Submission Form

The Ministry of Business, Innovation and Employment invites feedback on its Discussion Paper *'Promoting competition in New Zealand – A targeted review of the Commerce Act 1986'*

We welcome your feedback

This is the Submission Form for responding to the Discussion Paper released by the Competition Policy team at Ministry of Business, Innovation and Employment (MBIE) 'Promoting competition in New Zealand – A targeted review of the Commerce Act'. The Ministry of Business, Innovation and Employment welcomes your comments by **5pm 7 February 2025**

Please make your submission as follows:

1. Please see the full Discussion Paper to help you have your say. There is also a summary version.
2. Please read the privacy statement and fill out your details under the 'Submission information' section.
3. Please fill out your responses to the questions in the tables provided. Your submission may respond to any or all of the questions. Questions which we require you to answer are indicated with an asterisk (*). Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples. If you would like to make other comments not covered by the questions, please provide these in the 'General Comments' section at the end of the form.
4. If your submission contains any confidential information, please:
    a. State this in the cover page and/or in the e-mail accompanying your submission.
    b. Indicate this on the front of your submission (eg, the first page header may state "In Confidence").
    c. Clearly mark all confidential information within the text of your submission.
    d. Set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (OIA) that you believe apply.
    e. Provide an alternative version of your submission with confidential information removed in both Word and as a PDF, suitable for publication by MBIE.
5. Before sending your submission please delete this first page of instructions.
6. Submit your submission by:
    a. Emailing this form as both a Microsoft Word and PDF document to the Competition Policy team at competition.policy@mbie.govt.nz; or
    b. Posting your submission to:
    Competition Policy team
    Ministry of Business, Innovation and Employment
    15 Stout Street
    PO Box 1473
    Wellington 6140

Please direct any questions that you have in relation to the submissions process to competition.policy@mbie.govt.nz.

Release of Information

Please note that submissions are subject to the OIA and the Privacy Act 2020. In line with this, MBIE intends to upload copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission unless you clearly specify otherwise in your submission. MBIE will take your views into account when responding to requests under the OIA and publishing submissions. Any decision to withhold information requested under the OIA can be reviewed by the Ombudsman.

Privacy statement

Your submission will become official information, which means it may be requested under the Official Information Act 1982 (OIA). The OIA specifies that information is to be made available upon request unless there are sufficient grounds for withholding it.

Use and release of information

To support transparency in our decision-making, MBIE proactively releases a wide range of information. MBIE will upload copies of all submissions to its website at www.mbie.govt.nz. Your name, and/or that of your organisation, will be published with your submission on the MBIE website unless you clearly specify you would like your submission to be published anonymously. Please tick the box provided if you would like your submission to be published anonymously i.e., without your name attached to it.

If you consider that we should not publish any part of your submission, please indicate which part should not be published, explain why you consider we should not publish that part, and provide a version of your submission that we can publish (if we agree not to publish your full submission). If you indicate that part of your submission should not be published, we will discuss with you before deciding whether to not publish that part of your submission.

We encourage you not to provide personally identifiable or sensitive information about yourself or others except if you feel it is required for the purposes of this consultation.

Personal information

All information you provide will be visible to the MBIE officials who are analysing the submissions and/or working on related policy matters, in line with the Privacy Act 2020. The Privacy Act 2020 includes principles that guide how personal information can be collected, used, stored and disclosed by agencies in New Zealand. Please refrain from including personal information about other people in your submission.

Contacting you about your submission

MBIE officials may use the information you provide to contact you regarding your submission. By making a submission, MBIE will consider you to have consented to being contacted, unless you clearly specify otherwise in your submission.

Viewing or correcting your information

We may share this information with other government agencies, in line with the Privacy Act 2020 or as otherwise required or permitted by law. This information will be securely held by MBIE. Generally, MBIE keeps public submission information for ten years. After that, it will be destroyed in line with MBIE's records retention and disposal policy. You have the right to ask for a copy of any personal information you provided in this submission, and to ask for it to be corrected if you think it is wrong. If you'd like to ask for a copy of your information, or to have it corrected, please contact MBIE by emailing competition.policy@mbie.govt.nz.

Submission information

*(Please note we require responses to all questions marked with an *)*

Release of information

Please let us know if you would like any part of your submission to be kept confidential.

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because [Insert text]

[To check the boxes above: Double click on box, then select 'checked']

Personal details and privacy	
1.	I have read and understand the Privacy Statement above. Please tick Yes if you wish to continue* [To check the boxes below Double click on box, then select 'checked'] ☒ Yes ☐ No
2.	What is your name?* Joseph V. Coniglio
3.	Do you consent to your name being published with your submission?* ☒ Yes ☐ No
4.	What is your email address? Please note this will not be published with your submission.* Privacy of natural persons
5.	What is your contact number? Please note this will not be published with your submission.* Privacy of natural persons
6.	Are you submitting as an individual or on behalf of an organisation?* ☐ Individual (skip to 8) ☒ Organisation
7.	If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation. ☒ Yes, I am authorised to make a submission on behalf of my organisation
8.	If you are submitting on behalf of an organisation, what is your organisation's name? Please note this will be published with your submission. Information Technology and Innovation Foundation

9.	If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.
	☐ Law Firm ☐ Consumer organization ☐ Consultancy ☒ Think-Tank ☐ Advocacy group ☐ Business/Private Firm ☐ Contractor/SME ☐ Registered charity ☐ Non-governmental organisation ☐ Academic Institution ☐ Central government ☐ Iwi, hapū or Māori organisation ☐ Academic/Research ☐ Other. Please describe:

Responses to questions

The Competition Policy team welcomes your feedback on as many sections as you wish to respond to, please note you do not need to answer every question.

Mergers	
Issue 1 – the substantial lessening of competition test	
1.	What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.
	ITIF considers the existing "substantial lessening of competition" test to be effective in preventing anticompetitive mergers and acquisitions in New Zealand. This test, which is generally aligned with the prevailing legal standards in the United States, is as the Discussion Paper correctly notes designed to prohibit mergers that are likely to result in the creation of, or increase in, market power that may fall short of dominance but nonetheless harm consumers through higher prices, reduced output, or diminished innovation. Moreover, the Discussion Paper is correct that even if in limited cases "two-to-one" mergers may not be condemned under this test, that fact in and of itself is not evidence of the test's ineffectiveness. Indeed, while most mergers to monopoly will likely raise at least some competitive concerns, they may ultimately admit of compelling procompetitive justifications such as increasing the incentives and abilities to innovate, which is especially important in dynamic and R&D intensive markets driven by Schumpeterian or "leapfrog" competition by large firms.
2.	What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand? Please provide examples or reasons.
	As the Discussion Paper rightly identifies, "most mergers support the effective operation of markets through allowing the parties to achieve increased efficiencies, such as reducing transaction costs, sharing risk and capabilities, and obtaining scale economies." What's more, blocking a merger may not only have the effect of depriving the New Zealand economy of these procompetitive benefits, but also have second-order chilling effects on potential similar transactions in the future. These concerns about stifling procompetitive mergers are particularly acute in dynamic industries, where mergers and acquisitions play a key role in incentivizing innovation by empowering startups and small firms to recoup the costs of their investments in new products through a merger or acquisition.
3.	Has the 'substantial lessening of competition' test been effective in practice in preventing mergers that harm competition? Please provide examples of where it has, or has not, been effective.
	The Discussion Paper notes findings which suggest that merging parties often overstate the likelihood of entry, expansion, and countervailing buyer power to rebut a *prima facie* case that the merger will result in anticompetitive harm. It also considers whether dynamic markets may require a special analytical framework. With respect to the former concerns about over-crediting the merging parties'

	rebuttal case, these evidentiary issues are better first addressed not by changes to the Commerce Act, but through new guidelines such as those issued in 2022 by the Commerce Commission, which clarified the evidentiary burdens the merging parties should satisfy and may very well address MBIE's concerns over time. Moreover, regarding the analysis of transactions in dynamic markets, although it is true that complex issues often arise which should also be addressed in agency guidance—such as, for example, applying the hypothetical monopolist test in a platform market—the Discussion Paper is right to conclude that difficulties assessing competitive effects in these markets "do not of themselves indicate a failing in the competition test." Rather, they reflect the increased challenges that the Commerce Commission will regularly face in demonstrating a likelihood of anticompetitive effects in dynamic markets that are often characterized by innovation and potential competition, and thus unsuited to structural presumptions of harm, as well as powerful Schumpeterian forces of creative destruction that ultimately discipline the power of even dominant incumbent firms.
4.	Should the 'substantial lessening of competition' test be amended or clarified, including for: a. Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services? b. Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)? c. In relation to just the merger provisions or wherever the test applies in the Commerce Act? If so, how? Please provide reasons.
	Concerns about serial acquisitions, acquisitions of nascent competitors, or conglomerate mergers do not justify changes to New Zealand's merger regime. First, serial acquisition theories of harm are typically premised on the idea that a given merger is more likely to be anticompetitive if it is part of a pattern of acquisition activity, which is in turn based on the false assumption that growth by mergers is somehow more competitively suspect than growth achieved organically or through contract—mergers, contracts, and unilateral practices all encompass broad swaths of normal and generally procompetitive behavior that in some circumstances can run afoul of the antitrust laws. Similarly, with so-called "entrenchment" theories that involve a conglomerate merger which combines complementary products, transactions are usually condemned precisely because they result in efficiencies like economies of scope that allow a firm to better compete on the merits, which runs counter to the goals of sound merger policy. And, of course, anticompetitive bundling by the merged firm can be addressed if and when it arises. Finally, a "substantial lessening of competition" test is already able to challenge mergers that result in an anticompetitive reduction of potential competition, notwithstanding that given the more speculative nature of these theories, anticompetitive harm is often harder to demonstrate—a feature, not a bug, of sound enforcement.
5.	How important is it for the 'substantial lessening of competition' test in the Commerce Act to be aligned with the merger test in Australian competition law, for example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.

	While substantive convergence on antitrust legal standards across a large number of jurisdictions has long been desired, it has proven elusive. In reality, policymakers must design a competition regime in a way that is responsive and tailored to their specific national context. Additionally, while broader goals such as promoting trade are undoubtedly critical considerations across many policy areas, the central purpose of competition policy should be the promotion of economic welfare domestically through reduced prices, increased output, and especially greater innovation—the latter being the greatest driver of long-run economic growth. And, although businesses may enjoy reduced transaction costs and greater certainty from uniformity across jurisdictions, the economic costs from adopting an unsound competition regime domestically—for example, one which greatly chills procompetitive behavior—are likely to far outweigh these benefits in the long-run.
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	Sound merger policy attempts to minimize both false positives, or the risk of condemning procompetitive transactions, as well as false negatives, or the approval of anticompetitive transactions. In general, however, false positives are typically more concerning than false negatives: whereas market power created by an anticompetitive transaction faces the additional scrutiny of the marketplace, merger-specific benefits that are lost by preventing a procompetitive transaction are by their very nature not easily recoverable through market forces or alternative contractual arrangements. By applying the "substantial lessening of competition test" and condemning mergers only when they are likely to result in harm consumers in the form of higher prices, reduced output, or diminished innovation, New Zealand's current framework broadly strikes the right balance in ensuring that the Commerce Commission can challenge anticompetitive deals, but only if it has sufficient evidence that they are likely to result in negative effects on consumer welfare.
Issue 2 – Substantial degree of influence	
7.	Do you consider that the current test of 'substantial degree of influence' captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.
	ITIF agrees with the Discussion Paper that partial acquisitions can in some cases substantially lessen competition, both through coordinated and unilateral effects. As a general standard, the current test of "substantial degree of influence" appears likely to in principle already give the Commerce Commission sufficient ability to challenge these transactions when appropriate.
8.	Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.
	In general, the use of bright line rules as opposed to more general standards involves a tradeoff: whereas bright line rules are easier to administer and help create certainty for businesses, standards offer more uniformity and provide adjudicators with more flexibility to reach the correct outcome in a particular case. As such, just as with presumptions of harm based on market shares, bright line rules that attempt to measure the likelihood of control based solely on the amount of voting shares held, without a thorough consideration of other relevant factors, can

	often lead to enforcement errors. However, to the extent that the MBIE believes that some bright line rules, such as a presumption that a substantial degree of influence exists when an acquirer has more than 50% of voting shares in a company, may not lead to an undue amount of false positives, it should also consider implementing bright line rules in the form of safe harbors, such as presuming that partial acquisitions that result in under 10% of voting shares does not present competitive concerns, which helps to provide businesses with greater certainty as well as minimize the likelihood of chilling procompetitive behavior.
Issue 3 – Assets of a business	
9.	Do you consider the term "assets of a business" in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?
	See generally above.
10.	If you consider there is a problem, how should the phrase be amended? For example, by: a. referring simply to "assets"? or b. should the definition of "assets" in the Commerce Act be further refined?
	See generally above.
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	ITIF does not disagree with the conclusion of the Discussion Report that New Zealand's voluntary merger regime is working well.
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	ITIF acknowledges the concerns noted in the Discussion Paper involving cases where "the Commission may not be aware of an anticompetitive acquisition before it completes" and which results in "permanent structural changes to industries." These issues are common in voluntary merger control regimes.

13.	What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options: a. A stay and/or hold separate power b. A call-in power c. A mandatory notification power for designated companies.
	A mandatory notification system like the Hart-Scott-Rodino process in the U.S. offers certain advantages relative to a voluntary merger control regime. Specifically, the primary benefit of mandatory notification is to limit the practical and remedial problems associated with "unscrambling the eggs" when challenging consummated mergers that substantially lessen competition by giving enforcement agencies a greater ability to detect anticompetitive transactions before they occur.
Issue 5 – Behavioural undertakings	
14.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
	Behavioral remedies are a critical tool for remedying certain anticompetitive transactions, and especially anticompetitive vertical mergers. For example, while a vertical merger may in some cases create incentives for the merged firm to foreclose rivals and ultimately obtain or increase market power, vertical mergers not just also create corresponding incentives to lower prices through the elimination of double marginalization, but often result in synergies that further increase downward pricing pressure or increase incentives to innovate. As such, behavioral remedies can be used in these cases to limit the merged firm's ability to engage in foreclosure, such as non-discrimination provisions, while at the same time allowing the merged firm and consumers to reap the benefits that stem from increased incentives and abilities to improve economic performance.
Anticompetitive conduct	
Issue 6 – Facilitating beneficial collaboration	
15.	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
	ITIF agrees with the Discussion Paper that information sharing, even between actual or potential competitors, is "a feature of well-functioning competitive markets" and can help drive "technological innovation" and respond to other industry trends through "pooling resources and coordinating." ITIF also sympathizes with what the Discussion Paper describes as "concerns from some in the business community that the provisions relating to collaborative activities in the Commerce Act are uncertain

	and Commission processes for businesses to manage the Commerce Act risk can be slow and costly, with the associated risk that beneficial collaboration is deterred."
16.	What are your views on whether further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without risking breaching the Commerce Act?
	ITIF believes that the 2017 amendments to the Commerce Act likely helped to ensure that competitor collaborations which take the form of ancillary restraints that are procompetitive and reasonably necessary to a legitimate collaboration are not overly chilled by the Commerce Act. ITIF also notes the additional guidance materials subsequently issued by the Commerce Commission for analyzing when competitor collaborations are unlawful. Given the wide application of the ancillary restraint analysis, to provide the needed additional clarity to New Zealand's business community ITIF recommends that the Commerce Commission first consider modifications to these existing guidance statements before pursuing new amendments to the Commerce Act.
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	ITIF recommends that the Commerce Commission pursue Option 2 and provide greater certainty to the business community through the issuance of safe harbours, such as those that have traditionally been relied upon in the United States. Even if not binding, clear guidance from the Commerce Commission that puts forward objective safe harbours for when competitor collaborations like information sharing agreements will be deemed lawful is likely to reduce transaction costs as well as error costs in the form of false positives.
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	Objective factors that could be considered in a safe harbour include whether the data collection was managed by a third-party, the age of the information being shared, whether it relates to prices and quantities, the extent to which the information is company-specific, anonymous, or aggregated, the number of firms who are engaged in the information sharing, as well as the extent to which any one firm is providing a significantly high proportion of the overall data being shared.
Issue 7 – Anti-competitive concerted practices	
19.	What are your views on whether the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them?

	Invitations to collude or other unilateral facilitating or signaling practices in oligopolistic markets can constitute problematic behavior. In the United States, these practices are addressed through Section 5 of the Federal Trade Commission Act as "unfair methods of competition." Importantly, and to avoid chilling regular parallel market behavior, unilateral facilitating practices like signaling should only be condemned if they are likely to harm consumers and are engaged in with an anticompetitive intent to collude. And, while addressing the "gap" in this area would be a way to help the Commerce Commission deal with concerns associated with algorithmic pricing--which are not only often overstated but do not create novel liability scenarios--these concerns do not at all justify treating unilateral behavior that takes the form of either conscious or mere parallelism as actionable anticompetitive conduct.
20.	Should 'concerted practices' (eg, when firms coordinate with each other for the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?
	Information sharing agreements that form part of a broader cartel arrangement, whether express or implied, should be prohibited as part of that unlawful scheme even without analysis of their competitive effects. By contrast, information sharing agreements that are not incidental to a cartel should only be condemned if they are likely to result in overall anticompetitive effects that outweigh any procompetitive justifications. While anticompetitive agreements in both cases typically involve information passing directly between competitors, so-called "hub-and-spoke" arrangements that involve vertical agreements with a third party may also ultimately be found unlawful.
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	
21.	Do you consider that industry codes or rules could either: a. Fill a gap in the competition regulation regime or b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.
	Industry specific codes or rules should be a response to market failures that cannot be remedied by general competition law enforcement. While the justification for codes will vary by industry, the imposition of codes in digital markets should be treated with special caution given the dynamic nature of these markets. For example, commentators have reported that New Zealand's e-commerce market is expected to grow nearly 60% to (U.S.) $7.5 billion by the end of 2024 from $4.69 billion just a few years ago in 2022, before reaching $9 billion in 2028. Not only does this sort of digital growth belie the existence of any market failure, but to the extent that there are concerns about anticompetitive behavior, New Zealand should only consider the implementation of industry specific codes after it has found that enforcement of its existing and robust general competition law regime has failed to correct the purported market failures.

22.	If you think that industry codes or rules could fill a gap, what class of matters or rules could be included in an industry code or rules?
	Even if they are justified in terms of responding to a market failure that cannot be remedied using general competition law enforcement, industry specific codes should only be imposed if they are likely to improve the *status quo*. These industry codes or rules can take the form of either additional *ex post* competition rules tailored to a particular industry, or more heavy-handed *ex ante* regulation. Of these two approaches, industry specific amendments to *ex post* competition rules are preferable. Relative to an *ex post* approach, *ex ante* regulation is much less likely to improve the *status quo* due to issues associated with inadequate regulatory knowledge and compliance costs, as well as incentive problems that stem from regulatory capture. Of course, as evidenced by schemes like the Robinson-Patman Act in the United States, which acted as a grocery code to protect small grocers, *ex post* codes can also result in serious economic harm and capture problems without any offsetting benefits.
23.	If the Commerce Act is amended to provide for the making of industry codes or rules, what matters would be important to consider in the design of the empowering provisions in the Act?
	If the Commerce Act is amended to provide for industry codes or rules, such rules should adhere to at least two principles. First, to the extent that codes go beyond attempting to proscribe cartel behavior, they should avoid adopting *per se* rules that treat business conduct as automatically unlawful and instead allow firms to present procompetitive justifications for their behavior. Doing so helps to ensure that codes will not overly chill procompetitive business conduct. Second, the rules should not be designed to target foreign firms, but rather apply generally throughout the industry. This helps to make sure that codes do not foster an environment susceptible to regulatory capture, where the codes become a vehicle for effectively picking winners and losers or even *de facto* protectionism.
Issue 9 – Modernising court injunction powers	
24.	Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons
	In some cases, performance injunctions can be used to remedy anticompetitive conduct. For example, to remedy an anticompetitive refusal to deal, a court may order compulsory dealing. However, like standard prohibitory injunctions, which serve a clear purpose of removing the anticompetitive restraint, as a general matter performance injunctions in civil cases should be similarly and narrowly tailored toward eliminating the offending conduct and preventing future violations, rather than being used to achieve restitution, disgorgement, or put the injured party in the position it would have been had the anticompetitive conduct not occurred (i.e., the party had not engaged in a refusal to deal).

Issue 10 – Protecting confidential information	
25.	Do you consider that the Commission effectively maintains the balance between protecting commercially sensitive information and meeting its legal obligations, including the principle of public availability? Please provide reasons or examples.
	ITIF does not take a position as to whether the Commerce Commission currently strikes the right balance between protecting commercially sensitive information and meeting its legal obligations, such as public availability. However, ITIF believes that legal prejudice, trade secret, commercial harm, and confidence justifications are in general compelling grounds against public disclosure. Moreover, if not deemed conclusive reasons for withholding information, these justifications should be overcome by public interest arguments only in extremely limited and narrow circumstances.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	ITIF generally supports additional measures to ensure the protection of confidential business information gathered during the course of investigations by the Commerce Commission. Increasing protections for confidential business information serves the dual purpose of protecting businesses from the harms of disclosure, as well as incentivizing them to be more forthcoming with the information they provide, which in turn helps the Commerce Commission to make more informed and ultimately better enforcement decisions.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	ITIF generally supports reasonable measures that will increase both the scope of confidentiality protections for businesses as well as civil monetary penalties for breaching confidentiality orders.
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?
	ITIF generally supports providing businesses with additional certainty as to which practices may or may not be unlawful, including in the area of collaborations between competitors. Provision 1, which appears designed to provide greater clarity as to for whom and how long clearance applies, may result in less overdeterrence of procompetitive competitor collaborations that benefit New Zealand consumers. However, guidance statements, rather than legal amendments, are often sufficient

	to accomplish this type of purpose and also give regulators more flexibility to adapt standards going forward commensurate with increased learnings and experience.
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
	None.
Any other issues	
30.	Are there any other issues that you would like to raise?
	None.

General Comments:

On December 5, 2024, the Competition Policy team at New Zealand's Ministry of Business, Innovation and Employment (MBIE) released its Discussion Paper "Promoting competition in New Zealand – A targeted review of the Commerce Act 1986." As explained by the Honourable Andrew Bayly, New Zealand's Minister of Commerce and Consumer Affairs, the purpose of the Discussion Paper is to "seek feedback on New Zealand's current merger control regime and anti-competitive conduct provisions in the Commerce Act," as well as consider additional new competition powers, such as granting enforcers "the ability to influence business behaviour through industry codes, similar to those used by Australian regulators."

The Information Technology and Innovation Foundation (ITIF), the world's top-ranked science and technology policy think tank, greatly appreciates the opportunity to respond to MBIE's Discussion Paper from the standpoint of promoting sound and pro-innovation competition enforcement in New Zealand. While ITIF understands the importance of ensuring that New Zealand's competition regime is working effectively, this comment counsels against changes that substantially depart from the country's existing model, and in particular the adoption of industry codes of conduct akin to *ex ante* regulation in digital markets.

ITIF offers the following general recommendations to the MBIE:

Merger Enforcement. New Zealand's "substantial lessening of competition" test is properly focused on condemning mergers that are likely to result in higher prices, reduced output, or diminished innovation. Before the enactment of major substantive changes to its merger regime that risk chilling procompetitive transactions, New Zealand may consider introducing a mandatory

notification regime that increases the ability of the Commerce Commission to identify anticompetitive transactions before they are consummated.

Anti-competitive conduct. Additional guidance may be helpful in giving New Zealand's business community greater certainty and ensuring that procompetitive competitor collaborations are not stifled. Moreover, creating liability for certain unilateral practices like invitations to collude or signaling that harms consumers and is done with an anticompetitive intent may fill current gaps in New Zealand's competition law.

Code or rule-making powers. Industry specific codes should only be implemented as a response to market failures or anticompetitive behaviour that cannot be corrected through general competition law enforcement. Moreover, industry specific codes should only be adopted if they can improve the *status quo*, which is less likely to be the case with *ex ante* regulation relative to *ex post* frameworks, which can also be highly problematic.

New Zealand's Discussion Paper comes at a time when competition policy norms are being reevaluated across the globe, and in particular as a response to what are perceived to be market failures in many digital industries. While digital regulation has been adopted by some jurisdictions, most notably the European Union with its Digital Markets Act, other jurisdictions have prioritized modifying their *ex post* competition law schemes, while others still have focused on enforcing their existing antitrust laws. Some have mostly let their digital markets continue to grow. While ITIF commends the MBIE for analyzing the efficacy of its current regime, substantial changes to New Zealand's competition laws should be a response to clear market failures that improves consumer welfare, and not merely an attempt to keep up with perceived global or regional trends.

Thank you for your consideration.

Thank you

We appreciate you sharing your thoughts with us. Please find all instructions for how to return this form to us on the first page.