ISSN 1178–2560
Decision Series
Project no. 11.04/PRJ0045465

Public version

Determination

Zoetis Inc. and Betrola Pty Limited (which owns the Jurox Group of companies) [2022] NZCC 31

The Commission:	Sue Begg Dr John Small Elisabeth Welson
Summary of application:	An application from Zoetis Inc. seeking clearance to acquire 100% of the shares in Betrola Pty Limited, which owns the Jurox Group of companies.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	31 August 2022

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

Contents

The proposed acquisition

1. On 28 October 2021, the Commerce Commission 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).

Our decision

2. Both Zoetis and Jurox supply a range of animal healthcare products. The Commission's investigation found that for the product areas in which Zoetis and Jurox overlap with one another, they compete with other manufacturers and distributors. The Commission considers this competition will mean that the merged entity is unlikely to be able to significantly increase prices or reduce quality of those products.

3. The areas that initially raised potential competition concerns in New Zealand related to pre-anaesthetic products and sedatives for companion animals (used to calm animals prior to a procedure) and antidotes (used to counteract sedatives).

4. In the supply of antidotes, we had potential concerns that the Proposed Acquisition would remove the existing competition between Zoetis and Jurox and that, with only one other competitor, existing competition would not be sufficient to replace the loss of competition. In response to these concerns, following the issue of a Statement of Unresolved Issues, Zoetis surrendered the rights to distribute its antidote in New Zealand, Antisedan. This product is now being supplied by an independent party. Accordingly, with Zoetis no longer supplying an antidote in New Zealand, the Proposed Acquisition would not involve any overlap, or any loss of competition, between Zoetis and Jurox in this product area.

5. In the supply of the different types of sedatives, Zoetis and Jurox complete closely with one another. However, evidence received by the Commission subsequent to it issuing its Statement of Unresolved Issues satisfied the Commission that existing suppliers would likely impose a significant constraint on the merged entity in both the supply of opioid-based sedatives for companion animals and the supply of non-opioid-based sedatives for companion animals.

6. Accordingly, the Commission grants clearance for the Proposed Acquisition because it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any market.

7. As this was a lengthy investigation, the Attachment includes a timeline of the key events during the course of the Commission's assessment of the Application.

Our framework

8. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).[1]

    8.1 We assess mergers using the substantial lessening of competition test. 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).[2]

    8.2 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.[3] There is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.[4]

    8.3 We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[5] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

Key parties

The merging parties

9. 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).

10. 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.

Other relevant parties

11. There are a range of manufacturers that, like Zoetis and Jurox, develop and supply a wide portfolio of animal healthcare treatments in New Zealand. Some of these manufacturers focus on supplying patented animal healthcare treatments while other suppliers manufacture and distribute both patented and off-patented treatments.

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1 Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).
2 *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].
3 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].
4 *Mergers and Acquisitions Guidelines* above n1 at [2.23].
5 Section 66(3)(a) of the Commerce Act 1986.

12. In New Zealand, the suppliers that compete most closely with both Zoetis and Jurox include:

    12.1 Troy Laboratories Pty Limited (Troy);

    12.2 Ceva Animal Health (NZ) Limited (Ceva);

    12.3 Merck Sharp & Dohme (New Zealand) Limited (MSD); and

    12.4 Virbac New Zealand Limited (Virbac).

Industry background

13. Zoetis and Jurox both supply a wide range of animal healthcare products in New Zealand. The area where Zoetis and Jurox compete most closely with one another are the products used as anaesthetics on companion animals.

Anaesthetics

14. Anaesthetic products induce a loss of physical sensation, with or without a loss of consciousness.[6] We understand that when administering a general or a local anaesthetic to a companion animal, there are typically two to four steps, namely:

    14.1 pre-anaesthetic and/or sedation, administered by injecting into the muscle (intramuscular) or under the skin (subcutaneous). The pre-anaesthetic or sedative is used to calm or restrain the animal prior to a clinical examination or procedure;[7]

    14.2 induction, administered via an inhalant or an injection;[8]

    14.3 maintenance, such as with gaseous inhalation;[9] and

    14.4 reversal of the effects of sedation with an antidote.[10]

15. The products used in each step have a particular purpose and are indicated for that purpose. Thus, the administrating veterinarian is unlikely to find products at one step to be close substitutes for the products indicated for another step.

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6 See Clearance application from Zoetis (28 October 2021) at Annexure I.

7 For example, see Clearance application from Zoetis (28 October 2021); Email from Jurox to Commerce Commission [ ]; and Commerce Commission meeting with [ ](17 February 2022).

8 Clearance application from Zoetis (28 October 2021). Zoetis notes that the different ways to induce anaesthesia – such as inhalants to provide general anaesthetic, injections to provide general anaesthetic and injections to provide local anaesthetic - should be considered separately given they have different purposes. It considers this is consistent with past decisions by the European Commission such as in Schering-Plough/Organon Biosciences (2007) and Pfizer/Wyeth (2009).

9 For example, Clearance application from Zoetis (28 October 2021) and Email from Jurox to Commerce Commission [ ].

10 For example, see Clearance application from Zoetis (28 October 2021) and Commerce Commission meeting with [ ](16 February 2022).

Product registration and supply in New Zealand

16. 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).[11] 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 product.

17. Each product has 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'.[12] When a veterinarian uses it for one of these purposes 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-label' use. The ACVM provides a 'risk management-based product-use cascade' for veterinarians that sets out those circumstances although the ACVM strongly recommends that veterinarians follow the 'on-label' indications of each animal healthcare product.[13]

18. Not all products registered under the ACVM are manufactured and/or sold in New Zealand. Registrations last several years and suppliers with existing registrations make commercial decisions about which products they will manufacture and which products they will actively market and supply to customers in New Zealand. Many of these decisions are made overseas and this means that there can be circumstances where suppliers with active ACVM registrations are not able to readily supply their products in New Zealand.

19. In addition, many suppliers in New Zealand act as distribution agents for manufacturers based in other countries. An agent will typically enter an arrangement with a manufacturer that gives the agent the right to distribute the manufacturer's product(s) in New Zealand. As this is a commercial decision, there can be circumstances where the manufacturer may choose to end such an arrangement because it decides to distribute the product(s) itself or because it has selected an alternative distributor in New Zealand.

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

12 For example, see indication for Zoetis' opioid sedative called Torbugesic (as per the ACVM Register at. https://eatsafe.nzfsa.govt.nz/web/public/acvm-register)

13 See ACVM guidance for veterinarians: Deciding on treatment - Risk management-based product-use cascade https://www.mpi.govt.nz/animals/veterinary-medicines-acvm/acvm-guidance-veterinarians/#deciding-on-treatment

Existing product portfolios of Zoetis and Jurox

20. Like many suppliers of animal healthcare products, Zoetis and Jurox each have a wide portfolio of products and, as a result, they currently overlap in several different product areas in New Zealand.

21. However, compared to Zoetis, Jurox's overall presence in New Zealand is relatively limited and the Applicant submitted that, where there is existing overlap between the merging parties, the overlap is relatively limited.

22. The Commission tested the level of overlap between Zoetis and Jurox with industry participants and, consistent with the Applicant's submission, in many product areas the Proposed Acquisition would not raise any significant competition issues. This was primarily because in most product areas where there is overlap between Zoetis and Jurox:

    22.1 the merged entity would be constrained by the presence of well-established competitors and there are limited barriers to these competitors expanding;[14] and

    22.2 the overlap is very small and so there would only be a negligible increase in market share for Zoetis as a result of the Proposed Acquisition.[15]

23. To this extent, while the merging parties overlap in the following areas, our investigations found that: one or both of the merging parties only had a small presence in the market; and/or, there were other competitors. Accordingly, the overlap is unlikely to raise any competition issues in these areas and so we do not discuss these products any further in these reasons:[16]

    23.1 oral penicillin treatments for companion animals;

    23.2 injectable penicillin treatments for companion animals;

    23.3 intramammary antibiotic treatments for dry cows;

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[14] For example, in these areas industry participants noted that, rather than Jurox, Zoetis closest competitors include Boehringer Ingelheim Animal Health New Zealand Limited, Elanco Animal Health Inc., MSD, Norbrook New Zealand Limited and Virbac.

[15] The Applicant submitted that, in most instances, overlap between the parties would fall within the Commission's market share and concentration indicators. i.e. last year: Jurox had sales of less than [ ]of its non-steroidal anti-inflammatory drug while Zoetis' product had sales of over [ ]; Jurox had sales of approximately [ ]of its teat sealants while Zoetis' product had sales of over [ ]and Jurox had sales of approximately [ ]of its internal parasite treatment for cattle while Zoetis' product had sales of over [ ].

[16] These products are those submitted in the Clearance application from Zoetis (28 October 2021) and outlined in the statements published by the Commission, namely: Commerce Commission - Zoetis and Betrola (which owns Jurox) – Statement of Preliminary Issues (12 November 2021); Commerce Commission - Zoetis and Betrola (which owns Jurox) – Statement of Issues (23 December 2021); and Commerce Commission - Zoetis and Betrola (which owns Jurox) – Statement of Unresolved Issues (9 March 2022).

23.4 intramammary antibiotic treatments for lactating cows;

23.5 teat sealants for cows;

23.6 anthelmintic treatments for sheep;

23.7 anthelmintic treatments for cattle;

23.8 oral worming treatments for horses; and

23.9 nonsteroidal anti-inflammatory drugs for animals.

24. In addition, suppliers' product portfolios can change overtime. One such change is relevant to the Commission's assessment of the application.

25. When Zoetis submitted its application, both Zoetis and Jurox were supplying a reversing agent, or antidote, for use on a companion animal. Zoetis' product is called Antisedan while Jurox's product is called Antipam. These antidotes are administered to reverse the effects of a non-opioid sedative when it is used as a pre-anaesthetic on a companion animal.[17]

26. Our initial investigation indicated that Zoetis and Jurox competed closely with one another in the supply of these antidote products and that the Proposed Acquisition would remove this competition.[18] However, at the time of our decision, Zoetis was no longer supplying Antisedan in New Zealand and so our potential competition concerns have been removed.

26.1 Antisedan is not manufactured by Zoetis. Rather, Zoetis is in a global distribution arrangement with Antisedan's manufacturer, the Orion Corporation, which gives Zoetis the right to distribute Antisedan, and several other Orion Corporation products, in certain countries.

26.2 In August 2022, Zoetis surrendered its right to distribute Antisedan in New Zealand.[19] Following this, the Orion Corporation entered into a distribution arrangement with SVS Veterinary Supplies Limited (SVS), which gives SVS the right to distribute Antisedan in New Zealand.[20] In late August 2022, SVS began distributing Antisedan in New Zealand.

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17 Zoetis submitted the relevant market can be limited to antidotes for short-term pre-anaesthetics and sedatives and we consider this appropriate as these products are only used for the specific purpose for which they are indicated (in this case, reversing the effects of sedation from the use of medetomidine and dexmedetomidine in companion animals). See Clearance application from Zoetis (28 October 2021) and Commerce Commission - Statement of Unresolved Issues on Zoetis and Betrola, which owns Jurox (9 March 2022).

18 Commerce Commission - Statement of Unresolved Issues on Zoetis and Betrola, which owns Jurox (9 March 2022).

19 Email from Buddle Findlay (on behalf of Zoetis) to the Commerce Commission (23 August 2022).

20 SVS is a wholesaler of animal health remedies to veterinarians and vet clinics in New Zealand. [

The relevant markets

27. 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.

28. The area of overlap between Zoetis and Jurox that raises potential competition issues relates to pre-anaesthetic and sedative products for use on companion animals. We discuss this area further below.

Our assessment of the relevant product dimension - sedatives

29. Zoetis and Jurox both supply pre-anaesthetic and sedative products (which, for ease of reference, we refer together as sedatives). 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.

    29.1 Zoetis supplies a product called Torbugesic.

    29.2 Jurox supplies two products: Butordyne and Buprelieve.

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

    30.1 butorphanol or buprenorphine, which are opioids; or

    30.2 medetomidine or dexmedetomidine, which are non-opioids.

31. Clinically, sedatives based on these active ingredients can be used on companion animals, such as cats and dogs, as well as production animals, such as horses, subject to a given product obtaining the relevant indications from the ACVM. Zoetis' and Jurox's products are indicated for use on cats, dogs and horses. But, as discussed further below, some other manufacturers' products are only indicated for use on horses.

32. In this section, we assess the boundaries of the relevant product markets for assessing competition for the supply of sedatives for companion animals.

    32.1 The discussion below focuses on questions of demand-side substitutability – that is, which products a veterinarian can switch between for the same use, for example to sedate a cat before an operation. We consider whether, for the same use, a veterinarian could switch between:

        32.1.1 an opioid and a non-opioid;

]

32.1.2 opioids (or non-opioids) with different active ingredients; and

32.1.3 products with the same active ingredient but where one is indicated for the animal the veterinarian needs to sedate (for example, a cat) and the other is indicated for another animal (for example, a horse).

32.2 We consider that supply-side substitution is unlikely for the products at issue here. Supply-side substitution would occur if, in response to a small but lasting price increase (or quality decrease) for one product (for example, butorphanol-based opioid sedatives), suppliers of other products would readily switch production to the affected product and, in so doing, would constrain existing suppliers.[21] In this case, we consider that supply-side substitution is unlikely because suppliers of other products, which are mainly based overseas, would need to obtain ACVM authorisations and gear up supply chains before commencing supply. Such actions would constitute material expansion or market entry, rather than supply-side substitution.

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

33. We consider it appropriate to assess opioid sedatives separately from non-opioid sedatives.

34. Industry participants indicated that non-opioid sedatives are not a good alternative for opioid sedatives. For example, Zoetis submitted that opioid sedatives should be assessed separately from non-opioid sedatives as opioids can have significant side effects and their usage is more controlled than non-opioid products.[22]

35. Further, while opioid sedatives and non-opioid sedatives have the same purpose,[23] veterinarians and suppliers advised that opioid sedatives and non-opioid sedatives are not easily interchangeable with one another.[24] This is because opioids, such as butorphanol and buprenorphine, provide pain relief, whereas non-opioid sedatives, such as a medetomidine-based sedative (or a dexmedetomidine-based sedative) do not.

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21 To meet the test of supply-side substitutability, suppliers of other products would need to have the ability and incentive to start supplying the affected product easily, without undertaking material expansion or market entry. The test is explained in *Mergers and Acquisitions Guidelines* above n1 at [3.15 – 3.27].

22 Clearance application from Zoetis (28 October 2021). However, Zoetis notes that these side effects mean that there is a growing trend towards using non-opioid sedatives to avoid such side effects.

23 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 Register).

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

36. We understand that, rather than used as alternatives, opioid and non-opioid sedatives are regularly used in combination with one another.[25] For example, butorphanol and buprenorphine can be used in combination with medetomidine because, together, they have synergistic sedative effects. These synergistic effects mean that the veterinarian is able to reduce the overall amount of sedative administrated to the animal, which can also help improve the overall safety of the procedure.[26]

37. For these reasons, we consider it appropriate to define separate markets for opioid-based sedatives and for non-opioid-based sedatives. However, we recognise that there may be some instances where a veterinarian may find a non-opioid sedative substitutable for an opioid sedative and we account for this possibility in the competition assessment below.

Sedatives with different active ingredients are likely to be in the same market

38. As noted above, opioid sedatives (and, separately non-opioid sedatives) can contain different active ingredients. Industry participants noted that products with the same active ingredient tend to be the closest alternatives to one another compared to a product with a different active ingredient.[27]

39. For example, opioid sedatives containing butorphanol have slightly different indications than opioid sedatives containing buprenorphine, which could suggest that they may not be easily interchangeable with one another.[28] In this respect, we received some evidence from industry participants that suggested that buprenorphine-based sedatives and butorphanol-based sedatives are used for different purposes because a buprenorphine sedative is primarily used as an analgesic while a butorphanol sedative is primarily used as a sedative.[29]

40. To this extent, the Commission examined whether it would be appropriate to define the relevant market for opioid sedatives (and, separately, non-opioid sedatives) based on active ingredient.[30] If products with different active ingredients are not

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25 For example, see Commerce Commission meeting with [ ] (3 December 2021); Commerce Commission meeting with [ ](17 February 2022); and Email from [ ]to Commerce Commission (12 June 2022).

26 Commerce Commission meeting with [ ](6 December 2021); Commerce Commission meeting with [ ](17 February 2022); and Email from [ ]to Commerce Commission (12 June 2022).

27 For example, see Email from [ ] to Commerce Commission (31 January 2022); Email from [ ]to the Commerce Commission (15 December 2021) and Email from [ ]to the Commerce Commission (7 April 2022).

28 For example, Jurox's Butordyne (containing butorphanol) is indicated as an analgesic and sedative for use in horses, dogs and cats. Jurox's Buprelieve (containing buprenorphine) is indicated as an analgesic 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. See ACVM Register.

29 Commerce Commission meeting with [ ](6 December 2021) and Email from [ ] to Commerce Commission (12 June 2022).

30 See Commerce Commission - Zoetis and Betrola (which owns Jurox) – Statement of Issues (23 December 2021) and Commerce Commission - Zoetis and Betrola (which owns Jurox) – Statement of Unresolved Issues (9 March 2022).

substitutable for one another, and are therefore in different markets, then the Proposed Acquisition is more likely to raise concerns.

41. However, on balance after testing this issue further with industry participants, the evidence in this case does not support defining sedative markets based on active ingredient. For example:

    41.1 both butorphanol-based sedatives and buprenorphine-based sedatives have a similar purpose, which is to provide pain relief when used as premedication and as a pre-anaesthetic prior to induction, and there are limited barriers to an administrating veterinarian switching between products with a similar purpose;[31] and

    41.2 while the New Zealand Veterinary Association has no specific guidelines on the use of opioid sedatives in New Zealand, overseas guidelines list butorphanol-based sedatives and buprenorphine-based sedatives as close alternatives to one another.[32] This is also supported by various research papers provided by Zoetis.[33]

42. For these reasons, we consider it appropriate to assess butorphanol-based sedatives and buprenorphine-based sedatives in the same opioid sedative product market. For the same reasons, we also do not consider it necessary to delineate any non-opioid sedative market by active ingredient.[34] However, to the extent there are any differences between how products with different active ingredients compete with one another, we take this into account in the competition analysis for each market.

Products with alternative indications are not close substitutes for sedatives indicated for companion animals

43. Industry participants advised that opioid sedatives and non-opioid sedatives are primarily used on companion animals in New Zealand,[35] although most opioid and non-opioid sedatives are indicated for use on other animals.[36] Consistent with this,

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31 See ACVM Register. Also see Clearance application from Zoetis (28 October 2021), Commerce Commission meeting with [ ](6 December 2021) and Commerce Commission meeting with [ ](17 February 2022).

32 See Clearance application from Zoetis (28 October 2021) and Email from Jurox to Commerce Commission [ ]

33 For example see 'Evaluation of the perioperative analgesic efficacy of buprenorphine, compared with butorphanol, in Cats' Journal of the American Veterinary Medical Association 2014; 245; 195-202; attached to Letter from Zoetis to Commerce Commission on market definition (29 April 2022); 'A comparison of acepromazine-buprenorphine and medetomidine-buprenorphine for preanesthetic medication of dogs' Journal of the American Veterinary Medical Association 2010; 237; 1437-1437; attached to Letter from Zoetis to Commerce Commission on market definition (29 April 2022).

34 Most non-opioid sedatives contain medetomidine. However, one existing supplier supplies a non-opioid sedative containing dexmedetomidine and another supplies a non-opioid sedative containing zolazepam and tiletamine.

35 For example, see Email from Buddle Findlay (on behalf of Zoetis) to the Commerce Commission (8 February 2022); Email from [ ]to Commerce Commission (31 January 2022); and Commerce Commission meeting with [ ] (1 December 2021).

36 For example, Zoetis' Torbugesic, Jurox's Butordyne and Troy's Ilium Butorgesic are all indicated for use as an analgesic and sedative in horses, dogs and cats. See ACVM Register.

Zoetis submitted that opioid sedatives indicated for animals other than companion animals should be included in the same product market as opioid-based sedatives for companion animals.[37]

44. However, there are some opioid sedatives that are not indicated for companion animals. As set out in the background section above, 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 only for use in other animals are not likely to be close substitutes for those indicated only for companion animals. While it is possible that some veterinarians do not follow this advice, our investigation indicated this is not a common practice particularly in regards to anaesthetics for companion animals.[38]

45. To this extent, we consider that several products suggested by the Applicant[39] fall outside the relevant product markets because they do not have the same on-label indications as opioid-based sedatives for companion animal. As such, they are unlikely to be close substitutes.[40] These products include:

    45.1 Dolorex, which contains butorphanol and is supplied by MSD. However, Dolorex is only indicated for use on horses.[41]

    45.2 the generic form of Temgesic. Temgesic contains buprenorphine but it is only indicated for use on humans.

46. Accordingly, we consider there are separate product markets for the supply of opioid-based, and non-opioid-based, sedatives for companion animals. However, we have considered any constraint that products that are indicated for other animals, humans and/or other conditions impose on the merged entity in the competition assessment sections below.

Conclusion on the approach to assessing sedatives

47. We consider there are separate product markets for the supply of opioid-based, and non-opioid-based, sedatives for companion animals. In our view, particularly on the demand side, there are no close substitutes for the two types of sedatives for companion animals because:

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37 Clearance application from Zoetis (28 October 2021) and repeated in Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022).

38 For example, see Commerce Commission meeting with[ ](1 December 2021); Commerce Commission meeting with[ ](16 February 2022); Commerce Commission meeting with [ ](17 February 2022).

39 Clearance application from Zoetis (28 October 2021) and repeated in Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022).

40 For example, we consider it unlikely that a small but significant and non-transitory increase in price for either Zoetis' Torbugesic or Jurox's Butordyne would result in sufficient switching to either MSD's Dolorex or the generic form of Temgesic to make the price increase unprofitable.

41 Dolorex is an injectable analgesic containing butorphanol indicated for the relief of moderate to severe pain in a horse. See ACVM Register.

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

47.2 opioid-based sedatives, such as those with butorphanol or buprenorphine, are used differently to non-opioid sedatives; and

47.3 opioid and non-opioid-based sedatives only indicated for horses or for humans are not typically used to treat companion animals.

Our assessment of other relevant market dimensions

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

49. We consider the functional market is the manufacture/importation and wholesale supply of sedatives. All market participants either manufacture or import the relevant products and then supply them on a wholesale basis either directly to veterinarians or through third party distributors.

Conclusion on the relevant markets

50. We consider the relevant markets for the purpose of assessing the Proposed Acquisition are the national markets for the manufacture/importation and wholesale supply of:

50.1 opioid-based pre-anaesthetics and sedatives for companion animals (the opioid sedative market); and

50.2 non-opioid-based pre-anaesthetics and sedatives for companion animals (the non-opioid sedative market).

How the acquisition could substantially lessen competition

51. Our investigation focused on whether the Proposed Acquisition would be likely to substantially lessen competition by assessing the potential for unilateral, coordinated and conglomerate effects.

52. Unilateral effects can occur when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint. The Proposed Acquisition could substantially lessen competition due to unilateral effects if, in any relevant market, the competition lost between the merger parties' products allowed the merged entity to profitably increase the wholesale price and/or reduce the quality of its products.

53. Coordinated effects can occur when a merger or acquisition makes it significantly more likely that the remaining firms in a market can collectively exercise market power to increase prices, restrict output or reduce quality.

54. Conglomerate effects can occur when a merged firm gains the ability or incentive to foreclose competitors by using anticompetitive strategies that leverage its market power in a market into another market where it otherwise faces more competition.

In this matter we have focussed particularly on whether the Proposed Acquisition changes the ability or incentive of the merged entity to engage in anticompetitive tying or bundling strategies.

With and without scenarios

55. 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.

With the merger scenario

56. With the merger, Zoetis would acquire all of the existing products manufactured by Jurox.[42] However, with Zoetis no longer supplying Antisedan in New Zealand, the relevant with the merger scenario does not involve any overlap between Zoetis and Jurox in the supply of antidotes used to reverse the effects of a non-opioid sedative on a companion animal. With no overlap and having made enquiries with SVS before Zoetis surrendered, and SVS acquired, the right to distribute Antisedan in New Zealand, the Commission has not considered it necessary to assess these products any further.

Without the merger scenario

57. Without the merger, Zoetis and Jurox would be likely to continue to supply veterinary products as separate entities meaning the relevant counterfactual would likely be the status quo.[43] As noted above, under the status quo, Zoetis is not supplying an antidote for reversing the effects of a non-opioid sedative in New Zealand.

Competition assessment - the sedative markets

58. In both the opioid sedative market and the non-opioid sedative market, we consider the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition due to unilateral effects. We set out our reasoning for these assessments below.

59. In both the opioid and non-opioid sedative markets, Zoetis considers that the merged entity would be constrained by:[44]

    59.1 the presence of existing suppliers with the ability to expand;

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42 Annexure F of the Application sets out all the products supplied by both Jurox and Zoetis in New Zealand, as of October 2021.

43 Clearance application from Zoetis (28 October 2021) and Commerce Commission meeting with Jurox [ ]).

44 Clearance application from Zoetis (28 October 2021).

59.2 regulatory controls on the use of the products; and

59.3 the ability for a vet to administer a product indicated for another animal or a human being (rather than a companion animal).

60. Table 1 below lists the market share estimates for the products currently supplied in the opioid and non-opioid sedative markets in 2021.[45] This table indicates that the merged entity would be the largest supplier in each of the two markets and the Proposed Acquisition would remove the existing competition between Zoetis and Jurox in these two markets.

Table 1: Market share estimates for the opioid and non-opioid sedative markets in 2021

Supplier	Opioid sedative market			Non-opioid sedative market		
	Product (active)	Revenue	Share	Product (active)	Revenue	Share
Zoetis	Torbugesic (butorphanol)	[		Domitor (medetomidine), Dexdomitor (dexmedetomidine)	[	
Jurox	Butordyne (butorphanol)			Medetate (medetomidine)		
	Buprelieve (buprenorphine)					
Merged entity						
Troy	Ilium Butorgesic (butorphanol)			Ilium Medetomidine (medetomidine)		
Ceva	Vetergesic (buprenorphine)			Sedamed (medetomidine)		
Virbac	-	-	-	Zoletil (zolazepam and tiletamine)		
Total		]	**100%**		]	**100%**

Source: Application, industry parties, Commission estimates.

Unilateral effects in the opioid sedative market

61. In the opioid sedative market, the merged entity would likely be constrained by the presence of existing competitors. In addition, given the way the products are administrated, products from outside of the market would also likely provide some constraint on the merged entity.

62. As indicated above, Zoetis and Jurox complete closely with one another. Our preliminary investigation highlighted potential concerns in the supply of opioid sedatives and, in particular, the boundaries of the relevant product market. However, evidence received subsequent to the Commission issuing its Statement of Unresolved Issues satisfied the Commission that, when aggregated together, the collective constraints on the merged entity would mean that the Proposed

[45] As discussed further below, there are several products that are registered for sale in New Zealand but there is no evidence that these products have been supplied recently in New Zealand.

Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the opioid sedative market.

The merged entity will be constrained by existing suppliers

63. Opioid sedatives are based on active ingredients containing either butorphanol or buprenorphine. In this market, the merged entity would likely be constrained by the presence of existing competitors. However, the main overlap between the merging parties occurs in respect of butorphanol-based sedatives and so this would be where any loss of competition between the parties would most likely occur.

64. In respect of butorphanol-based sedatives, the merged entity would face a strong competitor in Troy, which is the leading supplier of butorphanol-based sedatives.

    64.1 Troy currently supplies a butorphanol-based sedative called Ilium Butorgesic. Like Jurox's Butordyne sedative, Ilium Butorgesic is a generic equivalent to Zoetis' product[46] and, given its efficacy and its pricing, Troy has a [ ] existing presence in the market and it would likely provide a strong constraint on the merged entity.[47]

    64.2 In our view, Troy would have the ability to increase its supply of Ilium Butorgesic, if incentivised by the actions of the merged entity.[48]

65. In addition to a butorphanol-based sedative, Jurox (but not Zoetis) also supplies a buprenorphine-based sedative. In respect of buprenorphine-based sedatives, there is no direct overlap between the parties and the merged entity would face competition from Ceva.

    65.1 Ceva currently supplies a buprenorphine-based sedative called Vetergesic. Ceva advised that
    [ ].[49]

    65.2 In our view, Ceva would likely provide some constraint on the merged entity particularly in relation to customers wanting to use a buprenorphine-based

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[46] Zoetis's product (Torbugesic) was the originator product in this market and the patent has now expired which allows other manufacturers to produce generic equivalent products. The products of Zoetis, Jurox and Troy are administrated via an injection and are indicated for use as a sedative for use in horses, dogs and cats (as per the ACVM Register).

[47] For example, see Commerce Commission meeting with [ ] (1 December 2021); Commerce Commission meeting with [ ] (8 December 2021); and Email from [ ] to the Commerce Commission (7 April 2022).

[48] For example,
[
]

[49] For example, Ceva advised
[
]

sedative. This is because, at present, Ceva and Jurox are the only suppliers with a buprenorphine-based sedative.[50]

Potential entry and expansion will not constrain merged entity

66. The main entry requirement into the opioid sedative market is having the necessary ACVM registration. Without an existing registration, all industry participants indicated the barriers to new entry are high. To this extent, our assessment focused on those suppliers with an existing registration.

67. Industry participants noted that, in addition to Troy, Ceva and the merging parties, there are several other parties that currently have an opioid sedative registered for sale in New Zealand and thus could potentially constrain the merged entity.[51] These parties are:

    67.1 Dechra Veterinary Products NZ Limited (Dechra), with a registered product called Calesedate;[52]

    67.2 Ausrichter (New Zealand) Limited (Ausrichter), with a registered product called Butomidor;[53] and

    67.3 Akorn Animal Health NZ Limited (Akorn), with a registered product called Butorphic.[54]

68. However, there is no indication that these three parties are marketing their registered products to any customers in New Zealand.[55] As such, we do not consider that these parties are currently providing any existing constraint on either of the merging parties.

69. To provide a constraint on the merged entity, entry and expansion must be likely. While having a registered product is a necessary step in supplying a product in the

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50 As noted above, products with the same active ingredient are likely to be closer competitors that products with a different active ingredient.

51 See ACVM Register (under butorphanol).

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

53 Email from Austrichter to the Commerce Commission (10 January 2022).
[
]

54 Email from Akron to the Commerce Commission (14 December 2021).
[
]

55 For example, see Zoetis' Response to Commerce Commission Statement of Issues (28 January 2022). Neither of the two most prominent wholesalers of animal pharmaceuticals has supplied any of these three products in the last three years. See
[ ]

market, there are other steps involved including: manufacturing; adapting to any specific requirements in New Zealand (such as labelling); and marketing the product. A supplier with a registration must be sufficiently confident there will be enough demand for the product to make it worthwhile to take these additional steps to introduce a registered product.

70. Based on the feedback from these registration holders and other industry participants, we are not satisfied that any one of these parties would provide a constraint on the merged entity through entry and expansion. This is because:

    70.1 there is limited recent evidence of any of the registration holders supplying their products in New Zealand;[56]

    70.2 the evidence we do have about previous sales in New Zealand indicates there was limited demand for the product/s;[57] and

    70.3 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.[58]

71. Accordingly, we are not satisfied that Dechra, Ausrichter, or Akron (or any other party) would enter and expand in the opioid sedative market in response to a price increase by the merged entity and so we do not consider the threat of potential entry and expansion would provide a constraint on the merged entity.

Constraints from outside the opioid sedative market

72. We also consider that the merged entity is likely to face an additional constraint in the opioid sedative market from opioid sedatives that are currently only indicated for use on horses.

73. As noted above, opioid sedatives are primarily used on companion animals in New Zealand but they can be, and are, also used on horses. At present, there are more opioid sedatives indicated for use on horses than there are indicated for use on companion animals. For example, MSD currently supplies an opioid sedative product called Dolorex although it is only indicated for horses.[59] This is in contrast to Zoetis', Jurox's and Troy's sedatives which are indicated for both companion animals and horses.

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56 [ ]

57 [ ]

58 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.

59 As per the ACVM Register, Dolorex is indicated for the relief of moderate to severe pain in the horse, especially abdominal pain associated with colic and post-partum pain.

74. MSD advised that Dolorex,
[

].[60]

75. Given the way sales are made in this market, we consider that MSD's sedative may provide a degree of constraint on the merged entity even though the product falls outside the opioid sedative market (as it is not indicated for use on companion animals).

    75.1 At present, the merging parties compete with Troy and MSD to supply opioid sedatives to horses. Zoetis', Jurox's and Troy's products can also be used on companion animals.[61]

    75.2 This presence of MSD, with its opioid sedative for horses, is likely to provide a degree of constraint on the merged entity in the supply of opioid sedatives to companion animals because it may be difficult to distinguish which customers are seeking a sedative for a horse or for a companion animal.

76. As noted above, opioid and non-opioid sedatives are regularly used in combination with one another and we consider it appropriate to assess them in separate markets. However, we recognised they have the same purpose, which is to provide sedation.

77. To this extent, we understand that there may be circumstances where a non-opioid sedative is used as an alternative to an opioid sedative (and vice versa). Therefore, we consider that suppliers of non-opioid sedatives would likely provide some constraint on the merged entity in the supply of opioid sedatives to companion animals.

Conclusion on the opioid sedative market

78. There appear to be limited barriers to expansion for the opioid sedative suppliers that currently market and supply their products in New Zealand. To this extent, we are of the view that the merged entity would likely be constrained by the presence of existing competitors such as Troy and Ceva in the supply of opioid sedatives for companion animals. In addition, products from outside of the market would likely provide a degree of constraint on the merged entity.

79. We note that there are several other products that are currently registered for sale in the opioid sedative market although they are not currently being supplied in New Zealand.[62] We consider these products would not provide a constraint on the merged entity because there is no indication that these particular products would

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60 Email from MSD to the Commerce Commission [ ].

61 Email from Jurox to Commerce Commission [ ]and Email from Buddle Findlay (on behalf of Zoetis) to the Commerce Commission (8 February 2022).

62 Being those registered to Dechra, Ausrichter and Akron.

enter the opioid sedative market in response to an exercise of market power by the merged entity.

80. We are satisfied that, when aggregated together, the collective constraints on the merged entity would mean that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the opioid sedative market due to unilateral effects.

Unilateral effects in the non-opioid sedative market

81. In the non-opioid sedative market, the merged entity would likely be constrained by the presence of existing competitors and there are limited barriers to these competitors expanding. The barriers to existing suppliers expanding are relatively low because, once a supplier has a presence in the market, they require limited additional resources to increase the amount of sedative they supply. [63]

82. In the non-opioid sedative market, most of the suppliers distribute a non-opioid sedative containing the active ingredient medetomidine.[64] All the products containing medetomidine are, essentially, generic equivalents of one another and so they compete closely with one another.[65] To this extent, the merged entity would likely face a strong constraint from:

    82.1 Ceva, with a product called Sedamed; and

    82.2 Troy, with a product called Ilium Medetomidine.

83. In addition, Virbac, with a product called Zoletil, would also likely provide some constraint on the merged entity. Virbac's Zoletil is the only product that contains zolazepam and tiletamine but it is used for the same purpose as the other products in the non-opioid market.[66] As indicated in Table 1 above, Zoletil has a [ ] existing presence in the market.

84. Accordingly, we are satisfied that, given the presence of existing competitors, the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the non-opioid sedative market due to unilateral effects.

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63 Similar to the opioid sedative market, the main entry requirement in this market is having the necessary ACVM registration and, without such an existing registration, new entry is considered unlikely.

64 Zoetis is the only supplier with a non-opioid sedative containing dexmedetomidine but this would be the case in both the factual and counterfactual scenarios. No industry participants considered that having a dexmedetomidine product would give the merged entity an additional advantage, given that Zoetis already supplies both a medetomidine product and a dexmedetomidine product.

65 Commerce Commission meeting with [ ] (1 December 2021); Commerce Commission meeting with [ ] (8 December 2021); and Email from [ ] to Commerce Commission (31 January 2022).

66 See ACVM Register and Commerce Commission meeting with Virbac [ ].

Coordinated effects

85. We are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition through coordinated effects in either of the relevant sedative markets.

86. 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 or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to act in a coordinated way.[67]

87. The Proposed Acquisition will increase concentration in both sedative markets. This may increase the likelihood of coordination post-acquisition as most products in each market use the same active ingredient so they are largely homogenous and there is relatively stable demand for the products.

88. However, the Proposed Acquisition would be unlikely to increase market transparency. The lack of market transparency means that, notwithstanding the increase in concentration, it may be hard for the remaining firms to reach a focal point for coordination. There is also no evidence to suggest that the Proposed Acquisition would result in greater symmetries in firm size or cost structures of the remaining suppliers in either of the sedative markets which may make coordinated effects more likely.

89. Also, while Zoetis and Jurox constrain each other and rivals in the relevant markets, there is no evidence that either party has been a particularly disruptive competitor which has, by itself, prevented coordination from emerging or progressing. Therefore, we consider that there is limited scope for the merger to facilitate coordination by removing such a 'maverick'.

90. Lastly, the relevant markets are and will remain small by international standards, and many of the suppliers are multinational and New Zealand is a small part of their global business, meaning that the risks of attempting coordination – legal liability, fines and reputational damage – would remain large relative to the potential benefits. Weighing all of these factors, we consider that the merger is unlikely to materially facilitate coordination.

Conglomerate effects

91. A merger has a conglomerate dimension when the parties supply at least some products that are not substitutes or inputs or outputs of each other, but that may relate to each other in other ways (for example, are complements).[68]

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67 *Mergers and Acquisitions Guidelines* above n1 at [3.84].

68 As noted elsewhere, when the parties supply substitutable products, ie are rivals in the same market(s), any competition effects that arise are horizontal effects. When the parties supply products that are

92. Conglomerate effects are a concern when a merged firm would have market power over some such products and may gain the ability or incentive to leverage it into markets for any of the other more competitive products, by using strategies to inhibit rivals in the latter from competing effectively. For example, one potential concern is whether the merged entity might use anticompetitive tying or bundling strategies to link the sales of products over which it has market power to more competitive products, preventing efficient rivals in the more competitive markets from gaining customers. This is known as 'foreclosing' rivals.

93. We considered whether the Proposed Acquisition could give rise to conglomerate effects in relation to anaesthetic and analgesic-related products (comprising sedatives, antidotes and anaesthetics). We examined whether:

    93.1 the merged entity could offer bundled or tied[69] deals including products over which it would have market power and more competitive products;[70]

    93.2 in at least some markets, 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 from those markets or even from New Zealand altogether; and

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

94. We saw no evidence that the merged entity would be able to offer tied or bundled deals that would be likely to prevent other suppliers of individual products from competing with the merged entity. In particular, it does not appear likely that the merged entity would have any 'must have' products or that competing suppliers would be unable to compete by forming their own bundles. While the merged entity would increase its portfolio of anaesthetics and sedatives, and gain market share over some, a range of others would remain available to customers. Consequently, if the merged entity offered tied or bundled deals including anaesthetics or sedatives with other products – in an attempt to restrict rival suppliers of other products from making sales – customers would most likely not be driven to accept them just to obtain effective anaesthetics or sedatives. As a result, we consider that rivals in the other markets should still be able to compete on the merits.

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inputs or outputs of each other any effects arising are vertical effects. Often, in mergers of large parties, horizontal, vertical and conglomerate effects are all potential concerns, when considering the full extent of the merged entity's portfolio.

69 Tying is when a firm refuses to sell one or more products unless customers also purchase another, "tied" product.

70 Jurox already has a product that some veterinarians consider "must-have", the anaesthetic Alfaxan. As such, it may already have the ability to offer bundles or tied deals including Alfaxan and other products that rivals could find difficult to match – although Jurox does not appear to have done so to date. Therefore the theory of merger-specific conglomerate effects that we tested was whether the merged entity would have greater ability and incentive to offer potentially anticompetitive bundles.

95. We also consider that any tied or bundled deals that the merged entity may offer would be unlikely to impair the competitive effectiveness of competing suppliers.

    95.1 Rivals' products are supplied globally and New Zealand accounts for only a small proportion of their total sales. This makes it unlikely that a loss of sales in New Zealand would significantly affect any rival's economies of manufacturing.

    95.2 Rivals also did not identify any significant fixed costs relating to the supply of their products in New Zealand. As such, it is unlikely that any rival would be forced to withdraw products from New Zealand even if it lost significant sales.

96. As such we are satisfied that the Proposed Acquisition would not result in a substantial lessening of competition due to conglomerate effects.

Overall conclusion on the application

97. For the reasons outlined above, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets.

Determination on notice of clearance

98. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to Zoetis Inc. to acquire 100% of the shares in Betrola Pty Limited (and indirectly Jurox Pty Limited, which includes Jurox New Zealand Limited).

99. The clearance is given only to the proposed transaction described in the notice seeking clearance dated 27 October 2021 as well as the email from Zoetis Inc. on 23 August 2022 advising the Commission that it no longer supplies the product Antisedan in New Zealand (which was previously listed as a Zoetis Inc. product in Annexure F of the notice seeking clearance).

Dated this 31st day of August 2022

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Sue Begg
Division Chair

Attachment: timeline of investigation

A. Over the course of its investigation, the Commission issued several public statements as well as stopping its administrative clock while it awaited on additional information from the Applicant. Table A below includes a list of these statements as well as the other key dates in the Commission's investigation.

Table A: timeline of investigation

Date	Timeline
28 October 2021	Registration of Application.
12 November 2021	Statement of Preliminary Issues published.

23 December 2021	Statement of Issues published.
	• Commission identifies two potential unilateral concerns:
	  ○ a market for opioid-based pre-anaesthetics and sedatives companion animals; and
	  ○ a market for antidotes for short-term pre-anaesthetic sedatives for companion animal.

28 January 2022	Letter to Commission from Zoetis on the concerns outlined in the Statement of Issues.

9 March 2022	Statement of Unresolved Issues published.
	• Commission identifies two potential unilateral concerns:
	  ○ a market for butorphanol-based pre-anaesthetics and sedatives for companion animals; and
	  ○ a market for antidotes for short-term pre-anaesthetic products for companion animals.

25 March 2022	Administrative clock stopped while the Commission awaits information from the Applicant.
29 April 2022	Administrative clock restarted after receiving further information from the Applicant. • Commission tests further a submission from Zoetis on market definition.
5 July 2022	Letter to Commission from Zoetis on a draft divestment undertaking.
1 August 2022	Administrative clock stopped while the Commission awaits information from the Applicant.
23 August 2022	Administrative clock restarted after receiving further information from the Applicant. • Commission advised that there has been a change in Zoetis' product portfolio because it no longer supplies an antidote in New Zealand.
31 August 2022	Commission grants clearance to Zoetis for the Proposed Acquisition.

Note: The due date for a decision (which is represented by the administrative clock) was extended several times at the request of the Applicant. During any investigation the Commission has the ability to stop the administrative clock and this is set out in *Mergers and Acquisitions Guidelines* above n1 at [6.32]).