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Purpose

This document provides additional information about the regulatory impacts of changes made to **Review Recommendation 20** regarding the intervention threshold for retail service quality regulations.

Changes to Review Recommendation 20

Introducing a high threshold for consumer protection intervention

The original Review Recommendation 20 set a new intervention threshold that did not exist under the status quo. It proposed a legislative amendment requiring the Commerce Commission (the Commission) to consider proportionality, transparency, and accountability when intervening by making a retail service quality code.

The Ministry for Regulation (the Ministry) assessed options for introducing a higher threshold for consumer protection intervention at the request of the Minister. Options were tested with the Commerce Commission (the Commission) and the Ministry of Business, Innovation and Employment (MBIE).

It is important to note that under the status quo (Option 1):

- There are no existing retail service quality codes; any impacts from changing the intervention process are hypothetical.
- The Commission has set out their own framework for investigating and prioritising issues with retail service quality¹. This includes a self-imposed process for assessing evidence based on the potential benefit to consumers, and the scale / duration of the issue.

Option 2: *Recommendation introducing a high threshold for intervention*

This replaces the current Cabinet paper wording that reflects Review Recommendation 20 with:

“The Commerce Commission may make, amend, or add to a retail service quality code where there is evidence of:

- a) *large-scale, ongoing harm or risk to consumers, **or***
- b) *substantial lessening of competition, **and***
- c) *the failure of non-regulatory and non-binding approaches.*

¹ Commerce Commission (November 2018) *Telecommunications Retail Service Quality Framework*: https://www.comcom.govt.nz/_data/assets/pdf_file/0021/108435/Telecommunications-retail-service-quality-framework-paper-30-Nov-2018.pdf.

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Encourage the Commission to publish the evidence collected to support [the above recommendation].”

This recommendation amends the legislation by setting a significantly higher threshold for intervention than the existing recommendation. This approach includes specific evidential requirements and narrows the scope of issues for which regulation could be introduced, while retaining some flexibility for the Commission to intervene when there is evidence of serious harm to consumers or competition that lighter-touch options are not able to address.

The specific requirements are set out to ensure that where regulatory action is proposed, there must be either evidence of significant negative impacts on consumers or competition, combined with evidence that a lighter-touch approach to addressing issues has not worked (i.e. it must meet the tests in both points a) and c) **or** in both points b) and c) above). A Letter of Expectation from the Minister encouraging the Commission to publish any evidence would further increase transparency and accountability.

The Commission expressed concerns that this threshold would be difficult to evidence and creates a risk of legal challenge if the Commission were to introduce RSQ measures.

Option 3: *Original Review Recommendation 20 - Require the Commission to consider the principles of proportionality, transparency, and accountability when developing consumer protection measures*

This is to ensure that where regulatory action is taken, it is proportionate to the issue and responsive to industry practice. The intent is to focus any code made more narrowly on the most significant consumer protection issues and mitigate the risk of a code imposing unnecessary costs on industry. Review Recommendation 20 sought to ensure regulatory actions taken by the Commission would be proportionate to the risk without unduly restricting the Commission’s ability to act if / when required in future.

Consultation feedback showed that while there is broad agreement on the value of proportionality and cost-benefit analysis in consumer protection code-making, views differ on how these principles should be implemented.

Many industry participants support a structured framework for assessing regulatory intervention in retail service quality. Consumer and advocacy groups emphasise that any process must not come at the expense of consumer protection or regulatory flexibility and should explicitly include equity and consumer outcomes. Respondents generally cautioned against any processes that would add unnecessary complexity or slow decision-making.

The table on the following page sets out the option described above against the Review’s assessment criteria.

Criteria	Option 2: Recommendation introducing a high threshold for intervention	Option 3: Original Review Recommendation 20 - Require the Commission to consider the principles of proportionality, transparency, and accountability when developing consumer protection measures
Effectiveness	<i>Pros</i> - Ensures that systemic consumer issues can be addressed where competition impacts are secondary. <i>Cons</i> - May reduce scope for the Commission to regulate towards consumer benefit, e.g., around information for switching.	<i>Pros</i> - Promotes accountability of the regulator, improving transparency as part of the decision-making process. <i>Cons</i> - Depending on how this change is exercised in practice, it may constrain the Commission's regulatory work or increase the resourcing burden.
Efficiency	<i>Cons</i> May reduce the efficiency of Commission investigation and intervention processes from any increase to information-gathering requirements.	<i>Pros</i> - Aligns with some existing internal practices and ensures these are enduring. <i>Cons</i> - May increase the costs of regulating, depending on how the principles are exercised in practice (e.g., around information-gathering and reporting)
Proportionality	<i>Pros</i> - Ensures regulatory actions are transparent, building credibility with the sector. - Targets regulatory actions to significant risk, reducing opportunities for over-regulation.	<i>Pros</i> Retains discretion for Commission around how proportionality requirements are implemented in their practices, without restricting oversight functions.

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<i>How does the option compare against the status quo / counterfactual?</i>			
Criterion	Option 1: Status Quo	Option 2: Recommendation introducing a high threshold for intervention (<i>Minister's preferred option</i>)	Option 3: Original Recommendation 20 (<i>Ministry's preferred option</i>)
Effectiveness	0	+	+
Efficiency	0	-	0
Proportionality	0	++	+
Overall assessment	0	2	2

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Qualitative Judgement

Both Options 2 and 3 should be materially more proportional than the status quo (i.e., the existing process for retail service quality interventions). The trade-off between the two is more concrete evidential requirements at the cost of some efficiencies for both the regulator and businesses.

Option 2 is intended to provide greater assurance that future interventions target significant and persistent risks, with the key drawback being potential increases in resourcing requirements for the Commission to meet a more specific legislative evidence threshold, noting the Commission raised additional concerns around increased contestability of their regulatory work under the new evidential requirements.

It is challenging to predict what the impact of a specified intervention threshold will be in the hypothetical scenario that the Commission undertakes to develop a code. TCF codes could continue to exist outside the jurisdiction of the government, as the TCF is a private industry organisation. If the Commission identifies regulatory gaps, it will be able to create a code of its own, but it is difficult to assess to what extent Option 2 or Option 3 would impact the likelihood of the Commission creating a code.

While the industry in general agreed on a clear basis for some regulation of retail service quality for consumers, providers were generally divided (as with many issues the Review investigated) on what the approach to regulation should look like.

As a whole, Review Recommendations 17-20 focused on ensuring the process for regulating retail service quality is more transparent, proportionate and maintains competitive neutrality (i.e. that conflicting market interests and different levels of market power do not distort the regulatory landscape).

Choosing Option 2 represents a stronger and more specific requirement around proportionality, that still supports to the overarching objectives of this package of consumer recommendations towards transparency and competitive neutrality.