

18 November 2022

Commerce Commission
PO Box 2351
Wellington 6140

Dear Sir/Madam

Submission on the Draft Misuse of Market Power Guidelines

BusinessNZ is pleased to have the opportunity to provide a submission to the Commerce Commission (ComCom) on its draft guidelines consultation entitled '*Misuse of Market Power Guidelines*', published on 18 October 2022.

1. Introduction & context

I am writing to you in regard to the recent draft guide released by the ComCom entitled *Misuse of Market Power Guidelines*. BusinessNZ submitted on the associated Commerce Amendment Bill in 2021 that proposed changes via the introduction of an effects-based test to section 36 (s36) should not proceed. We were mindful that the proposed changes to s36 would likely bring about a high level of uncertainty for the business community, along with the potential for a chilling effect on business activity. Therefore, to help at least mitigate some of these concerns, we recommended the ComCom provide guidelines around what would or would not be considered breaches of s36. Therefore, we are pleased to see the ComCom has decided to provide a draft guideline document for comment.

As we have previously outlined to the Government, we are concerned that an effects-based test will mean businesses will fear that legitimate competition could be misconstrued or misrepresented as anti-competitive conduct. There will always be a highly subjective aspect of what is considered to be anti-competitive conduct. This means a guide is critical to provide greater clarity and help mitigate the chilling effect

through clear explanations and various examples that outline the practical outcomes of an effects-based test.

While the draft guidelines document is a noteworthy body of work at 34 pages long, BusinessNZ would like to provide some specific comments and suggestions to ensure it provides key information for the broad business community. As we see it, the key challenge for the ComCom when developing these guidelines will not necessarily be about either end of the spectrum for determining the existence of misuse of market power. Instead, the challenge will lie somewhere in the middle where boundaries are not clearly defined and open to interpretation.

Overall, BusinessNZ believes the ComCom have provided a useful draft guidelines document for the business community to use. However, there are aspects of it that we believe could be enhanced or added to so that it becomes a valuable resource in the future.

2. Evolution of the guidelines

As discussed in paragraphs 10-13 of the draft guidelines, the ComCom's approach to the new prohibition will likely change over time as it gains more experience working with the new provisions. Part of that will involve claims made here in New Zealand, but also continued alignment with equivalent prohibition in Australia.

Therefore, a high degree of flexibility and ongoing inspection of the guidelines are required. First, as the title suggests, it should remain a guide rather than any 'locked-in' definitive publication that would not require modification or additions over the short-medium term. While we would want the first publicly released guide to be as accurate as possible, there will most likely be further additions as issues relating to misuse of market power present themselves over time. As the guide would almost always be downloaded from the ComCom website, ComCom need to ensure that the webpage providing the guide outlines any significant amendments etc which may require a modified copy to be downloaded or printed by applicants. Also, although the draft guidelines document is not overly lengthy at 34 pages, we would not object to some type of separate single summary pages that pulled out the fundamental aspects of the guidelines, which could involve a series of downloadable pages from the ComCom website.

Furthermore, we would want ComCom to remain transparent about how the misuse of market power unfolds in terms of complaints and decisions. Therefore, we would support some form of online logbook that the public could refer to improve their understanding of how the prohibition on the misuse of market power is playing out in real life.

Recommendation: That over the longer term, the Commerce Commission looks to make amendments and additional features to the guidelines to lift knowledge and awareness around the misuse of market power.

3. Specific recommendations

Catering for all users

As paragraph 7 of the guidelines states, "*These Guidelines provide a broad overview of our proposed approach to the amended prohibition.*" Therefore, it is important to understand that these guidelines will be read and likely interpreted from multiple angles. There will be those who believe some form of misuse of market power may have taken place that directly affects them, so seek to understand whether their case might meet the criteria for further action. There will also be businesses that have in some way been informed they are currently part of a preliminary investigation for misuse, so seek to get a better understanding of whether they might meet the threshold for misuse of market power. As well, the significant change to the s36 legislation means there will now be various businesses across multiple sectors that will likely initially refer to the guidelines when seeking to instigate any changes that could in any way be construed or misconstrued as anti-competitive conduct.

BusinessNZ appreciates the points made within the guidelines that they are not law and are not legally binding. Also, they should not replace legal advice. However, for many businesses the guidelines will set the initial tone around what businesses might or might not be able to do going forward. Given the potential for chilling effects on competition, this should mean a very high threshold for regulatory intervention, especially when the intervention is looking to displace market practice.

To that end, the guidelines need to strike the right balance for all interested parties, and not lean more towards one outcome than another. Therefore, we believe that proper explanations and examples of types of conduct that are unlikely to substantially lessen competition (SLC) are just as important as conduct that is likely to SLC.

Therefore, BusinessNZ recommends two changes to the draft guidelines document in relation to this issue. First, we believe some reordering of sections might be useful to achieve the balance discussed above. For instance, pages 27-29 of the guidelines examine types of conduct that are unlikely to SLC. In addition, page 30 discusses authorisation, providing protection against legal action for future conduct that might breach the Commerce Act including the misuse of market prohibition. This compares with more substantive discussion and examples over 11 pages that examine types of conduct that may SLC. While we have no problem with in-depth analysis around conduct that may SLC, we would support steps that provide more detail on conduct unlikely to SLC, to provide greater balance.

Also, since only a few pages discuss conduct unlikely to SLC, this has meant the topic is not given its own chapter and is placed near the end of the guidelines. From

BusinessNZ's perspective, this tends to give the impression it is of less importance in the full context of possible misuse of market power. Therefore, in addition to being expanded upon, we would like to see the section have its own chapter.

Recommendation: That the section examining conduct that is unlikely to substantially lessen competition is expanded upon and given its own chapter.

Although this issue will be discussed in more depth below, BusinessNZ would like to see more examples of conduct that are unlikely to SLC. Currently, there are two examples in the draft guidelines, compared with four in the Australian guidelines. We note the Australian examples are fairly short and concise, so we would support similar examples along similar lines being inserted in the New Zealand guidelines.

Recommendation: That the number of examples of conduct that is unlikely to substantially lessen competition is increased from two to at least four.

Increased use of examples

Following on from the recommendation raised above, BusinessNZ strongly endorses the use of examples throughout the guide to explain the practical outcomes of conduct that is likely or unlikely to SLC. However, we believe there is scope for a greater number of examples that identify other aspects businesses may be interested in. While we would not expect the examples provided to cover all likely scenarios, we believe further examples would help explain the probable outcome of possibly common situations.

Given the similar nature of the equivalent prohibition in Australia, BusinessNZ would not be adverse to the idea of using either theoretical or real-world examples from Australia in the New Zealand guidelines. With the latter, we would obviously not expect names of companies and exact details to be published, but the general outcomes of decisions could be used as examples in the guide, or as mentioned above kept as an electronic logbook that could be referred to by interested parties.

Recommendation: That there is an increased use of examples throughout the guidelines document.

Australia's guideline development path

Given the ComCom's desire to remain in step with the equivalent prohibition in Australia, we note that the Australian Competition and Consumer Commission (ACCC) guidelines went through a few iterations when their draft framework was initially released in 2016. This included interim guidelines in 2017, followed by their final guidelines document in August 2018 after recommendations from the Harper Report.

When refining the guidelines, the ACCC provided a comprehensive list of key changes from the interim guidelines on their website. Therefore, BusinessNZ would welcome

a similar approach by the ComCom, whereby changes to New Zealand's guidelines are outlined after the views and recommendations of submitters are taken into account.

Recommendation: That the Commerce Commission provides a list of changes made to the draft guidelines document along similar lines to that made by the Australian Competition and Consumer Commission.

In relation to the ACCC guidelines, we note their most recent version is now over four years old. Obviously, between then and now the world has gone through a global pandemic that has likely diverted resources elsewhere. However, BusinessNZ would not expect a review of the New Zealand guidelines to take four or more years. We believe it would be advisable for some form of review after no longer than two years to take place. This would invite public comment so as to define improvements and points of difficulty/clarity, especially concerning any compliance and operational issues that may appear.

Recommendation: That the guidelines document is formally reviewed no more than 2 years after initially being published.

Last, we note that the ACCC document is 14 pages shorter than the draft New Zealand one. While we do not have a strong view around exactly how long or short the draft guidelines document needs to be, the significantly shorter length of the Australian document tends to suggest that there is scope to sharpen the New Zealand one so that it provides greater clarity for users. As we discussed above, we do not have an issue with increased numbers of examples in the guidelines lengthening the document. However, other parts of the New Zealand guidelines could be tightened up, commensurate with what the ACCC has provided.

Recommendation: That the Commerce Commission considers tightening up the guidelines' length, commensurate with what the ACCC has provided in its guidelines document.

Overall, BusinessNZ will be taking a keen interest in how the amended s36 plays out over time in New Zealand. In an ideal world, we hope it is never used or that perceived issues around competition are not found to be improper competitive practices. We also hope that it will lead to businesses taking a more proactive and strategic consideration of what competition means, and that any adverse issues around uncertainty and its potential chilling effects on competition are minimised as much as possible.

Yours sincerely

