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Advantages and Disadvantages of Competition Welfare Standards – Note by New Zealand

15 June 2023

This document reproduces a written contribution from New Zealand submitted for Item 6 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/advantages-and-disadvantages-of-competition-welfare-standards-in-competition.htm>

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1. Introduction

1. This paper is a contribution to the Competition Committee's call for country contributions to the Competition Committee Roundtable on the 'Consumer welfare standard - Advantages and disadvantages compared to alternative standards' to be held on 15 June 2023.

2. Under the Commerce Act 1986 (Act) two main welfare standards are applicable to New Zealand's competition law regime: consumer welfare and total welfare. In certain circumstances, the New Zealand Commerce Commission (NZCC) is also able to take a 'modified' total welfare approach. New Zealand therefore has a 'mixed' welfare standard regime. Mixed regimes are uncommon, as noted by the Secretariat in the Background Note to this Roundtable¹.

3. The consumer welfare standard and modified total welfare standard, as applied in New Zealand, can be summarised as follows:²

- *The consumer welfare standard:* The consumer welfare standard focusses on assessing changes in consumer welfare within the relevant market, through price and non-price factors such as quality, range, service, or innovation. The consumer welfare standard is reflected in the statutory substantial lessening of competition (SLC) test, applicable to merger control, anti-competitive agreements and misuse of market power. The standard is applied flexibly, in that harm to end consumers is not required for the SLC test to be met. Effects on competition in intermediary markets are also captured by the SLC test.
- *The total welfare standard:* The NZCC adopts a total welfare standard when assessing ex ante public benefits and detriments in the authorisation context. Under this approach, distributional factors are not considered.
- *The modified total welfare approach:* In the authorisation context, the NZCC is permitted, in certain circumstances, to assess and adjust the weight given to benefits and detriments to reflect their distribution within the wider community, beyond consumers and producers.³

4. This mixed regime provides the NZCC with sufficient flexibility to balance public benefits (such as sustainability, media plurality, fiscal matters) against competition in certain circumstances to identify whether conduct restricting competition should be authorised.

¹ Directorate for Financial and Enterprise Affairs Competition Committee, OECD, *The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards - Background Note* (DAF/COMP(2023)4) at [68].

² See Chris Noonan *Competition Law in New Zealand* (online looseleaf ed, Thomson Reuters) at [14.C.1.5] and [14.C.13.3].

³ Commerce Commission, *Authorisation Guidelines* (December 2020) ('*Authorisation Guidelines*') at [81], citing *NZME* at [66]-[67]; [75].

5. As stated in our joint contribution with Australia “Sustainability and Competition” prepared for the OECD’s Competition Committee in 2020,⁴ our authorisation regimes have benefits in enabling our agencies to account for public interest factors (such as sustainability) in certain circumstances to allow anti-competitive arrangements or mergers to proceed. In those situations, the regimes have sufficient flexibility to look beyond the consumer welfare standard to consider broader economic and social impacts.⁵

6. This is a relatively unique benefit of the New Zealand regime, compared to some other competition regimes, at a time where there is a higher expectation from the public/business community that competition objectives need to be balanced against wider public benefits in some circumstances. As is described below, having a clear structure for this analysis, including requiring quantification of benefits where possible but making qualitative judgment possible too, allows conduct to be authorised by the NZCC that may be anti-competitive and otherwise in breach of the Act, but produces a net public benefit for the people of New Zealand.

2. Legislative history

7. The consumer welfare standard is enshrined in the Act’s statutory purpose, which is to “promote competition in markets for the long-term benefit of consumers within New Zealand.”⁶

8. The Act in its current form was introduced in 1986. It replaced the Commerce Act 1975, which allowed the NZCC to take into account and/or promote wider economic and social goals when considering anti-competitive activity.

9. The purpose of the Act, when it was first enacted, was stated in the long title; that is, “to promote competition in markets within New Zealand”. The Court of Appeal in 1988 stated:

*In terms of the long title the Commerce Act is an Act to promote competition in markets in New Zealand. It is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources.*⁷

10. This purpose was subject to some criticism for focussing solely on efficiencies, leading to the long title being repealed in 2001, and section 1A being introduced which provides that the purpose of the Act is “to promote competition in markets for the long-term benefit of consumers within New Zealand”.

11. The Commerce Committee Report, which was produced in response to the Committee’s consideration of the draft section 1A in 2001, clarified that section 1A “confirms the existing approach that competition is a means to an end, not an end in itself

⁴ Directorate for Financial and Enterprise Affairs Competition Committee, OECD, *Sustainability and Competition – Note by Australia and New Zealand* (DAF/COMP/WD(2020)62).

⁵ Directorate for Financial and Enterprise Affairs Competition Committee, OECD, *Sustainability and Competition – Note by Australia and New Zealand* (DAF/COMP/WD(2020)62).

⁶ Commerce Act 1986, s 1A

⁷ *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA).

[and] clarifies that it is the *long-term welfare of consumers*⁸ [emphasis added] within New Zealand that should be the overarching goal when assessing market behaviour”.⁹

12. During Parliament’s consideration of the Commerce Committee Report on 27 February 2001, the then Minister of Commerce stated:

*The focus on competition in the purpose statement... does not preclude wider public benefit issues being taken into account where appropriate. [The purpose statement] simply clarifies that there should be a presumption in favour of competition, and competition must prevail unless the efficiencies of other public benefits are shown to exceed the detriments from the lessening of competition [emphasis added].*¹⁰

13. Section 1A sets out a consumer welfare purpose, which can be considered when assessing and interpreting anticompetitive conduct or mergers under the Act. The authorisation provisions of the Act set out where a total welfare or modified total welfare framework can be applied to conduct or mergers.¹¹

14. We note that the interpretation of what is meant by a ‘consumer welfare standard’ is likely to differ by jurisdiction depending on the legislative framework and purpose, judicial interpretation and domestic context. The words ‘consumer welfare standard’ are not set out in the Act. References to ‘the consumer welfare standard’ in this document refer to the standard as interpreted in a New Zealand context.

3. The consumer welfare standard

15. The SLC test is the key operative test in the Act for assessing whether conduct is anticompetitive. It is used to assess agreements (excluding cartels), unilateral conduct and mergers.

16. Depending on the context, the SLC test can be applied by looking at whether the conduct has the purpose, effect, or likely effect of substantially lessening conduct in a relevant market. The SLC test is concerned with protecting the competitive process and the resulting consumer benefits this process produces. In all applications it requires a counterfactual analysis to assess the state of competition ‘with and without’ the relevant conduct.¹²

⁸ The Report clarifies what “long-term benefit of consumers” means in the context of the purpose statement and by reference to efficiencies. Essentially, the objective of the Act is the long-term benefit of consumers through the promotion of competition, which will generally mean an increase in economic efficiency – however this is not always the case. Where conduct is likely to contravene the Act because it is anti-competitive, that course of action can be legitimised through authorisation if the benefits to the public (generally through improved efficiencies) outweigh the detriments. In considering such an authorisation, the term “public” would need to be interpreted as specifically including consumers.

⁹ Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Thompson Reuters), at [CA1A.01] citing the Report from the Commerce Committee (296-2).

¹⁰ Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Thompson Reuters), at [CA1A.01] citing *Hansard*, 27 February 2001.

¹¹ Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Thompson Reuters), at [CA1A.01].

¹² *Authorisation Guidelines* at [40]; Commerce Commission, *Misuse of Market Power Guidelines* (March 2023) (*Misuse of Market Power Guidelines*) at [70].

17. It is also the prevailing test for assessing anticompetitive conduct in Australia, which is important given conduct or mergers will not infrequently fall for consideration in both jurisdictions. While there are slight differences in the application of the test in Australia, commonality also means that Australian jurisprudence can (and does) provide guidance for New Zealand’s judiciary.

18. The SLC test solely focuses on competitive harm in an affected market, rather than requiring an assessment of out-of-market effects.

19. In applying the SLC test, New Zealand courts have confirmed that procompetitive effects, including efficiencies, that flow through to consumers in an affected market may be considered under the SLC test.¹³ Therefore, in applying the SLC test, the NZCC also considers the pro-competitive effects of the conduct in the relevant market.

20. While the NZCC's experience has been (largely, in the mergers context) that in-market efficiencies flowing to consumers have rarely been of a sufficient magnitude to outweigh consumer harm, there is flexibility in the system to accommodate such arguments.¹⁴ Consideration of efficiencies are more common under the authorisation process.

21. Several benefits arise from New Zealand’s experience of protecting the competitive process under the consumer welfare standard. Over the years, predictability has built through precedent, and consistency is promoted in the regulatory environment through the SLC test being used to assess most conduct. The standard is well-understood by the competition community and businesses. The overarching consumer welfare standard in New Zealand ensures that the efficacy of competition law is not undermined by a range of competing policy objectives that are more appropriately dealt with under other regulations.

4. The total welfare and modified total welfare standards

4.1. The authorisation regime

22. New Zealand’s authorisation regime recognises the fact that in some situations anticompetitive conduct or mergers may have sufficient public benefit to outweigh the competitive harm arising from the conduct or merger. Changes that lessen competition might nevertheless promote wider economic welfare, even if competition is lessened.

23. Firms can apply to the NZCC for authorisation of a merger (section 67) or an arrangement (section 58) to allow firms to act in a way that would otherwise breach the Act.¹⁵ The NZCC will grant authorisation where it is satisfied that the merger or arrangement would be likely to result in a net public benefit to the New Zealand public (known as the “public benefit” test)¹⁶.

¹³ *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC).

¹⁴ Commerce Commission, *Mergers and acquisitions Guidelines* (May 2022) (*‘Mergers and acquisition guidelines’*) at [3.119].

¹⁵ For further guidance on the NZCC’s approach to authorisations, refer to our Authorisation Guidelines: https://comcom.govt.nz/__data/assets/pdf_file/0018/165123/Draft-revised-Authorisations-Guidelines-9-August2019.PDF.

¹⁶ The Commerce Act contains two versions of the public benefit test, but the Courts have held there is no material difference between the two: see *Air New Zealand v Commerce Commission (No 6)* (2001) 11 TCLR 347 (HC) at [33].

24. Therefore, notwithstanding the use of the consumer welfare standard in New Zealand's competition law regime, the regime does have the flexibility to depart from this approach in the situations above. This can allow potential trade-offs between wider objectives that are in the public interest, and competition law, without needing to change the objective of competition law.¹⁷

25. The NZCC's ability to take a modified total welfare approach was confirmed by the Court of Appeal in the *NZME* case¹⁸. The Court of Appeal stated that:

...it follows that the legislation permits the modified total welfare approach... We should not be taken to say, however, that the Commission must follow the modified total welfare approach in practice. The Commission is equipped to develop policies and guidelines within the statutory framework, and it is responsible for doing so. The courts are responsible for assessing the Commission's decisions, in law and on their merits, against that framework and what can reasonably be found in it.

26. The authorisation regime has been utilised frequently and the approach taken by the NZCC is set out in its Authorisation Guidelines.¹⁹

27. Following recent amendments, a wider gamut of conduct now may be authorised, such as unilateral conduct and cartel conduct.²⁰

28. Only the NZCC and the courts can decide whether conduct ought to be authorised. Private parties are not entitled to self-assess, and authorisation cannot be granted if the conduct has already commenced.²¹ It is not a defence to say that conduct would have been authorised if it had been sought.

29. Whereas the NZCC is charged with administering the Act for the long-term benefit of consumers, and is answerable to the courts, private parties have different objectives such as maximising of profits for shareholders. The NZCC may therefore be better placed than private parties to weigh benefits and detriments of conduct that occur outside of the market where competition is affected. That said, such assessments may require analysis of public benefits where the NZCC does not have technical expertise. In such cases, the NZCC may seek expert assistance in order to assess benefits and detriments, as it did in the *NZME* case with media plurality (discussed below).

4.2. Identifying and assessing the relevant benefits and detriments

30. While the NZCC must attempt to quantify benefits and detriments flowing from conduct, there is a recognition that this will not always be possible.

31. In 2016, in the *Godfrey Hirst* case,²² the Court of Appeal stated that the NZCC cannot be expected to define all relevant factors in quantitative terms. It confirmed the

¹⁷ OECD (2020), *Sustainability and Competition - Note by Australia and New Zealand*. For more information, see: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf).

¹⁸ *NZME Ltd v Commerce Commission* [2018] NZCA 389.

¹⁹ https://comcom.govt.nz/__data/assets/pdf_file/0018/165123/Draft-revised-Authorisations-Guidelines-9-August2019.PDF.

²⁰ Commerce Amendment Act 2022.

²¹ The NZCC is able to grant interim authorisation, which allows parties to engage in conduct for which authorisation is sought prior to the NZCC making a final determination on authorisation.

²² *Godfrey Hirst NZ Ltd 2 v Commerce Commission* [2016] NZCA 560, [2017] 2 NZLR 729.

NZCC's ability to proactively exercise its qualitative judgement – as a specialist regulator – to consider the broader, unquantifiable public interests.

32. When identifying and assessing the relevant benefits and detriments of any conduct or merger sought to be authorised:

1. Courts have broadly defined a public benefit as “anything of value to the community generally, any *contribution* to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.”²³ A corresponding judicial interpretation is applied to detriments.
2. The Act requires the NZCC to have regard to efficiency benefits²⁴ likely arising from the conduct in its assessment. The traditional efficiency factors considered are that of allocative, productive, and dynamic efficiency
3. However, the Courts have also recognised that benefits go beyond efficiencies in an economic sense and can relate to matters such as the environment, health, media or social welfare.²⁵ The NZCC has previously taken into account the following types of benefits:
 - reduced pollution or other environmental improvements;²⁶
 - health benefits of breastfeeding;²⁷
 - safer handling of hazardous substances;²⁸ and
 - improved industry viability and resourcing.²⁹
4. Likewise, detriments can include wider losses to the New Zealand public as well as efficiency losses wherever they occur. Examples of such detriments include:
 - loss of media plurality as a result of a merger between two media firms. The NZCC identified this as a detriment in the *NZME* case (see case study below);
 - adverse effects on the environment;
 - impacts on privacy interests; and
 - adverse social welfare impacts or other impacts on the community generally.
5. Following identification, the NZCC assesses the value of these benefits and detriments by assessing the submissions and supporting evidence of the applicants

²³ *Air New Zealand Ltd v Commerce Commission* (No 6) (2004) 11 TCLR 347 at [319]; *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC).

²⁴ Commerce Act 1986, s 3A.

²⁵ See *NZME*, above n 29, at [68]-[73]: “... the Act is not exclusively concerned with efficiency but rather allows it to be balanced alongside other public benefits that may include anything of importance to the community as a whole. Nothing in the legislation requires that public detriments be defined less comprehensively.”

²⁶ *Nelson City Council and Tasman District Council* [2017] NZCC 6 at [111]-[112].

²⁷ *Infant Nutrition Council Ltd* [2015] NZCC 11 at [69]-[71].

²⁸ *Refrigerant Licence Trust Board Commerce Commission* Decision 735, 25 November 2011 at [77]-[81].

²⁹ *NZME Ltd v Commerce Commission* [2017] NZHC 3186 at [27].

regarding the nature and likely extent of the benefits and detriments, and how those are distributed. Depending on likelihood, or if the link to the agreement is tenuous, the NZCC adjusts the weight placed on these benefits and detriments.

6. All quantifiable and non-quantifiable benefits and detriments are considered, and the ultimate decision of granting authorisation depends on an evaluative judgement of the NZCC's quantitative and qualitative analysis, and the balancing of the two against one another.³⁰
7. When assessing the likely benefits and detriments, the NZCC seeks to quantify them to the extent practicable, and carry out qualitative analysis to determine their nature and significance for those that may not be quantifiable.

4.3. The distribution of benefits and detriments

33. When applying a modified total welfare approach, identified non-quantifiable public benefits and detriments will be appropriately weighted by the NZCC depending on the nature of the benefit and detriment, and who the benefit and detriment applies to their distribution within the wider community.³¹ This includes a broad range of market participants,³² for example:

- Less weight might be given to benefits flowing from a merger or agreements that only flow to limited number of shareholders through dividends or higher profits;³³ and
- Conversely, more weight might be given to benefits that are realised by the wider community and sustained for a period,³⁴ or more weight might be given to detriments that would reduce access to a good or service of value to low-income consumers.³⁵

34. The NZCC has considered sustainability considerations in several authorisation decisions to date. In these cases, the sustainability issues considered were environmental benefits that were claimed as arising from the various proposals.³⁶

35. The measurement of sustainability impacts follow a standard Government policy framework, as outlined within the New Zealand Treasury's Cost/Benefit analysis

³⁰ *Authorisation Guidelines*, at [45].

³¹ *Authorisation Guidelines* at [81]

³² *NZME*, above n 29, at [69]-[77].

³³ *NZME*, above n 29, at [67].

³⁴ This approach is reflected in the Australian Competition Tribunal's decision *Qantas Airways Ltd* [2005] ACompT 9, (2005) ATPR 42-065 at [185]-[189] cited in *NZME* at [66]; also see *NZME* at [64]-[68].

³⁵ For example, see *The Commissioner of Competition v. Superior Propane Inc.*, 2002 Comp. Trib. 16.

³⁶ See, for example: *Ravensdown Corporation Limited and SouthFert Co-operative Limited* (Commerce Commission Decision 279, 21 June 1992), at [427-437]; *Air New Zealand Limited and Qantas Airways Limited* (Commerce Commission Decision 511, 23 October 2003) at [1378-1380]; *Nelson City Council and Tasman City Council* [2017] NZCC 6 at [107-112]; *Tennex Capital Limited and San-i-pak Limited* [2018] NZCC 25 at [116-120].

guidelines.³⁷ Depending on the materiality of any such impacts, independent expert advice may be used where necessary, and may be informative for assisting the NZCC to make decisions regarding the trade-offs inherent in such analysis. Historically, these benefits were unable to be quantified and did not materially affect the NZCC's final determination.³⁸ For example, in the *Nelson City Council* decision, the NZCC considered reduced greenhouse gas emissions that would result from lower waste volumes but did not consider that the savings would meaningfully contribute to the assessment.³⁹

36. Ultimately, how and whether the modified total welfare approach is applied and adjusted will depend on the facts and circumstances of each case.⁴⁰

Box 1. Case study of NZME Ltd v Commerce Commission [2018] NZCA 389 (NZME case)

The NZME case provides guidance on how the NZCC and the Courts assessed and gave weight to significant quantifiable net benefits through efficiency gains, against the unquantifiable net detrimental impacts on media plurality and quality.

In 2017, the NZCC declined to grant clearance or authorisation for a merger which would bring New Zealand's two largest newspaper and online news site networks – NZME and Fairfax – under common ownership.

The NZCC accepted that the efficiencies gained from the merger would produce significant public benefit, such as cost savings over a five year period, but found that the unquantifiable detriment of a loss of media plurality and news quality outweighed the quantifiable benefits. The NZCC was not satisfied the merger would produce a net benefit in the public interest and therefore declined to authorise the merger.

The NZCC sought evidence from expert media advisers who identified media plurality as an important contributor to democracy and Government accountability, and as an issue of public importance irrespective of the type of media coverage (reporting or opinion).

Both the High Court and the Court of Appeal affirmed the NZCC's ability to consider a range of public benefits and detriments beyond those which are economic or financial and, in particular, the NZCC's ability to both take into account the material detriment arising from a loss of media plurality and quality and place significant weight on this.

NZME serves as useful precedent for considering the broader social and economic implications of firms' conduct, and indicates that public welfare factors can be taken into account by the NZCC when considering authorisation applications.

³⁷ See: <https://treasury.govt.nz/information-and-services/state-sector-leadership/investment-management/planinvestment-choices/cost-benefit-analysis-including-public-sector-discount-rates>.

³⁸ See, for example: *Ravensdown Corporation Limited and SouthFert Co-operative Limited* (Commerce Commission Decision 279, 21 June 1992), at [427-437]; *Air New Zealand Limited and Qantas Airways Limited* (Commerce Commission Decision 511, 23 October 2003) at [1378-1380]; *Nelson City Council and Tasman City Council* [2017] NZCC 6 at [107-112]; *Tennex Capital Limited and San-i-pak Limited* [2018] NZCC 25 at [116-120].) For more information, see: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf)

³⁹ *Nelson City Council and Tasman City Council* [2017] NZCC 6.

⁴⁰ *Authorisation Guidelines*, at [83].

4.4. Assessment of the total and modified total welfare tests

37. The total welfare test, and availability of the modified total welfare test, in the authorisation context supports the welfare of consumers, as well as a broader range of market participants. In doing so, it allows flexibility when assessing the relevant benefits and detriments arising from the conduct, and their effect on a broad range of market participants. This can allow space for the consideration of broader social welfare factors, such as sustainability and the other considerations outlined above, when assessing the competitive effects of the conduct.

38. The NZCC considers that its authorisation regime is well set up to take into account society's changing preferences, without needing to change the objectives of New Zealand's competition law regime.

39. For example, the regime is flexible enough to deal with the perceived conflict between competition and sustainability goals and initiatives, which has been the subject of been significant commentary recently in jurisdictions such as the US. The New Zealand authorisation regime can accommodate sustainability initiatives where their benefits would outweigh any detriments from a loss of competition. This means the NZCC does not have to decline a merger or take action against an arrangement that has potential sustainability benefits because of its likely impact on competition.

40. Finally, given the wide, nuanced and considered nature of the analysis, a downside to applying the modified total welfare approach is that it can be time and resource intensive on the NZCC and those seeking authorisation. Particularly so in cases where benefits and detriments are unquantifiable. However, the NZCC is able to authorise conduct on an interim basis enabling conduct to proceed while it considers the substantive authorisation application, and will take a very streamlined approach to authorisations in emergency situations.⁴¹

5. Conclusion

41. In summary, New Zealand has a mixed welfare standard regime. Although primarily adopting a consumer welfare standard, there is flexibility through the authorisation process to go beyond this standard and consider broader wider economic and social impacts of conduct, through a total and modified total welfare approach.

42. The mixed regime reflects dynamism in New Zealand's competition regime, which is becoming increasingly important as consumers demand, and market participants look to achieve, broader welfare-based, long-term goals and social benefits. Our regime is able to respond to anticompetitive conduct in a principled and consistent manner, while having the flexibility to authorise conduct that may be anticompetitive and otherwise in breach of the Act, but nonetheless produces a net public benefit for the people of New Zealand.

⁴¹ The NZCC recognises that the time involved in attempting to quantify the nature and extent of benefits and detriments may be a barrier to parties filing applications in emergency situations. Where a situation is covered by the NZCC's *Business collaboration in response to an emergency* guidance, the NZCC may be able to consider an application for interim authorisation without detailed quantification. For further information on how businesses can collaborate in response to emergency situations, please see our *Business collaboration in response to an emergency* guidance at https://comcom.govt.nz/_data/assets/pdf_file/0019/215812/Business-collaboration-in-response-to-an-emergency-Guidance-March-2023.pdf