ICN MERGER NOTIFICATION AND PROCEDURES TEMPLATE

Merger Working Group

New Zealand Commerce Commission

March 2021

IMPORTANT NOTE: This template is intended to provide background on ICN jurisdiction's merger notification and review procedures.

Reading the template is not a substitute for consulting the referenced statutes and regulations.

[Please include, where applicable, any references to relevant statutory provisions, regulations, or policies as well as references to publicly accessible sources, if any.][1]

1. Merger notification and review materials [references to publicly accessible sources (homepage address) and indication of the languages in which these materials are available]	
	Statutory Laws
A. Notification provisions	The New Zealand Commerce Commission operates a voluntary merger regime and parties are therefore not required to obtain the endorsement of, or notify, the Commission before completing mergers and acquisitions. Under section 66 of the Commerce Act 1986 (Commerce Act), an acquirer (known as the 'applicant') may seek "clearance" of an acquisition from the Commission. Under section 67 of the Commerce Act, an acquirer may also seek "authorisation" of a merger or acquisition. See the response to 1B, below, for further details about the test for receiving clearances and authorisations. Clearance applications are far more common than authorisation applications.

[1] Editor's note: all the comments in [square brackets] are intended to assist the agency when answering this template but will be removed once the completed template is made public.

B. Substantive merger review **Provisions**	Section 47 of the Commerce Act prohibits business acquisitions that would have, or would be likely to have, the effect of substantially lessening competition in a market. The Commission can grant clearance or authorisation of anticipated (but not completed) mergers and acquisitions that would be likely to breach section 47. To grant clearance under section 66 of the Commerce Act, the Commission must be satisfied that a merger or acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market. To grant an authorisation under section 67 of the Commerce Act, the Commission must be satisfied that a merger or acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted. If the Commission clears or authorises a merger or acquisition, the transaction is legally immune to challenge from third parties (and the Commission) so long as it is completed within 12 months. Where clearance or authoriation is not sought, the Commission can open an investigation for a breach, or to prevent a breach, of section 47 of the Commerce Act. Where appropriate, it can initiate legal proceedings in the High Court. In the case of transactions that have not yet closed, it can apply for an injunction to prevent completon. In the case of a completed transaction, it can seek divestments and/or penalties. Third parties may also challenge acquisitions under section 47 of the Commerce Act.
C. Implementing regulations	The Commerce Act 1986 and Commerce Act (Fees) Regulations 1990.[2]

[2] Text of Act and Regulations are publicly available at https://www.legislation.govt.nz/.

D. Notification forms or information requirements	The Commission has prescribed forms for notice for clearance under section 66 and authorisation under section 67 of the Commerce Act that are available on its website:[3] • Merger clearance application form: https://comcom.govt.nz/__data/assets/pdf_file/0031/90877/Notice-seeking-clearance-Application-October-2019.pdf • Merger authorisation application form: https://comcom.govt.nz/__data/assets/pdf_file/0023/90932/Section-67-Authorisation-application-for-mergers-December-2020.pdf.pdf

Interpretative Guidelines and Notices

E. Guidance on Merger Notification Process [e.g., information on calculation of thresholds, etc.]	In relation to mergers and acquisitions, the Commission has published the following guidelines that include both guidlines on process and substantive assessment: • Mergers and Acquisitions Guidelines (updated 2019) - https://comcom.govt.nz/__data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-Guidelines-July-2019.pdf; and • Authorisation Guidelines (updated 2020) - https://comcom.govt.nz/__data/assets/pdf_file/0012/91011/Authorisation-Guidelines-December-2020.pdf.
F. Guidance on Substantive Assessment in Merger Review [Please include reference separately, if applicable]	See 1E, above.
G. Has your agency published guidelines or directives on notification of mergers involving specific sectors (e.g., digital economy)? [If affirmative, please provide references and languages available]	No.

[3] https://comcom.govt.nz/business/merging-or-acquiring-a-company/applying-for-a-merger-clearance and https://comcom.govt.nz/business/merging-or-acquiring-a-company/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand

H. Other relevant notices, policy statements, interpretations, rules, or guidance on aspects of merger review or the agency's decision-making process	The Commission has published the following fact sheets providing more information on the application and assessment process: • Mergers and Acquisitions – Applying for a clearance: https://comcom.govt.nz/__data/assets/pdf_file/0028/90964/Mergers-and-acquisitions-Applying-for-a-clearance-Fact-sheet-August-2019.PDF • Mergers and Acquisitions – Merger assessment: https://comcom.govt.nz/__data/assets/pdf_file/0029/90965/Mergers-and-acquisitions-Merger-assessment-Fact-sheet-July-2018.pdf • Advisory note (guidance to businesses and advisors on the use of quantitative analysis to assess mergers.): https://comcom.govt.nz/__data/assets/pdf_file/0010/111520/How-to-use-quantitative-analysis-in-your-merger-analysis-Advisory-note-December-2018.pdf The Commission also publishes written reasons for its decisions on all merger clearance and authorisation decisions, together with court judgments (where cases have been challenged in court) and investigation reports for selected section 47 investigations: https://comcom.govt.nz/case-register.

2. Agency (or Agencies) responsible for merger enforcement.	
A. Name of the Agency which reviews mergers. If there is more than one agency, please describe the allocation of responsibilities.	The New Zealand Commerce Commission.
B. Contact details of the agency [address and telephone including the country code, email, website address and languages available on the website]	Wellington (Head Office) 44 The Terrace PO Box 2351 Wellington 6140

	New Zealand Tel: (04) 924 3600 Auckland Level 12, 55 Shortland Street PO Box 105-222 Auckland 1143 New Zealand Tel: (04) 924 3600
C. Is agency staff available for jurisdiction/filing guidance? [If yes, please provide contact points for questions on merger filing requirements and/or consultations]	Yes. The Commission strongly encourages potential applicants to initiate pre-notification discussions with us before submitting a clearance or authorisation application. The Commission will engage in pre-notification discussions if it is satisfied that a potential applicant has a good faith intention to proceed with a merger or acquisition. Applicants may request pre-notification discussions by contacting the Mergers Manager at registrar@comcom.govt.nz.

3. Covered transactions	
A. Thorough definition of potentially covered transactions [i.e., share acquisitions, asset acquisitions, mergers, de-mergers, consolidations, consortia, amalgamations, joint ventures or other forms of contractual relationships, such as partnerships and alliance agreements]	Section 47 of the Commerce Act applies to acquisitions of "assets of a business or shares". It does not apply to contractual arrangements other than for the acquisition of assets of a business or shares. Such contractual arrangements (eg a joint venture by contract) can be considered by the Commission under 27 of the Commerce Act (and a party to such an arrangement

	can apply for authorisation of that arrangement under section 58 of the Commerce Act[4]).
B. What is the geographic scope of transactions covered?	The Commission considers the impact of mergers acquisitions on markets in New Zealand only.
C. If change of control is a determining factor, how is control defined and interpreted in practice?	The concepts of 'control' relevant to merger control in New Zealand are 'interconnection' and 'association'. Entities are "interconnected" if they are in a parent/subsidiary relationship, subsidiaries of the same company or interconnected with other entities that are interconnected. Where merger parties become interconnected as a result of a transaction, the Commission's approach is to assess the transaction as a full merger. Entities are "associated" where one party is able to exert a "substantial degree of influence" over the activities of the other, meaning they must be able to exert real pressure to bear on their decision-making process. Whether parties will become "associated" as the result of a transaction, and the potential impact that this will have on competition, is a question of fact in each case. Among the factors the Commission typically takes into account in determining whether a person has a substantial degree of influence over another are: • the nature and extent of ownership links between the companies; • the presence of overlapping directorships; • the rights of one company to appoint directors of another;

[4] Or section 65AA of the Commerce Act, if the arrangements are proposed to be entered into during the COVID-19 epidemic period and contain a "cartel provision" (ie one that would be caught by the prohibition on price fixing, market allocation or output restriction).

	• the nature of other shareholder agreements and links between the companies concerned (including family or financial links); and • the nature and extend of the communications between the persons, and the apparent influence of one person on the key strategic decisions of the other. There is no minimum prescribed level at which a substantial degree of influence can arise.
D. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels? Are acquisitions of assets ever covered? If so, do the assets have to form a free-standing business or can the combination of the assets with the business of the acquirer be considered in order to have jurisdiction? Does the authority have jurisdiction over "bare" asset purchases, e.g. where the assets purchased do not relate to the acquirer's existing business?	Yes. See response to 3C, above. Section 47 covers acquisitions of assets. See response to 3A, above. The assets do not have to form a free-standing business. Bare asset purchases eg acquisitions of land are not covered by section 47, although they may be covered by the prohibition on anticompetitive contracts (section 27).

4. Thresholds for notification	
A. What are the general thresholds for notification? [If the thresholds are subject to adjustment, state on what basis and how frequently (e.g., for inflation, annually)]	There are no thresholds for notification. The Commission's Guidelines set out "safe harbours" which give guidance as to which mergers and acquisitions are unlikely to substantially lessen competition and contravene the Commerce Act, but are not a strict threshold and they do not bind the Commission in any way. The Guidelines state that the Commission is unlikely to consider that an acquisition substantially lessens competition where either of the following situations exist: • the three firm concentration ratio in the relevant market is below 70% and the market share of the combined entity is less than 40%; or

	• the three-firm concentration ratio in the relevant market is above 70% and the market share of the combined entity is less than 20%.
B. To which entities do the merger notification thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?	Not applicable.
C. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an "effects doctrine", please describe how this is applied in practice. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?"	The Commission has jurisdiction to consider transactions that impact competition in New Zealand. Section 47 of the Commerce Act extends to transactions that occur outside New Zealand by a person (whether or not the person is resident or carries on business in New Zealand) to the extent that the acquisition affects a market in New Zealand (see section 4(3) of the Commerce Act).
D. Can a single party trigger the notification threshold (e.g., one party's sales, assets, or market share)?	Not applicable.
E. Are any sectors excluded from notification requirements? If so, which sectors? To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?	Not applicable.
F. Are there special threshold calculations for specific sectors (e.g., banking, airlines, media, digital markets) or specific types of transactions (e.g., joint ventures, partnerships, financial investments)? If yes, for which sectors and types of transactions?	Not applicable.

G. Are there special rules or exceptions/exemptions regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign (foreign-to-foreign transactions)? [Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or the relevant assets]	Not applicable.
H. Does the agency have the authority to review transactions that fall below the thresholds or otherwise do not meet notification requirements? If so, what is the procedure to initiate a review? [Describe methodology for calculating exchange rates]	The Commission actively monitors transactions for those that may affect markets in New Zealand. The Commission may investigate any transaction that is not notified to it, even if it might be within the safe harbours.
I. Are current notification criteria catching relevant transactions related to digital markets?	Not applicable.

Calculation Guidance and related issues

J. If thresholds are based on any of the following values, please describe how they are identified and calculated to determine if notification is required: **i) the value of the transaction;** **ii) the relevant sales or turnover;** **iii) the relevant assets;** **iv) market shares;** **v) other (please describe).**	Not applicable.
K. Which entities are included in determining relevant investment funds for threshold purposes? If based on control, is the definition of control in these cases any different from the definition of control in general (question 3C)? If yes, how?	Not applicable.

L. In case an investment fund is part of a transaction, are its controllers required to present turnover information related to other funds under same manager (general partner) control? Are those other funds considered as part of the transaction for turnover purposes?	Not applicable.
M. Describe the methodology applied for currency conversion [e.g. which exchange rates are used].	Not applicable.

5. Pre-notification	
A. If applicable, please describe the pre-notification procedure and whether it can be mandatory or not [e.g., time limits, type of guidance given, etc.].	Pre-notification discussions are not mandatory, however we encourage potential applicants to initiate pre-notification discussions with us before submitting a clearance application. These discussions can take place in person, by video/audio conference or a combination of them. We encourage at least one of the applicant's senior employees to attend. We also expect an applicant to provide us with a substantially developed draft clearance application and supporting documents (eg, sale and purchase agreement, business plans, sales data and any expert evidence) at least a week before meeting with us, to allow us to review the draft clearance application prior to meeting. During the pre-notification stage, we are likely to also seek relevant documents (and other information) relating to the target of the acquisition. Given the commercial sensitivity of such documents, we are likely to request them from the target directly.
B. If applicable, what information or documents are the parties required to submit to the agency during pre-notification?	See response to 5A, above.

6. Notification requirements and timing of notification	
A. Is notification mandatory? [Please describe if notification is mandatory in pre-notification phase, post-merger or voluntary]	No.
B. If parties can make a voluntary merger filing when may they do so?	The Commission may only grant clearance or authorisation to anticipated acquisitions. It cannot grant clearance or authorisation for completed acquisitions, including those that are unconditional. Where an acquisition becomes unconditional during the Commission's assessment, it will discontinue the process and will likely open an enforcement investigation.
C. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive?)	A party can apply to the Commission for clearance or authorisation of a proposed acquisition at any time before an acquisition is completed or becomes unconditional. However, the Commission will not consider transactions unless it is satisfied that there is a good faith intention to proceed. Applications are typically not made until after the parties have signed a sale and purchase agreement (or similar deal documentation). However, in competitive bid scenarios, the Commission can receive applications before the outcome of a sales process is known.
D. When must notification be made? If there is a triggering event, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?	See response to 6C, above. There are no special rules for different types of transaction or public takeover bids.

E. If there is a notification deadline, can parties request an extension for the notification deadline? If yes, please describe the procedure and whether there is a maximum length of time for the extension.	Not applicable.

7. Simplified Procedures	
A. Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain information requirements, etc.).	Not applicable.
B. Describe the criteria adopted to consider a transaction under the simplified procedure.	Not applicable.

8. Information and documents to be submitted with a notification	

A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents, internal documents).	Applications for clearance and authorisation must be made on the prescribed form. Full details of the required documents are in the merger clearance application form (see response to 1D, above), however in summary the applicant must provide copies of:
	• the final or most recent versions of any documents bringing about the merger such as the sale and purchase agreement, contracts, ancillary agreements or offer documents;
	• the most recent annual report, audited financial statements and management accounts for the business unit(s) relevant to the proposed acquisition;
	• documents in the applicant's possession which:
	  • have been considered by senior management or the board of directors, and
	  • relate to the rationale for the proposed acquisition, the applicant's competitive analysis of the proposed acquisition and/or competitive conditions generally in relation to the market(s) relevant to the proposed acquisition.

B. Is there a distinction between tangible and intangible (e.g., customer portfolio, data on consumers, etc.) assets in the description of the transaction? [In respect to digital markets, state if the agency considers the amount of user data the companies have, and which will be passed on in the transaction]	See response to 3A, above.
C. Are documents proving the efficiencies of the transaction required? [If applicable, please provide the type of documents normally required]	Where a party applies for merger authorisation under section 67 of the Commerce Act, it must provide information and evidence to support the efficiencies claimed. Efficiencies can be taken into account as part of the substantive assessment of merger clearance applications, but in practice this is rare.
D. What information is required in case the target company is experiencing financial insolvency?	Attachment E to the Commission's Mergers and Acquisitions Guidelines covers "failing firm" arguments and sets out information that the Commission may find useful, including: • evidence that the firm has been liquidated or placed into administration; • financial statements of the firm or division in question (those that have been audited if available) and/or management accounts; • budgets and forecasts for the current year and future years; • volume / demand data (trend analysis); • board minutes and papers concerning viability; • internal strategic plans; • capital expenditure proposal documents; • documents regarding initiatives or plans to restructure or improve the firm (or to reduce costs); • asset valuation reports; • independent appraisals of the firm; • costs of exit or closure; • evidence of genuine efforts to sell either the firm as a going concern or its assets on closure;

	• any offers for the firm; and • identity of likely purchasers and the timeframe under which an alternative transaction would likely take place.
E. Is there a specific procedure for obtaining information from target companies in the case of hostile/ unsolicited bids?	No. In practice Commission will first attempt to obtain information from the target voluntarily, but if this is unsuccessful it may use its compulsory information gathering powers.
F. Are there any document legalization requirements (e.g., notarization or apostille)? What documents must be legalized?	A person that applies for merger clearance or authorisation is required to provide a signed declaration that information supplied with an application is accurate. In the case of corporate entities, the application can be signed by a director or other officer authorized to sign on behalf of the company.
G. What are the agency's rules and practice regarding exemptions from information requirements (e.g., information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign (foreign-to-foreign transaction)?	Not applicable. There are no specific rules for foreign-to-foreign transactions.
H. Can the agency require third parties to submit information during the review process? Can third parties voluntarily submit information or otherwise contact the agency to intervene?	During the Commission's investigation of an application for clearance or authorisation, it gathers information from the merging parties and third parties. It usually seeks information on a voluntary basis, although it can use its compulsory information gathering powers to require parties (including third parties) to provide information and documents, and to compel persons to attend the Commission to be interviewed under oath.

	The Commission publicly invites submissions from the merging parties and interested parties as part of its processes of investigiing mergers and acquisitions. Public versions of written submissions are published on the Commission's website. In addition, third parties can contact us and raise concerns about an acquisition that is not the subject of a clearance or authorisation application. This may result in us conacting the relevant merger parties, and potentially opening an investigation under section 47 of the Commerce Act.
I. Are parties allowed to submit information beyond what is required in the initial filing voluntarily (e.g., to help narrow or resolve potential competitive concerns)?	Yes.
J. Are there different forms for different types of transactions or sectors?	No.
K. With respect to investment funds: **i) Is it requested that an investment fund taking part in a transaction provide a statement that its controllers do not manage any other investment funds in the same relevant market?** **ii) Should an investment fund be controlled by an entity that is also responsible for other funds in the same relevant market, are such funds considered part of the transaction? Is it requested that the controlling entity provide market information (e.g., market share) related to the other funds it manages and which are in the same relevant market?**	There have no specific requirements relating to investment funds. In general, where a firm is controlled by another entity that operates in the same or related markets, the Commission would expect this to be set out in any application for clearance or authorisation, and for the information provided to include data and documents for the wider group of firms.

iii) Should there be no classic concentration, is there any sort of exemption regarding presenting certain information requested in the form?	

9. Translation	
A. In what language(s) can the notification forms be submitted?	An application can be submitted in either of New Zealand's official written languages, English or Te reo Māori. However in practice applications are submitted in English.
B. Describe any requirements to submit translations of documents: **i) with the initial notification; and** **ii) later in response to requests for information.** **In addition:** **iii) what are the categories or types of documents for which translation is required;** **iv) what are the requirements for certification of the translation;** **v) which language(s) is/are accepted; and** **vi) are summaries or excerpts accepted in lieu of complete translations and in which languages are summaries accepted?**	Not applicable.

10. Review Periods	
A. Describe any applicable review periods following notification.	Under the Commerce Act, there is an initial statutory timeframe from point of registration for a decision on an application for clearance or authorisation. For section 66 merger clearance applications, this timeframe is 40 working days. For section 67 merger authorisation applications, this timeframe is 60 working days.

	The Commission must make a decision within these statutory timeframes, unless the Commission and the applicant agree to an extension. There is no limit on the number or length of extensions that can be agreed between the Commission and an applicant.
B. Are there different rules for public tenders (e.g., open market stock purchases or hostile bids)?	No.
C. What are the procedures for an extension of the review periods, if any? Do requests for additional information suspend or re-start the review period?	Extensions to the statutory timeframe require agreement between the Commission and the applicant. There is no formal procedure for negotiating an extension, and there are no 'automatic' suspensions or extensions to the statutory time period eg if the Commission issues an information request. Reasons why the Commission may extend the statutory timeframe include to: • consider and test divestments that have been offered; • test new information provided by the merging parties or a third party; • test issues through the publication of a Statement of Issues or Statement of Unresolved Issues; • hold a public conference; and/or • allow for parties to respond to information requests. The Commission requesting additional information does not automatically suspend or re-start the timeframe/statutory clock. For the purpose of determining its output measures, the Commission may stop counting the administrative days taken to reach a decision in specific situations that cause delays to our investigation. This is known as 'stopping the clock'.

D. Is there a statutory or other maximum duration for extensions?	No. As noted in response to 10A above, there is no limit on the number or length of extensions that can be agreed between the Commission and an applicant.
E. Does the agency have the authority to suspend review periods? Does suspending a review period require the parties' consent?	No. As noted in response to 10C, above, an extension of the statutory time period can only be by agreement with the applicant. As noted in response to 10C, above, the Commission may suspend its administrative time period in certain situations. These may arise out of, for example: • the review of the merger by another jurisdiction(s); • time spent assessing divestment undertakings; or • the applicant, target or an interested party requesting further time to respond to information requests. Stopping the administrative clock does not suspend the statutory time period.
F. What are the time periods for accelerated review of non-problematic transactions, if any?	Not applicable.
G. If remedies are offered, do they impact the timing of the review?	Remedies can impact the timing of review. The length of delay (if any) will depend on the complexity of the proposed remedy and how early in the process it is submitted to the Commission. As noted in response to 10C above, one reason why the Commission may seek an extension of time from an applicant is because it needs to consider and test divestments. In order to minimise the impact on timing, the Commission encourages applicants to offer divestment undertakings as early as possible if applicants consider that a divestment undertaking may be required to prevent or mitigate competition concerns arising from a transaction.

11. Waiting periods / suspension obligations	
A. Describe any waiting periods/suspension obligations following notification (e.g., full suspension from implementation, restrictions on adopting specific measures) during any initial review period and/or further review period.	As noted in the response to 6B, above, the Commission may only grant clearance or authorisation to anticipated acquisitions. It cannot grant clearance or authorisation for completed acquisitions, including those that are unconditional. Where the parties complete an acquisition during the Commission's assessment, the Commission will discontinue the process and may open an investigation.
B. Can parties request a derogation from waiting periods/suspension obligations? If so, under what circumstances?	No.
C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the agency's jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent can the parties implement the transaction outside the agency's jurisdiction prior to clearance (e.g., through derogation from suspension, hold separate arrangements)?	No. In the case of a global acquisition, merger parties could theoretically complete a transaction in other jurisdictions prior to the Commission making its decision on an application for clearance or authorisation. However, if the global acquisition involves any of the assets or shares for which clearance has been sought, the Commission would no longer be able to grant clearance or autorisation. Further, to the extent that the global closing had an impact on a New Zealand market, the Commission could take action under section 47.
D. Are parties allowed to close the transaction if no decision is issued within the statutory period?	If the Commission does not reach a decision within the statutory period then the Commission is deemed to decline to give clearance or authorisation. In practice, however, this would be very rare and the Commission and the applicant would typically agree an extension to the statutory time period before this time. If the parties proceeded to close a transaction in these circumstances, then they would risk the Commission or a third party taking action against them under section 47 of the

	Commerce Act. The Commission could could take action to prevent completion of an acquisition or unwind an acquisition that has occured.
E. Describe any provisions or procedures available to the enforcement agency, the parties and/or third parties to extend the waiting period/suspension obligation.	See response to 10A, above.
F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.	Not applicable.
G. Describe any provisions or procedures allowing the parties to close the transaction at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).	An applicant that applies for clearance or authorisation may at any time withdraw an application for clearance by notice in writing to the Commission. However, the Commission may still continue to investigate under section 47 of the Commerce Act.

12. Responsibility for notification / representation	
A. Who is responsible for notifying – the acquiring company(ies), acquired company(ies), or both? Does each party have to make its own filing?	The acquirer is responsible for submitting the application for clearance or authorisation.
B. Do different rules apply to public tenders (e.g., open market stock purchases or hostile bids)?	No.
C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?	No. Applications can be filed by companies themselves or their external legal representatives. In practice, virtually all filings are made by legal representatives.

D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized, or apostilled?	Not applicable.

13. Filing fees	
A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)? [Please provide the amount in local currency and in USD as of December 31st, 2020]	Applications for section 66 clearance and section 67 authorisation applications have to be accompanied by payment of the prescribed fee. The clearance fee is currently NZD$3,860 (GST inclusive). The authorisation fee is currently NZD$36,800 (GST inclusive). The fees are set in the Commerce Act (Fees) Regulations 1990. The fee is a flat amount per application. It is not tiered based on value of transaction or any other metric.
B. Who is responsible for payment?	The acquirer (i.e., the applicant).
C. When is payment required?	Payment of the prescribed fee is required to be paid at the time that clearance or authorisation is sought. The Commission does not register an applicaiton until payment of the fee has been received.
D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?	Payment can be made by cheque or electronic payment into the Commission's bank account. The applicant's company name must be used as the reference when depositing funds electronically. Applicants will often send proof of payment of the funds with an application.

14. Process for substantive analysis and decisions [Please give a brief summary and provide information on relevant Guidance papers]	
A. What are the key procedural stages in the substantive assessment (e.g., screening mergers, consulting third parties)?	The stages of the Commission's investigation processes are set out in its Mergers and Acquisition Guidelines and Authorisation Guidelines. See response to 1E, above, for links to these guidelines. By way of illustration, for a section 66 clearance application, the key stages in the process are typically: • pre-notification • registration of application • identification of preliminary issues • initial investigation, information gathering/analysis (through interviews and requests for information, and receipt of submissions on issues) • decision as to whether to give clearance or issue a Statement of Issues. If a Statement of Issues is issued: • testing of issues and further investigation/analysis • decision as to whether to give clearance or issue a Statement of Unresolved Issues If a Statement of Unresolved Issues is issued: • testing of issues and further investigation/analysis • decision on whether to give clearance or decline to give clearance In all cases once a final decision has been reached: • decision on application • announcement of decision • publication of written reasons for decision. The Commission may invite submissions and seek information from third parties on multiple occasions during the above processes.
B. What merger test does the agency apply (e.g., dominance test or substantial lessening of competition test)?	Substantial lessening of competition.

C. What theories of harm does the agency consider in practice?	The most common theories of harm considered by the Commission are horizontal unilateral effects, vertical effects, conglomerate effects and coordinated effects.
D. What are the key stages in the substantive analysis? Does this differ depending on the type of transaction (e.g., joint venture)?	See response to 14ª, above and links to guidelines in the response to 1E, above.
E. Are non-competition issues ever considered (in practice or by law) by the agency? If so, can they override or displace a finding based on competition issues?	When the Commission considers section 67 authorisation applications, it must consider whether the transaction gives rise to such a public benefit that it should be authorized. The types of benefits that the Commission is able to consider is not limited eg it has in the past considered media plurality to be a public benefit.
F. What are the possible outcomes of the review (e.g., unconditional/conditional clearance, prohibition, etc.)?	The possible outcomes for a section 66 clearance application are cleared unconditionally, cleared subject to divestment remedy, declined, application withdrawn. The possible outcomes for a section 67 authorisation application are authorised unconditionally, authorized subject to a divestment remedy, declined, application withdrawn.
G. What types of remedies does the agency accept? Is there a preference on any particular type of remedies? How is the process initiated and conducted?	Under the Commerce Act, the Commission is only able to accept divestment remedies for merger clearance and authorisation applications. It cannot accept behavioural remedies**.**

15. Confidentiality	
A. To what extent, if any, does the agency make public the fact that a premerger notification filing was made or the contents of the notification? If applicable, when is this disclosure made?	The Commission treats all pre-notification discussions as fact confidential until an application is registered. Once an application is registered, in most cases the fact of these discussions is no longer considered confidential.
B. Do notifying parties have access to the agency's file? If so, under what circumstances can the right of access be exercised?	Notifying parties do not have access to the agency's file. The above said, all information received by the Commission from the merger parties or third parties is subject to the principle of availability under the Official Information Act 1982 (OIA). Anyone, including the merging parties and third parties, may request information relating to the merger under the OIA. However, the OIA does not require disclosure of information that would prejudice investigations. The OIA also offers protection to confidential information through the exceptions to the disclosure obligations contained in it. These include when the public interest desirability in making the information available is outweighed by good reasons to withhold information from disclosure such as: • it would unreasonably prejudice the commercial position of the supplier or subject of the information; or • the information is subject to an obligation of confidence and making it available would either prejudice the supply of similar information, or information from the same source where it is in the public interest that such information continue to be supplied, or be likely otherwise to damage the public interest.
C. Can third parties or other government agencies obtain access to notification materials and any other information provided by the parties (including confidential and non-confidential information)? If so, under what circumstances?	Yes, they can access public versions of the clearance or authorisation application form and submissions made by the parties. The Commission has a policy of proactively publishing on its website public versions of clearance and authorisation applications, together with public versions of written submissions (from the merger parties and third parties) that it receives on a clearance or authorisation application.

	See 15B above in relation to confidential information.
D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.	The Commission will consider requests for fact confidentiality on a case-by-case basis. The Commissionis only likely to grant it for a limited period of time and in exceptional circumstances. Fact confidentiality is likely to severely hamper crucial parts of the Commission's assessment of an application for clearance, as investigators cannot gather information from market participants and test information provided in an application for clearance. With regard to confidential information given to the Commission as part of the application for clearance, once an application for clearance has been registered and confidential information has been identified and confirmed, the public version (i.e. a version that omits the merger parties' commercially sensitive and confidential information) is published on the Commission's website.
E. Can the agency deny a party's claim that certain information contained in notification materials is confidential? Are there procedures to challenge a decision that information is not confidential? If so, please describe.	The Commission will consider claims of confidentiality by reference to the principles of the OIA. See response to 15B, above. Where the Commission considers that certain information in a clearance or authorisation application is not confidential and should be made public, it will advise the applicant. If the applicant does not agree to the information being published, it may amend its application to remove this information. The Commission will typically not register an application until an agreed public version of the application has been received.

F. Does the agency have procedures to provide public and non-public versions of agency orders, decisions, and court filings? If so, what steps are taken to prevent or limit public disclosure of information designated as confidential that is contained in these documents?	Yes. The Commission publishes non-confidential versions of its decisions on merger clearances and authorisations. It also publishes non-confidential versions of documents during the course of its review, such as a Statemements of Preliminary Issues, Statements of Issues, Statements of Unresolved Issues and draft determinations (in the case of merger authorisations). Applicants are required to provide both confidential and public versions of all applications and submissions, third parties must provide confidential and public versions of submissions. This enables the Commission to readily identify information that is confidential. The Commisiosn has internal processes whereby documents are independently checked for confidentiality before publication to make sure that no confidential information is disclosed. Confidential information is marked up in documents (inside [ ] and highlighted) and a software macro is used to remove this information from documents. The Commission does not routinely publish public versions of its court filings, although it may do so in an appropriate case, subject to any order of the Court.

16. Transparency	
A. Does the agency publish an annual report with information about mergers? Please provide the web address if available.	The Commission publishes an annual report (for the entire organisation) which is available at: http://www.comcom.govt.nz/accountability/.
B. Does the agency publish press releases related to merger policy or investigations/reviews? If so, how can these be accessed (if available online, please provide a link)? How often are they published (e.g., for each decision)?	The Commission issues a media release upon registering an application and publishing any documents that discuss the substantive issues that the Commission is considering eg Statements of Preliminary Issues, Statements of Issues and Statements of Unresolved Issues. It also publishes a media release when it makes a final decision.

	In the case of authorisation applications, the Commission will publish media releases when it issues its draft determination and in advance of any public conference that it holds. The Commission's media releases are published on its website, but people can also subscribe to receiving them by e-mail.
C. Does the agency publish decisions on why it challenged, blocked, or cleared a transaction? If available online, provide a link. If not available online, describe how one can obtain a copy of decisions.	The Commission prepares written reasons for decisions on its merger clearance and authorisation decisions. The Commission's policy is to publish public versions of its decisions on the case register on its website. The Commission also publishes reports on some of its merger enforcement investigations under section 47 of the Commerce Act.
E. Does the agency publish statistics or the number of annual notifications received, clearances, prohibitions, etc.? [if applicable, please provide a link for these figures]	Yes, in the Commission's annual report. The Commission also publishes separately on a six monthly basis more detailed statistics on its merger work – this is available on its website at https://comcom.govt.nz/about-us/strategic-planning-and-accountability-reporting/mergers-and-trade-practices-statistics.

17. Cooperation	
A. Is the agency able to exchange information or documents with international counterparts?	Yes, although confidential information and documents can only be exchanged subject to the receipt of waivers from the parties to whom the information relates.
B. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?	Yes. For acquisitions under review in New Zealand and Australia, the Commission has a specific Cooperation Protocol for Mergers Review with the Australian Competition and Consumer Commission (ACCC). The Commission also has agreements with the Canadian Competition Bureau (CCB) and the Chinese Taipei Fair Trade Commission. In 2020, the

	Commission also signed a Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities with the ACCC, CCB, the United Kingdom Competition and Markets Authority, the United States Department of Justice and the United States Federal Trade Commission.[5]
C. Does the agency need consent from the parties who submitted confidential information to share such information with foreign competition authorities? If the agency has a model waiver, please provide a link to it here, or state whether the agency accepts the ICN's model waiver of confidentiality in merger investigations form.	Yes. See response to 17A, above. A waiver template is attached to the Commission's application form – see for example: https://comcom.govt.nz/__data/assets/pdf_file/0031/90877/Notice-seeking-clearance-Application-October-2019.pdf.
D. Is the agency able to exchange information or documents with other domestic regulators?	The Commission is able to share information with other domestic regulators where disclosure is permitted under the OIA, or where the provider of the information has given a waiver allowing the Commission to share information with this other agency.

18.Sanctions/penalties	
A. What are the sanctions/penalties for: **i) failure to file a notification;** **ii) incorrect/misleading information in a notification;** **iii) failure to comply with information requests;** **iv) failure to observe a waiting period/suspension obligation;** **v) breach of interim measures;**	As noted in response to 1A above, The Commission has a voluntary regime, so there is specific sanction or penalty for failure to file an application. However, merger parties are liable to pay a penalty where a court determines that a transaction breaches section 47 of the Commerce Act. The penalty is currently NZD 500,000 for individuals and NZD 5 million for companies.[6]

[5] https://comcom.govt.nz/__data/assets/pdf_file/0014/224114/Multilateral-Mutual-Assistance-and-Cooperation-Framework-for-Competition-Authorities-Memorandum-of-Understanding-2020.pdf.

[6] In June 2020 the New Zealand Government announced proposals to increase these penalties for corporations to NZD 10 million: https://www.mbie.govt.nz/dmsdocument/11263-review-of-section-36-of-the-commerce-act-and-other-matters-policy-decisions-proactiverelease-pdf.

vi) failure to observe or delay in implementation of remedies; **vii) implementation of transaction despite the prohibition from the agency?**	It is an offence under section 103 of the Commerce Act for any person to attempt to deceive or knowingly mislead the Commission in relation to any matter before it. The Commission can take court action and seek penalties against parties for breaching section 103. The maximum penalty for a breach is NZD 100,000 for an individual and NZD 300,000 for a company. There are no sanctions or penalties for failure to respond to voluntary information requests, but where the Commission uses its compulsory information gathering powers under section 98 of the Commerce Act, the Commission can take action against parties for failure to comply, without reasonable excluse, with a Notice. The maximum penalty is NZD 100,000 for an individual and NZD 300,000 for a company. There is no specific penalty for failure to wait for a Commission's decision on clearance or authorisation decision before closing an acquisition, however the merger parties will not gain the benefit of legal immunity and will be exposed to a potential action under section 47. The Commission does not use interim measures. If an applicant breaches any of the terms or conditions of its undertaking to the Commission on remedies, this may void the clearance given by the Commission and leave the applicant exposed to a potential action under section 47. There is no specific penalty for implementing an acquisition where the Commission has declined to give clearance or authorisation. However, the Commission can apply to the court for an injunction preventing the acquisition from closing.
B. Which party/ies (including natural persons) are potentially liable for each of A(i)-(vii)?	Action can be taken under the Commerce Act against companies and individuals.

C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.	The Commission must apply to the High Court in order to have penalties imposed. The process can take several years if the matter is appealed to the Court of Appeal and Supreme Court.
D. Are there any recent or significant fining decisions?	A recent significant fine decision issued by the courts was against First Gas for breaches of section 47 and 27 (prohibition on anticompetitive agreements) of the Commerce Act: https://comcom.govt.nz/news-and-media/media-releases/2019/first-gas-to-pay-$3.4-million-for-anti-competitive-conduct.

19. Independence	
A. Is there possibility for any ministry or a cabinet of ministries to abrogate, challenge or change merger decisions issued by the agency or by a court? If yes, to which merger decisions does this apply (e.g., any decision, prohibitions, clearances, remedies)?	The Commerce Commission is an independent crown entity. The executive, including ministries, cannot challenge or change the decisions of the Commission, or the courts. Legislative amendment to retrospectively change a decision is theoretically possible, but extremely unlikely.
B. What are the grounds for such ministerial intervention?	Not applicable.
C. Please provide any description or guidance regarding the ministerial intervention process and procedures [If applicable]	Not applicable.

20. Administrative and judicial processes/review

A. Describe the timetable for judicial and administrative review related to merger transactions.	Where the Commission declines to give clearance or authorisation, the parties to a merger can appeal that decision to the High Court. Such appeals proceed by way of rehearing. An appeal must be made within 20 working days after the date of the Commission's decision or within a timeframe that the court allows. The Commerce Act does not give the Commission authority to give an extension beyond the 20 working day timeframe. Applicants must apply to the court for such an extension. However, the Commission will not oppose an application made to the court if it is made within 20 working days of the release of the Commission's written reasons. Judicial review proceedings may also be brought in relation to the Commission's exercise of its statutory power to make a determination. These can be brought by both parties to a merger and third parties. All judicial reviews are heard in the High Court.
B. Describe the procedures for protecting confidential information used in judicial proceedings or in an appeal/review of an agency decision.	High Court rules and processes apply to protecting confidential information where a matter is appealed or a judicial review if filed.
C. Are there any limitations on the time during which an appeal may be filed?	See response to 20A, above.

21. Additional filings	
A. Are any additional filings/clearances required for some types of transactions (e.g., sectoral or securities regulators or national security or foreign investment review)?	No additional filings or clearances are required in relation to the competition law aspects of an acquisition, however additional filings may be required for certain types of transaction, for example: • Overseas Investment Office for overseas people investing in significant business assets in New Zealand;

	• Takeovers Panel for recommendation and enforcement of the Takeovers Code; and • Reserve Bank of New Zealand for significant acquisitions by locally incorporated banks and insurance companies, and for prudential requirements to become licensed as a financial institution.

22. Closing Deadlines	
A. When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized? If yes, can the parties obtain an extension of the deadline to close?	A merger clearance or authorisation provides applicants with protection from proceedings initiated under section 47 of the Commerce Act by the Commission and/or from another party. If the merger has not been completed, a clearance or authorisation expires: • 12 months after the date on which it was given; or, • in the event of an appeal being made against the Commission's determination, 12 months after the date on which the determination is confirmed by the court. There is no ability for the parties to apply to the Commission to extend the period within which clearance or authorisation expires. To benefit from the legal immunity conferred by clearance or authorisation, an applicant would need to reapply to the Commission with a new clearance or authorisation application.

22. Post Merger review of transactions	
A. Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?	The Commission cannot re-open its consideration of a transaction that it has cleared or authorised, although it can consider variations to undertakings accepted as part of giving clearance (section 69AC of the Commerce Act). Where the Commission has given clearance subject to a divestment undertaking, there is a period following the decision where it montitors the completion of the divestment. If the assets or shares are not divested according to the terms of the undertaking, the

	clearance granted becomes void and the Commission may choose to prosecute the applicant under section 47 of the Commerce Act.
B. Does the agency publish studies regarding ex-post analysis of reportable transactions which have been cleared by the agency? Are these studies publicly available? How does the agency obtain data for carrying out these studies?	No.