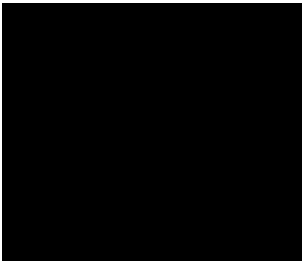


23 August 2023

To

Commerce Commission
44 The Terrace
Wellington Central
Wellington 6011

From



By Email

competition@comcom.govt.nz

Collaboration and Sustainability Guidelines

1. Thank you for the opportunity comment on the Commerce Commission's draft Collaboration and Sustainability Guidelines (**Draft Guidelines**).
2. Overall, the Draft Guidelines provide a useful explanation of when collaborative efforts between competitors to support sustainability outcomes will be permissible, and where certain conduct might trigger competition law issues. Where those issues do arise, the Draft Guidelines also usefully outline the necessary actions that businesses should take to remain compliant with the Commerce Act 1986.
3. We provide some comments below, on specific areas of the Draft Guidelines where additional clarification or more detailed explanation would be useful.

Examples in Draft Guidelines

4. The Draft Guidelines provide some good examples to demonstrate sustainability focussed collaborative activities that the Commission considers will and will not breach the Commerce Act, and what would constitute a substantial lessening of competition in this context.
5. However, we consider that the Draft Guidelines could be improved by providing more examples specifically related to issues arising from potential cartel conduct, as the *per se* nature of the cartel prohibition means that it is an area that can trip businesses up.
6. For example, in paragraph 29 where different forms of cartel conduct are outlined, it would be useful to include an example for each type of cartel conduct about how the relevant conduct might arise in the context of collaborations relating to sustainability. This could be done by referring to some of the specific examples elsewhere in the guidelines – eg, an example of price fixing would be a variation on the example after paragraph 37 of competitors agreeing to charge a levy, an example of output restriction might be the supply chain restrictions example in paragraph 26.2, and an

example of market sharing is the sustainable packaging example after paragraph 29. We recommend that examples such as the example after paragraph 37 be expanded to identify when variations on the scenario could raise issues, such as if the arrangement to impose a levy did not involve a joint activity like joint disposal.

7. We also suggest clarifying paragraph 25.3 to add a reference to pricing/pricing strategies – eg, 'An agreement about policies relating to the internal conduct of businesses that does not affect capacity or output, or pricing/pricing strategies'. This is because the breadth of the phrase 'policies relating to the internal conduct of businesses' could be interpreted to mean that agreements relating to the internal conduct of businesses are okay as long as they do not affect capacity or output (whereas, of course, agreements relating to the internal conduct of businesses relating to pricing/pricing strategy would also raise issues).
8. In relation to the example in paragraph 25.3, there are also potential pitfalls in agreeing to use better environmental practices for handling hazardous chemicals that we suggest be noted (eg, as highlighted in the example after paragraph 37 relating to arrangements for the disposal of harmful wastes, or if it included an agreement not to use a particular provider).

Other comments

9. We recommend that the box 'standard setting' on page 9 be presented with paragraph 26.1 (or at least that they cross-refer to each other), given they relate to the same topic and the box is an elaboration of the content of paragraph 26.1.
10. Finally, one minor point is that we recommend that paragraph 29.3 refer to market allocation as well as market sharing (eg, "market sharing, also known as market allocation") to avoid any confusion given the Commission's other guidance often uses the term "market allocation".
11. Please let us know if you have any questions about the above. We would be happy to meet with you to discuss the Draft Guidelines.

Yours sincerely

