

May 2020

Business collaboration under COVID-19



The purpose of this guidance is to explain to businesses and the public how the Commission will be approaching business collaborations reached in response to COVID-19 that risk contravening the Commerce Act.

Competition continues to benefit consumers even in times of crisis

The Commission is focused on ensuring that markets continue to work as effectively as possible for New Zealand consumers as the country responds to the COVID-19 pandemic.

It is important that consumers and businesses continue to have confidence in markets and that consumers continue to experience the benefits of competition. Competition generally encourages businesses to offer lower prices, better services and higher quality goods, as well as incentivising businesses to innovate and improve efficiency. Competition law prohibits businesses from agreeing to increase prices, divide up markets or restrict the supply of goods or services or enter into arrangements that substantially lessen competition.

The Commission recognises that the impact of the COVID-19 outbreak is significant for businesses, consumers and the economy, and that businesses and government are collaborating to tackle the consequences of the COVID-19 pandemic. In response to the crisis, we want to prioritise our resources to focus on work that will maintain well-functioning markets. We also want to provide clarity and guidance for all businesses, whether they are small, medium or large, about how they can legitimately collaborate in response to the COVID-19 pandemic.

The Commission's approach to business collaboration relating to the provision of essential goods and services in response to COVID-19

The Commission acknowledges that the exceptional circumstances surrounding the COVID-19 pandemic may require businesses to collaborate to deal with the crisis and ensure security of supply of essential goods and services that are important to New Zealanders. The Commission is also mindful of the importance of maintaining competitive markets in New Zealand.

The Minister of Commerce and Consumer Affairs issued a policy statement under section 26 of the Commerce Act asking that 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 over the period that COVID-19 is affecting the New Zealand economy.¹

The Commission welcomed the statement and publicly stated that it has no intention of taking enforcement action against businesses that are cooperating to ensure New Zealanders continue to be supplied with essential goods and services during this unprecedented time.²



1. <https://gazette.govt.nz/notice/id/2020-go1374>

2. <https://comcom.govt.nz/news-and-media/media-releases/2020/covid-19-commerce-commission-approach-to-essential-goods-and-services-business-cooperation>

However, both the Minister and the Commission noted that this approach would not extend to unscrupulous use of the COVID-19 pandemic as an excuse for non-essential collusion or anti-competitive behaviour.

The Commission is conscious of concerns that uncertainty over competition law enforcement could impede necessary cooperation. This guidance sets out the factors that the Commission will take into account when considering the type of collaboration that is likely to be required in response to the COVID-19 pandemic. These factors will inform the exercise of the Commission's discretion when it decides whether to investigate or take enforcement action in relation to such conduct.

Factors we are taking into account in exercising our discretion

The Commission is committed to continuing its work towards making New Zealanders better off. Our two strategic objectives of markets working well and consumers and businesses being confident market participants will provide the framework for this work.

The Commission has interpreted the Government Policy Statement as covering collaboration relating to the provision of essential goods and services that is necessary to respond to the COVID-19 pandemic. Sometimes this collaboration may be at the direction or request of Government.

We have outlined some factors that will be relevant to our assessment of whether it is necessary for businesses to collaborate in response to the crisis.

- The collaboration should concern new measures being taken in good faith in response to extraordinary circumstances arising out of the COVID-19 pandemic that cannot be effectively achieved by businesses acting alone.
- The collaboration should relate to essential goods or services, or facilitating the supply of such goods or services.
- The collaboration should be directed at achieving an outcome that benefits consumers or is otherwise in the public interest, for example ensuring consumers have access to essential goods or services by avoiding a shortage, ensuring security of supply, or promoting a fair distribution to consumers of essential goods or services.
- The collaboration should be limited in scope and duration, and cover no more than is necessary, and last no longer than is necessary, to deal with issues specifically related to the COVID-19 pandemic.
- The collaboration should include an ongoing and regular review of whether the collaboration remains necessary, and a process for bringing the collaboration to an end when it is no longer required.
- The collaboration should ensure that the extent of any information sharing, and the type of information being shared, does not extend beyond what is necessary to address the COVID-19 pandemic. For example, we would not expect businesses to be sharing commercially sensitive information on future pricing or longer term business strategies.
- The collaboration should include any reasonably available measures to minimise any lessening of competition or other harm it may cause.
- The collaboration should be inclusive and not, for example, exclude smaller or independent businesses from any efforts to co-operate or deny competing businesses access to goods or services.

Ultimately, the Commission will assess each arrangement and what is an essential good or service on a case-by-case basis, taking into account the current environment and the longer term impact on competition from any collaboration. Businesses should continue to turn their minds to what decisions they can reach independently.

Where confidentiality and time permit, the Commission may seek comment on the collaboration from other parts of government, stakeholders, and market participants.

When determining whether further investigation or enforcement action is required, the Commission will also consider:

- The extent to which the collaboration is supported by the government agency or agencies with relevant regulatory responsibilities, including those responsible for relevant aspects of the COVID-19 response.
- The extent to which the collaboration is, or would be, supported by affected parties, such as major suppliers and customers, end consumers, employees, or their representatives.
- The extent to which the participants have proactively engaged with the Commission, including fully and transparently disclosing the measures to the Commission, and addressing any concerns raised by Commission staff.

The Commission may ask businesses that engage with us to update us on the final form of any collaboration, and to keep the Commission updated on any changes to the collaboration, including when it comes to an end. This will provide the Commission, affected parties and the public with greater confidence that the collaboration will not become a vehicle for inappropriate conduct.

Other ways that businesses can legitimately collaborate

The Commission also understands that businesses affected by the COVID-19 pandemic may be considering the possibility of collaborating to supply goods and services that may not be essential for consumers. We will continue to consider what other types of guidance may be useful to assist these businesses in their decision making.

In addition, whether in relation to the provision of essential goods and services in response to the COVID-19 pandemic or not, certain collaborative arrangements are generally exempt from the Commerce Act. While cartels are regarded as unlawful, New Zealand's competition law recognises that in some circumstances collaboration between businesses is much less likely to harm competition and that cartel provisions can form part of arrangements that have pro-competitive or benign competitive effects. Such arrangements may increase innovation, reduce production costs, enhance product quality, and/or result in lower prices.

Therefore, the Commerce Act provides three different exceptions to the cartel prohibition for cartel provisions in certain types of arrangements.³ If an exception applies, then the cartel provision is lawful provided the provision does not have the purpose, effect, or likely effect of substantially lessening competition. The three exceptions cover vertical supply contracts, joint buying and promotion agreements and collaborative activities.

Under the vertical supply exception manufacturers and suppliers can take steps to help combat 'price gouging' or excessive pricing by retailers. Manufacturers and suppliers may set maximum prices at which retailers may sell their products as long as that does not have the dominant purpose of lessening competition.⁴

3. A cartel provision is defined as price fixing, market allocation or restricting output in section 30A of the Commerce Act. The Commission regards bid rigging as a form of price fixing.

4. Section 32 of the Commerce Act.

The Commission has published guidelines explaining how competitors may legitimately collaborate under the Commerce Act.⁵

Businesses may also apply for authorisation from the Commission to enter into arrangements if the public benefits outweigh the competitive harm arising from the arrangement. This may cover arrangements where businesses are not engaging in any activity such as the production of goods and services jointly, but are collaborating to assure the security of supply of goods and services to consumers.

The Commission also has guidelines on what factors it takes into account when determining whether to authorise restrictive trade practices in the public interest.⁶

The only way businesses can obtain legal certainty about the lawfulness of their collaboration is if they formally seek clearance or authorisation from the Commission. A decision by the Commission to exercise its discretion not to investigate a matter further or not to take enforcement action does not insulate businesses from any challenge to the lawfulness of an arrangement by a third party.

The Commission will seek to streamline any authorisation or clearance applications which are urgent, including by working with parties to deal with such applications as quickly and efficiently as possible.

The Commission will not tolerate unscrupulous conduct

While the range of options described above are available to businesses that want to collaborate, the Commission will not tolerate conduct which opportunistically seeks to exploit consumers. It is important to ensure that the prices of goods and services are not artificially inflated by businesses seeking to take advantage of the COVID-19 pandemic by colluding to limit supply or keep prices high. This type of conduct includes:

- businesses allocating customers to each other without reasonable excuse, ie, it is unrelated to issues such as staff availability
- businesses agreeing to limit the production of goods or supply of services in an effort to inflate the prices of those goods or services
- collusion between businesses to keep prices artificially high to mitigate a fall in demand, and
- coordination between businesses that is wider in scope than what is needed to address the issue in question (for example, if the coordination extends to the distribution or provision of goods or services that are not affected by the COVID-19 pandemic).

The Commission is committed to taking enforcement action to prevent consumer harm, and the Commission has the ability to take action to stop such conduct or seek appropriate penalties.

The Commission will not tolerate misuse of its processes by those seeking to promote or prevent collaboration. If parties engaging with the Commission seek to mislead the Commission over material matters relating to COVID-19 collaboration, the Commission may investigate and take appropriate enforcement action in relation to that conduct.



5. https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

6. https://comcom.govt.nz/_data/assets/pdf_file/0018/165123/Draft-revised-Authorisations-Guidelines-9-August-2019.PDF

Getting in touch with the Commission

Parties may self-assess the lawfulness of their collaborations. However, the Commission encourages businesses and industries to advise the Commission about how they are proposing to collaborate and what steps they are taking. Businesses can email the Commission at competition@comcom.govt.nz or get in touch with their regular contact at the Commission to obtain further information.

Where businesses seek to engage with the Commission over time-sensitive collaborations as part of their COVID-19 response, the Commission will make available appropriate senior staff to carry out these discussions. The Commission will endeavour to work to industry timeframes, but will expect full and frank co-operation from affected parties and their advisers.

Businesses can contact the Commission if they are uncertain about whether any type of collaboration is lawful, whether a collaboration would be considered by the Commission to relate to the supply of essential goods and services or whether businesses should apply for a collaborative activity clearance or authorisation.

Businesses should also consider whether to obtain their own legal advice before entering into any arrangements that may be at risk of contravening the Commerce Act.

Consumers are also welcome to contact the Commission if they have any questions or concerns about conduct involving competitors in a particular industry.

Our position will continue to evolve

We will continue to develop strategies to respond to the impact of the COVID-19 pandemic on competition to reflect the many issues faced by businesses as they seek to mitigate the effects of the pandemic, while at the same time protecting against anti-competitive conduct that may cause consumer detriment.

The Commission will continue to monitor the current situation and may update this guidance to provide further clarity and certainty for businesses.

This guidance has been issued in direct response to the COVID-19 pandemic. The Commission will withdraw this guidance from its web page when it considers that it is no longer necessary.



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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Contact us with information about possible breaches of the laws we enforce:

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