COMMERCE COMMISSION NEW ZEALAND

July 2013

Authorisation Guidelines

Contents

Introduction by the Chairman

We last published Benefits and Detriments Guidelines in 1997 explaining when we will authorise an agreement or merger (a transaction).

Since then, we have considered a number of authorisations and the courts have issued further guidance in judgments. While these developments in thinking and approach are reflected in our written decisions, our revised guidelines seek to capture these developments in one place. However, the guidelines reflect only one substantive change from the approach we have developed over the years since 1997.

We no longer presume that an anti-competitive transaction would lead to a loss in productive and dynamic efficiency.

In the past, the Commission moved quickly from finding that a transaction is anti-competitive to assessing the extent of any losses in productive and dynamic efficiency. In effect, there was a presumption that an anti-competitive transaction automatically leads to a loss in productive and dynamic efficiency.

That is no longer the case. Our revised guidelines explain that we assess whether an anti-competitive transaction will likely lead to any losses in productive and dynamic efficiency (and if so, their magnitude) on a case-by-case basis.

In preparing these guidelines we have consulted with a number of interested parties, and taken their helpful comments into account.

We have written these guidelines in plain English. We want to make the guidelines more user-friendly and understandable for businesses and their advisors.

We have also made these guidelines a 'one-stop shop' by including the process guidelines for standard and streamlined authorisations into this document.

Naturally, our approach will continue to evolve just as it has since we published our 1997 guidelines, but we trust these guidelines will help businesses to understand our approach, and assist them in their decision making.

Dr Mark Berry

Chairman

24 July 2013

Purpose

These guidelines explain when we will authorise mergers and agreements under Part 5 of the Commerce Act 1986 and the processes we use in determining authorisation applications.

Introduction

1. The Commerce Act 1986 (the Commerce Act) prohibits certain agreements[1] and mergers that harm, or are deemed to harm, competition. In these guidelines we call these prohibited agreements and mergers 'anti-competitive transactions'.[2]
2. However, the Commerce Act recognises that an anti-competitive transaction may have sufficient public benefit to outweigh the competitive harm arising from the transaction.
3. Firms can apply to the Commission for authorisation of a transaction. Authorisation allows firms to undertake transactions that would otherwise breach the Commerce Act. We will authorise a transaction when we are satisfied that it is likely to benefit New Zealanders.[3]
4. We have two processes for considering authorisation applications:
   - 4.1 a streamlined process – for straightforward authorisation applications; and
   - 4.2 a standard process – for more complex authorisation applications.
5. These Authorisation Guidelines set out our approach to assessing benefits and detriments for all authorisations and the standard and streamlined processes we follow in determining authorisation applications.
6. As these guidelines are by their nature general, we apply them flexibly according to the facts of each application. These guidelines do not, and cannot, address every issue that might arise, so anyone contemplating applying to us for authorisation of an anti-competitive transaction should consider seeking legal advice.
7. These guidelines reflect the current state of the law, international best practice, and our own experience. Our approach will, therefore, continue to evolve in light of new developments.

1. The Commerce Act prohibits contracts, arrangement or understandings that have the purpose, or effect or likely effect, of substantially lessening competition in a market (s 27). We use the term 'agreements' to refer to any contracts, arrangements or understandings. The Commerce Act also prohibits covenants that have the purpose, or effect or likely effect, of substantially lessening competition in a market (s 28), certain exclusionary agreements (see s 29 of the Commerce Act) and resale price maintenance (s 37 and 38). Unless indicated otherwise, we use the term agreements to also cover all of these.
2. Unless otherwise stated we use the term 'mergers' in these guidelines to describe all types of acquisitions regardless of their legal form.
3. This is consistent with the purpose of the Commerce Act, as set out in s 1A: to promote competition in markets for the long-term benefit of consumers within New Zealand.

8. The remainder of these guidelines describe:

   8.1 the framework we use to assess whether to authorise an anti-competitive transaction (see paragraphs 11-34);

   8.2 the benefits and detriments that are relevant (see paragraphs 35-42);

   8.3 how we assess and balance benefits and detriments (see paragraphs 43-81);

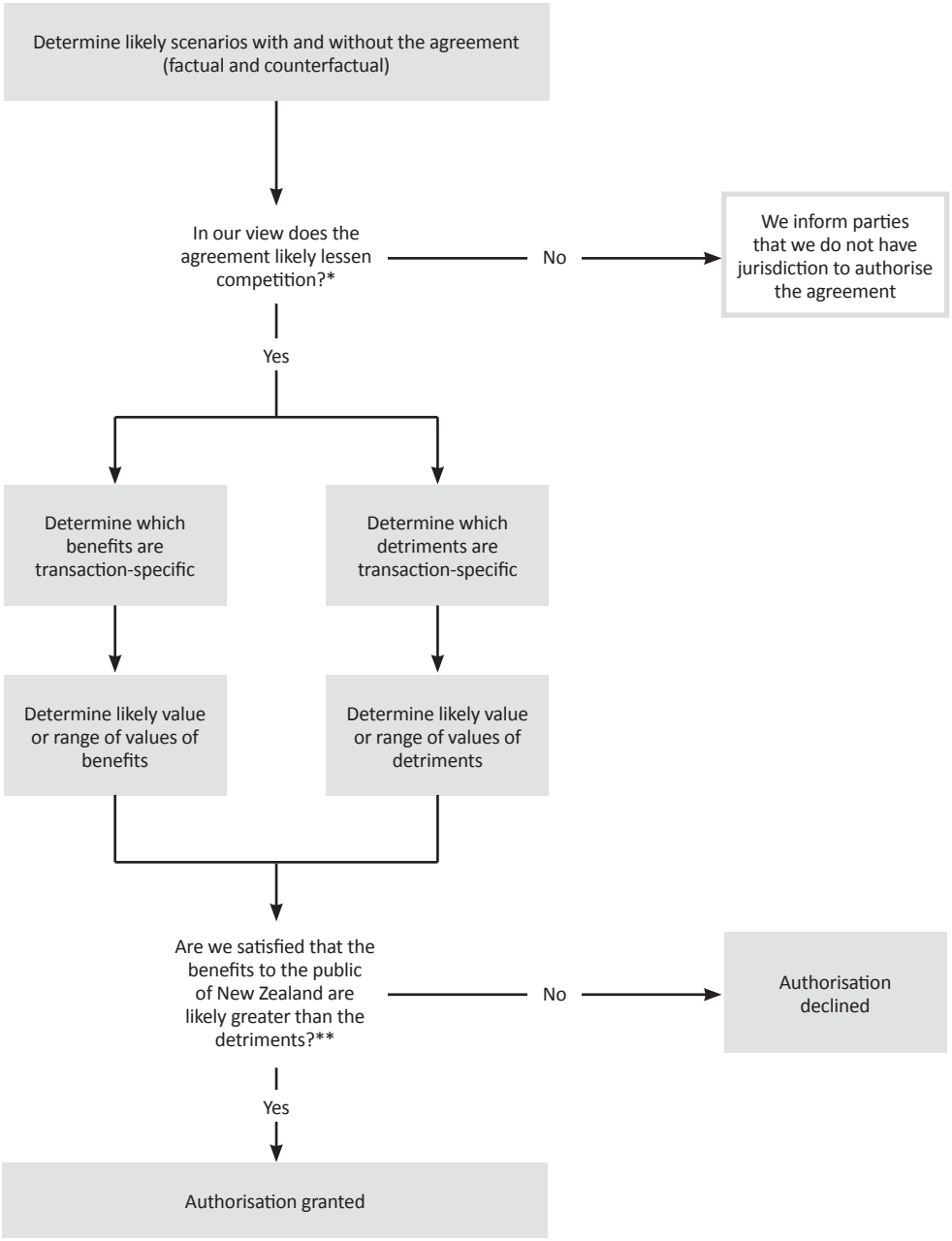
   8.4 the standard process we follow when considering authorisation applications (see paragraphs 82-156); and

   8.5 the streamlined process we use when considering appropriate authorisation applications (see paragraphs 157-177).

9. Attachment A sets out a glossary. Attachment B sets out evidence that we find useful in assessing a transaction's likely impact on competition and allocative efficiency.

10. The figures below set out flowcharts summarising how we decide whether to grant authorisation.

Figure 1: What the Commission considers when deciding whether to authorise an agreement

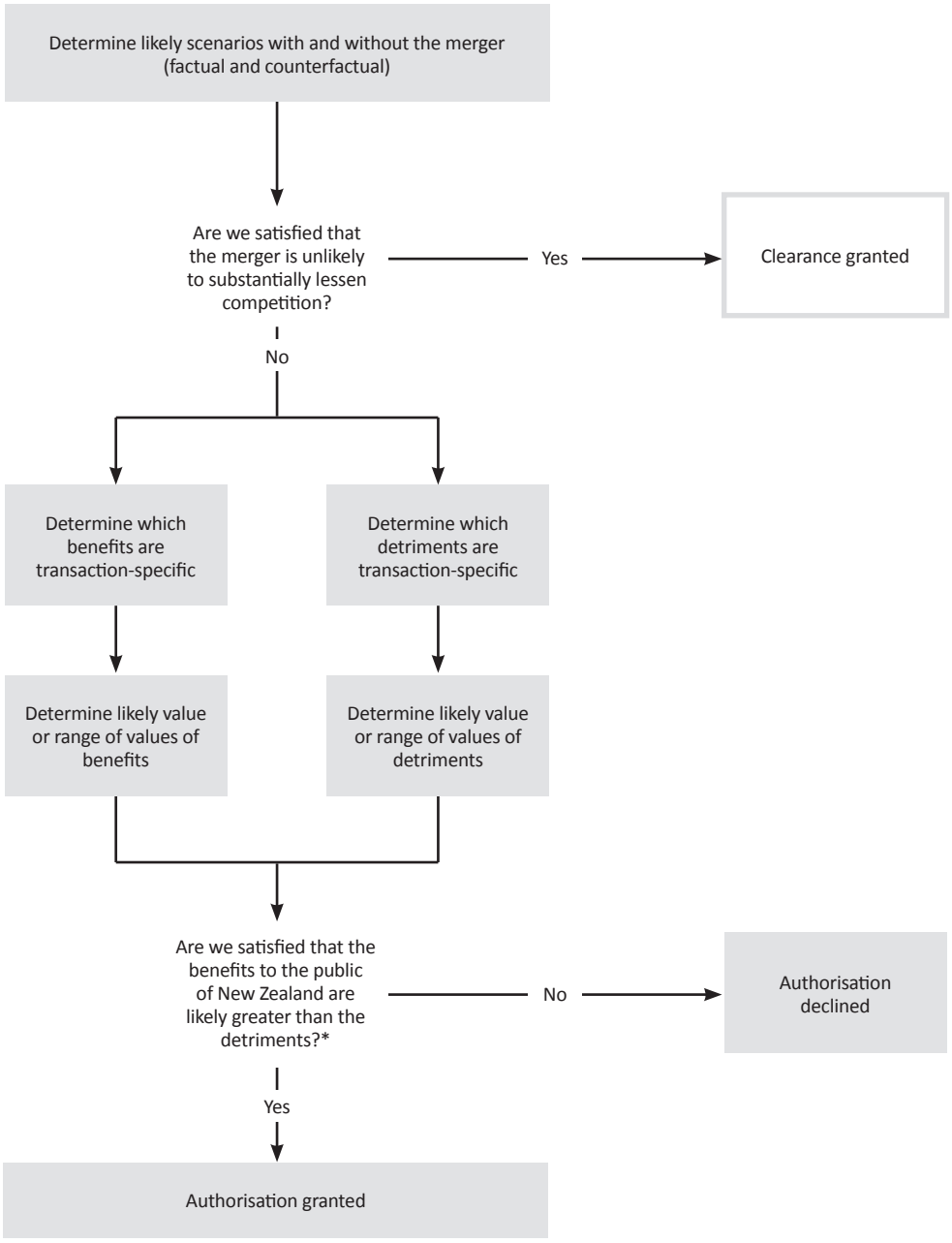


Notes:

*We also consider if the agreement is deemed to lessen competition under section 27 via section 30 or breaches sections 37 or 38 (resale price maintenance) or section 29(1) (exclusionary contracts between competitors).

**We take into account any conditions we may decide to impose at this point.

Figure 2: What the Commission considers when deciding whether to clear or authorise a merger



Notes:

*We take into account any undertakings at this point.

Authorisation framework

11. In this section, we explain:

    11.1 what transactions can be authorised;

    11.2 our jurisdiction to grant authorisation;

    11.3 when we will grant authorisation;

    11.4 the effect of authorisation and how long authorisation lasts;

    11.5 our power to accept undertakings for mergers and to include conditions on authorisation for agreements; and

    11.6 when we can amend and vary authorisations.

Transactions we can authorise

12. We can authorise[4] the following conduct or provisions of agreements that would otherwise breach the Commerce Act:[5]

    12.1 mergers that would be likely to have the effect of substantially lessening competition in a market (section 47);[6]

    12.2 provisions of agreements between any persons that have the purpose, or effect or likely effect, of substantially lessening competition in a market (section 27);[7] and

    12.3 provisions of agreements between competitors that have the purpose, or effect or likely effect of fixing, controlling or maintaining the price of a good or service (section 30 which deems a breach of section 27);

    12.4 if a supplier of goods enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods (resale price maintenance) (sections 37 and 38); and

    12.5 provisions of agreements between competitors that have the purpose of preventing, restricting or limiting the supply, or acquisition, of goods or services to competitors by the parties to the agreements (section 29).

13. We cannot, however, authorise conduct that may breach sections 36 and 36A of the Commerce Act. In other words, we cannot authorise a firm with a substantial degree of market power taking advantage of that market power for an anti-competitive purpose.[8]

4. Commerce Act 1986, ss 58 and 67.
5. Some agreements are exempt from the Commerce Act. A number of specific exemptions exist including for agreements between interconnected companies, partnership agreements (as long as none of the partners is a company) and agreements specifically authorised by another law. For further information on these exemptions, see our Factsheet "Exemptions under the Commerce Act" at www.comcom.govt.nz/exemptions-under-the-commerce-act
6. We must clear a merger where we receive an authorisation application and are satisfied that the merger will not have, or will not be likely to have, the effect of substantially lessening competition in a market. Our approach to assessing clearance applications is explained in our Merger and Acquisition Guidelines at www.comcom.govt.nz/mergers-and-acquisitions-guidelines
7. For further details, see our fact sheet "Agreements that Substantially Lessen Competition" at www.comcom.govt.nz/slc-agreements. Section 28 also prohibits covenants on similar terms.
8. However, ss 36(2) and 36A(2) do not apply to any practice or conduct that has been authorised. See ss 36(1) and 36A(1).

The public benefit test and our jurisdiction to grant authorisation

14. The Commerce Act contains two versions of the public benefit test.

    14.1 For mergers,[9] we must authorise where we are satisfied that the merger will be likely to result in such a benefit to the public that it should be permitted.

    14.2 For agreements generally,[10] we must authorise where we are satisfied that the agreement will be likely to result in a benefit to the public that would outweigh the lessening in competition.

15. While stated differently, the courts have held that there is no material difference between the two.[11] We refer to these two versions as the 'public benefit test'.

16. While the public benefit test is the same for all authorisations, our jurisdiction to consider whether to authorise is different for mergers and agreements.

17. For mergers, when we receive an authorisation application, we must first assess whether the merger would be likely to substantially lessen competition in a market.[12] If we are satisfied that the merger would not be likely to have that effect, then we would clear the merger.

18. If we are not satisfied and cannot grant clearance, we apply the public benefit test to determine whether to authorise the merger. When we receive an authorisation application for an agreement, we must first assess whether we have jurisdiction to grant authorisation. We can only authorise an agreement that lessens competition,[13] or that is deemed to lessen competition (as it breaches section 30 and is therefore deemed to breach section 27).[14] We call this jurisdictional threshold the 'competition threshold'.[15] If we determine that an agreement does not meet the competition threshold, we are unable to grant authorisation.

19. If we determine that an agreement meets this competition threshold, we apply the public benefit test to determine whether to authorise the agreement.

20. When applying the public benefit test, we must quantify benefits and detriments to the extent that it is practicable, rather than rely solely on qualitative judgement.[16]

9. And exclusionary agreements contrary to s 29 and resale price maintenance.
10. With the exception of exclusionary agreements between competitors contrary to s 29 and resale price maintenance contrary to ss 37 and 38.
11. See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 at [33] and also *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 at [88]-[90].
12. Commerce Act 1986, s 67(3)(a). We set out more detail about how we assess the competitive effects of mergers in our Mergers and Acquisitions Guidelines at www.comcom.govt.nz/mergers-and-acquisitions-guidelines
13. In general, our competition assessment considers the extent of competition from existing competitors, whether existing competitors can expand their sales, or new competitors can enter and compete effectively, and whether buyers can exercise countervailing power (or, in the case of potential buyer market power concerns, suppliers). Attachment B sets out evidence that we find useful to consider when considering a transaction's impact on competition.
14. We also assess whether the agreement breaches the prohibitions on exclusionary agreements between competitors (s 29) and resale price maintenance (ss 37 and 38).
15. We can only authorise resale price maintenance if we determine that the practice amounts to resale price maintenance (as defined in ss 37 or s 38). We can also authorise any agreements that we determine breach s 29(1) (exclusionary agreements).
16. See *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) at 447 per Richardson J and *Air New Zealand*, above n 11, at [319].

Effect and length of an authorisation

21. When we authorise a merger, it cannot be challenged either by us or by a third party as being in breach of section 47 so long as it is carried out within one year of authorisation being granted or the Court upholding our decision to grant authorisation.

22. We authorise agreements for a period for which we can be satisfied there will be net public benefits. Typically, applicants seek authorisation for the length of the relevant agreement. We have the power to impose conditions (see paragraphs 28-30 below), and vary and revoke authorisations in certain circumstances (see paragraphs 31-34 below).

23. When we authorise an agreement, it cannot be challenged either by us or by a third party as being a breach of section 27 or section 30 (and therefore a deemed breach of section 27).[17] However our decision to authorise (or not) a transaction can be appealed to the High Court by parties to the transaction, or any person who participated in a conference held by us in relation to an authorisation.[18]

Undertakings and conditions

24. Where we are not satisfied that a transaction is likely to result in net public benefits, we can nevertheless authorise the transaction subject to a divestment undertaking (for mergers) or conditions (for agreements).[19] We will do this where we consider such an undertaking or condition will enable the transaction to pass the net public benefit test.[20]

25. In principle, the anti-competitive effect of a transaction could be remedied by a party to the transaction:

    25.1 selling assets or shares (a structural remedy); or

    25.2 agreeing or becoming bound to behave in a certain way in the future (a behavioural remedy).[21]

Mergers

26. For mergers, we can only accept an undertaking to dispose of assets or shares, ie, a structural undertaking.[22] We cannot accept behavioural undertakings.

27. If a party to a merger breaches any undertaking given to the Commission, the authorisation is void. For further details on our approach to assessing undertakings, refer to our Mergers and Acquisitions Guidelines.[23]

17. Or sections 29, 37 and 38.
18. Commerce Act 1986, s 92.
19. Undertakings are offered by merging firms, and we decide whether to accept those undertakings. Conditions can be imposed by the Commission as part of the authorisation, without any offer by the participating firms.
20. Applicants are invited to discuss divestment undertakings and/or proposed conditions with us at any time during the process. However, the early offer or suggestion of undertakings and/or conditions will avoid re-consideration of the application with and without the undertaking or condition.
21. Behavioural remedies could include things such as a business agreeing not to reduce its current supply of a product, a vertically integrated business agreeing to supply an input at current prices to competitors, and monitoring and reporting agreements.
22. Commerce Act 1986, s 69A(1).
23. These are available at www.comcom.govt.nz/mergers-and-acquisitions-guidelines

Agreements

28. We can authorise agreements subject to conditions. Unlike for mergers, this includes behavioural remedies. The conditions must be consistent with the Commerce Act[24] and can last for such period as we think appropriate. We may include conditions that remove or lessen the extent of detriments or enhance the benefits arising from an agreement.

29. It is unusual for us to impose behavioural conditions because they carry their own costs. In particular they:

    29.1 are difficult to design in a way that will achieve their objectives, while minimising the risk of unintended negative consequences;

    29.2 are difficult and costly to monitor and enforce; and

    29.3 create significant compliance costs for the firms involved.

30. If a firm does not comply with any one of the conditions, we can vary or revoke the authorisation.[25] Parties to the transaction would then be at risk of legal action by us or third parties under the Commerce Act.

Varying or revoking authorisations

31. We cannot vary or revoke a merger authorisation.

32. We can vary or revoke the authorisation of an agreement if we are satisfied that:

    32.1 the authorisation was granted on information that was false or misleading in a material way;

    32.2 there has been a material change of circumstances since the authorisation was granted (which may include a material change in the terms of the agreement); or

    32.3 a condition upon which the authorisation was granted has not been complied with (see paragraphs 28-30 above).[26]

33. If we revoke an authorisation of an agreement, we may decide to grant a new authorisation in its place.

34. Before deciding whether to vary or revoke the authorisation of an agreement, we will consult with the person who was granted the authorisation and any other interested party. We will consider these submissions when making our decision.[27]

24. Commerce Act 1986, s 61(2).
25. Commerce Act 1986, s 65(1)(c).
26. Commerce Act 1986, s 65(1).
27. Commerce Act 1986, s 65(2)

Relevant benefits and detriments

The definition of benefits and detriments

35. New Zealand's courts[28] have defined a public benefit as:

> anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

36. In particular, section 3A of the Commerce Act requires us to have regard to efficiencies that likely arise from the transaction in assessing whether a transaction gives rise to public benefits. However, New Zealand courts have made clear that efficiencies are not the only public benefits which can be counted.[29]

37. In our assessment we regard a public benefit as any gain to the public of New Zealand that would result from the proposed transaction regardless of the market in which that benefit occurs or whom in New Zealand it benefits. We take into account any costs incurred in achieving benefits.[30]

38. In contrast, in assessing detriments we only consider anti-competitive detriments that arise in the market(s)[31] where we find a lessening of competition (whether substantial or otherwise).[32]

39. To illustrate the difference in our approach to benefits and detriments, if a transaction gives rise to a lessening of competition in market A and benefits in market A and market B, then:

    39.1 the public benefit is counted across both markets A and B; and

    39.2 only those detriments arising in market A are counted.

Benefits and detriments must be transaction-specific

40. Benefits and detriments must result from the transaction. They must be 'transaction-specific' in the sense that they arise with the transaction, but not without the transaction.[33]

41. To determine whether benefits and detriments are transaction-specific, we assess:

    41.1 what is likely to occur in the future with the transaction; and

    41.2 what is likely to occur in the future without the transaction.

42. We use the same with and without scenarios for both our assessment of whether there is a lessening of competition (whether substantial or not) and of benefits and detriments.[34]

28. See *Air New Zealand*, above n 11, at [319], and *Telecom Corporation of New Zealand Ltd v Commerce Commissio*n (1991) 4 TCLR 473 (HC) at 527-530 and 554-555 quoting *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242 and *In Re Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110 at 18,123.
29. See *Godfrey Hirst*, above n 11, at [51], *Air New Zealand*, above n 11, at [319] and *Telecom Corporation of New Zealand Ltd v Commerce Commission* (HC) above n 28, at 528.
30. See *Air New Zealand*, above n 11, at [319].
31. Market definition is a framework to identify and assess the close competitive constraints a firm would likely face. Our Mergers and Acquisition Guidelines explain our approach to market definition.
32. *Godfrey Hirst*, above n 11, at [72]. Observation by Wilson J in *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [271]. In *Godfrey Hirst* while the court endorsed this settled approach, it observed that 'disbenefits' or negative benefits that arise outside the affected markets may be relevant to the public benefit test.
33. See *Godfrey Hirst*, above n 11, at [119].
34. Our Mergers and Acquisitions Guidelines contain further details on how we assess the with- and without-a-transaction scenarios. For a brief overview of how we assess the competitive effect of a transaction, see n 13 above.

Assessing and balancing benefits and detriments

43. Once we have identified all transaction-specific benefits and detriments, we assess, where practicable, the likely value or range of values of those benefits and detriments. To do this, we require detailed and verifiable evidence regarding the nature and likely extent of benefits resulting from the transaction (see paragraphs 56-60 and 75-81 below).

44. We place less weight on the benefits and detriments that are less likely to occur. This may include those that occur further into the future or that are more distantly related to the goods and services being purchased and consumed. This is because the more distant a benefit, the less direct the causal link is likely to be.[35] Applicants should explain precisely how the benefit arises from the transaction and provide robust evidence about each step in the causal chain.

45. We also consider the reliability of the evidence and analysis when determining what weight to attach to each benefit and detriment.[36]

46. Having assessed the magnitude of benefits and detriments, we decide whether we are satisfied that the transaction is likely to result in net benefits to New Zealanders. If we are satisfied that the benefits of the transaction likely outweigh the detriments, we will authorise the transaction. If we are not satisfied, we will not authorise the transaction.

47. We consider all identified benefits and detriments in the balancing process – whether quantified or not.[37] In doing so, we ensure that our analysis as a whole is complete, consistent and avoids double-counting gains and losses.[38]

48. In the remainder of this section, we explain:

    48.1 when we quantify benefits and detriments;

    48.2 the role of wealth transfers in our analysis;

    48.3 how we assess detriments in more detail; and

    48.4 how we assess benefits in more detail.

Quantifying benefits and detriments

49. As noted above, we have a responsibility to quantify benefits and detriments to the extent that it is practicable, rather than rely solely on qualitative judgement.[39] However, how much we quantify benefits and detriments will vary depending on the application. We may not always have to do a detailed quantification to determine whether the benefits outweigh the detriments of a transaction.

35. When quantifying, we also discount future benefits and detriments to obtain a present value as explained at paragraph 51 below.
36. See *Air New Zealand*, above n 11, at [416].
37. See *Air New Zealand*, above n 11, at [415].
38. For example, we would not deduct the cost of achieving a benefit when assessing the magnitude of the benefit and then also count this cost as a detriment.
39. *Telecom* (CA), above n 16, at 447 per Richardson J.

50. When quantifying benefits and detriments we assess the robustness of the results by varying the underlying assumptions.[40] This is known as 'sensitivity testing'. This helps us test the reliability of any quantification, particularly when the information we have is limited or unreliable, or the methods of calculation are not necessarily robust.

51. As well as considering whether to place less weight on benefits and detriments that are less likely to occur, or for which the evidence is less strong,[41] we also discount future benefits and detriments. This reflects that there is a preference to receive a benefit today, rather than a benefit of the same size in the future, all else being equal.[42]

52. Where we cannot quantify a benefit or detriment, we make a qualitative judgement as to the importance of that benefit or detriment relative to the quantified benefits and detriments.

Role of wealth transfers

53. Changes in the distribution of income, where one group gains at the expense of another, are generally not relevant to our analysis because they do not usually involve a change in overall public benefit.[43]

54. Wealth transfers may become relevant where the transfer is between New Zealanders and non-New Zealanders.[44] This is because the public benefit test focuses on benefits to New Zealanders. As a result, transfers of wealth from non-New Zealanders to New Zealanders may be a public benefit. Similarly, transfers of wealth in the opposite direction may be a public detriment.

55. However, in addition to considering the direct effects of wealth transfers, we also consider any effects on non-New Zealanders that may ultimately feed back to impact New Zealanders. For example, if a transaction would lead to a New Zealand firm charging higher prices to tourists, that would result in a transfer of wealth from those tourists to the New Zealand firm resulting in a public benefit. However, equally, those higher prices could lead to fewer tourists coming to New Zealand, which in the longer term could negatively affect New Zealanders.

40. For example, when estimating the loss in allocative efficiency, we often need to make assumptions, such as the prospect for greater imports if prices increase. Sensitivity testing in this context would involve us assuming different levels of imports in response to a price increase and see how this affects the profitability of price increases. If small changes in an estimate of imports significantly affects the estimated price increase, a range of imports may be used and so consequently a range of price increases.

41. See paragraphs 44 and 45 above.

42. We consider which percentage to use on a case-by-case basis, and within any one case a different discount rate may be appropriate depending on the benefit or detriment in question. For example, if the benefit in question is an increase in productive efficiency that is only to be realised at some point in the future, the firm's own cost of capital may be the appropriate discount rate.

43. See *Air New Zealand*, above n 11, at [241] and Telecom (HC), above n 28, at 531.

44. See *Air New Zealand*, above n 11, at [242] and Telecom (HC), above n 28, at 531. The Commission treats the New Zealand public as those people domiciled in New Zealand.

Relevant evidence

56. We expect applicants to provide robust qualitative and quantitative evidence of benefits or detriments when they make an authorisation application.[45]

57. Where an applicant considers its efficiency will improve, it should substantiate its claims, wherever possible. Evidence could include plant and firm-level accounting statements, internal studies, strategic plans, integration plans, management consultant studies, consumer surveys or research and other available data.

58. More generally, we place weight on business documents prepared in the ordinary course of business in considering the competitive effects of a transaction and the benefits and detriments arising from it. Attachment B sets out more detail on the type of evidence we find useful in assessing a transaction's impact on competition and allocative efficiency.

59. As we must quantify benefits and detriments where practicable, applicants should provide quantitative evidence in their authorisation application if possible. If the applicant is not able to do so, it should discuss this with us prior to lodging the application.

60. All quantitative evidence should be as clear and understandable as possible. In particular, it must include:

    60.1 the data used;

    60.2 a description of the method used;

    60.3 a description of the assumptions adopted and the underlying rationale, and any evidence relevant to these assumptions;

    60.4 the results of the analysis;

    60.5 any sensitivity testing undertaken; and

    60.6 the conclusions derived from the analysis.

Detriments

61. Our assessment of detriments arising from a lessening of competition is informed by our competition analysis. A lessening of competition is typically associated with a decrease in allocative efficiency. A lessening of competition may also lead to productive and dynamic inefficiencies. These concepts are discussed in more detail below.

62. We assess detriments on the basis of the facts of each case, rather than assuming inefficiency "on the grounds of economic doctrine" alone.[46]

45. We are happy to discuss what evidence may be useful prior to the application being lodged (see paragraphs 84-90 for further information).

46. *Telecom* (CA), above n 16, at 439.

Loss of allocative efficiency

63. A reduction in competition tends to result in higher prices and/or a reduction in service, quality, choice or some other element of value to the consumer.[47] This causes a proportion of consumers to switch some or all of their purchases to otherwise inferior or less satisfactory products/services. This type of switching is referred to as an allocative inefficiency (or a deadweight loss). More precisely, it "reflect(s) the 'cost' to society of an increase in price which leads either to unsatisfied demand or the purchase of a less preferred substitute".[48]

64. When considering whether to authorise a transaction, we consider the extent of any resulting allocative inefficiency.

65. We consider two aspects of allocative inefficiency: price effects and non-price effects.

66. In terms of price effects, a transaction which lessens competition will tend to create a greater allocative inefficiency:

    66.1 the more sensitive demand is to price;

    66.2 the greater the pre-existing market power;

    66.3 the greater the loss of competition between the parties to the transaction; and

    66.4 the greater the size of the market.

67. We also consider non-price effects, such as the effect of the transaction on service, quality and choice, as well as any other dimension of competition that customers value. Non-price effects are typically difficult to measure and may be assessed qualitatively.

Loss in productive efficiency

68. Productive efficiency is the ability to use the minimum amount of resources to produce a certain volume of output given available technology.[49] A transaction will lead to a loss in productive efficiency if it results in a greater number of inputs being required to produce a certain volume of output.

69. We do not assume a transaction leads to productive inefficiency. Instead, we assess on the facts of the case whether productive inefficiency would likely arise as a result of a transaction, and where possible, the likely size of that efficiency loss.

70. In this context we note that shareholders generally want a firm to minimise its costs.[50] A transaction is less likely to lead to a loss in productive efficiency if shareholders can effectively monitor productive efficiency and pressure management to minimise costs.[51] A transaction may be more likely to lead to a loss in productive efficiency if it reduces management's ability and/or incentive to minimise costs.

47. It is not only the parties to the transaction that may increase prices (or otherwise make their offerings less valuable) to consumers. Other market participants may have the incentive to similarly increase prices (or otherwise make their offerings less valuable) unilaterally, reducing the amount of product purchased overall. Alternatively, the transaction may make it more likely that all or some firms in the market would coordinate their behaviour by accommodating one another's responses and thereby collectively exercise market power such that output reduces across the market.

48. *Air New Zealand*, above n 11, at [243].

49. *Air New Zealand*, above n 11, at [272].

50. We recognise many transactions will be based, at least in part, on an intention to reduce cost.

51. In particular, the incentive for managers to minimise costs is likely to be more acute when they are (substantial) shareholders/owners of the business.

71. Relevant factors and evidence can include:

71.1 the impact of the transaction on competition;

71.2 the extent to which management retains the ability to minimise costs, including being able to monitor costs against an external benchmark to assess efficiency (cost benchmarking);

71.3 the extent to which management retains the incentive to minimise costs, for example:

71.3.1 whether shareholders can easily monitor productive efficiency and pressure management to minimise costs;

71.3.2 whether corporate takeover and management displacement is a significant possibility; or

71.3.3 whether the competition remaining in the market sufficiently disciplines management's behaviour.

71.4 information on the parties' past acquisitions and what happened to production costs after the acquisition;

71.5 information on productive efficiency within the industry or market over time; and

71.6 whether the parties to the transaction have plans in place to address these issues above and how well-developed and robust those plans are.

Loss in dynamic efficiency

72. Dynamic efficiency is an increase in economic efficiency over time through the introduction of demand-enhancing new products or cost-reducing production processes.

73. We do not assume a transaction leads to a loss in dynamic efficiency. While competition can be a key driver of innovation, more profitable firms may have a greater ability to carry risk. Increased concentration may therefore increase or reduce dynamic efficiency, depending on the context.[52]

74. The effect of a transaction on dynamic efficiency can be difficult to measure and typically involves qualitative judgement. However, when assessing the possibility of losses in dynamic efficiency, we review the relevant evidence, taking into account:

74.1 the importance of innovation to the industry, for example:

74.1.1 levels of research and development and related spending in the industry;

74.1.2 the extent of innovation introduced in recent years in the industry, and the extent to which product or service innovation drives sales;

74.1.3 any evidence about future innovation in the industry;

52. We discuss how we assess whether a transaction would increase dynamic efficiency at paragraph 80 below.

74.2 the importance of each party to the transaction in driving innovation in the industry relative to other parties, for example:

74.2.1 whether the parties to the transaction compete closely in terms of innovation;

74.2.2 the importance of other parties in the industry in driving innovation;

74.3 how the ability and incentives to innovate differ with and without the transaction, specifically whether, and the extent to which:

74.3.1 the parties to the transaction bring together complementary or substitutable intellectual property, trade secrets or skill sets;[53]

74.3.2 before the transaction, innovation by one of the parties would likely take sales from one of the other parties, so that the incentive to innovate may decrease as a result of the transaction;[54]

74.3.3 innovations may be imitated by rivals, reducing the payoff from innovation.

Benefits

General principles of assessment

75. For each benefit anticipated by an applicant, we consider:

75.1 the nature of the benefit;

75.2 whether there is a clear link between the transaction and the benefit (ie, the benefit must be transaction-specific);[55]

75.3 whether the benefit is one-time or recurring;

75.4 how and when the benefit will arise; and

75.5 the likelihood and magnitude of the benefit.

76. Applicants must provide sufficient qualitative evidence to support any claimed benefits, as well as quantification of the likely level of benefits where possible.

77. The remainder of this section explains how we assess potential improvements in productive and dynamic efficiency and other benefits.

Productive efficiency

78. A transaction may improve productive efficiency in a number of ways, including:[56]

78.1 by increasing economies of scale (where unit costs fall as production increases);

78.2 by creating or increasing economies of scope (where unit costs fall when more than one product is produced or transported etc);

53. Bringing together complementary intellectual property, trade secrets or expertise may increase the ability to innovate (see paragraph 80 below).

54. This is an extension of the unilateral effects logic to innovation. To illustrate, pre-transaction, firm A may have the incentive to innovate in order to win share from firm B. After firm A and firm B, say, merge, the incentive to innovate would be diminished because of the loss in dynamic competition between firms A and B.

55. See *Air New Zealand*, above n 11, at [319].

56. Quantification of an increase in productive efficiency typically involves a comparison of the costs of producing a given level of output with and without the transaction.

78.3 by allowing better use of existing capacity; or

78.4 by reducing cost by:

78.4.1 allowing greater specialisation of production, such as where parties to the transaction bring together complementary strengths in production;

78.4.2 allowing rationalisation of assets; or

78.4.3 reducing transaction costs.

79. Applicants should explain whether the claimed improvement to productive efficiency involves savings of fixed or variable costs.

Dynamic efficiency

80. A transaction may increase innovation in products or processes compared to the situation without the transaction. This may be the case if the transaction:

80.1 increases the ability to innovate, eg, if the transaction allows for a combination of intellectual property, trade secrets or expertise that are more likely to give rise to innovation, and this combination would otherwise be unlikely to occur;[57] or

80.2 increases the incentive to innovate, eg, without the transaction, one party would be likely to imitate the innovations of the other, so that the incentive to innovate may be greater as a result of the transaction.[58]

Other benefits

81. As discussed earlier, a benefit is anything of value to the community generally.[59] While we cannot exhaustively identify these types of benefits, they could include the following examples.

81.1 A merger between firms at different levels of the supply chain (a vertical merger) results in a firm charging one mark-up rather than the two pre-merger mark-ups – one for each level of the supply chain.[60]

57. We may also consider whether the transaction will increase the ability to take on risk and, therefore, innovate. A transaction may increase the ability to innovate, for example, if the firms to the transaction were unprofitable pre-transaction, and returning the firms to profitability may increase their ability to take on risk. As with any such arguments, we expect to receive evidence to support arguments that such a benefit is transaction-specific and the magnitude of the benefit.

58. For example, if without the transaction firm B was likely to quickly imitate any innovation firm A made and so reduce the benefits of that innovation to firm A, firm A would be less likely to invest in innovation in the first place. A merger between firms A and B would remove this effect, and the merged firm may consequently be more likely to invest in innovation.

59. See paragraphs 35-37 above.

60. Such a benefit may alternatively be taken into account as reducing any loss in allocative efficiency. For example, if a merger involved the merger of an integrated manufacturer and retailer with a retailer, this may lessen competition at the retail level. This would typically be associated with a loss in allocative efficiency as prices increase to retail customers. However, the merged firm may only now take one mark-up on the product it manufactures and sells through its newly acquired retail business, rather than the two margins that would have been taken previously. This removes the double mark-up. If the evidence establishes that this is passed onto retail customers to some degree, this reduces the extent of any loss in allocative efficiency.

81.2 A transaction allows the parties to more efficiently price their goods or services by, for example, jointly setting the price of complementary products[61] or for interoperable platforms that exhibit network effects.[62]

81.3 A transaction results in other benefits valued by the community generally which could include, eg, environmental improvements or health improvements.

61. Joint price-setting of complementary products may lead to a lower overall mark-up being charged on the products than would be charged by firms individually setting prices to increase demand for the products. This is analogous to the example in sub-paragraph 81.1, explained at n 60 above.

62. For example, a merger that allows applications to be used on two different operating systems.

The standard authorisation process

82. In this section we describe the process we follow when considering standard authorisation applications for anti-competitive transactions. We also describe our approach to confidential information.

83. Our process has the following stages: pre-notification, the authorisation application, our investigation and determination, and post-determination.

Pre-notification

84. A person may apply to us for authorisation of a transaction where they propose to:

    84.1 acquire assets of a business or shares; or

    84.2 enter into an agreement that lessens or is deemed to lessen competition.

85. We encourage potential applicants to inform us by contacting the Competition Manager[63] about potential authorisation applications as early as possible.

86. We also encourage applicants to have pre-notification discussions with us before submitting an authorisation application. We will have pre-notification discussions where we are satisfied that an applicant has a good faith intention to proceed with a merger or agreement.[64]

87. We treat the fact and content (including any documents provided) of all pre-notification discussions as confidential until an application is registered. We do not seek third party views at the pre-notification stage.

88. While pre-notification discussions are not compulsory, they are designed to reduce the time we need to investigate once we have received an authorisation application. Pre-notification discussions can benefit both the applicant and the Commission by:

    88.1 educating our investigation team about markets that are complex and/or unfamiliar;

    88.2 setting the scene for the transaction, including its rationale, at an early stage;

    88.3 clarifying what information and evidence we are likely to need, and identifying useful evidence that may assist our analysis (including economic evidence);

    88.4 providing us with an opportunity to indicate further information (including competition issues) that should be included in the application; and

    88.5 allowing the applicant to have a preliminary discussion with us about likely competition issues (although our comments are only indicative and not binding).

89. These pre-notification discussions allow us to plan more effectively for the authorisation process, and to allocate appropriate resources. This means we are better able to provide the applicant with an indication of the likely timeframe for our investigation.

63. The Competition Manager can be contacted at competition@comcom.govt.nz

64. As evidenced by, for example, adequate financing, heads of agreements, or evidence of board-level consideration. We will also take into account other evidence of good faith intention; for example, when an acquirer is genuinely considering making a bid at auction.

90. To get the most out of these discussions, we encourage at least one of the applicant's senior employees to attend. We also expect an applicant to provide us with a substantially developed draft authorisation application at least two working days before meeting with us, to allow us to review the application prior to meeting.[65]

Applying for authorisation

91. Applications for authorisation must be made on the prescribed forms. There are separate application forms for mergers and agreements under each of the standard process and the streamlined process (ie, four forms in total). The forms are available on the Commission's website www.comcom.govt.nz

92. The application form sets out the information we need to start our investigation. It allows applicants to present their arguments and supporting evidence, including any expert economic evidence the applicant wishes to provide.

93. We require both a confidential version and a public version of the application. In the confidential version any information for which confidentiality is sought must be highlighted and contained in square brackets. In the public version the confidential information should be removed from within the square brackets, with the brackets remaining, ie, [ ].

94. The application must be accompanied by payment of the $11,500 filing fee (GST incl) for agreement authorisation applications or the $23,000 filing fee (GST incl) for merger authorisation applications. Payment can be made by cheque or electronic payment into our bank account. Please use the applicant's company name as the reference when depositing funds electronically. Our bank account details are:

    Commerce Commission
    BNZ North End
    02 0536 0329867 00

95. After receiving an authorisation application and payment, we check that the application is in the correct form and completed to a sufficient standard to enable us to proceed with our investigation. We then register the application and inform the applicant of this fact.[66]

96. If the application does not meet our requirements, we inform the applicant as soon as we can and give them the opportunity to remedy this.

97. If the applicant does not address our concerns, or does not pay the fee, we may decline to register the application.[67]

65. A longer timeframe may be appropriate for more complex mergers or agreements.
66. Commerce Act 1986, ss 60(2) and 67(2).
67. Commerce Act 1986, ss 60(4) and 67(2).

Confidentiality as to the fact of an authorisation application

98. Applicants sometimes ask that we do not publicly disclose the fact that they have made an authorisation application (fact confidentiality).[68]

99. We consider requests for fact confidentiality on a case-by-case basis, but we are only likely to grant fact confidentiality for a limited period and only in exceptional circumstances. This is because fact confidentiality is likely to severely hamper our investigation, as we cannot gather information from market participants and test information provided in an authorisation application.[69]

Publication of a public version of an authorisation application

100. Once we have registered an authorisation application and agreed which information is confidential, we publish a public version on the merger authorisations register or the anti-competitive practices authorisations register on our website and issue a media release. We do this to inform the public of the proposed merger or agreement and to enable third parties to make submissions to us.

How we investigate an authorisation application

Who determines an authorisation application

101. Each authorisation application is decided by a Division of Members of the Commission appointed by the Chair for that purpose.

102. The Division is supported by an investigation team – a multi-disciplinary team of Commission staff, comprising one or more investigators, and economic and legal staff.

103. Staff brief the Division during the investigation, and the Division provide staff with guidance and direction.

Indicative authorisation timeline

104. When we are considering a merger, the Commerce Act sets out a 60 day statutory timeframe in which we must clear, authorise, or decline to authorise the merger. If this period expires without negotiating an extension of time or having made a decision, we are deemed to have declined to grant an authorisation. Because we often need more time to process an authorisation than the statutory timeframe, we are likely to seek an extension. There is no statutory timeframe when we are considering whether to authorise an agreement.

68. Applicants may request fact confidentiality because, for example, the merging firms have not informed their employees about the merger, or there is competition from other parties to acquire the business in question.

69. Confidentiality of information is discussed further below at paragraphs 130-136.

105. The Commission has committed to determining applications for authorisation (whether a merger or an agreement) within an average of 80 working days of registering the application. We have developed an indicative investigation timeline to allow us to do this.

Day 1	Application for authorisation registered.
By day 10	We provide a draft investigation timeline based on likely complexity and resources. If required, we also seek an extension based on the draft timeline.[70]
Day 10-40	We investigate, receive submissions and post public versions of any submissions on our website.
Day 40-50	We publish a draft determination.[71]
Day 50-60	We receive submissions on the draft determination and we hold a conference, if requested,[72] or if we think a conference would be useful.[73]
Day 70-80	We grant, or decline to grant, authorisation.[74]

106. We try and give the most accurate timeline we can at an early stage. However, we may have to seek further extensions later in the authorisation process, particularly where we need to:

106.1 test new information provided by the applicant or market participants (including economic evidence); and/or

106.2 provide an applicant with the opportunity to fully respond to any unresolved issues.

107. We may also need further time to consider any divestments that have been offered or to discuss any proposed conditions with the applicant.

Communication with the applicant

108. A member of the investigation team contacts the applicant early in the investigation to let them know who will be the main point of contact.

109. Throughout our investigation we keep in regular contact with the applicant about progress. How often depends on the circumstances of the case.

Seeking views from market participants

110. We gather and analyse information from market participants, such as customers, existing and potential competitors, and suppliers. This helps us assess the likely competitive effects, public benefits and anti-competitive detriments of the merger or agreement and to test the information provided in an authorisation application.[75]

70. We make extension requests verbally in the first instance, although we will follow that request with a written request by email or letter.
71. The Commission is not required to publish a draft determination for merger authorisations. However, we generally do.
72. Under s 62(3) in relation to an application for authorisation of an agreement, the applicant or other person who has received a copy of the draft determination may ask the Commission to hold a conference.
73. Commerce Act 1986, ss 62(6) and 69B.
74. We must clear a merger where we receive an authorisation application but are satisfied that the merger will not have, or will not be likely to have, the effect of substantially lessening competition in a market.
75. In relation to merger authorisations, under s 68(5) of the Commerce Act we may consult with any person we think is able to assist us in making a determination.

111. We generally give public notice of authorisation applications by publishing a media release and the application on our website, and inviting parties to give notice to us that they have an interest in the application.[76] In respect of agreement authorisation applications, we must give notice of the application to any person who, in our opinion, is likely to have an interest in the application.[77]

112. Anyone who has information that they believe is important for our investigation, or wants to provide us with a written submission can contact us at registrar@comcom.govt.nz

How we gather information

113. We gather information from applicants, market participants and other parties in a variety of ways, depending on the circumstances. This can include through face-to-face interviews, telephone interviews, letters or emails.

114. We usually seek information on a voluntary basis, although in some cases we use our information-gathering powers to require parties to provide information. We discuss our powers to do so in more detail at paragraphs 124-129 below.

115. It is an offence for any person to attempt to deceive or knowingly mislead us through their communications with us, voluntary interviews, emails or telephone conversations.

The interview process

116. Where we wish to interview someone, we make contact to request a time for a face-to-face or telephone interview. Before the interview, we provide a public version of an application for authorisation, explain our processes and provide an agenda or a list of topics to be discussed (including any specific information we require).

117. We prefer to conduct these interviews on a voluntary basis. However, under our powers to require information, we can require persons to appear before us to give evidence under oath.

118. We prefer to record interviews and can provide a copy to the interviewee on request. Recording interviews ensures that both parties have access to an accurate record of what was discussed, and allows us to converse freely without the need to take extensive notes.

119. Interviews often include discussion of information that is confidential. We explain our approach to confidentiality at paragraphs 130-136 below. However, interviewees are encouraged to identify all commercially sensitive and/or confidential information during the interview.

120. We often request that interviewees provide evidence or information to substantiate their arguments. This is more likely to happen where such arguments are key considerations in our assessment of an authorisation application.

76. Under s 60(2)(d) of the Commerce Act we are required to give public notice of applications for agreement authorisation in such manner as we think fit.

77. Commerce Act 1986, s 60(2)(c).

Information requests

121. We also often ask applicants, market participants or other parties to provide on a voluntary basis, information relevant to our investigation, such as market shares and future strategies.

122. We recognise that in many cases such information is confidential. As with interviews, we encourage parties to identify all commercially sensitive and/or confidential information when providing information to us.

123. When we make an information request, we usually specify a deadline for the information to be provided. This allows us to progress our investigation as quickly as possible. We encourage parties to contact us as soon as possible if they believe they cannot meet the deadline.

Our statutory information-gathering powers

124. We can require a person to supply information or documents or give evidence by issuing a statutory notice (a section 98 notice).

125. There are a number of reasons why we may decide to use a section 98 notice, including that:

    125.1 it ensures information is gathered in a timely manner;

    125.2 parties may prefer it because, for example, they might be under a duty such as a confidentiality obligation not to reveal that information unless compelled to do so; or

    125.3 parties with relevant information are unwilling to disclose the information.

126. A section 98 notice explains what is required under the notice (for example, information, documents and/or giving evidence in person), and provides a timeline for providing that information or documents or to attend to give evidence.

127. A section 98 notice creates a legal obligation for the recipient to provide us with the information or documents requested. It is an offence to refuse or fail to comply with a section 98 notice without reasonable excuse.

128. If the recipient anticipates difficulty in complying with a section 98 notice, they should let us know as early as possible and explain the reasons why. For example, if the information we have asked for does not exist or the documents are no longer in the recipient's possession or control, the recipient must explain why the requested documents or information cannot be provided.

129. Similarly, if the recipient wishes to seek an extension to the deadline, they should make a request stating the reasons and allowing sufficient time for us to process the request before the original deadline.

Confidentiality

130. All information we receive is subject to the principle of availability under the Official Information Act 1982 (the Official Information Act).

131. However, the Official Information Act does not require us to disclose information if it would prejudice our investigations, or where the public interest in making the information available is outweighed by the fact that, in our view:

131.1 disclosure would unreasonably prejudice the commercial position of the supplier or subject of the information; or

131.2 we received the information under an obligation of confidence, and if we were to make that information available it would:

131.2.1 prejudice the supply of similar information to us (by any person) where it is in the public interest that such information continues to be supplied to us; or

131.2.2 be likely otherwise to damage the public interest.[78]

132. We acknowledge that much of the information we seek during our investigations will be commercially sensitive. We also recognise that this information is generally highly relevant to our investigation. As such, we recognise that preserving the confidentiality of commercially sensitive information and providing protection against disclosure is necessary. This ensures that parties continue to supply such information to us and that we can deal with authorisation applications as quickly and efficiently as possible.

133. That said, because we aim to carry out our investigations quickly, transparently and adhering to the principles of natural justice, we take a cautious approach in accepting assertions of confidentiality. We test all claims to ensure that the information provided is truly commercially sensitive.

134. During the authorisation process parties must also provide us with a public version of any submission made, which can then be viewed by the applicant/interested parties.[79]

135. In some cases, we may need to test confidential information provided by one party with the applicant or other interested parties. If possible, we hypothetically test the confidential information to avoid disclosure.

136. However, in some cases, we need to test confidential information with another party's external legal counsel or economic experts. This will be the case where a hypothetical discussion combined with a public version of a submission does not convey the key arguments or where we consider that it would assist our analysis. In those situations it may be appropriate for the advisers to sign counsel/expert only undertakings and receive the confidential information. By signing confidentiality undertakings, external legal counsel/ economic experts agree to keep the information confidential and to destroy all confidential information received within 20 working days of the authorisation determination.

78. While we have the discretion to issue a confidentiality order under s 100 of the Commerce Act to prohibit the publication or communication of certain information, we very seldom do so. This is because the information would already be protected the obligations of confidence and the exceptions to disclosure obligations in the Official Information Act, and because a s 100 order expires 20 working days from the date of a determination, and so it will not protect information on an ongoing basis.

79. We also publish public versions of submissions on authorisation applications on our website.

Draft determination

137. We publish a draft determination on an application for authorisation, around 40-50 working days after receiving an application.[80] A copy of the draft determination is sent to the applicant and interested parties.[81]

138. The draft determination sets out our preliminary view on whether or not we are likely to grant an authorisation, and the reasons for that view. In particular, the draft determination outlines any unresolved issues and requests further submissions and evidence that may assist us in making a final determination. Parties are encouraged to provide only new evidence at this stage of the process.

139. As discussed above, any party providing a submission on the draft determination should provide both a confidential and public version.

Conferences

140. The purpose of a conference is to allow Commissioners to question the applicant and interested parties on topics on which we consider we need further information or clarification. A conference allows:

    140.1 Commissioners to test preliminary views with interested parties;

    140.2 Commissioners to test the submissions of interested parties; and

    140.3 interested parties to hear and comment on each other's views.

141. Whether we hold a conference or not differs for mergers and agreements.

    141.1 In the case of an application for authorisation of a merger, we can decide whether or not to hold a conference.[82]

    141.2 In the case of an application for authorisation of an agreement, we must hold a conference if requested by the applicant or an interested party who has been sent a copy of the draft determination. Such a request must be made within 10 working days after a date set by us (usually the date on which the draft determination is released). If we receive such a request, we must hold a conference.

142. Before any conference, we publish a notification on our website. We may also let interested parties know directly. The notification includes:

    142.1 the date, time and location of the conference;

    142.2 a request for attendees at the conference;

    142.3 an outline of the agenda and key issues for the conference; and

    142.4 an outline of the procedures for the conference.

80. The Commission is not required under the Commerce Act to publish a draft determination for merger authorisations; however, we generally do. Under s 62(1) of the Commerce Act we must prepare a draft determination before determining an application for authorisation of an agreement.

81. Under s 62(2) of the Commerce Act, in relation to an application for authorisation of an agreement, we must send a copy of the draft determination to the applicant, those who have given notice to the Commission under s 60(3) or other people who may be interested or may be able to assist.

82. Commerce Act 1986, s 69B.

143. The conference is chaired by a Commissioner and he or she introduces the issues to be discussed. The process of a conference is not adversarial, and will be carried out in the way that best assists the Commission's decision-making.

144. At the conference, we expect parties to provide new information on the matters already identified. We do not expect attendees to merely restate information already provided to us in interviews or via the submission process. Also, interested parties should not introduce matters not previously raised prior to the conference, other than in exceptional situations. If a party cannot respond to a direct question from Commissioners, that party will be given the opportunity to respond after the conference.

145. We expect that attendees at a conference will include any experts that have been advising parties throughout the consultation process. We expect experts to attend as experts in their fields rather than as an advocate for any particular party and follow the guidance in the High Court's code of conduct for expert witnesses.

146. Members of the public and media representatives may attend the conference but are not entitled to address the conference.

147. We expect that confidential material will be kept to a minimum at the conference in order to maintain as transparent a process as possible. When required, we may decide to conduct a confidential closed session which would limit attendees to those participants and experts that have confidentiality undertakings in place with the Commission.

148. We also record the conference and provide a transcript on our website as soon as practicable.

149. At or after the conference, we may request final written submissions on issues discussed at the conference. Any final submission must introduce new information. We will not accept information that is already on the conference record or has already been provided to us.

Post-determination: publication of decisions and written reasons

150. Once we have completed our investigation, the Division makes a decision on whether to grant the authorisation or decline to grant the authorisation.

151. We inform the applicant of our decision by telephone and then issue a media release and update the relevant authorisations register on our website. Where the applicant or target is listed on the New Zealand and/or Australian stock exchanges, we issue the media release outside of trading hours. We may also inform market participants and other interested parties of our decision.

152. We also publish written reasons to explain our decision, and to provide guidance for the business community.

153. While we draft written reasons during our investigation, we can only finalise these following our decision. This may mean that we do not publish written reasons on the day we issue our decision.

154. We do, however, recognise that businesses want to understand the reasons for our decisions as soon as possible, particularly when we decline to grant authorisation. Because of this, we aim to publish reasons as soon after our decision as we are able.

Rights of appeal and review

155. The applicant, the target (in the case of mergers) and persons who participated in any conference held by the Commission have the right to appeal against an authorisation determination to the High Court.

156. The High Court Rules provide that a party must file any appeal within 20 working days of the date on which the decision is made. As the decision date may be different to the date on which we publish our reasons, we generally indicate to parties that we do not oppose a party filing an appeal out of time provided they file any appeal within 20 working days of the date on which we publish our written reasons.

The streamlined authorisation process

157. In this section we describe when we will consider an application under the streamlined authorisation process, as well as the differences in timeline for that process. Our standard authorisation process applies unless otherwise indicated below.

Purpose of the streamlined process

158. The streamlined authorisation process is designed to enable us to make a determination on straightforward authorisation applications as quickly as possible. Not all authorisation applications can be dealt with under the streamlined process.

159. The streamlined process is designed to provide:

159.1 quicker decisions by the Commission; and

159.2 minimum costs to the applicants.

160. The streamlined process is only appropriate for straightforward applications, and applications for authorisation of transactions that have obvious public benefits and limited impact on competition (see paragraphs 166-171 below for more details).

Indicative streamlined authorisation timeline

161. Under the streamlined authorisation process we aim to make a determination within 40 working days. The process assumes that no conference will be held.[83]

162. To achieve the 40 working day timeline, we rely on the full cooperation of the applicant throughout the process. Applicants must provide complete, concise and relevant information promptly and within the timeframes specified below. We also request that interested parties comply with strict timeframes for submissions and consultation.

163. We have developed separate application forms for the streamlined process.[84]

164. Our indicative timeframe for the streamlined process is as follows.

Before registration	Applicant requests that the proposed application be considered under the streamlined process. We respond within five working days with our preliminary view as to whether the application could be considered under the streamlined process. Applicant submits a substantially completed draft application two working days before pre-notification discussions (PND).
Day 1	Application for authorisation registered.
By day 5	We publish a public version of the application on the Commission's website.
Day 20	We publish a draft determination.
By day 30	We receive all submissions from the applicant and interested parties.
Day 40	We grant, or decline to grant, authorisation.

83. Further information on conferences can be found at paragraphs 140-149 of these guidelines.

84. These are available at www.comcom.govt.nz

165. However, where a conference is required, the process is likely to continue as follows:

Days 40-50	Conference is held.
Day 60+	We grant, or decline to grant, authorisation.

When it may be appropriate to consider an application under the streamlined process

166. We apply the streamlined process to:

166.1 applications that the Commission considers are relatively straightforward; and

166.2 applications for authorisation of transactions that have obvious public benefits and will have a relatively limited impact on competition in the relevant market.

167. Applications that do not qualify for the streamlined process will be considered under our standard authorisation procedures.

168. To reach a decision on whether we can use this streamlined process, we apply a number of factors that make it more or less likely that the process will be appropriate. The factors are only indicative and are designed to be pragmatic and flexible, rather than prescriptive. Not all factors need to be fulfilled for the streamlined process to be available. The lists of factors below are non-exhaustive.

169. In addition to these factors, a key issue is the degree of quantification that is required. The Commission acknowledges that it has a general responsibility to quantify benefits and detriments to the extent that it is practicable, rather than rely solely on qualitative judgment. However, we may not need to do a detailed quantification to determine whether the benefits outweigh the detriments in every case.

170. For the streamlined process to be available, the following criteria need to be met.

170.1 Detailed quantification must not be necessary.

170.2 Any quantification necessary must be submitted by the applicant promptly at the time of application, together with the data, assumptions and method used.[85]

170.3 The quantification analysis would need to be relatively straightforward in the Commission's opinion.

171. The factors that make it more likely that the streamlined process would be appropriate are as follows.

171.1 The issues raised by the application are discrete and straightforward.

171.1.1 Only one market or a small number of markets is affected.

171.1.2 The number of interested parties is small.[86]

171.1.3 There is broad consensus of interested parties in favour of the transaction.

171.1.4 We are familiar with the market(s).

85. See paragraph 60 above for what detail we require regarding quantification.

86. If a large number of parties are interested or affected, we may need to consult widely and therefore need more time for consultation and for reviewing submissions.

171.2 The transaction has obvious public benefits, and impact on competition is likely to be limited.[87]

171.2.1 The total size of the relevant market(s) is $20 million or less.[88]

171.2.2 All parties involved in the transaction are small and medium enterprises (ie, each party has 19 or fewer employees).

171.2.3 The combined market share of parties to the transaction is less than 70 per cent.

171.2.4 It is a one-off event.[89]

172. The factors that make it less likely that the streamlined process would be appropriate are as follows.

172.1 If the parties to the transaction do not accept that we have jurisdiction to grant an authorisation.[90]

172.2 We need to use our statutory information-gathering powers.[91]

172.3 Applicants request that the fact of the application is confidential (fact confidentiality).[92]

172.4 Divestment undertakings are offered at a late stage.

172.5 The applicant does not participate in pre-notification discussions.

When it may not be appropriate to continue to consider an application under the streamlined process

173. When using the streamlined process we keep under review whether the process remains appropriate.

174. At any stage, we may decide that the streamlined process is no longer appropriate. This could occur for a number of reasons, including where the issues are more complex than they had first appeared.[93]

175. In most cases the pre-notification discussions should ensure that applications are correctly classified as qualifying for the streamlined process.

176. However, if we consider that it is no longer appropriate to consider an application under the streamlined process, we will let the applicant know why. The applicant will then have two working days to respond to our concerns. Applicants may provide new evidence to us that shows that it is still appropriate for us to consider the application under the streamlined process.

87. Detailed quantification is not necessary as discussed above.

88. However, an application might still be able to be considered under the streamlined process even in a significantly larger market. We apply this criterion cautiously because some transactions might have a significant impact on some consumers even though the total size of the market is small. While the detriment might be small, so too might be the benefits (in absolute terms).

89. A one-off event may raise limited issues and have limited impact. However, we will exercise some caution in assessing whether this criterion applies because some one-off events may still have a significant short-term impact on the market, and the effect on the market may be permanent or structural. In such cases, the streamlined authorisation process may not be appropriate.

90. For what is needed for the Commission to have jurisdiction, see paragraphs 12-20 above.

91. The use of our statutory information-gathering powers, such as issuing section 98 information requests or the conducting of section 98c interviews, is time-consuming. The full cooperation of the parties to the transaction in providing complete and accurate information promptly to us is likely to avoid the need to use those powers.

92. See paragraphs 98-99 above.

93. Further reasons why the streamlined process may not be appropriate are listed at paragraph 172 above.

177. If we conclude that it is no longer appropriate to consider an application under the streamlined process, the applicant would have the choice of:

177.1 allowing the application to be declined;

177.2 allowing us to consider the application outside of the streamlined authorisation process; or

177.3 withdrawing the application.

Attachment A: Glossary

Allocatively efficient – products are priced so that customers who value the products more than their costs of production can buy them.

Benefit – any gain to the public of New Zealand that would result from the proposed transaction.

Competition threshold – the jurisdiction threshold an agreement must meet for us to be able to authorise it. Generally this is that the agreement lessens competition, or is deemed to lessen competition (as it breaches section 27 and is therefore deemed to breach section 30).

Detriment – an anti-competitive detriment that arises in the market(s) where we find a lessening of competition (substantial or otherwise).

Dynamically efficient – the optimal introduction of demand-enhancing new products and cost-reducing production processes over time.

Merger – we use merger in these guidelines to cover any acquisition of shares or assets of a business, no matter what the form. The term also covers partial acquisition.

Present value – the value on a given date of a future payment or series of future payments, 'discounted' to reflect that there is a preference to receive a benefit today, rather than a benefit of the same size in the future, all else being equal.

Productively efficient – the ability to use the minimum amount of resources to produce a certain volume of output given available technology.

Transaction – agreements or mergers between firms.

Attachment B: Documents and other information that we find useful in assessing a transaction's effect on competition and allocative efficiency

Documents and other information

B1. When assessing a transaction's effect on competition and allocative efficiency, we seek information from customers, competitors, and other interested parties.

B2. We examine parties' statements and submissions and assess those against the documents and other information put forward by other parties. We give less weight to a statement or submission that a party cannot support with corroborating evidence, than a statement or submission that a party can support with corroborating evidence.

B3. As a general rule the information we find most persuasive are business documents and records that were prepared in the ordinary course of business.

B4. We encourage transacting parties to discuss with us at the earliest opportunity, and ideally before the parties file an authorisation application,[94] the types of evidence that we might find helpful in our investigation. Providing information as early as possible will help us to progress our investigation in a more timely way.

B5. In this respect, we request certain documents as part of an application, namely:

- B5.1 transaction documents such as contracts including sale and purchase agreements, memoranda of understanding, share transfer documents and register of assets being transferred;
- B5.2 company structure documents such as organisational diagrams and listings of shareholders and directors;
- B5.3 financial statements for the three financial years prior to the current year; and
- B5.4 documents showing the rationale/strategy for the transaction.

B6. Other information we look for and which we may find useful can be summarised as follows.

- B6.1 General information which explains market conditions and trends. This may include market reports or studies prepared by a transacting firm or an independent third party, and market forecasts.
- B6.2 Information on how the transacting firms and other parties view their competitors. This may include documents that assess or describe competing firms, such as SWOT or competitor analysis, and regular reporting on business performance (eg, monthly sales reports).

94. See paragraphs 84-90 for further details on pre-notification discussions.

B6.3 Information on customers, and their preferences and behaviour. This may include information about recent tenders, such as who bid and who won, information about customers switching between suppliers, such as reports on customer churn, and customer surveys and forecasts.

B6.4 Strategy documents and financial information. This may include research and development plans, investment proposals, business plans and financial projections, marketing and advertising strategies, and financial reports specific to the product(s) or geographic region(s) we are interested in.

B6.5 Information on how a party determines its pricing. This can include price lists, forecasts, analysis and strategies, discount/rebate policies, and examples of how pricing decisions have been made in the past and what factors influence those decisions.

Data for quantitative analysis

B7. In addition to examining information and documents, we may also carry out quantitative analysis to assist our decision making. We may carry out and rely on a quantitative analysis, if the analysis is likely to help clarify the issues in the case and appropriate reliable data is available.

B8. Our quantitative analysis can take many forms and may include: estimating diversion ratios, estimating own- and cross-price demand elasticities, identifying 'natural experiments' which allow us to compare prices (or non-price factors) in different time periods or different geographic areas characterised by different competitive conditions, merger simulations, and assessing the profitability of entry or expansion.

B9. The data we need to undertake these types of analysis differs depending on the type of analysis we are undertaking. However, we typically seek data capturing one or more of price, discounts, rebates, costs, quantities and margins. The extent to which we prefer this data to be aggregated or disaggregated depends on the analysis we are undertaking and the data available.

B10. Our preference is to obtain data over a three year period, although in some cases a longer or shorter timeframe might be more appropriate.

B11. Before requesting data we generally discuss our data requirements with the parties so that we can better understand what data is available and the easiest way it can be provided to us.

This is a guideline only and reflects the Commission's view. The publication is not intended to be definitive and should not be used instead of legal advice. It is businesses' responsibility to remain up to date with legislation.

→ To check for updates to these guidelines visit: **www.comcom.govt.nz/authorisation-guidelines**

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