons, at this stage we consider the relevant market is limited to butorphanol-based sedatives for companion animals. We consider that products that are indicated for other animals, humans and/or other conditions impose only a limited constraint, which we take into account in the competition assessment section below.

The antidote market

49. As discussed above, veterinarians have the option to use an antidote on a companion animal to counteract the effects of a short-term pre-anaesthetic product. Both Zoetis and Jurox supply antidotes for reversing the effects of sedation from the use of medetomidine and dexmedetomidine (which are not opioids) in companion animals.[31]

50. Zoetis submitted the relevant market was for antidotes for short-term pre-anaesthetics and sedatives.[32] We consider this market is appropriate, as these products are only used for the specific purpose for which they are indicated.[33]

51. Zoetis submits that antidotes are not necessary but rather a "nice to have" for the earlier wake up and comfort of the animal.[34] To this extent, we assess the potential constraint on the merged entity from vets choosing not to administer an antidote on a companion animal after sedation in the competition assessment below.

Geographic and functional markets

52. We consider the relevant geographic markets are national on the basis that market participants distribute their products nationally.

53. We consider the functional market is the manufacture/importation and wholesale supply of the products. All the market participants either manufacture or import the products and then supply on a wholesale basis either direct to veterinarians or through distributers.

Current view of the relevant markets

54. Based on the information we have collected to date, we consider that there are two relevant markets impacted by the Proposed Acquisition, namely:

    54.1 the butorphanol sedative market; and

    54.2 the antidote market.

55. We invite submissions on these proposed market definitions. In particular, we invite submissions on:

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31 Like sedatives, antidotes are prescription only products.

32 The Application at [155].

33 In this case, reversing the effects of sedation from the use of medetomidine and dexmedetomidine in companion animals.

34 Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022) at 2.

55.1 the extent to which veterinarians will follow ACVM recommendations to use on-label indications or switch from butorphanol-based sedatives for companion animals to products indicated for other animals (such a horse), humans or other purposes; and

55.2 the extent to which veterinarians will switch from butorphanol-based sedatives to any other sedative (such as non-opioid-based sedatives) indicated for use on a companion animal.

With and without scenarios

56. Assessing whether a substantial lessening of competition is likely requires us to compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the merger, often referred to as the factual) with the likely state of competition if it does not (the scenario without the merger, often referred to as the counterfactual) and to determine whether competition is likely to be substantially lessened by comparing those scenarios.

57. With the acquisition, Zoetis would acquire Jurox. Zoetis submitted that without the acquisition, Zoetis and Jurox would be likely to continue to supply veterinary products as separate entities (that is, the status quo).[35] We agree that the status quo is the appropriate counterfactual.

Unilateral effects in the butorphanol sedative market

58. Unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that a market participant can profitably increase prices above the level that would prevail without the merger (and/or reduce quality).

59. At this stage, our current view is that in the butorphanol sedative market:

59.1 Zoetis and Jurox are close competitors and this competition would be lost with the Proposed Acquisition;

59.2 the collective constraints remaining would be insufficient to prevent a substantial lessening of competition;

59.2.1 there would be only one existing competitor to the merged entity, which may not be sufficient to replace the lost competition;

59.2.2 there is unlikely to be a strong constraint from expansion, potential competition and/or from countervailing power; and

59.2.3 constraint from outside the butorphanol sedative market is unlikely to place a material constraint on the merged entity.

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35 The Application at [38].

60. Accordingly, at this stage, we are not yet satisfied that there would likely be sufficient constraint on the merged entity to prevent a substantial lessening of competition due to unilateral effects. We set out our current reasoning for this preliminary assessment below.

Competition between Zoetis and Jurox lost due to the Proposed Acquisition

61. The Proposed Acquisition would eliminate existing competition between Zoetis and Jurox within the butorphanol sedative market.

62. In the SoI we said that Zoetis and Jurox are likely to be close competitors.[36]

    62.1 Zoetis is the originator of butorphanol sedatives and supplies a product called Torbugesic and may enjoy some brand strength as a result.[37]

    62.2 Jurox supplies a product called Butordyne. Jurox's product is a generic equivalent of Torbugesic and veterinarians have identified it as an alternative.[38]

63. Zoetis did not submit on this in its response to the SoI.

64. Given the closeness of competition between the merging parties, the ways in which the Proposed Acquisition could harm competition include:

    64.1 first, where a large proportion of Zoetis' customers view Jurox as the next best alternative, the merged entity may find it profitable to raise prices on Zoetis' products post-merger because Jurox would no longer be an independent competitive constraint (or vice versa);[39] and/or

    64.2 second, Zoetis may choose to withdraw some brands from the market (for example Jurox brands), which may harm customers who prefer those brands.

65. The likelihood that such effects will be substantial depends on the extent of the collective constraints on the merged entity. For example, if a significant proportion of Zoetis' customers would be likely to switch to other suppliers of butorphanol sedatives in response to a significant price increase then it is less likely that the Proposed Acquisition would cause a substantial lessening of competition. We consider these constraints below.

Constraint from existing suppliers with registered butorphanol sedatives for companion animals

66. In the SoI, we identified one other existing supplier with a registered butorphanol sedative for companion animals that is actively selling in the market: Troy

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36 The SoI at [40] and FN17.

37 Commerce Commission meeting with [ ].

38 For example, see Commerce Commission meeting with [ ].

39 This approach follows that set out in Commerce Commission *Mergers and Acquisitions Guidelines* (July 2019) at [3.72].

Laboratories Pty Limited (Troy), with a product called Ilium Butorgesic.[40] Like Jurox's Butordyne, Ilium Butorgesic is a generic equivalent to Zoetis' originator product and industry participants identified Troy's product as an alternative.[41] Troy has a significant market share of butorphanol sedatives for companion animals.

67. Zoetis submits that there are more market participants than it originally identified in the Application and that the merged entity would be constrained by these rivals.[42] In the Application, Zoetis only identified Troy as an active player in the market. The additional competitor products that Zoetis identified as having sales or being marketed are:

    67.1 MSD's Dolorex; and,

    67.2 Ceva's Vetergesic.

68. As we noted earlier, the evidence does not suggest those products are likely to impose a material constraint on the butorphanol sedatives of Zoetis and Jurox. This is because they use different active ingredients and/or have different indications.

69. Although Troy will be a competitor in the market, unilateral effects could still arise. Even if the merged entity and firms set prices independently, they will do so taking into account each other's price.[43] In this case, the loss of Jurox as a competitor may give Zoetis the incentive and ability to profitability increase prices for one or both of Torbugesic or Butordyne, and/or discontinue Jurox's Butordyne product. Troy may also have the incentive and ability to increase prices in response. For these reasons, we are not yet satisfied that existing competition would impose sufficient constraint on the merged entity to prevent a substantial lessening of competition.

Potential entry and expansion in the butorphanol sedative market

70. At this stage, we are not yet satisfied that, in response to a price increase:

    70.1 a supplier with an existing registration, but with no existing sales, could profitably enter and expand in a timely manner; and/or

    70.2 a supplier without an existing registration could obtain a new registration and then profitably enter and expand in a timely manner.

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40 The products of Zoetis, Jurox and Troy are administrated via an injection, contain the active ingredient butorphanol and are indicated for use as a sedative for use in horses, dogs and cats (as per the ACVM).

41 For example, Commerce Commission meeting with [ ] (15 November 2021); Submission from Troy Laboratories to the Commerce Commission (26 November 2021); Email from [ ] to the Commerce Commission (10 January 2022).

42 Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022) at 1.

43 Commerce Commission *Mergers and Acquisitions Guidelines* (July 2019) at FN81.

Entry and expansion with an existing registration

71. In the SoI, we were not yet satisfied that suppliers with existing registrations, but with no existing presence in the butorphanol sedative market, would enter and expand in the market in response to a price increase.

72. There are three suppliers that have butorphanol sedatives with existing ACVM registrations but do not appear to be active in the market. These are:[44]

    72.1 Dechra Veterinary Products NZ Limited (Dechra), with a registered product called Calesedate;

    72.2 Ausrichter (New Zealand) Limited (Ausrichter), with a registered product called Butomidor; and

    72.3 Akorn Animal Health NZ Limited (Akorn), with a registered product called Butorphic.

73. In Zoetis' response to the SoI it recognised that there was no evidence of these three products being marketed in New Zealand at present.[45] However, Zoetis previously submitted in the Application the barriers to these parties supplying their registered products in New Zealand are relatively low.[46] Further, while demand for butorphanol sedatives may, by itself, not encourage entry and expansion, Zoetis considers there are other reasons that would incentivise entry such as:

    73.1 where there is a compelling strategic reason to continue marketing the product; or

    73.2 if the presence of a lower selling product supports the sales of another product.[47]

74. To provide a constraint on the merged entity, entry must be likely. However, at this stage, we are not satisfied that any one of the three holders of an existing registration for a butorphanol opioid sedative listed above would likely enter and expand in the butorphanol sedative market.

75. Having a registered product is a necessary step in supplying a product in the market. However, there are other steps involved. This includes sourcing the product from a manufacturer, adapting the product for any specific requirements in New Zealand (such as labelling), and marketing the product. A new supplier must be sufficiently confident there will be enough demand for the product to make it worthwhile to take the steps to introduce a product.

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44 As per https://eatsafe.nzfsa.govt.nz/web/public/acvm-register. For example, [ ]wholesalers of animal pharmaceuticals has supplied any of these three products in the last three years. See [ ].

45 Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022) at 2.

46 The Application at [10(c)].

47 Email from Buddle Findlay (on behalf of Zoetis) to the Commerce Commission (4 February 2022).

76. While the registration holders have provided commercially sensitive information to the Commission about their intentions, the main reasons for our preliminary assessment that we are not satisfied about the likelihood of entry and expansion in the butorphanol sedative market are that:

    76.1 there is limited recent evidence of any of the registration holders supplying their products in New Zealand;

    76.2 the evidence we do have about previous sales in New Zealand indicates there was limited demand for the product/s; and,

    76.3 it is unclear whether there would be sufficient future demand (even if the merged entity was to raise the price of one or more of its products) for any one of them to have an incentive to supply their product.[48]

77. Further evidence is set out in the confidential Attachment.

De novo entry and expansion without an existing registration

78. In the SoI, we were not satisfied that potential suppliers without existing registrations would enter and expand in the butorphanol sedative market in response to a price increase.

79. Zoetis did not submit on this in its response to the SoI, however in the Application submitted that there are low barriers to entry and expansion in any market that may be defined for opioid sedatives. Zoetis argued that:

    79.1 the majority of the products are already highly genericised and no longer subject to any meaningful patent protection; and

    79.2 regulatory barriers in New Zealand are relatively low for generic products.[49]

80. Manufacturing processes for opioid sedatives appear to be relatively straightforward and there appear to be limited barriers to any supplier obtaining ACVM registration, if required. As noted above, we have evidence that there are three butorphanol opioid sedatives with existing ACVM registrations but with no existing sales in the opioid sedative market.

81. Further enquiries have identified one supplier that is considering de novo entry with a butorphanol sedative. However, to provide a constraint on the merged entity, de novo entry must be sufficiently likely and timely, and we are not satisfied that it is in this case. Further evidence is set out in the confidential Attachment. In particular, the same concerns outlined above about entry by holders of existing registrations also apply here. A new supplier would need to have an incentive to undertake the time-consuming registration process, but that incentive is likely to be undermined by

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48 For example, a post-merger increase in price only for Torbugesic may result in some customers switching to Butordyne and to Ilium Butorgesic. As such, this increase in price may not create sufficient demand for new entry.

49 The Application at [253(b)].

the presence of several parties with existing registrations and uncertainty over demand.[50]

Countervailing power in the butorphanol sedative market

82. In the SoI, we were not satisfied that any customers would have the ability to substantially influence the price the merged entity charges.

83. Zoetis did not submit on this in its response to the SoI, but in the Application submitted that veterinarians can purchase their entire requirements from a wholesaler of animal health products and, because of this, distributors, wholesalers, as well as the larger vet groups, have strong bargaining power as most manufacturers sell through them.[51]

84. Based on our further assessment, we do not consider that countervailing power is likely to impose a significant constraint on the merged entity.

84.1 It is unlikely that the threat of sponsoring entry would impose a significant constraint on the merged entity.

84.1.1 The most likely means to sponsor entry would be for a large veterinarian chain or buyer group to guarantee volumes to a new entrant, such as one of the firms that already holds a registration but is not currently supplying the market.[52] However, it is unclear any single customer would be large enough to be sufficient to justify entry. One potential supplier noted that while it had no current idea of the number of customers it would need for entry to be attractive, no one customer would be sufficiently large enough on its own to underpin entry.[53]

84.1.2 If a customer is large enough to sponsor entry, it will only protect smaller veterinarians if it results in new entry. The customer could instead use the threat of sponsorship to leverage a lower price for itself, with other veterinarians not benefitting.

84.2 Customers purchase a broad range of products from the merging parties and we are considering whether they are able to threaten to punish the merged entity in a more competitive market. Such behaviour comes at a cost for customers, since it implies veterinarians are purchasing products that are not their first preference. It is unclear whether customers would take this action to defeat a price rise given these additional costs. Further, this may not be

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50 For example, see Commerce Commission meeting with [ ] (14 December 2021); Commerce Commission meeting with [ ] (10 December 2021).

51 The Application at [77]-[80].

52 Wholesalers are unlikely to be able to sponsor such entry as they would not be a position to guarantee the purchases of veterinarians.

53 Commerce Commission meeting with [ ] (14 December 2021).

sufficient to deter the merged entity if it could still gain more from raising the price in the butorphanol sedative market.

85. At this stage, we are not satisfied that any customers might have sufficient countervailing power to constrain a price increase from the merged entity though sponsoring entry or punishing in another market.

Constraints from outside the butorphanol sedative market

86. For the purposes of our analysis we have limited the market to butorphanol-based sedatives for companion animals. In the market definition section, we identified some examples where some limited constraint may arise from products outside the market such as non-opioid sedatives and where a customer uses butorphanol for purposes other than sedation.

87. At this point, there is limited evidence to suggest that these constraints impose material constraint. However, we continue to assess this.

Preliminary conclusion on the butorphanol sedative market

88. Accordingly, we are not yet satisfied that that the Proposed Acquisition would not be likely to result in substantial lessening competition due to unilateral effects in the butorphanol sedative market.

89. We invite submissions on our assessment of the Proposed Acquisition on the butorphanol sedative market. In particular, we invite submissions on:

    89.1 the extent of lost competition between Zoetis and Jurox and whether Troy would have the ability and incentive to replace that lost competition;

    89.2 the likelihood and timeliness of entry and expansion in the supply of butorphanol sedatives for companion animals given the uncertainty of demand;

    89.3 whether any customer would have sufficient demand to sponsor entry and, if so, whether that would necessarily protect smaller customers; and

    89.4 the extent to which sedatives with a different active ingredient, or a different indication, can be used as an alternative to butorphanol-based sedatives for use on companion animals.

Unilateral effects in the antidote market

90. As discussed above, antidotes are supplied to reverse the effects of a non-opioid[54] sedative when it is used as a pre-anaesthetic.

91. At this stage, our current view is that in the antidote market:

[54] Either medetomidine or dexmedetomidine.

91.1 Zoetis and Jurox are close competitors and this competition would be lost with the Proposed Acquisition;

91.2 the collective constraints remaining would be unlikely to prevent a substantial lessening of competition;

91.2.1 there would be only one existing competitor to the merged entity, which may not be sufficient to replace the lost competition;

91.2.2 there is unlikely to be a strong constraint from expansion, potential competition and/or from countervailing power; and

91.2.3 constraint from outside the antidote market is unlikely to place a material constraint on the merged entity.

92. Accordingly, at this stage, we are not yet satisfied that there would likely be sufficient constraint on the merged entity to prevent a substantial lessening of competition due to unilateral effects. We set out our current reasoning for this preliminary assessment below.

Competition between Zoetis and Jurox lost due to the Proposed Acquisition

93. The Proposed Acquisition would eliminate existing competition between Zoetis and Jurox within the antidote market.

94. In the SoI, we identified that Zoetis and Jurox are likely to be close competitors and together will account for a high proportion of the market.

94.1 Zoetis supplies a product called Antisedan, which is the originator product in this market.

94.2 Jurox supplies a product called Antipam. Jurox's product is a generic equivalent of Antisedan and veterinarians have identified it as a good alternative.[55]

95. As with the butorphanol sedative market, we continue to assess whether the loss of competition will be substantial.

Constraint from existing suppliers with antidotes for companion animals

96. In the SoI, we identified only one other supplier with a registered antidote that is actively selling in the market: Ceva, with a product called Reversamed.[56] Industry participants advised that Ceva's product is an alternative as it is a generic equivalent

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[55] See for example, Commerce Commission meeting with [ ] (1 December 2021) and Commerce Commission meeting with [ ] (3 December 2021) (noting that it is possible to interchange drugs with the same active ingredient).

[56] The products of Zoetis, Jurox and Ceva are administrated via an injection, contain the active ingredient butorphanol and are indicated for use as a sedative for use in horses, dogs and cats (as per the ACVM).

of Zoetis' product.[57] It would have a relatively low market share compared to the merged entity.

97. Zoetis submits in response to the SoI that there were more market participants active in the market than it originally identified in the Application and that the merged entity would be constrained by these rivals.[58] Zoetis' update on products in the market is:

97.1 Ceva's Reversamed, which is being marketed;

97.2 Ferrari Animal Health Pty Limited's (Ferrari) Mobitor Injection, which is registered in New Zealand but not marketed in New Zealand (although is being sold in Australia); and

97.3 Le Vet Beheer BV's Sedastop, which is registered but not marketed in New Zealand (Dechra now owns the registration for this product).

98. We have already included Ceva in our assessment and we address Mobitor and Sedastop in our entry analysis below.

99. For similar reasons in the butorphanol sedative market, although there will be a competitor in the market, unilateral effects could still arise. We are still assessing whether Ceva would have the incentive and ability to constrain a price increase by the merged entity, especially given its low market share. For these reasons, we are not yet satisfied that existing competition would impose sufficient constraint on the merged entity to prevent a substantial lessening of competition.

Potential entry and expansion in the antidote market

100. Given our concerns about the level of existing competition, we are continuing to assess the likelihood of entry and expansion into the market in response to a price increase.

101. At this stage, we are not yet satisfied that:

101.1 a supplier with an existing registration, but with no existing sales, could profitably enter and expand in a timely manner; and/or

101.2 a supplier without an existing registration would obtain a new registration and could then profitably enter and expand in a timely manner.

Entry and expansion with an existing registration

102. In the SoI, we stated that we were not yet satisfied that suppliers with existing registrations, but with no existing presence in the antidote market, could profitably enter and expand in response to a price increase.

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57 For example, Commerce Commission meeting with [ ](15 November 2021); Commerce Commission meeting with [ ] (8 December 2021).

58 Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022) at 2.

103. As noted above, Zoetis submits that Ferrari and Dechra also hold registrations for antidotes, although accepts that there is no evidence these products are being marketed in New Zealand at present.[59] While the registration holders have provided commercially sensitive information to the Commission about their intentions, the main reasons for our preliminary assessment that we are not satisfied about the likelihood of entry and expansion in the antidote market are that:

    103.1 it is unclear whether there would be sufficient future demand (even if the merged entity was to raise the price of one or more of its products) for any one of them to have an incentive to supply their product; and

    103.2 it is unclear whether entry will be sufficiently timely.[60]

104. Further evidence is set out in the confidential Attachment.

105. On the basis of these comments, we are not satisfied that either of these holders of an existing registration for an antidote would likely enter and expand in the antidote market in a sufficiently timely manner in response to a price increase.

De novo entry and expansion without an existing registration

106. In the SoI, we were not satisfied that potential suppliers with no existing registration would profitably enter and expand in the antidote market in response to a price increase.

107. We have identified one potential entrant, but we are not satisfied that it is a likely entrant in the antidote market. Further evidence is set out in the confidential Attachment. The same concerns outlined above about entry from a holder of an existing registration also apply to de novo entry without an existing registration. As above, industry participants have indicated that the demand for antidotes is relatively low compared to other animal healthcare markets, which could reduce the incentive for suppliers to enter and expand. As such, we are not satisfied that de novo entry would be likely.

Countervailing power in the antidote market

108. For the same reasons as in the butorphanol sedative market, we are not yet satisfied that any large and/or wholesale customers would have sufficient countervailing power to constrain a price increase. This includes the ability of any wholesale customer to sponsor entry or punish the merged entity in another market.

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59 Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022) at 2.

60 For example, a post-merger increase in price only for Antisedan may result in some customers switching to Antipam and to Reversamed. As such, this increase in price may not create sufficient demand for new entry.

Constraints from outside the antidote market

109. Zoetis submitted that the merged entity would be constrained by veterinarians having the option of not using antidotes.[61] In its view, an antidote is a "nice-to-have" but not a necessity.

> Antidotes in this market are a "nice-to-have" for the earlier wake up and comfort of the animal, but they are not a necessity. Instead of using an antidote, the animal can be left to wake up as the sedative wears off. That being the case, a constraint on the price of Zoetis and Jurox's products in this market is the option for vets not to use them at all.
>
> Zoetis understands that most vets would use sedatives to carry out minor procedures (eg. x-rays, stitching up small wounds under local anaesthetic), and would aim to reverse the sedation. Pre-anaesthetic sedation with this type of sedative is used very rarely, as these sedatives are very hypotensive. An example of when they would be used is if a vet conducts an x-ray and decides to go straight into surgery. In those cases, the vet would most likely not reverse the sedation.[62]

110. A supplier with a registered antidote supported this submission noting that that there would be many situations where, after sedation, an antidote would not be administered to a companion animal.[63] To this extent, we are aware of instances where an antidote would not be used after a non-opioid sedative is administered.[64]

111. However, we also understand that non-opioid sedatives are selected by veterinarians primarily because they are reversible and have evidence that the reversing antidote is very often used.[65] For example, Zoetis noted that its antidote is used in [ ] of cases when its non-opioid sedative is used.[66]

112. At this stage, we do not consider the option to not administer an antidote is likely to provide a significant constraint on the merged entity in the antidote market. However, we continue to assess this.

Preliminary conclusion on the antidote market

113. Accordingly, we are not yet satisfied that that the Proposed Acquisition would not be likely to result in substantial lessening competition due to unilateral effects in the antidote market.

114. We invite submissions on our assessment of the Proposed Acquisition on the antidote market. In particular, we invite submissions on:

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61 Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022) at 2.

62 Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022) at 2.

63 Email from [ ] to Commerce Commission (31 January 2022).

64 Fro example, see Commerce Commission meeting with [ ] (16 February 2022); and Commerce Commission meeting with [ ](17 February 2022).

65 For example, see Commerce Commission meeting with [ ] (16 February 2022); Commerce Commission meeting with [ ](17 February 2022); and Email from [ ]

66 Email from Buddle Findlay (on behalf of Zoetis) to the Commerce Commission (4 February 2022).

114.1 the extent of lost competition between Zoetis and Jurox and whether Ceva would have the ability and incentive to replace that lost competition given its low market share;

114.2 the likelihood and timeliness of entry and expansion in the supply of antidotes for companion animals given the uncertainty of demand;

114.3 whether any customer would have sufficient demand to sponsor entry and, if so, whether that would protect smaller customers;

114.4 whether there are situations where an antidote must be used and the extent to which not administrating an antidote would place a constraint on the merged entity in the supply of antidotes for companion animals.

Coordinated effects

115. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all, or some of its remaining competitors to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase in the relevant market. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all the firms in the market to be acting in a coordinated way.[67]

116. In the SoI, we considered whether the Proposed Acquisition could give rise to coordinated effects. Zoetis did not submit on coordinated effects in its response to the SoI. However, in the Application, it submitted there was no potential for coordinated effects as a result of the Proposed Acquisition since the relevant markets are highly competitive and there are a number of vigorous competitors of varying sizes that can readily expand.[68]

117. We have further considered whether the Proposed Acquisition might result in coordinated effects in the relevant markets by asking whether:[69]

117.1 the relevant markets are likely to be vulnerable to coordination because;

117.1.1 there is a metric that the market participants could coordinate on; and

117.1.2 the markets have the necessary features to sustain an agreement (such as the ability to monitor and punish deviations from the agreement and aligned incentives to coordinate); and

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67 Commerce Commission *Mergers and Acquisitions Guidelines* (July 2019) at [3.84].

68 The Application at [254].

69 We focus on these markets because it is in these markets in which post-merger there will be few remaining players (which is a factor that makes coordination easier).

117.2 the Proposed Acquisition will make coordination significantly more likely (for example, by removing an aggressive market participant or increasing symmetry among competitors).

Whether the markets are vulnerable to coordination

118. Coordination can take place on different elements of competition. In this case, we are considering whether any markets might be vulnerable to firms coordinating by reaching an understanding to:

118.1 increase prices; or

118.2 allocate customers between each other.

119. Coordination on price occurs when suppliers reach an understanding to raise prices. This can include an implicit understanding which may not be regarded as a contract, arrangement or understanding for the purpose of assessing whether a cartel prohibited by the Commerce Act 1986 exists.

120. At this point we consider the evidence is mixed on whether the markets are likely to be vulnerable to this form of coordination.

120.1 In the markets where Zoetis and Jurox operate, there is only limited price transparency. It may be possible for suppliers to find out what price each other's products are listed for by wholesalers. However, suppliers also negotiate discounts directly with customers.[70] These discounts are not easily observable. This may make it harder to coordinate to raise prices and then monitor adherence to an agreement.

120.2 In each market, products use the same active ingredient and so are largely homogenous. Homogeneity supports coordination because it is easier to identify a price level that parties in the market can agree to.[71] However, there appear to be some perceived differences between brands. For example, some vets appear to prefer Zoetis' products because they were the originators and Zoetis can accordingly charge higher prices.[72] It is possible that the firms could reach an understanding based on a differential between the prices, but this is not as easy as having the same price.

120.3 Coordination is also more likely where the market has stable demand and a lack of supply shocks. Total market demand for sedatives and antidotes is likely to be related to the total pet population. Pet ownership has grown rapidly over the past few years.[73]

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70 The Application at [79(c)].

71 It is still possible for coordination to exist if there are differences in the products. If the difference in the quality of the products is consistent, the parties may only need to establish a price differential once and then maintain that differential when raising prices.

72 For example, see Commerce Commission meeting with [ ].

73 See for example Bonnie Flaws & Tina Morrison "Kiwis seek comfort of pets during Covid, splash out on premium petfood" *Stuff* (24 November 2020).

121. Coordination through customer allocation occurs when competitors reach an understanding to avoid competing aggressively for each other's customers. All the factors listed above apply to this form of coordination except for price transparency. With customer allocation it is not necessary that parties can observe the prices that each sets. Instead, this form of coordination requires that rivals find a way to divide up customers and then monitor adherence to the allocation. The evidence is mixed on whether this could occur. In particular, customers vary greatly in size, from small vets to large buying groups. It may be difficult for suppliers to reach an understanding how to allocate such customers between one another.

Whether the Proposed Acquisition would make coordination more likely or complete

122. We are also considering whether the Proposed Acquisition makes coordination more likely or more complete. We consider that in the markets identified the Proposed Acquisition would on balance increase the likelihood of coordination.

122.1 The Proposed Acquisition would eliminate a competitor in each market, leaving only two current competitors. Given that the barriers to entry are high, the loss of a competitor is likely to make it easier to engage in coordination. Although some other suppliers hold registrations for equivalent products, it is unclear whether they are likely to enter the market to disrupt a coordinated agreement if one emerged.

122.2 The Proposed Acquisition would make the market shares of the parties in the market for butorphanol-based sedatives more similar. Symmetry between players makes coordination easier as it is then more likely that they will have similar pricing incentives. In the antidote market, the market shares of the remaining market participants would become less similar. We are continuing to assess whether the remaining market participants have other similarities that will encourage coordination, such as similar costs and strategies.

Preliminary conclusion on coordinated effects

123. As identified above, there are some factors that support coordination and some that do not. Not all factors need to be present for coordination to occur. For that reason, we continue to assess whether the Proposed Acquisition would result in a substantial lessening of competition due to coordination. We invite submissions on this.

Conglomerate effects

124. A conglomerate merger is a merger between firms that supply products that may relate to each other (for example, complementary products). Conglomerate effects occur when a merged firm gains the ability and incentive to foreclose competitors by using anticompetitive strategies that leverage its position in some of its products (particularly 'must-have' products), such as anticompetitive tying or bundling strategies.

125. In the SoI, we identified that we continued to consider whether the Proposed Acquisition could give rise to conglomerate effects. Zoetis did not submit on conglomerate effects in its response to the SoI. However, in the Application it

submitted that any attempt to do so would likely be defeated by large competitors and wholesalers who could match or better the merged entity's bundled offers.[74]

126. We have further considered whether the Proposed Acquisition could cause conglomerate effects in relation to anaesthetic and analgesic-related products (comprising sedatives, antidotes and anaesthetics). The theory we have tested is whether:

126.1 the merged entity could offer a bundled discount for a group of products or refuse to sell one of its products unless customers buy another (known as "tying");[75]

126.2 rivals would be unable to match the merged entity's offers and would fail to make enough sales to achieve efficient scale, resulting in the rivals withdrawing their competing products from the relevant markets or even withdrawing from New Zealand altogether; and

126.3 the rivals would find it difficult to re-enter, allowing the merged entity to raise prices relative to the counterfactual.

Ability to affect competition by bundling or tying

127. We are continuing to test whether the merged entity would have the ability to foreclose through bundling or tying. This would require the merged entity to have market power in at least one market. As regards this question, industry participants identified Zoetis and Jurox as two of the most prominent suppliers of anaesthetic and analgesic-related products for companion animals:

127.1 Jurox is the supplier of Alfaxan (an injectable steroid anaesthetic for use in cats and dogs). Some of the vets we have spoken to have indicated that there are no close substitutes for this product.[76] We are considering whether Alfaxan might be a "must have" product. If so, this would make it difficult for rivals to match the bundle.

127.2 Zoetis was the originator of several anaesthetic and analgesic-related products and is likely to have brand recognition for its range of sedatives and antidotes.[77] Jurox also has credible products in these markets.

128. Overall, the merged entity would have a strong portfolio of analgesic products including sedatives, antidotes and anaesthetics. Many vets use some or all of these

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74 The Application at [262].

75 Jurox already has the key components to form a bundle of analgesics (Alfaxan and credible brands of sedatives and antidotes). The theory would therefore rely on a "strengthening" of the bundle from a point at which Jurox was not able to foreclose through bundling to a point whether the merged entity was able to foreclose through bundling.

76 For example, see Commerce Commission meeting with [ ](1 December 2021); Commerce Commission meeting with [ ] (1 December 2021) and Commerce Commission meeting with[ ](26 November 2021).

77 Commerce Commission meeting with [ ](1 December 2021).

and some vets may prefer to purchase products made by the same supplier.[78] We continue to assess how much market power the merged entity could have across analgesic-related products, and what bundled or tied deals it may have the incentive to offer.

Impact on competition

129. We are continuing to test how any bundling or tying by the merged entity may affect rivals, including whether rivals could be denied sufficient scale or incentives to compete effectively. Among other issues, we are assessing are:

    129.1 whether rivals could match the merged entity's bundle, in particular through sourcing an alternative to Alfaxan or through creating a bundle with a different combination of products; and,

    129.2 if they cannot match the bundle, whether rivals could be sensitive to customer losses and therefore vulnerable to foreclosure. This could be so, for example, if any rivals have high fixed costs on capital dedicated to New Zealand, have minimum profit targets for New Zealand or would withdraw from New Zealand if they could not continue profitably supplying particular key products here.

130. We also continue to assess how easily any rivals affected by bundling or tying post-merger could re-enter relevant markets if they did exit. A substantial lessening of competition would only occur if the merged entity could then raise prices without attracting re-entry (or other new entry).[79] Re-entry may not occur if there are high barriers, for example if:

    130.1 product registrations lapse and reapplying is costly;

    130.2 products are produced specifically for New Zealand (meaning a supplier would have to re-establish manufacturing upon re-entry); and/or

    130.3 there are high costs specifically attached to introducing a product in New Zealand, such as;

        130.3.1 packaging costs, such as labels to meet specific requirements in New Zealand or different packet sizes;

        130.3.2 marketing to re-launch the product; or

        130.3.3 the need for a New Zealand office.

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78 For example, see Commerce Commission meeting with [ ] (1 December 2021) and Commerce Commission meeting with [ ](1 December 2021).

79 A similar point applies if the merged entity forces rivals to a scale that is inefficient. Harm will only occur if the rival is unable to expand if the merged entity raises prices.

Preliminary conclusion on conglomerate effects

131. We are continuing to test whether the Proposed Acquisition would result in a substantial lessening of competition due to conglomerate effects, given the product portfolios that both Zoetis and Jurox have regarding analgesic related products for companion animals. We invite submissions on this.

Next steps in our investigation

132. The Commission is currently scheduled to decide whether or not to give clearance to the Proposed Acquisition by **14 April 2022**. However, this date may change as our investigation progresses.[80]

133. As part of our investigation, we will continue to identify and contact parties that we consider will be able to help us assess the issues identified above.

Making a submission

134. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 'Zoetis/Jurox' in the subject line of your email. Please do so by close of business on **23 March 2022**.

135. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.

136. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would be likely to unreasonably prejudice the commercial position of the supplier or subject of the information.

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80 The Commission maintains a clearance register on our website at http://www.comcom.govt.nz/clearances-register/ where we update any changes to our deadlines and provide relevant documents.

Attachment: Likelihood of entry

[Confidential material redacted]