



Business collaboration in response to an emergency

March 2023

Business collaboration in response to an emergency

1. The purpose of this guidance is to explain to businesses and the public how the Commission approaches business collaborations reached in the immediate response to an emergency.¹
2. Our focus is on collaboration between businesses who would usually be expected to compete.

What is an emergency?

3. For the purposes of this guidance, the Commission considers an emergency could include a major weather event, a major health crisis (e.g. pandemic) or an international incident (e.g. war), which causes a significant disruption to goods or services being supplied to New Zealand businesses or consumers. The Commission would not ordinarily consider that sudden changes in market conditions such as cost increases would constitute an emergency requiring anti-competitive collaboration.
4. This guidance will only apply when:
 - 4.1. a State of Emergency is in effect²; or
 - 4.2. businesses have identified what they consider to be an emergency and, following consultation with the Commission, the Commission agrees.
5. When a State of Emergency is not in effect, businesses will need to determine what might constitute an emergency for their business and whether collaboration with competitors is essential for continued supply of goods and services. Businesses will need to consider their ability to supply goods and/or services and the length of time the impact is anticipated to last. If businesses consider that an emergency situation is present, and they need to enter into a collaboration that might be unlawful, they should engage with the Commission.
6. Not all emergencies will justify collaboration that goes beyond what is permitted by law. This guidance only applies where such collaboration is necessary in the circumstances. If in doubt about whether or how these guidelines may apply in a specific situation or proposed collaboration, parties should contact the Commission.
7. 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.

¹ These Guidelines replace the Business collaboration under COVID-19 Guidelines issued in 2020.

² Under the Civil Defence Emergency Management Act 2002.

Competition benefits consumers even in times of crisis

8. The Commission is focused on ensuring that markets continue to work as effectively as possible for New Zealand even during emergencies.
9. It is important that consumers and businesses 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. It also incentivises businesses to innovate and improve efficiency. Competition law prohibits businesses from agreeing prices, dividing up markets, agreeing to restrict the supply of goods or services, or entering into arrangements that substantially lessen competition.
10. The Commission recognises that emergency situations can cause disruption and uncertainty for businesses, consumers and the economy. In response to the crisis, we want to prioritise our resources to focus on work that will maintain well-functioning markets. We want to provide clarity and guidance for all businesses, whether small, medium or large, about how they can legitimately collaborate in response to an emergency.



The Commission's approach to business collaboration in response to emergencies

11. The Commission acknowledges that when there is an emergency, the response may require businesses to collaborate. The Commission is also mindful of the importance of maintaining competitive markets in New Zealand.
12. The Commission is conscious of concerns that uncertainty over our competition law enforcement stance 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 an emergency. 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.
13. To be clear, the Commission will not tolerate the use of an emergency as an excuse for collusion or other anti-competitive behaviour.

Factors we take into account when exercising our discretion

14. The Commission is committed to continuing its work towards making New Zealanders better off. We have two strategic objectives: (1) markets working well, and (2) consumers and businesses being confident market participants. These objectives provide the framework for this work.
15. Note that this guidance does not allow firms to self-assess whether an emergency exists. That decision will be made either under the Civil Defence Emergency Management Act or by agreement of the Commission on request.

16. After an emergency has been deemed to exist, some factors that will be relevant to our assessment of whether it is necessary for businesses to collaborate in response to the emergency are set out below.
 - 16.1. The collaboration relates to goods or services for which ongoing supply is needed.
 - 16.2. The collaboration should concern new measures being taken in good faith in response to extraordinary circumstances arising out of the emergency that cannot be effectively achieved by businesses acting alone.
 - 16.3. The collaboration should be directed at achieving an outcome that benefits consumers or is otherwise in the public interest, for example ensuring consumers have continued access to goods or services by avoiding a shortage, ensuring security of supply, or promoting a fair distribution to consumers. The Commission will not tolerate collaborations that have the purpose of profiteering or otherwise taking advantage of an emergency for commercial gain.
 - 16.4. 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 emergency.
 - 16.5. 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. Decisions taken under this process, and the reasons for them, should be documented at or shortly after the time that they are made.
 - 16.6. The collaboration should include any reasonably available measures to minimise any lessening of competition or other harm it may cause.
 - 16.7. 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.
 - 16.8. 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 emergency. For example, we would not expect businesses to be sharing commercially sensitive information on future pricing or longer term business strategies.
 - 16.9. Unless otherwise required by law or regulation, sensitive information shared in response to an emergency should be destroyed once it is no longer needed to respond to the emergency. Access to sensitive information retained should be restricted only to those people that need to have access to it.
17. Ultimately, the Commission will assess each arrangement 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.
18. Where confidentiality and time permit, the Commission may seek comment on the collaboration from other parts of government, stakeholders, and market participants.
19. When determining whether further investigation or enforcement action is required, the Commission will also consider:

- 19.1. 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 emergency response.
 - 19.2. 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.
 - 19.3. 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.
20. 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

21. 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.
22. Therefore, the Commerce Act provides three different exceptions to the cartel prohibition for cartel provisions in certain types of arrangements³. 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.
23. 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 competition⁴.
24. The Commission has published guidelines explaining how competitors may legitimately collaborate under the Commerce Act.⁵
25. 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. The Commission has guidelines on what factors it takes into account when determining whether to authorise restrictive trade practices in the public interest.⁶

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.

⁵ The Commission will publish revised authorisation guidance including in relation to interim authorisations shortly.

⁶ https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

In the absence of clearance or authorisation, any 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.

26. The Commission will seek to streamline any authorisation or clearance applications that 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

27. While the range of options described above are available to businesses that want to collaborate, the Commission will not tolerate conduct that opportunistically seeks to exploit consumers. It is important to ensure that the prices of goods and services are not artificially inflated by businesses taking advantage of an emergency by colluding to limit supply or keep prices high. This type of conduct includes:
 - 27.1. businesses allocating customers to each other without reasonable excuse, i.e. it is unrelated to issues such as staff availability
 - 27.2. businesses agreeing to limit the production of goods or supply of services in an effort to inflate the prices of those goods or services
 - 27.3. collusion between businesses to keep prices artificially high and
 - 27.4. 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 where this is not necessary to respond to the emergency).
28. 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.
29. 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 emergency collaboration, the Commission may investigate and take appropriate enforcement action in relation to that conduct.

Getting in touch with the Commission

30. The Commission encourages businesses and industries to advise the Commission early about how they are proposing to collaborate and what steps they are taking in response to an emergency. 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.
31. Where businesses seek to engage with the Commission over time-sensitive collaborations as part of their emergency 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.
32. Businesses should contact the Commission if they are uncertain whether an incident qualifies as an emergency for the purposes of these guidelines, whether any type of collaboration is lawful, or whether businesses should apply for a collaborative activity clearance or authorisation.
33. 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.
34. Consumers are also welcome to contact the Commission if they have any questions or concerns about conduct involving competitors in a particular industry.



ISBN 978-1-99-101280-7

Phone: 0800 943 600
Write: Enquiries Team, PO Box 2351, Wellington 6140
Email: contact@comcom.govt.nz
www.comcom.govt.nz