



23 August 2023

Commerce Commission New Zealand  
44 The Terrace  
PO Box 2351  
Wellington 6140  
New Zealand

Email: [competition@comcom.govt.nz](mailto:competition@comcom.govt.nz)

Tēnā koe

Attached are the comments that the New Zealand Food and Grocery Council wishes to present on the *Collaboration and Sustainability Guidelines: Draft for consultation*.

Ngā mihi nui

A handwritten signature in blue ink, appearing to be "Raewyn Bleakley".

Raewyn Bleakley  
**Chief Executive**



# **Collaboration and Sustainability Guidelines: Draft for consultation**

**Submission by the New Zealand Food and Grocery  
Council**

**23 August 2023**

---

## NEW ZEALAND FOOD AND GROCERY COUNCIL

1. The New Zealand Food and Grocery Council (**NZFGC**) welcomes the opportunity to comment on the *Collaboration and Sustainability Guidelines: Draft for consultation (the Guidelines)*
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

### COMMENTS

#### Competition and Sustainability

3. The role of the Guidelines at paragraph 7 states that “vertical arrangements between firms at different levels in the supply chain” are not covered. NZFGC considers the Guidelines will be deficient without their inclusion since such arrangements are fundamental to product stewardship schemes which are important collaborations to deliver sustainability. Global experience and best practice would suggest that single, monopolistic schemes deliver the best outcomes for sustainability to prevent a dilution of those outcomes by businesses ‘shopping around’. To complement and complete other parts of the Guidelines, vertical agreements need to be included.
4. NZFGC considers it important that businesses do not feel constrained to collaborate on achieving broad sustainability goals that require a whole-of-system approach ‘for fear of breaching competition law’. There is much to be gained from broad supply chain measures in relation to addressing climate change. For example, carbon footprinting is referenced in para 14 of the Guidelines. We envisage that a packaging company’s carbon footprint feeds into a manufacturer’s (brand’s) use and that manufacturer’s carbon footprint and the manufacturer needs accurate information to determine its true footprint and so on up the chain to retail. Some guidance on what is acceptable in these circumstances in terms of companies working together would be helpful rather than foreshadowing that some circumstances may raise competition issues.
5. We agree that collaboration on setting standards for industry and consumers is not contrary to competition (we have been doing that for multiple years without constraint). However, when competing on environmental outcomes as a point of difference by a business, we concur that sustainability characteristics of products must be substantiated.
6. It is also important to consider the competition issues in situations such as where a company places packaging on the market but is also one of the major recyclers. Such a company can dictate the supply chain because they are the supplier of a packaging product to specifications that suit them as the end recyclers. They can effectively lock out other packaging suppliers by determining specifications that favour their commercial interests in the guise of general recycling.
7. It is just as important to ensure that companies that benefit from product stewardship such as waste companies/processors are not involved in the governance on the producer responsibility organisations (**PROs**) because of similar commercial conflicts. Alternatively their involvement is not at a governance level but at an operational level, or, if at a governance level, their involvement constrained.

- 
8. We ask that the Commission consider clarifying use of the word 'industry' in the Guidelines which is often used as a general description of all players within a sector or supply chain. This is too general when used in the context of EPR schemes. It would be clearer to refer to the obliged or liable parties or producers who generally fund a scheme. Obligated parties will by nature be competitors in the market, however they would be working to a common sustainable outcome through a PRO. Global guidance is that the obliged parties should be responsible for the success of a scheme and delivering to objectives set by the regulator.
  9. A minor amendment might be made to remove the text referring to the statement of intent (paragraph 13 in the Guidelines) because it is not commonly used outside the Public Service.

#### **Collaboration and the Commerce Act – a snapshot**

10. It could be useful to link the 'snapshot' to what is to follow by adding at the end of paragraph 23 in the Guidelines "...interact with the Commerce Act in relation to climate change and sustainability".

#### **Collaborative sustainability initiatives unlikely to affect competition**

11. It is stated that collaboration between businesses is unlikely to breach competition between businesses "if the collaboration does not impact on the dimensions of price, quantity, quality, service, choice or innovation". Where a joint campaign is run to raise awareness if only two or a small number of businesses put their names to it, could that be interpreted as impacting the choice of products of those businesses? If no product is used but the branding is strong for the business, is that a surrogate for product promotion?

#### **Collaborative sustainability initiatives may impact competition**

12. In para 26.2 on supply chain restrictions, it is not clear how this particular example operates and an example or further clarification would be useful. Our experience is that standards are being introduced in relation to packaging materials used in what might be considered an anti-competitive manner. For example, retailers are stipulating the type of materials they will accept. We know that in Australia the 'Circular Economy for Flexible Packaging'<sup>1</sup> (CEFLEX) standard sets a high threshold for monopolymers. Where these are adopted, for example, by APCO in its PREP tool for ARL (and there are packaging manufacturers in the decision making room), this can disadvantage manufacturers who don't have the necessary technology. This might be considered market control by stealth.
13. Similarly, an illustrative example in relation to 'an agreement to share infrastructure with a view to reducing environmental footprint' in para 26.3 would help. For example, if a state-of-the-art piece of equipment that was more environmentally positive was a shared purchase and used by two competing businesses, this would result in its use over any further purchase of equipment that improved environmental outcomes further at least until the initial purchase had been written down. Would its initial purchase and use then be anti-competitive?
14. Product stewardship covered in para 26.4 of the Guidelines provides the example that recovery of costs associated with the scheme can impact competition. We appreciate that any agreement that will adjust the price at which products are sold (to take account of the cost of disposal or recycling at a later stage in the product's lifecycle) would be anti-competitive.

---

<sup>1</sup> CEFLEX is the collaborative initiative of a European consortium of companies representing the entire value chain of flexible packaging.

- 
15. The Government has recently released its decision making Cabinet Paper on the *Legislative framework for Extended Producer Responsibility*<sup>2</sup> (the **Cabinet Paper**). This would see the replacement of the product stewardship provisions in the current *Waste Minimisation Act 2008*. It would be helpful if the definitions (such as 'extended producer responsibility') and examples in the Guidelines aligned with those in the Cabinet Paper. Under the framework, the responsibility and costs of end-of-life product management in a supply chain would be the producers, importers, retailers and consumers. Examples are included in the Cabinet Paper of a proposed statutory monopoly (paragraphs 72-74 of the Cabinet Paper). NZFGC supports this approach as driving the best outcome for sustainability.
16. In our view, if a group of participants in a stewardship scheme agreed to fund the service of collection and/or disposal of a product's packaging (since the level of service would be negotiated amongst the parties) would that be a breach? Some illustrative examples would help in this area especially since 'container deposit schemes' are being designed by the food and grocery sector now. This eco-modulation is discussed in the Cabinet Paper (paragraphs 63-65) which recognises the importance of supporting such approaches in extended producer responsibility (**EPR**) schemes. The PRO must be able to set fees that will involve competitors (such as the major supermarket chains).

#### **Cartel conduct**

17. We generally support the comments in this section. One concern is the general understanding that levies are associated with a legal authority for their application. There are a particularly large number of levies applied in the food and agricultural area but also in a range of other government administered areas. The reference in the example to industry imposed levies might not ring true and that the alternate term 'fees' might be considered. We also refer again to the content of the Cabinet Paper and to its discussion of eco-modulation in the discussion of cartel behaviour to ensure alignment.

#### **Agreements that substantially lessen competition**

18. The example of application of a measure (removal of plastic handles) is a useful one for the New Zealand market. It raises a question about the extent of involvement of the Commerce Commission in similar developments and whether the Netherlands Authority for Consumers and Markets agreement with industry players was a form of authorisation to proceed.
19. In relation to labelling systems (paragraph 42.7 of the Guidelines) clarity is sought about discriminatory behaviour in the situation of paying to/membership of a system which operates a label. Could a business argue it is being discriminated against because there is a prerequisite membership fee?
20. It is of concern that collaboration in one year might not be considered harmful because of market share but the following year 'becomes' harmful due to changes in listing/delisting by supermarkets to change share. Its not clear how this would be treated over time. Would this fall into the 'duration of conduct' area?

---

<sup>2</sup> <https://environment.govt.nz/assets/publications/redacted-cab-paper-legislative-framework-for-EPR.pdf>

---

## **Authorisations**

21. In paragraph 48 of the Guidelines, reference is made that the Commission and other regulators have made several authorisation decisions drawing on consideration of sustainability issues. It would be useful to add “(see next page)” which is where three examples are made and/or to list the examples by title. It would also be helpful to provide guidance on when in the development process of schemes, the designers should involve the Commission. For example, we understand that the Australian Food and Grocery Council provided a briefing to the ACCC at an early stage of its National PRO Scheme.