

Submission to the Commerce Commission

Misuse of Market Power Draft Guidelines

18 November 2022

Introduction

1. Russell McVeagh appreciates the opportunity to submit to the Commerce Commission ("**Commission**") on its draft Misuse of Market Power Guidelines ("**Draft Guidelines**").
2. Our submissions are designed to assist the Commission to create guidelines that achieve the best policy outcomes for all New Zealanders, and reflect that we act for a range of businesses, both large and small.
3. We consider that the recent amendments to the Commerce Act 1986 ("**the Act**") as a result of the Commerce Amendment Act 2022 represent one of the most significant changes to New Zealand's competition law framework in recent years, and will have far-reaching implications for the way that businesses operate. It is therefore important that clear and detailed guidelines are implemented to help reduce uncertainty and assist businesses in their decision-making. This is particularly pertinent in the context of a misuse of market power provision that utilises a substantial lessening of competition test, where the inherent uncertainty in an effects-based test has the potential to chill procompetitive conduct by large firms.

Expansion of examples

4. As expressed in our previous submissions to the Ministry of Business, Innovation and Employment ("**MBIE**") and the Select Committee during the legislative process, much of our concern regarding the introduction of the new section 36 is the potential for legal uncertainty, leading to the potential chilling of legitimate and pro-competitive conduct.
5. Although it is helpful that the Commission has provided some guidance on the type of conduct that, in its view, should not substantially lessen competition in a market, we think it would be helpful if the guidelines also addressed some of the common factual scenarios raised by submitters during the consultation process.
6. Addressing this issue would resolve the perceived imbalance in the current guidelines where just two of 36 pages are devoted to what conduct is unlikely to be problematic. We consider this to be just as, if not more, important than guidance on what conduct is considered likely to be problematic.
7. Some examples of situations that were raised by submitters, but have not been sufficiently addressed in the Draft Guidelines include:
 - (a) a firm with substantial market power closing one of its production stations for maintenance in order to ensure the safety and sustainability of its operations. This conduct may reduce supply and therefore have the effect of substantially lessening competition in a market despite the fact that the firm's purpose is to operate its production station responsibly;
 - (b) where all other suppliers of a particular product exit the market, leaving one firm as the proverbial "last person standing". If that firm decides to also cease production,

even if motivated by a legitimate business rationale (eg increased compliance costs), this could effectively be a refusal to supply that substantially lessens competition;

- (c) a firm with substantial market power refusing to supply a downstream competitor who requires an input to supply a downstream market due to an objective credit risk or previous non-payment of invoices;
- (d) a firm with substantial market power refusing to supply a downstream supplier with a product that it does not make available on the open market, but otherwise has the ability to supply; and
- (e) a decision by a large firm to run a tender process for a single supplier of a particular input in order to attain better terms and conditions for that input which they intend to pass on to customers. This may substantially lessen competition in an upstream market if they are a significant customer of that particular input, despite end-customers benefitting from the process.

Other conduct

- 8. On page 26 of the Draft Guidelines, the Commission has identified a number of other forms of conduct which, in its opinion, may breach section 36.
- 9. We consider that this list does not sufficiently elaborate on each of these forms of conduct. If the Commission is confident that engaging in this "other conduct" may be captured under the new section 36, it is important that further guidance is provided to reduce uncertainty. The very identification of this conduct as problematic may lead businesses to take an overly cautious approach in these areas, with the potential of chilling innovation and conduct that would otherwise be pro-competitive out of fear of prosecution.
- 10. For example, in 114.2, the Commission has identified that utilising legal proceedings in an "unreasonable or vexatious manner" may breach section 36. This statement may deter businesses from undertaking litigation that they would otherwise be entitled to pursue. Further guidance on what is considered "unreasonable" should be provided, including clarification that businesses with market power are entitled to exercise their rights to have a court opine on certain issues even if they are ultimately unsuccessful on the particular facts.

Predation cost concepts

- 11. Paragraphs 109 – 113 of the Draft Guidelines provide guidance on when low pricing by a firm with substantial market power may be considered "predatory". We consider that further clarification in this area is necessary to avoid the unintended consequence that businesses will decide not to engage in pro-competitive conduct, such as offering low prices, out of fear of breaching the new section 36.
- 12. For example, overseas, the European Commission has acknowledged that normally, only pricing below long-run average incremental cost (LRAIC) (ie the average of all variable and fixed costs that a firm incurs to produce a particular product or service) will be capable of having the foreclosure effect necessary to establish predatory pricing. While the Draft Guidelines note that merely supplying below "cost" is not unlawful, and there must also be a substantial lessening of competition, it would be helpful for the Commission to more clearly identify what it considers to be the relevant "cost" benchmark so that businesses can have confidence to offer sharp prices to customers.

Concluding Comments

13. As expressed, Russell McVeagh is grateful for the opportunity to submit on the Draft Guidelines. We consider that, against the legislative backdrop, the Draft Guidelines serve as a useful initial tool for businesses seeking to understand the new regime. However, we would urge the Commission to consider providing more comprehensive detail, including further examples covering a wider range of potentially harmful conduct, to help reduce business uncertainty in what is an undeniably complex area of law.
14. All enquiries on this submission may be directed to:

