

May 2020

Guidelines on Approach to Authorisations

under the COVID-19 Response (Further Management Measures) Legislation Act



Purpose

- 1 These Guidelines explain when the Commission will authorise agreements that may lessen competition or contain a cartel provision under Part 5 of the Commerce Act 1986 (the Commerce Act), as amended by the COVID-19 Response (Further Management Measures) Legislation Act 2020 (the Amendment Act), and our process for determining such authorisation applications.
- 2 These Guidelines will apply to any application for authorisation made during the epidemic period. These Guidelines supplement the Commission's Authorisation Guidelines dated July 2013. Those Guidelines continue to apply in respect of matters not provided for in these Guidelines, and for other types of authorisation not affected by the Amendment Act.

Introduction

- 3 The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand. Competition will be important to New Zealand's recovery from the impact of COVID-19, and the Commerce Act prohibits certain agreements that harm competition.²
- 4 New Zealand's response to COVID-19 may, however, require businesses to enter into arrangements that may limit competition but are nevertheless in the public interest. The Commerce Act also recognises that an anti-competitive agreement may have sufficient public benefit to outweigh the harm arising from the agreement.
- 5 The Commission recognises that businesses may need to take steps to respond to the effects of COVID-19 quickly, and that significant public benefits may be lost, or significant detriments or costs incurred, if these steps are delayed.
- 6 The temporary amendments contained in the Amendment Act will enable the Commission to better respond to the needs of businesses seeking legal certainty through the authorisation process. Ultimately, this will help strike the balance between ensuring that businesses can enter into agreements that benefit New Zealand, while protecting consumers and the competition needed for the long-term benefit of New Zealand consumers.
- 7 The Amendment Act provides two ways to realise the benefits of authorisation sooner:
 - 7.1 First, the Commission may grant a provisional authorisation under section 65AD, enabling conduct to proceed while the Commission considers and consults on the application, as explained at [40] to [72] below.
 - 7.2 Second, the Commission may grant an authorisation under section 61 without issuing a draft determination or holding a conference, as explained at [73] to [78] below.
- 8 The Commission will endeavour to determine any COVID-19 related³ application as quickly as possible, while acting consistent with the requirements of the statutory framework, the rights and interests of affected parties, and the public interest.

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1. Section 65AA of the Commerce Act provides that the epidemic period is the period between 16 May 2020 and the close of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked. Section 65AE of the Commerce Act provides that the provisions inserted by the Amendment Act are repealed immediately after the expiry of the epidemic period. Section 12 of Schedule 1AA of the Commerce Act provides that the provisions remain in force for any application made during the epidemic period.
 2. The Commerce Act prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market (section 27), or that contain a cartel provision (section 30). We use the term 'agreements' to refer to contracts, arrangements or understandings.
 3. A COVID-19 related application is an application for authorisation of an agreement that relates to or supports a response to COVID-19 or its effects, including measures to prevent its entry or spread, or to address its economic, social and health effects.

- 9 Because these Guidelines are by nature general, the Commission will 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 agreement should consider seeking legal advice.
- 10 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. We may update these Guidelines as appropriate.
- 11 The remainder of these Guidelines describes the Commission's approach to:
 - 11.1 the Government Policy Statement issued on 24 March 2020 in relation to essential goods and services;
 - 11.2 fee waivers under section 65AC of the Commerce Act;
 - 11.3 authorisation of agreements that contain a cartel provision;
 - 11.4 the grant of provisional authorisations;
 - 11.5 when the Commission is likely to issue a draft determination and hold a conference;
 - 11.6 the imposition of conditions; and
 - 11.7 quantification in respect of urgent applications.

How we take into account the Government statement on essential goods and services

- 12 On 24 March 2020, the Minister of Commerce and Consumer Affairs issued a policy statement under section 26 of the Commerce Act asking that, over the period that COVID-19 is affecting the New Zealand economy, the Commission have regard to the Government's objective of maintaining confidence in the market for essential goods and services such as grocery products, by ensuring that there is broad and fair access to them by as wide a range of consumers as possible.⁴ We refer to this as the section 26 statement.
- 13 Where an application for authorisation relates to essential goods and services, the Commission must have regard to the section 26 statement when determining the application. The High Court has made clear that this means the Commission must give the section 26 statement genuine attention and thought, and such weight as the Commission considers appropriate.⁵ The Court noted that however weighty the section 26 statement may be, as an expression of considered Government policy, it does not vary the nature of the duties which the Commission must carry out under the Commerce Act. The Commission at all times acts independent of Government influence.
- 14 The Commission will also take into account the section 26 statement in its other work under the Commerce Act. The Commission has also published guidance on how it is assessing business collaborations that are being entered into in response to COVID-19.⁶ That guidance is available [here](#).



4. Government Policy Statement on Essential Goods and Services Such as Grocery Products in Response to COVID-19 (24 March 2020) *New Zealand Gazette*, No 2020-go1374[ref] available for download at <https://gazette.govt.nz/notice/id/2020-go1374>.

5. *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 21.

6. Commerce Commission, Business collaboration under COVID-19, 1 May 2020.

Fee Waivers

- 15 The Commerce Act provides for the setting of fees to provide a means for the Commission to recover some of the costs of processing an authorisation application. The Commerce Act (Fees) Regulations 1990 (Fees Regulations) set the fee for an application for authorisation of agreements that may lessen competition or contain a cartel provision at \$36,800.⁷ There is no additional fee for applications for provisional authorisation, which are discussed below.
- 16 The Commission recognises that at this time this fee may represent a barrier to some applicants seeking authorisation. Section 65AC of the Commerce Act provides that the Commission may, in its discretion, waive all or part of any fee payable for applications for authorisation made during the epidemic period.

When is the Commission likely to grant a request for fee waiver?

- 17 Ordinarily, an applicant is required to pay the fee in full at the time an application for authorisation is made. Any applicant may request a full or partial fee waiver. The Commission is unlikely to grant a request for a fee waiver except where there is good reason to do so.
- 18 Without limiting the exercise of the Commission's discretion, when considering whether to grant a full or partial fee waiver, factors the Commission will consider include:
 - 18.1 the circumstances of the applicant, including any significant or undue financial hardship the applicant would suffer if the request for the fee waiver was not granted;
 - 18.2 whether the application for authorisation would likely be made or pursued by the applicant or another party if the request was not granted;
 - 18.3 whether, if the application fee was paid, it would be:
 - 18.3.1 likely to be partially refunded under the Fees Regulations,⁸ given the work likely to be undertaken to determine the application for authorisation; or
 - 18.3.2 out of proportion to the financial benefit of the arrangement to the applicant or applicants;
 - 18.4 whether the application for authorisation is brought by, or on behalf of:
 - 18.4.1 one or more small or medium businesses;
 - 18.4.2 a non-profit organisation or other body seeking to promote the public interest;
 - 18.5 whether for any other reason it is in the public interest that the application fee be paid or waived; and
 - 18.6 any other factors that the applicant considers are relevant to support its request.
- 19 In the case of a partial fee waiver, without limiting the Commission's discretion, the Commission is likely to take into account similar factors to determine how much of the fee remains payable.

7. Regulation 2(a), Fees Regulations.

8. Regulation 3(3) of the Fees Regulations requires the Commission to refund to an applicant any part of the application fee paid that is more than the cost to the Commission of determining the application.

What is the process for obtaining a fee waiver?

- 20 An applicant seeking a full or partial fee waiver should discuss the potential for a fee waiver with Commission staff prior to filing their application for authorisation. They should include a completed fee waiver application form (as a separate document from the application for authorisation) either:
 - 20.1 when the applicant submits a pre-notification draft, with the draft application; or
 - 20.2 with the application for authorisation at the time of filing.
- 21 If an applicant does not request a fee waiver before or at the time of filing their application for authorisation, the full application fee will be payable.
- 22 If an applicant requests a fee waiver at the same time as they file their application for authorisation, the Commission will consider the fee waiver request first.
- 23 Once the fee waiver request has been determined, the Commission will communicate its decision to the applicant.
 - 23.1 If the Commission grants a full fee waiver, the Commission will register the application for authorisation.
 - 23.2 If the fee waiver request is declined, or the Commission grants a partial fee waiver, the application for authorisation will be registered once the applicant has paid the required fee. Consistent with our usual practice, proof of electronic payment must be provided by the applicant.
- 24 The Commission is unlikely to register the application for authorisation under section 60 of the Commerce Act until the fee waiver request has been determined. In appropriate circumstances, the Commission may consider registering an authorisation application immediately, even though the fee waiver request has not been determined, or the fee has not been paid or waived⁹ (for example, subject to an undertaking from the applicant to either pay the application fee or withdraw the application for authorisation within 5 working days if the fee waiver request is declined).
- 25 Where a fee waiver request relates to an application for authorisation that is urgent, and the Commission is satisfied that there is good reason to consider the application for authorisation urgently, the Commission will aim to make a decision on the fee waiver request as soon as practicable.
- 26 In all other cases the Commission will aim to determine the fee waiver request within 5 working days of the request.
- 27 The Commission will provide the applicant with reasons for its decision on any fee waiver request.
- 28 The Commission does not intend to publish the specific details of individual fee waiver requests, or the reasons for our decisions, on our website. However, all information held by the Commission is subject to the Official Information Act 1982.



9. Section 60(4) of the Commerce Act.

Authorisation of agreements that contain a cartel provision

- 29 Section 65AA of the Commerce Act permits a person to apply for authorisation during the epidemic period if they consider an arrangement contains or may contain a cartel provision. There are two types of application for authorisation of a cartel provision:
- 29.1 The first is an application under section 65AA(2) of the Commerce Act. These applications may be made by a person who wishes to enter into a contract or arrangement, or arrive at an understanding, that the applicant considers contains, or may contain, a cartel provision. This has the same legal effect as an application under s 58(1) of the Commerce Act.¹⁰
- 29.2 The second is an application under sections 65AA(3) of the Commerce Act. These applications may be made by a person who wishes to give effect to an agreement that the applicant considers contains, or may contain, a cartel provision. This has the same legal effect as an application under s 58(2) of the Commerce Act.¹¹
- 30 A cartel provision is any provision in an agreement between competitors that has the purpose, effect, or likely effect of:¹²
- 30.1 fixing prices – an agreement not to compete on price or on an element of price;
- 30.2 restricting output – an agreement to prevent, restrict, or limit output, production, capacity, supply, acquisition, etc; or
- 30.3 allocating markets – an agreement not to sell to or buy from certain customers or suppliers, or in particular areas.
- 31 Our Authorisation Guidelines describe two tests that must both be met before the Commission can authorise an agreement:
- 31.3.1 A jurisdictional threshold;¹³ and
- 31.3.2 The “public benefit” test.¹⁴
- 32 The jurisdictional threshold for an application under section 65AA(2) or (3) to authorise a cartel provision is different from the jurisdictional “competition” threshold set out in our Authorisation Guidelines for applications made under section 58(1) or (2). However, the public benefit test is the same. We explain this in further detail below.

The jurisdictional threshold

- 33 Where an application is made to authorise an agreement containing a cartel provision under section 65AA(2) or (3), to have jurisdiction to authorise the agreement, the Commission must have reasonable grounds for believing that the agreement might contain a cartel provision.¹⁵

10. Section 65AA(4)(a) provides that an application under section 65AA(2) is to be treated as if it were an application under section 58(1), except to the extent provided under sections 65AB and 65AC.

11. Section 65AA(4)(b) provides that an application under section 65AA(3) is to be treated as if it were an application under section 58(2), except to the extent provided under sections 65AB and 65AC.

12. Section 30A of the Commerce Act.

13. Commerce Commission Authorisation Guidelines, July 2013, at page 8.

14. Commerce Commission Authorisation Guidelines, July 2013, at page 8.

15. Section 64AB(4) of the Commerce Act.

- 34 In most cases, this is likely to be a lower jurisdictional threshold to meet than establishing that an agreement lessens competition. Practically speaking, this means that less of the Commission's consideration of an application for authorisation under section 65AA is likely to be focused on the jurisdictional threshold compared with applications to authorise agreements that lessen competition.
- 35 Any application for authorisation of a cartel provision under section 65AA(2) or (3) should provide sufficient explanation of the potential cartel provision, and sufficient supporting information, to provide the Commission with a reasonable basis to consider that it is a cartel provision. We describe what a cartel provision is in more detail in Chapter 2 of our Competitor Collaboration Guidelines.¹⁶

The public benefit test

- 36 The Commission is able to grant authorisation for an application under section 65AA where the public benefit test is satisfied. The Commerce Act contains two versions of the public benefit test.
 - 36.1 The Commission can authorise an agreement that contains, or there is reasonable grounds to believe contains, a cartel provision if the Commission is satisfied that the agreement will in all the circumstances result, or be likely to result, in *such a benefit to the public that it should be permitted*.¹⁷ As outlined above, the Commission is not required to determine whether the cartel provision results in a lessening of competition before undertaking this assessment.
 - 36.2 The Commission can authorise an agreement that may lessen competition if it is satisfied that the agreement will be likely to result in *a benefit to the public that would outweigh the lessening in competition*.¹⁸ The Commission is not required to establish that the lessening of competition is substantial.¹⁹
- 37 While stated differently, the courts have held that there is no material difference between the two assessments of public benefit.²⁰ We refer to these two versions interchangeably as the 'public benefit test'.
- 38 Because there is no material difference between the two formulations of the public benefit test, the Commission's approach to the public benefit test for an application under section 65AA is the same as the approach we describe in our Authorisation Guidelines. Despite the lower jurisdictional threshold, the Commission will still need to investigate the nature, likelihood and magnitude of any detriments (including detriments to competition) that might arise from the cartel provision.
- 39 The applicant bears the burden of demonstrating to the Commission that the public benefit test is satisfied. Our Authorisation Guidelines describe our approach to assessing public benefit in more detail.²¹

16. For further details, see our *Competitor Collaboration Guidelines* at: https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf.

17. Section 65AB(3) and (4) of the Commerce Act.

18. Section 61(6) of the Commerce Act.

19. Section 61(6A) of the Commerce Act.

20. See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) (Air New Zealand) at [33] and also *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) (Godfrey Hirst (No 1) (HC)) at [88]-[90].

21. Commerce Commission Authorisation Guidelines, July 2013, at pages 11 to 18.

The grant of provisional authorisations

- 40 Section 65AD of the Commerce Act provides the Commission with the power to grant a provisional authorisation in respect of an application for authorisation during the epidemic period under section 58(1) or (2) or section 65AA(2) or (3).
- 41 A provisional authorisation has the same effect as an authorisation,²² but is of limited duration and only available while the Commission considers an application for authorisation of the relevant agreement. The provisionally authorised agreement cannot be challenged by the Commission or by a third party as being in breach of section 27, section 30, or section 30C while the provisional authorisation remains in force. A provisional authorisation only remains in force until:
- 41.1 the end of the period determined by the Commission as a condition of the provisional authorisation;²³ or
 - 41.2 the provisional authorisation is revoked by the Commission;²⁴ or
 - 41.3 the application for authorisation has been granted, declined or withdrawn.²⁵

When can the Commission grant a provisional authorisation?

- 42 A provisional authorisation may only be granted if an application for authorisation has also been lodged for the same agreement under either section 58(1) or (2) or section 65AA(2) or (3). The applications may be filed together or separately. There is no additional fee for applications for provisional authorisation.
- 43 The Commission may grant a provisional authorisation of its own motion or following an application for provisional authorisation. If an applicant for authorisation considers that it would be appropriate for the Commission to provisionally authorise the relevant agreement while the Commission considers the application for authorisation, the applicant should also apply for provisional authorisation using the prescribed form.
- 44 A provisional authorisation may authorise all or some of the agreement for which authorisation has been sought. A provisional authorisation will be subject to such conditions as the Commission sees fit.²⁶ The imposition of conditions on provisional authorisations are discussed below.
- 45 The Commission may grant a provisional authorisation at any time during its consideration of the application for authorisation. However, the Commission is most likely to grant a provisional authorisation at or near the beginning of the authorisation process, or at the same time as a draft determination, if any, in respect of the application for authorisation is published.
- 46 The Commission is not required to issue a draft determination, or hold a conference, in relation to the grant of a provisional authorisation and is unlikely to do so except in exceptional circumstances.²⁷
- 47 The Commission's decision to grant (or decline) a provisional authorisation should not be taken as an indication that it is likely to grant (or decline) the application for authorisation. The Commission may grant a provisional authorisation but subsequently dismiss the application for authorisation following public consultation and detailed analysis of the agreement. The Commission may also decline an application for provisional authorisation on the basis it is not appropriate under section 65AD(2), but grant the application for authorisation under section 61 after considering the application.

22. Section 65AD(4) of the Commerce Act.

23. Section 61(2) of the Commerce Act.

24. Section 65 of the Commerce Act.

25. Section 65AD(5) of the Commerce Act.

26. Section 61(2) and 65AD(4) of the Commerce Act.

27. Section 65AD(3) of the Commerce Act.

When is the Commission likely to grant provisional authorisation?

- 48 The Commission may grant provisional authorisation where it considers it appropriate:
- 48.1 to allow parties to give effect to the proposed agreement while due consideration is given to the application for authorisation;
 - 48.2 for any other reason.
- 49 When granting provisional authorisation the Commission does not need to be satisfied that the agreement will meet the public benefit test.²⁸ Nevertheless, given the purpose of the Commerce Act and of the authorisation regime, the Commission is unlikely to grant provisional authorisation in respect of an agreement that has the potential to substantially lessen competition unless there are compelling reasons in the public interest to do so.
- 50 Without limiting the Commission's discretion, when considering whether a provisional authorisation is appropriate, factors the Commission will consider include:
- 50.1 the purpose of the Commerce Act, to promote competition in markets for the long-term benefit of consumers within New Zealand;
 - 50.2 the urgency of the application for authorisation, including whether a provisional authorisation is necessary to provide sufficient time for the Commission to fully consider the application for authorisation;
 - 50.3 the potential benefits and detriments based on all information available to the Commission at the time the application for provisional authorisation is considered;²⁹
 - 50.4 the extent to which any relevant market may change if a provisional authorisation is or is not granted – provisional authorisation is more likely to be granted when:
 - 50.4.1 it will maintain the market status quo; or
 - 50.4.2 it is unlikely to materially alter the competitive dynamics of the market;
 - 50.5 the possible harm, if any, to the applicant if a provisional authorisation is not granted;
 - 50.6 the possible harm to other parties (such as customers and competitors) or the public if a request for provisional authorisation is granted or declined; and
 - 50.7 the likely scope and duration of the provisional authorisation, and any conditions that might be imposed within it.
- 51 Provisional authorisation is unlikely to be granted if the relevant agreement could significantly alter the competitive dynamics of the market permanently, or for a substantial period, if the application for authorisation is later declined.
- 52 The Commission may exercise the power to grant provisional authorisation more than once in respect of the same application.³⁰ This enables greater flexibility in the granting of provisional authorisations. For example:
- 52.1 where urgency is sought, the Commission may grant a provisional authorisation for a shorter period than requested to enable full consideration of the provisional authorisation application. After consideration, a further provisional authorisation could then be granted; or
 - 52.2 where the benefits of the agreement are clear but the potential detriments are not, a shorter period of provisional authorisation may be appropriate. A further provisional authorisation could then be granted once the Commission has more information on the potential detriments.

28. Section 65AD(3) of the Commerce Act.

29. For further details on how we assess benefits and detriments, see our *Authorisation Guidelines* at: https://comcom.govt.nz/__data/assets/pdf_file/0012/91011/Authorisation-guidelines-July-2013.pdf.

30. Section 51(1) of the Legislation Act 2019.

What is the Commission's process for considering a provisional authorisation?

- 53 A party seeking provisional authorisation should discuss their application with Commission staff prior to filing their application for authorisation. They should include a provisional authorisation application form (as a separate document from the application for authorisation) either:
 - 53.1 with the draft application for authorisation, where the applicant submits a pre-notification draft; or
 - 53.2 with the application for authorisation at the time of filing.
- 54 An application for provisional authorisation may also be made during the Commission's consideration of the application for authorisation. Any person considering seeking a provisional authorisation during consideration of the application for authorisation should discuss this with Commission staff.
- 55 No additional fee is payable for the application for provisional authorisation (ie, subject to any fee waiver request, the only fee payable is in respect of the separate application for authorisation).
- 56 Once the Commission has received an application for provisional authorisation and agreed with the applicant which information is confidential, a public version of the application will be published on our website. The Commission may also issue a media release. We do this to inform the public of the application and to enable interested parties to make submissions to us.
- 57 Where an applicant seeks an urgent decision on its application for provisional authorisation, and the Commission is satisfied that there is good reason to consider the matter urgently, the Commission will aim to make a decision as soon as practicable.
- 58 In all other cases the Commission will aim to determine the application for a provisional authorisation within 20 working days of the request.
- 59 The process adopted by the Commission to receive submissions on the application for provisional authorisation will vary depending on the level of urgency involved. In most cases, there will be a short opportunity to make submissions when the application for provisional authorisation is published. The Commission may also engage in targeted consultation with parties that are likely to be affected if the provisional authorisation is granted.
- 60 Each application for authorisation is decided by members of the Commission appointed by the Chair for that purpose (the Division). The application for provisional authorisation will generally be considered by the same Division that will consider the application for authorisation. Where an applicant seeks an urgent decision on their application for provisional authorisation, the Chair may appoint a Division for the purpose of dealing with the provisional authorisation only, and the Division that determines the application for authorisation may differ in its membership.
- 61 The Commission must determine the application for provisional authorisation in writing and give notice to the applicant and any interested parties. The Commission will endeavour to provide a copy of written reasons for its determination within five working days of making its decision.



What conditions are the Commission likely to impose on provisional authorisations?

- 62 A provisional authorisation will be subject to such conditions as the Commission sees fit. The Commission may impose conditions to:
- 62.1 secure the benefits arising from the agreement that will be provisionally authorised;
 - 62.2 minimise any detriments arising from the agreement that will be provisionally authorised; and
 - 62.3 ensure that the Commission is aware of any material change in circumstances that might arise during the period of the provisional authorisation.
- 63 The conditions imposed by the Commission may include reporting or monitoring obligations. Where monitoring suggests that the agreement is causing detriments that were not anticipated, or to an extent that was not anticipated, the Commission is likely to consider this a material change in circumstances that may justify variation or revocation of the provisional authorisation. Variation or revocation of the provisional authorisation is discussed below.
- 64 Where the provisional authorisation is likely to be in place for only a short time, the Commission is more likely to consider imposing behavioural conditions. This is because it is more likely that the benefits of such conditions will exceed the potential costs. These costs are discussed further at [79] to [84] below.
- 65 In most cases the Commission will impose conditions to ensure that the applicant pursues the application for authorisation without undue delay. Provisional authorisations are likely to be granted for a limited period of time and will come to an early end if the application for authorisation is declined, granted or withdrawn.

Variation and revocation of a provisional authorisation

- 66 The Commission can vary or revoke a provisional authorisation if it is satisfied that:
- 66.1 provisional authorisation was granted on information that was false or misleading in a material way;
 - 66.2 there has been a material change of circumstances since provisional authorisation was granted (which may include a material change in the terms of the agreement); or
 - 66.3 a condition upon which provisional authorisation was granted has not been satisfied.
- 67 If the Commission revokes provisional authorisation of an agreement, it may decide to grant a new provisional authorisation in its place.
- 68 Before deciding whether to vary or revoke provisional authorisation of an agreement, the Commission will consult with the person who was granted provisional authorisation and any other interested party. We will consider their submissions when making our decision.³¹

When the Commission determines a provisional authorisation application

- 69 When the Commission grants or declines to grant a provisional authorisation, the Commission will provide notice of its determination to the applicant. The Commission will endeavour to provide a copy of written reasons for its determination within five working days of making its decision. We will also advise interested parties of our determination and publish it on our website.

31. Section 65 of the Commerce Act.

- 70 The Commission’s determination to grant or refuse to grant a provisional authorisation may be appealed to the High Court under section 91 of the Commerce Act.³² An appeal may be brought by the applicant, or by any person who has both a direct and significant interest in the application, and who has participated in the Commission’s process leading up to the determination.³³
- 71 Any appeal must be filed within twenty working days of the Commission’s determination, or within such further time as the Court permits.
- 72 There is no restriction on a party making a second application for provisional authorisation. The Commission is unlikely to grant an application for provisional authorisation it has previously refused unless there is good reason for it to reconsider its previous determination. This may occur where material new information has become available to the Commission, or there has been a material change of circumstances.

Draft determinations and conferences

- 73 The Commerce Act gives interested parties and the public the opportunity to be heard on any application for authorisation the Commission receives. The Commission:
 - 73.1 must give public notice of an application for authorisation.³⁴ We generally do this by publishing a public version of the application on the Commission’s website, issuing a media release, and inviting parties to give notice to the Commission if they have an interest in the application;³⁵
 - 73.2 must give notice of an application for authorisation to any person who, in the Commission’s opinion, is likely to have an interest in the application;³⁶
 - 73.3 may consult with any person who may assist the Commission in determining the application;³⁷
 - 73.4 will publish public versions of any submissions received on the application unless there are compelling reasons not to; and
 - 73.5 must take into account any submissions received on the application.³⁸
- 74 Ordinarily, the Commission must issue a draft determination and summary of reasons for the draft determination (which we will refer to together as a “draft determination”) before making its final determination.³⁹ The Commission is not required to issue a draft determination for applications for authorisation under section 65AA or section 58 made during the epidemic period,⁴⁰ or for provisional authorisations,⁴¹ although the Commission may choose to do so.
- 75 Given the purpose of the Commerce Act and the authorisation regime, the Commission is likely to issue a draft determination unless there are good reasons not to. The Commission is unlikely to issue a draft determination or hold a conference in relation to the granting of a provisional authorisation.

32. Section 65AD(4) of the Commerce Act.

33. Section 92(a)(i) of the Commerce Act.

34. Section 60(2)(d) of the Commerce Act.

35. Section 60(3) of the Commerce Act.

36. Section 60(2)(c) of the Commerce Act.

37. Section 60(3) of the Commerce Act.

38. Section 61(3) of the Commerce Act.

39. Section 61(5) and section 62(1) and (2) of the Commerce Act.

40. Section 65AC(3) of the Commerce Act.

41. Section 65AD(3) of the Commerce Act.

- 76 In determining whether to dispense with issuing a draft determination on an application for authorisation, without limiting the broad discretion in section 65AC(3), factors that the Commission will consider include:
- 76.1 the time it is likely to take to prepare a draft determination and consider any submissions arising from the draft determination;⁴²
 - 76.2 the urgency of the application for authorisation;
 - 76.3 the complexity of the application, including whether it raises any novel issues of public interest;
 - 76.4 the extent to which the Commission's consideration of the authorisation application would be assisted by issuing a draft determination and potentially holding a conference;
 - 76.5 the extent to which consultation on the authorisation application can occur, or has already occurred, by means other than issuing a draft determination or holding a conference;⁴³
 - 76.6 the submissions and evidence received by the Commission, including the extent to which there are substantial conflicts between them on important issues;
 - 76.7 whether issuing a draft determination or holding a conference is likely to result in the Commission obtaining further relevant submissions or evidence;
 - 76.8 the public interest in the application;
 - 76.9 the views of the applicant and any other affected party; and
 - 76.10 whether a provisional authorisation has been, or could be, granted to allow parties to give effect to the proposed agreement while consultation occurs.
- 77 If the Commission decides to issue a draft determination, it will also consider whether to hold a conference under section 62(6) of the Commerce Act.⁴⁴

Relationship between provisional authorisations and draft determinations

- 78 For each application for authorisation, it is open to the Commission to grant a provisional authorisation, determine not to issue a draft determination, or both. The Commission will determine its approach based on the circumstances of each application, taking into account the matters set out in these Guidelines.

Imposition of conditions on an authorisation

- 79 Where the Commission is not satisfied that an agreement meets the public benefit test, it can nevertheless grant authorisation subject to conditions where it considers the conditions will enable the agreement to satisfy the public benefit test. The Commission can also impose conditions when granting a provisional authorisation.
- 80 The conditions can be behavioural conditions,⁴⁵ must be consistent with the Commerce Act, and can last for such period as the Commission thinks appropriate.⁴⁶
- 81 The Commission may include conditions that remove or lessen the extent of detriments or enhance the benefits arising from an agreement. Conditions may be suggested by the applicant, an interested party, or the Commission.

42. In the past four years, the time from draft decision to final decision has averaged around 25 working days.

43. This is likely to include an assessment of the extent to which the public version of the authorisation application enabled interested parties to make informed submissions on the application.

44. The Commission may, but is not required to, hold a conference under section 62(6) of the Commerce Act.

45. Behavioural conditions could include a business agreeing not to reduce the supply of a product, a vertically integrated business agreeing to supply an input at current prices to competitors, or monitoring and reporting agreements.

46. Section 61(2) of the Commerce Act.

- 82 It is generally unusual for the Commission to impose behavioural conditions because they carry their own costs. In particular, they may:
- 82.1 be difficult to design in a way that will achieve their objectives, while minimising the risk of unintended negative consequences;
 - 82.2 be difficult and costly to monitor and enforce; and
 - 82.3 create significant compliance costs for the businesses involved.
- 83 These costs are likely to increase as the duration of the authorisation increases. Where authorisation is granted for a shorter period, including in the case of provisional authorisation, the Commission is more likely to consider behavioural conditions appropriate. The imposition of conditions on a provisional authorisation is discussed in more detail at [62] to [65] above.
- 84 If a business does not comply with any one of the conditions, the Commission can vary or revoke the authorisation or provisional authorisation.⁴⁷ Parties to the agreement would then be at risk of legal action by the Commission or third parties under the Commerce Act.

Quantification in COVID-19 related matters

- 85 Once the Commission has identified all likely benefits and detriments arising from an agreement, we assess the value of those benefits and detriments. To assist the Commission with undertaking this assessment, applicants should provide supporting evidence regarding the nature and likely extent of benefits and detriments resulting from the agreement.
- 86 The Commission is required to seek to quantify the likely benefits and detriments to the extent practicable.⁴⁸ It should not, however, engage in false scientism.⁴⁹ Our decision whether to grant authorisation is informed by balancing the quantitative and qualitative benefits and detriments. Having assessed the value of benefits and detriments, if we are satisfied that the benefits of the provision likely outweigh the detriments, we will grant authorisation. If we are not satisfied, we will not grant authorisation.
- 87 The Commission understands that the cost and time involved in attempting to quantify the nature and extent of benefits and detriments may be a barrier to parties filing applications for authorisation during the epidemic period. This is particularly likely given uncertainty about future economic conditions during the recovery phases of the response to COVID-19 which may make attempts at quantification difficult and potentially unreliable. The Commission is also alert to the impact that COVID-19 may have had on the resources available to applicants and third parties. That may particularly affect small and medium sized enterprises.



47. Section 65 of the Commerce Act.

48. *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A) at 447.

49. *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [36] to [38], citing *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [104].

- 88 Where time allows, we encourage applicants to discuss the need for detailed quantification with us before submitting an application. We will consider, for example:
- 88.1 the applicant's explanation of the causal link between the agreement and the claimed benefits and detriments;
 - 88.2 the impact of COVID-19 on the applicant's ability to quantify benefits and detriments;
 - 88.3 whether the qualitative evidence of benefits and detriments is sufficiently robust to inform our assessment;
 - 88.4 what information should be quantified;
 - 88.5 the extent of quantification required and the complexity of that analysis;
 - 88.6 the availability and reliability of data that would inform quantitative analysis;
 - 88.7 the anticipated reliability of available estimates.
- 89 Where quantification is required, but an application for authorisation is nevertheless urgent, applicants may wish to seek a provisional authorisation as well. In most cases the Commission is likely to be able to consider an application for provisional authorisation without detailed quantification.

Timeframes

- 90 The Commerce Act sets out a 120 working day statutory timeframe to authorise or decline to authorise an agreement.⁵⁰ If this period expires without a determination, we are deemed to have declined to grant an authorisation.
- 91 For some applications, especially those that are not straightforward, we may require more time to process an application than allowed for in the statutory timeframe. We may therefore need to seek an extension beyond this timeframe.
- 92 As noted earlier, the Commission recognises that businesses may need to take steps to respond to the effects of COVID-19 quickly, and that significant public benefits may be lost, or significant detriments or costs incurred, if these steps are delayed.
- 93 The Commission will endeavour to deal with applications for authorisation under section 65AA and section 58 during the epidemic period as quickly as possible, and will try to give the most accurate estimate of the likely timeline during any pre-notification discussions.

50. Section 61(1A) of the Commerce Act.

This is a guideline only and reflects the Commission's view. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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