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# Collaboration and Sustainability Guidelines



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# Purpose

- 1 Many businesses are considering initiatives to respond to climate change and other sustainability challenges in New Zealand. The Commission recognises that sustainability responses can sometimes require widespread and collective efforts from people, businesses, and government.
- 2 Collaboration with competitors may be necessary to overcome the challenges that individual businesses face to meet New Zealand's climate change commitments and sustainability goals. For example, individual businesses may be disadvantaged if they are the first or only business to adopt a more sustainable but costlier practice.
- 3 When businesses collaborate, including with the public sector, it can affect competition in markets. Not all types of collaboration between competitors will harm competition or breach the Commerce Act.
- 4 These Guidelines set out the factors that the Commission, as the competition regulator, considers when assessing collaboration between competing businesses<sup>1</sup>, particularly where that collaboration has sustainability objectives. To that end, these Guidelines explain when collaboration for sustainability objectives is more or less likely to harm competition. They also explain how, through the clearance and authorisation processes, New Zealand's competition laws can accommodate collaboration between businesses even when it may harm competition.
- 5 These Guidelines are not law and are not intended to be legally binding or to replace legal advice. They are not an exhaustive guide to the interaction between collaboration for the purpose of achieving sustainability objectives and competition law.
- 6 Businesses can email the Commission at [competition@comcom.govt.nz](mailto:competition@comcom.govt.nz) to discuss proposals. We also encourage businesses to seek legal advice on how competition law may apply to any proposals.

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1 In these Guidelines, references to businesses that are competitors also include potential competitors. A business that has the potential to enter or expand into the relevant geographic location or to expand its offering, in competition with the with the other businesses, is a potential competitor.

# Introduction

- 7 Collaboration between businesses is governed by the Commerce Act 1986 (Commerce Act). The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers in New Zealand.<sup>2</sup> Competition is the process of rivalry between firms that leads them to offer better products, lower prices and drives them to innovate.
- 8 The Commission's competition functions include educating consumers and businesses, and investigating and enforcing provisions of the Commerce Act that are designed to protect competition. These include provisions that prohibit anti-competitive agreements, mergers, and misuse of market power. The Commission also carries out market studies.
- 9 These Guidelines explain how the Commission approaches business collaborations that have sustainability objectives. The Commission has separate guidance discussing our approach to other forms of competitor collaboration, including collaboration in an emergency.<sup>3</sup> The Commission provides guidance on other conduct that may substantially lessen competition or breach competition laws.<sup>4</sup> The Commission also provides guidance for public officials, businesses, and other interested parties to consider competition at an early stage in decisions and actions that influence markets.<sup>5</sup>
- 10 These Guidelines do not address businesses' obligations when making environmental claims. Businesses may want to compete on environmental outcomes where their customers view that as a point of difference between competing products or services. For competition to work well, consumers must have access to the information they need to make well-informed choices about which goods and services to buy. Many consumers rely on the representations of manufacturers about the sustainability characteristics of their products. All businesses must make sure their sustainability claims are substantiated, truthful, and not misleading to avoid breaching the Fair Trading Act 1986.<sup>6</sup>

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2 Commerce Act 1986, s 1A.

3 For more information, see our [Competitor Collaboration Guidelines](#) (January 2018); [Business collaboration in response to an emergency](#) (March 2023).

4 These Guidelines do not cover other business arrangements and conduct that might affect competition. For example, mergers, conduct by a single firm with a substantial degree of market power, and vertical arrangements between firms at different levels of the supply chain. For more information, see our [Mergers and Acquisitions Guidelines](#) (May 2022); [Misuse of Market Power Guidelines](#) (March 2023); [Agreements that substantially lessen competition Fact Sheet](#) (July 2018). See also, Commerce Commission website: [Avoiding Anti-Competitive Behaviour](#).

5 For more information, see our [Competition Assessment Guidelines](#) (January 2023).

6 For more information, see our [Environmental Claims Guidelines: A Guide for Traders](#) (July 2020) to help retailers and manufacturers understand their obligations when making environmental claims.

# Competition and Sustainability

- 11 Sustainability refers to the practice of future-focused development, to ensure future generations will have access to the resources needed to meet their needs. Sustainability balances economic, social, and environmental considerations. While the concept is generally associated with environmental protection, it also includes broader aims such as inequality, food security, responsible consumption, and labour rights.<sup>7</sup> Given the scale and urgency of environmental sustainability (including initiatives to reduce greenhouse gas emissions and adapt to the effects of climate change), these Guidelines focus on environmental sustainability.<sup>8</sup> However, they also apply to the wider definition of sustainability.
- 12 Competition is a key driver of value, innovation, and productivity in markets, and generally creates better outcomes for New Zealanders. Competition can incentivise businesses to innovate to meet consumer preferences for sustainable products and services.<sup>9</sup> Sustainable innovation is becoming an increasingly important parameter of competition between businesses in addition to being an important policy goal. Consequently, competition can make an important contribution to sustainability.
- 13 In our [Statement of Intent 2023-2027](#), the Commission recognises the impact of climate change on key sectors of the economy and the need for a whole-of-system approach that delivers an appropriate level of resilience over the long term that is affordable and sustainable for consumers. We are paying attention to how climate change affects how markets are working and impacts on the lives of those in New Zealand.
- 14 We recognise that businesses play an important role in encouraging and promoting sustainability objectives. For example, businesses may change production techniques to reduce emissions or reduce the environmental impact of production, packaging, distribution, or disposal. In doing so, businesses may want to collaborate with businesses they are ordinarily expected to compete with. An individual firm may be disadvantaged if it is the first to switch to a more sustainable but costlier input ('first-mover disadvantage'), while other firms may not have sufficient incentives or capabilities to independently switch to more sustainable alternatives. In some cases, collaboration may assist in achieving sustainability objectives by reducing or sharing costs, overcoming the first-mover disadvantage, or achieving the scale needed to address industry-wide environmental issues.
- 15 The Commission encourages lawful collaboration between businesses to help them achieve sustainability objectives. As mentioned, the Commerce Act can accommodate collaboration in certain circumstances even where it may adversely affect competition. For example, the Commission is able to authorise collaboration where it creates sufficient public benefits that outweigh any competitive harm.
- 16 However, to be clear, the Commission will not allow the use of sustainability objectives and initiatives as an excuse for collusion or other anti-competitive behaviour that harms New Zealanders.

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7 OECD Competition Committee - Sustainability and Competition (2020) – Note by Australia and New Zealand [https://one.oecd.org/document/DAF/COMP/WD\(2020\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf).

8 For more information see: <https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/about-new-zealands-climate-change-programme/>.

9 For example, the development of electric vehicles began slowly and, in response to consumer preferences for more sustainable vehicles, the market has now grown. Competition between manufacturers has resulted in innovation through research and development, the expansion of charging infrastructure, and rapidly increasing electric vehicle sales. [https://one.oecd.org/document/DAF/COMP/WD\(2020\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf).

# Collaboration and the Commerce Act

## – a snapshot

- 17 Collaboration between competitors can adversely affect the competitive process. It may raise potential issues under the Commerce Act if the collaboration involves cartel conduct (section 30), or substantially lessens competition (section 27).<sup>10</sup>
- 18 A cartel is where two or more businesses agree not to compete with each other. Cartel conduct may take many forms, including price fixing, market sharing, bid rigging, or restricting output. Cartel conduct is illegal, punishable by pecuniary penalties or fines, and up to seven years in prison.
- 19 Other agreements between businesses that have the purpose, effect, or likely effect of substantially lessening competition can also breach the law.
- 20 In certain circumstances, conduct that might otherwise be prohibited under the Commerce Act will be permitted when:
  - 20.1 one of the exceptions to the cartel prohibition, such as the exception for collaborative activities or for joint buying, is satisfied;<sup>11</sup> or
  - 20.2 authorisation or clearance is granted.<sup>12</sup>
- 21 The following sections provide further explanation to assist businesses to consider how competitor collaboration for the purpose of achieving sustainability objectives may interact with the Commerce Act.
- 22 Further guidance on avoiding anti-competitive behaviour is available on our [website](#).<sup>13</sup>

## Collaborative sustainability initiatives that are unlikely to affect competition

- 23 Collaboration between businesses is unlikely to breach the Commerce Act if the collaboration does not affect competition between businesses. For instance, if the collaboration does not affect businesses' ability to independently decide on prices, quality, service or innovation. Some examples of collaboration that are unlikely to raise competition concerns are:
  - 23.1 a joint campaign to raise awareness about sustainability issues within the industry or among customers;
  - 23.2 an agreement to engage in training activities for people working in the industry to improve sustainability outcomes;
  - 23.3 an agreement about policies relating to the internal conduct of businesses that does not affect capacity or output, or pricing;<sup>14</sup> or
  - 23.4 a transparently developed and publicly accessible industry-wide framework for reporting climate-related information.

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10 Conduct by a single business with a substantial degree of market power may also have competition implications. For further information on how competition law applies to businesses with substantial market power, see our [Misuse of Market Power Guidelines](#) (March 2023). Parties should also consider whether the collaboration may be a merger or acquisition caught by the merger regime. For more information, see our [Mergers and Acquisitions Guidelines](#) (May 2022).

11 Commerce Commission [Competitor Collaboration Guidelines](#) (January 2018).

12 Commerce Commission [Authorisation Guidelines](#) (June 2023).

13 For more information, see our website: [Avoiding Anti-Competitive Behaviour](#).

14 For example, an agreement to use better environmental practices for handling hazardous chemicals on business premises.

## Climate disclosure reporting

Businesses in a particular industry are facing new obligations to report on the annual climate impacts of their operations. All businesses are facing the same need to establish and maintain mechanisms to meet these obligations. They wish to agree on a common framework for reporting, which would include agreeing on the indicators that each business will report on, and the methodology for calculating performance against each indicator.

This is less likely to raise competition concerns in circumstances where, for example:

- disclosure reporting is not something the businesses compete with one another on;
- the process for developing the framework is transparent and open to all businesses in the industry;
- each business decides on the extent to which they implement the framework (so there is no agreement between them about whether they will or will not implement it);
- each business determines independently of the others whether they implement another framework for reporting or uses other indicators or methodologies;
- the framework (including the indicators and methodology) is available on an open-source basis that is accessible to all the industry, including to any business that did not take part in the process of developing the framework; and
- no competitively sensitive information is shared between the businesses (or if it is necessary to share such information in order to develop the framework, protections are put in place to ensure that there is no risk of that information being misused, for example, by one business in setting its prices).

This scenario is more likely to raise competition concerns if:

- certain businesses are excluded from the process of developing the framework, or from using the framework, especially if the businesses with access to the framework have significant market share;
- businesses using the framework want one another to commit to using it and not use any other framework; or
- while developing the framework or implementing it, businesses are sharing competitively sensitive information with one another (or sharing it without appropriate protections in place).

# Collaborative sustainability initiatives that may impact competition

24 It is not possible to identify and categorise all types of collaboration that may be at risk of breaching the Commerce Act. However, examples of competition considerations that may arise through different types of collaboration for sustainability objectives include:

**24.1 Industry commitments to sustainability-related standards.** Agreements setting out industry standards might specify requirements for manufacturers, retailers or service providers to meet in relation to their products or services. However, if the standards are mandatory, not timebound or stricter than necessary to achieve the sustainability objective, they may impact on the ability of businesses to offer goods or services that are different from, or improve on, the agreed standard. This can remove the incentive to compete on this aspect of their products or services and reduce the incentive to innovate. The process of agreeing on standards can also raise concerns if parties are unnecessarily exchanging competitively sensitive information. Businesses can mitigate competition concerns by ensuring that:

- 24.1.1 the standard setting process is transparent and open to all to participate;
- 24.1.2 the standard itself is not mandatory;
- 24.1.3 the standard can be used by any business;
- 24.1.4 businesses are free to develop alternative standards;
- 24.1.5 businesses are free to innovate beyond the agreed standard; and
- 24.1.6 there is no agreement between the businesses as to other aspects of their businesses, for example, there is no agreement that they will increase their prices to recover additional costs arising from implementation of the standard.

## Example

### Car nitrogen oxide cleaning technology

Public campaigns emphasise the harmful environmental impacts of car emissions. In response, a group of competing car manufacturers come together and decide to implement nitrogen oxide cleaning mechanisms in their cars. Without the collaboration, individual car manufacturers would not have sufficient incentives to invest in the costly but environmentally beneficial technology.

This is less likely to raise competition concerns if, for example:

- the car manufacturers develop the standard for the cleaning mechanism through open consultation, and make the standard available online;
- any car manufacturer can join the group on non-discriminatory terms; and
- the car manufacturers are not obliged to follow the standard and remain free to exceed the standard.

In July 2021, the European Commission imposed fines of €875 million on car manufacturers for colluding on technical development in nitrogen oxide cleaning. The collaboration raised competition concerns because the businesses agreed to avoid using the full potential of the cleaning technology by agreeing to meet the standard, and no more, despite improvements to the technology being available.

The effect of the agreement was to deny consumer access to better technologies and the associated environmental benefits.



**24.2 Agreements about products or packaging** (such as packaging size, weight, or recycled content). Limiting the use of particular types of packaging or product materials can have significant environmental benefits. However, competitors might individually be reluctant to implement such changes for fear of being competitively disadvantaged, for example, if replacement components or packaging is more expensive. When competitors collectively agree to take such steps, it can sometimes mean that the change is more likely to occur, and the benefits are realised. However, if the agreement removes the ability of the businesses to compete on the nature or quality of their packaging or product materials, and this is an important parameter of competition, it risks breaching the law.

#### Example

### Publishing standards for recycled paper content

A group of competing publishers are concerned about the environmental impact of the materials they use to produce publications. The publishers compete with one another to acquire paper from suppliers, as well as in selling publications to consumers. The publishers consider reaching an agreement to only purchase paper that contains a certain minimum level of recycled content to use in their publications and ensure that individual publishers are not disadvantaged by the move to implement the standard. If the publisher's agreement on the standard of recycled paper content in their publications affects competition between the businesses on aspects of quality or price of the paper, it may raise competition concerns.

Instead, the group re-works their proposal so that instead of reaching such an agreement, they create and use a common label or logo which communicates that a publication is printed using paper with a certain percentage of recycled content.

This is less likely to raise competition concerns if, for example:

- publishers are free to determine whether or not to use the label for particular products, or to use another label to signify some other environmental credentials for paper with some other level of recycled content; and
- those outside the publisher group can also use the label (provided the publication meets the attributes denoted by the label).

This is more likely to raise competition concerns in circumstances where, for example:

- once the standard is set, participating publishers are obliged to use the standard on all their printed publications and cannot use competing labels;
- participating publishers are restricted from developing some other label (for example, one that would denote more stringent environmental credentials); or
- non-participating publishers and other third parties are prevented from using the label or from accessing information about it.

**24.3 Supply chain restrictions** (including not dealing with businesses that have unsustainable practices). An agreement by a group of purchasers not to purchase from a specific supplier might harm competition for the provision of the final product if, for example, that supplier's product or service was provided at a lower cost and constrained the price that other sustainable suppliers charged.

### Environmentally friendly suppliers list

A group of local cafes in the same suburb selling takeaway food and beverage products are concerned about the environmental impact of using disposable single-use plastic packaging. Through informal discussions, they identify that many in the group are not aware of which suppliers of takeaway food and beverage containers and cutlery offer products with sound environmental credentials. Together, the local cafes put together a list of suppliers that offer products with these environmental credentials and circulate them by email to members of the group.

This is less likely to raise competition concerns if, for example:

- the list does not include competitively sensitive information about customers, price, or quantities; and
- each member of the group remains free to make their own decisions about which suppliers and products to use, whether they are included in the list or not, and the price and other terms of purchase or sale.

Because the local cafes are in direct competition with one another, the above example is more likely to raise competition concerns in circumstances where, for example:

- the list includes or encourages discussion between competitors on competitively sensitive information about customers, price, or quantities; or
- the cafes agree that they will only use the suppliers on the approved list, and no other suppliers.

**24.4 An agreement to share infrastructure with a view to reducing environmental footprint.** An agreement to share infrastructure might have significant environmental benefits. Generally, sharing infrastructure may also achieve efficiencies and cost reductions. However, in certain circumstances, such as where infrastructure is an important dimension of competition between the parties, it might also remove the incentive of parties to achieve efficiencies and reduce costs in respect of their own infrastructure. For an example of a potential environmental housing project, see page 16 of these Guidelines.

**24.5 Product stewardship.** This describes the situation where manufacturers, importers, distributors, and/or retailers of a product, share responsibility for reducing the environmental impact of their products. This can have significant environmental benefits, for example, the disposal of batteries or chemicals. It can impact competition when the parties seek to coordinate on the recovery of costs associated with the scheme. For more information, see our [Product Stewardship Schemes Fact Sheet](#).<sup>15</sup>

- 25** Whether conduct is at risk of breaching the Commerce Act will depend on the particular facts relating to each collaboration and involve an assessment of factors described in the following sections. Where collaboration does impact competition, and businesses might be at risk under the Commerce Act, the parties to the collaboration can apply to the Commission for an authorisation of their collaboration.

<sup>15</sup> Commerce Commission [Product Stewardship Schemes Fact Sheet](#) (June 2019).

# Cartel conduct

- 26 As described above, a cartel is where two or more businesses agree not to compete with each other. Cartel conduct can result in higher prices and a reduction of choice and quality for consumers.
- 27 Cartel conduct can take many forms including:
- 27.1 **Price fixing** – where two or more businesses agree prices to avoid having to compete with each other. Price fixing is not limited to agreements between competitors setting a specific price for goods or services – it also includes competitors agreeing to fix any part of a price, or to set price according to an agreed formula. An example may be where competitors agree to impose a levy or surcharge on customers (say to cover costs of harmful waste disposal).
  - 27.2 **Bid rigging** – an agreement among some, or all of the bidders, about who should win a bid. Such an agreement prevents open and effective competition and means customers are unlikely to achieve best value for money for their business, customers, and in some cases, taxpayers. An example would be where competitors agree that only one of them will bid on an auction to buy a key item of machinery needed to make a production process more efficient so as not to drive the input price up.
  - 27.3 **Market sharing** – when businesses collude to carve up markets and not compete for the same customers. This could be in relation to the sale of a specific product, a geographic area, or a particular type of customer. An example would be where a business agrees with a competitor that they will avoid going after one another's existing customers.
  - 27.4 **Restricting output** – when two or more competing buyers or sellers agree to prevent, restrict, or limit the goods or services they are buying or selling, or the goods or services that would likely be bought and sold, in competition with one another. An example would be where a group of competing supermarkets agree that, after a certain date, they will only stock sustainable sources of tinned tuna to ensure no individual supermarket is competitively disadvantaged in making the change independently.

## Example

### Attempted customer allocation in the sustainable packaging industry

In 2022, the Commission issued a warning letter to a company and one of its directors following an investigation into an attempted customer allocation agreement in a fast-growing sustainable packaging industry.

Company A learned that its competitor, Company B, had approached an existing customer of Company A and allegedly made negative and untrue statements about Company A. In response, Company A's director emailed Company B complaining about those statements, but the email also included statements that the companies should:

- not go after each other's customers;
- avoid a bidding war; and
- not drop their prices.

Company A invited a response from Company B. The Commission recognised that, while Company A's initial purpose may have been to stop Company B from speaking badly of Company A, Company A's communications with Company B went beyond what is lawful.

- 28 Businesses may have legitimate reasons to communicate with each other, including for sustainability objectives, but these are not opportunities to try to reach unlawful cartel agreements with competitors, which can harm the potential for industries to innovate and develop products and services at the lowest cost and highest quality.
- 29 Cartel conduct can be cleared or authorised in certain circumstances. Further information about how cartel conduct can be cleared or exempt is provided in paragraphs [31] and [35] below. Further information on the authorisation of cartel conduct is provided in paragraphs [47] to [53].
- 30 For more information, see our [Cartel Conduct Fact Sheet](#).<sup>16</sup>

## Exceptions and Clearances

### Collaborative activities

- 31 The Commerce Act contains an exception to the cartel prohibition for collaborative activities.<sup>17</sup> To satisfy the exception for collaborative activities, the parties must show (among other things) that:
  - 31.1 the cartel provision is reasonably necessary for the purpose of the collaboration; and
  - 31.2 the dominant purpose of any collaboration is not to lessen competition between them.<sup>18</sup>
- 32 Parties are able to self-assess the application of this exception. However, if they are unsure about whether it applies, they can apply to us for a ‘clearance’ for an agreement containing a cartel provision that is part of a collaborative activity.
- 33 For a clearance to be granted, we must be satisfied that the criteria in paragraphs [31.1] and [31.2] are met but also that entering into or giving effect to the proposed arrangement is not likely to have the effect of substantially lessening competition in the relevant market(s).
- 34 For more information about the collaborative activity exception, see our [Competitor Collaboration Guidelines](#).<sup>19</sup> These guidelines also set out the application process to seek clearance for cartel conduct.

#### Example

### Joint waste disposal arrangement

A collaborative activity could include arrangements between competitors to jointly dispose of harmful waste, such as paint, batteries, or refrigerant gas, including agreeing to impose levies on consumers to cover the costs associated with that disposal.

This is more likely to be a lawful collaborative activity in circumstances where the competitors can demonstrate that without agreeing to charge levies, the joint disposal arrangement would not be economically viable. In that case, agreeing to charge levies might be said to be reasonably necessary to achieve the disposal of the harmful waste.

This is less likely to be a collaborative activity (and therefore, more likely to be an unlawful cartel) if the parties are in effect reaching an agreement about how they will jointly charge for their separate disposal of harmful waste. In that case, an agreement to charge levies could not be said to be reasonably necessary to achieve the objective.

16 Commerce Commission [Cartel Conduct Fact Sheet](#) (May 2022).

17 Commerce Act 1986, s 31.

18 In contrast to other parts of the Commerce Act, the words ‘lessening competition’ are not qualified by ‘substantially.’ All that is required is a dominant purpose of lessening competition between the parties.

19 Commerce Commission [Competitor Collaboration Guidelines](#) (2018).

## Joint buying

- 35 The Commerce Act contains an exception to the price fixing cartel prohibition for certain joint buying activities.<sup>20</sup> The joint buying and promotion exception applies when competing buyers arrange to purchase goods or services collectively. The conduct will be exempt from the prohibition if the relevant provision:
- 35.1 relates to the price of goods or services that some or all of the competing buyers collectively acquire (either directly or indirectly);
  - 35.2 provides for the competing buyers to collectively negotiate the price for goods or services which they then purchase individually; or
  - 35.3 provides for an intermediary to take title to the goods and resell or resupply them to one or more of the competing buyers.
- 36 As an example of joint buying, a group of small businesses might get together to collectively purchase 100% recycled office paper from a particular supplier at a volume discount. Although such an agreement between competing buyers could be regarded as price fixing, the conduct will be exempt from the price fixing cartel prohibition if it falls within one of the categories at paragraphs [35.1] – [35.3].
- 37 The exception applies only to price fixing, not to the other forms of cartel conduct. If the agreement included other aspects that may adversely affect competition (such as if they agreed to only purchase from a certain supplier) then other cartel prohibitions or other sections of the Commerce Act may apply. It also does not exempt any conduct or arrangements from other provisions of the Commerce Act. For example, businesses would still need to consider whether any arrangement may risk substantially lessening competition in any market under section 27.
- 38 For further detail about the joint buying exception, see our [Competitor Collaboration Guidelines](#).<sup>21</sup>

### Example

#### Electric vehicle joint buying group

A group of rental car companies decide that they would like to make the switch to using electric vehicles, and they know that negotiating a price collectively with a car dealer is likely to result in lower prices. The companies are in competition with one another to acquire vehicles, so in principle, agreeing the terms on which they will each purchase an electric vehicle will harm competition. However, they may rely on the exception for joint buying arrangements in the Commerce Act, and they may negotiate a price with a local electric vehicle dealer.

As long as there are no other agreements reached between the companies that affect the way in which they make business decisions or compete, and the agreement does not have any significant effect on competition to acquire electric vehicles, that arrangement will be lawful and is not likely to otherwise raise competition concerns.

If the companies participating in the agreement comprised the largest acquirers, there would be a higher risk of the agreement harming competition and potentially raising concerns under the general prohibition on arrangements substantially lessening competition under section 27.

20 Commerce Act 1986, s 33.

21 Commerce Commission [Competitor Collaboration Guidelines](#) (January 2018).

# Agreements that substantially lessen competition

- 39 Agreements that substantially lessen competition can do so in several ways. For example, the businesses that are party to the collaboration might be able to charge higher prices, lower the quality of their goods, reduce services, reduce choice, or reduce innovation without fear of losing their customers.
- 40 Our approach to assessing whether collaboration has the purpose, effect, or likely effect of substantially lessening competition in a market under section 27 of the Commerce Act is set out in more detail in our [Agreements that substantially lessen competition Fact Sheet](#).<sup>22</sup>
- 41 When assessing the effect or likely effect of conduct on competition, the Commission will usually undertake a ‘with or without test’. This compares the likely state of competition ‘with’ the relevant conduct to the likely state of competition ‘without’ the conduct, to isolate the effect of the conduct on competition.
- 42 Whether or not the collaboration is at risk of substantially lessening competition will always depend on the individual circumstances of the collaboration. We consider how the collaboration affects competition between the businesses that are party to the collaboration in the context of all the other factors that influence competition in the relevant market.

## Factors to consider when assessing the effect, or likely effect, of substantially lessening competition in a market

- 43 Examples of some of the factors that may be relevant to deciding whether the collaboration is likely to substantially lessen competition include:
  - 43.1 **The nature and extent of the impact on competition, including the effect on price, output, quality, and innovation.** The collaboration is less likely to harm competition when it does not affect the firms’ competitive offerings, in terms of price or quality, and it does not threaten independent initiatives or innovation by competitors in the market.

### Example

#### Soft drink multi pack handles<sup>23</sup>

The Netherlands Authority for Consumers and Markets (ACM) agreed with some soft-drink suppliers and supermarket chains that arrangements regarding the discontinuation of plastic handles on all soft-drink and water multipacks would help to realise sustainability objectives, and not have any resulting negative effects on consumers.

Soft-drink multipacks consist of, for example, six bottles of soda, wrapped in plastic with a plastic handle on top. Removing the handles on these multipacks make them more recyclable and overall require less plastic. With this joint agreement, over 70% of multipacks will no longer have handles.

In reaching its decision, the ACM took into account evidence from suppliers that the handles do not play a role in the competitive process. The ACM also noted it was important that the agreement would not prevent suppliers from making their own commercial decisions, including how and when to discontinue the handles.

22 Commerce Commission [Agreements that substantially lessen competition Fact Sheet](#) (July 2018)

23 Authority for Consumers and Markets, ACM is favourable to joint agreement between soft-drink suppliers about discontinuation of plastic handles, 26 July 2022, <https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles>

- 43.2 The extent to which the collaborating businesses have collective market power in the relevant market.** Competition is likely to be affected if the collaboration allows the participating firms to exercise market power over suppliers, customers, or competitors. The greater the market power, the more likely it is to harm competition.
- 43.3 The proportion of the market affected by the conduct.** Collaboration is less likely to be harmful when it only covers a small portion of the market. For example, two competitors might agree to collaborate to use more sustainable packaging for one of their products. If they hold a small share of the market for that product, it is unlikely to affect the prices and choices available to consumers, as they can choose products from other businesses.
- 43.4 Barriers for businesses entering or expanding into markets.** Competition is likely to be affected if the collaboration makes entry or expansion into a market difficult for potential entrants.
- 43.5 The duration of the conduct.** The longer the duration of the conduct, the more likely harm to competition may occur.
- 43.6 The ability for parties to act independently.** For example, in the case of an agreement to develop new standards for a particular product, competition is less likely to be harmed if the parties remain free to sell products not subject to the standard and if they are free to take steps which go beyond the minimum set by a standard.
- 43.7 The ability for non-parties to participate.** For example, in the case of an agreement to introduce technical sustainability standards, competition is less likely to be harmed if other businesses are able to access and use the technical standards on non-discriminatory terms.
- 43.8 The exchange of competitively sensitive information.** The agreement is more likely to harm competition if competitively sensitive information is shared that is not necessary for the collaboration.

## Pro-competitive efficiencies

- 44** The assessment of whether a collaboration substantially lessens competition in a market involves a consideration of the pro-competitive effect of the conduct.
- 45** This assessment might take into account sustainability factors. For example, to contribute to sustainable development, competitors may wish to agree to replace non-sustainable products or processes with sustainable ones. Competitors might enter into a standardisation agreement to achieve this. As part of this, the competitors might introduce a label or logo to demonstrate that they meet the requirements of the standard. By using a logo or label that provides information about the sustainability characteristics of their products, consumers can be more confident that products or services meet their sustainability preferences. This might, thereby, increase sales of sustainable products. For an example of use of a logo or label, see page 7 of these Guidelines.
- 46** In assessing whether the conduct has, or is likely to have, the effect of substantially lessening competition, we will consider any pro-competitive effects of the conduct. In practice, the Commission finds it helpful for parties to identify pro-competitive effects to the Commission as early as possible in the investigation process. Any out of market pro-competitive effects can only be considered under the authorisation process.

# Authorisations

- 47 Where collaboration does impact competition, and businesses might be at risk under the Commerce Act, the parties to the collaboration can apply to the Commission for an authorisation of their collaboration. Authorisation is available for collaborations that may involve cartel conduct or may otherwise lessen competition.<sup>24</sup>
- 48 We can authorise a collaboration if there are public benefits that arise which outweigh the detriment that results from the loss of competition. Sustainability is a benefit that could be taken into account in this regard.<sup>25</sup>
- 49 We, and other regulators, have considered sustainability considerations in several authorisation decisions to date. In these cases, the sustainability issues considered were environmental benefits that were claimed by the applicants as arising from the various proposals. Some of these examples are set out below.
- 50 The effect of an authorisation, once granted, is that the agreement will not be prohibited and cannot be challenged by the Commission or third parties for a breach of the Commerce Act while the authorisation remains in force.
- 51 The Commission is also able to authorise an agreement on an interim basis, so that the parties can give effect to the proposed collaboration while we continue to consider the application for authorisation. Interim authorisations apply for a limited time-period and are only available during the Commission's assessment of the authorisation application for the relevant agreement. Interim authorisations have the same effect as an authorisation.
- 52 Our [Authorisation Guidelines](#) explain how we assess applications to authorise agreements in the public interest.<sup>26</sup>
- 53 In addition to authorising agreements, we can also authorise other conduct that would otherwise breach the Commerce Act. For example, single firm conduct that would be likely to have the effect of substantially lessening competition in a market. If there is sufficient public benefit to outweigh the competitive harm arising from the conduct, we can authorise it.

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24 The Commission can authorise cartel conduct. For more information, see our [Competitor Collaboration Guidelines](#) (January 2018). The Commission can also authorise mergers and unilateral conduct. For more information, see our [Mergers and Acquisitions Guidelines](#) (May 2022); and [Misuse of Market Power Guidelines](#) (March 2023).

25 For further details of how this approach works see: Sustainability and Competition – Note by Australia and New Zealand, 1 December 2020, at [https://one.oecd.org/document/DAF/COMP/WD\(2020\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf).

26 Commerce Commission [Authorisation Guidelines](#) (June 2023).



### Example

## Refrigerant License Trust Board<sup>27</sup>

In 2011, the Commission considered environmental benefits in the Refrigerant License Trust Board authorisation decision. Here, the Trust Board wanted to impose conditions on 100% of New Zealand's refrigerant wholesalers (including any new refrigerant wholesalers entering the market) to agree to only supply refrigerants to customers with the necessary training and licensing.

The Commission considered that the conditions were exclusionary as they were part of an agreement between competitors seeking to prevent the supply of refrigerants to non-certified and non-licensed purchasers (or imposing extra compliance costs on existing purchasers). Further, the refrigerant purchasers were likely to have been competing with one or more wholesalers who were party to the agreement.

The primary benefit that the Commission considered was increased compliance with safety regulations and a reduction in the release of potentially hazardous substances into the atmosphere. The Commission was satisfied that the agreement would result, or be likely to result in a net benefit to the public outweighing any detriments to competition, and that the agreement should be authorised.

### Example

## Nelson City Council and Tasman District Council<sup>28</sup>

In 2016, Nelson City Council and Tasman District Council sought authorisation from the Commission to create a Regional Landfill Business Unit (Unit) to make joint governance, management, and operational decisions for the Councils' two landfills in the Nelson-Tasman Region. The parties submitted that the proposed agreement would promote the efficient and effective use of waste management services in the wider region – promoting environmentally-friendly disposal options and reducing greenhouse gas emissions associated with lower waste volumes.

Prior to this, the Councils individually owned and operated their own landfill, which included them independently setting their prices, fees, and other terms and conditions.

The Commission considered that the Councils were close competitors who constrained one another on price, and the proposed joint control over price and operations provided the Councils with a greater ability to raise price. The Commission considered that the potential price increases could be significant and posed a real chance that the detriments of the agreement would exceed the benefits.

Alongside benefits such as operational costs savings and savings from deferred investment, the Commission considered environmental benefits such as reduced waste volume, the Councils' underlying waste minimisation strategies (for example, by appropriately setting landfill disposal fees to encourage solid waste to be diverted to more environmentally friendly disposal options like recycling) and reduced greenhouse gas emissions from lower waste volumes.

The Commission authorised the arrangement subject to conditions. The Commission considered that without the conditions, there was a real chance that the detriments would exceed the benefits. The Commission proposed:

- The Unit would confirm that any operating surplus would be used solely to fund the Councils' waste management and minimisation services, facilities, or activities; and
- The Councils' annual report must clearly disclose the amount of any operating surplus received from the Unit, and record how the surplus is being applied consistently with the condition.

27 Refrigerant License Trust Board (Commerce Commission Decision 735, 7 July 2011)

28 Nelson City Council and Tasman District Council [2017] NZCC 6.

## Example

### Soft Plastics Taskforce<sup>29</sup>

In November 2022, Australia's Competition and Consumer Commission (ACCC) approved an interim authorisation to allow major supermarket retailers to form part of a recycling "Soft Plastics Taskforce". The supermarkets lodged an urgent request to cooperate following the suspension of the country's only return-to-store plastics programme.

The decision allowed the retailers to cooperate for a limited period to develop and implement a short-term solution for storing, transporting, processing, recycling, and managing soft plastics. The ACCC noted the approval responded to the urgent need to address the environmental risk of the existing stockpile and future waste and recognised the public benefit of the initiative for all consumers.

On 30 June 2023, the ACCC granted authorisation subject to conditions promoting continued transparency over the agreement and ensuring that the public are kept up to date for a period 12 months. The ACCC considers that the conduct was likely to result in significant public benefit which would outweigh any likely public detriments.

## Example

### Zero-energy housing pilot project

Several community housing organisations from the public and private sectors want to participate in a joint pilot project to develop zero-energy housing using a novel, more efficient technology in a fast-growing regional area. However, applying the technology to a large-scale project is complex, costly, and resource intensive.

Collaboration to design and build the housing complex is unlikely to raise competition concerns where each organisation can demonstrate that they would not have the resources to undertake the activity independently. In this case, none of them would likely be in competition with one another in relation to the development.

If it is unclear whether or not they could undertake the development independently, but nonetheless want to combine resources because it would be efficient and cost-effective, then the organisations may be able to rely on the collaborative activity exception and could consider applying for a clearance.

If it is not clear whether the requirements of the collaborative activity exception could be met, they may seek authorisation if they are able to demonstrate sufficient public benefits (including environmental benefits) to outweigh any adverse effect on competition.

<sup>29</sup> Australian Competition & Consumer Commission Final Determination Application for authorisation AA1000627 (30 June 2023) <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/coles-group-on-behalf-of-itself-and-participating-supermarkets-2>.

# What businesses considering collaboration can do

Businesses considering collaboration for sustainability purposes can follow the process below:

1. Read these Guidelines carefully to better understand the potential effects of the collaboration on competition.
2. Consider the objectives of your proposed collaboration, and to what extent collaboration is necessary to achieve those objectives.
3. Consider whether the collaboration affects competition:
  - Will the collaboration involve actual or potential competitors?
  - Will the collaboration affect the competitive process? For example, will it affect the way that firms in the market make decisions about how they each conduct their businesses in relation to:
    - how prices are set;
    - the quantity of goods and services supplied;
    - the range of goods and services supplied; and/or
    - incentives to improve and innovate.
  - Will the collaboration be between competitors who collectively hold a significant share of the market?
  - Will the collaboration restrict the ability for businesses, or other entities, in the relevant industry to enter, exit, or expand in the market?
  - Will any competitively sensitive information be shared between competitors?
    - If so, how can it be limited to what is strictly necessary to achieve the sustainability objectives? What protocols can be put in place to protect against the wider circulation and use of that information?
  - Will the collaboration take place over an extended or unlimited time?
4. If the answer is yes to any part of question 3, or you are unsure, consider seeking legal advice on how the Commerce Act may apply to any proposals.
5. Consider the benefits of collaboration and whether a collaborative activity clearance or authorisation might be appropriate.

Contact us at [competition@comcom.govt.nz](mailto:competition@comcom.govt.nz) if you are unsure how to apply this guidance or wish to discuss your proposal further. While we are unable to provide legal advice, we can discuss, and are open to discussing, the various options.

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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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