COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW AND INTERNATIONAL LAW SECTIONS ON THE DRAFT NEW ZEALAND MISUSE OF MARKET POWER GUIDELINES

December 1, 2022

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The American Bar Association Antitrust Law Section and International Law Section (the "Sections") appreciate the opportunity to submit these comments on the draft Misuse of Market Power Guidelines ("Guidelines"), published by New Zealand's Commerce Commission ("Commission").[1] The Sections welcome the Commission's effort to clarify its means of analyzing the misuse of market power. Clarity, stability, and transparency are important hallmarks of an effective competition enforcement program. The Sections commend the Commission for its commitment to transparency and consultation with stakeholders, which we believe will help ensure high-quality proposals and policies for the Commission and its stakeholders. Our comments focus on a number of suggested clarifications for Commission consideration.

These comments reflect the Sections' experience and expertise with the application of competition laws in a wide range of jurisdictions and with related international best practices.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy as well as related aspects of economics. Section members, numbering over 9,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

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[1] Misuse of Market Power Guidelines, Draft for Consultation, Commerce Commission New Zealand, (hereinafter "Guidelines"), *available at:* https://comcom.govt.nz/__data/assets/pdf_file/0023/295160/Draft-Misuse-of-Market-Power-Guidelines-October-2022.pdf

[2] Past comments of the Antitrust Law Section are available at https://www.americanbar.org/groups/antitrust_law/resources/comments-reports-briefs/.

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total over 10,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's more than 50 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as regulatory compliance, mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has provided input on debates relating to international legal policy.[3] The International Law Section has provided input for decades to authorities around the world.[4]

I. The Guidelines' Definition of "Substantial Market Power" Would Benefit From Greater Specificity

The Sections applaud New Zealand's draft Guidelines, including their underlying goal of assuring the opportunity for rivals to compete. The Sections note, however, that given the broad applicability of the Guidelines, the definition of "substantial market power" may make it difficult for businesses to predict in various circumstances whether or not they fall within the definition of a firm possessing "substantial market power."[5] Accordingly, as discussed below, the Sections respectfully suggest that the Commission clarify the definition of "substantial market power" to provide: (i) additional guidance on the threshold or level of market power considered substantial; (ii) a more precise definition of "an interconnected group of companies;" and (iii) a more detailed discussion of the evidence considered in assessing market power. In addition, the Sections suggest that the Guidelines provide a safe harbor threshold to enable businesses to assess with greater certainty whether or not they would be considered to possess "substantial market power" under the Guidelines.

The Sections agree with the principle expressed in the Guidelines that competition is promoted by prohibiting firms with too much market power from misusing that power to maintain or extend their power in a way that makes it harder for other firms to compete.[6] The Sections suggest, however, that businesses would benefit from additional guidance on the threshold or level of market power the Commission considers substantial, since jurisdictions have different definitions of how much market power is substantial enough to serve as a basis for a competition law offense. In the United States, for example, the Sherman Antitrust Act ordinarily requires a market share of at least 50% to condemn single-firm misuse of market power as attempted monopolization, and about 70% to condemn it as monopolization. The Supreme Court has indicated that in oligopolistic markets, a lower share may suffice.[7] Courts in

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[3] American Bar Association, International Law Section Policy, *available at* https://www.americanbar.org/groups/international_law/policy/about/.
[4] Past comments of the international Law Section are available at https://www.americanbar.org/groups/international_law/policy/blanket-authorities-initiatives/.
[5] *See generally* Paragraph 17, Guidelines.
[6] *See* Paragraph 2, Guidelines.
[7] *See* Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 228-29 (1993).

the United States also have found liability for misuse of market power under the Clayton Act, which applies to exclusive dealing, tying, and related offenses, with lower market shares, but at least 30%. However, market share is only an indicator of market power, and it is necessary to consider additional factors. In determining whether an inference of substantial market power from market shares is appropriate, courts in the United States regularly consider the relative size and strength of the competition, the stability of market shares over time, a firm's ability to sustain supracompetitive profits, and the presence and degree of regulatory or other barriers to entry or expansion.[8] U.S. courts also regularly consider barriers to entry and expansion as integral components of market power analysis. Examples of such barriers include licensing or permitting requirements, entrenched buyer preferences for established brands, limited demand for a particular product or service, possession of patents or other intellectual property, economies of scale, and the need for large capital outlays or capital market evaluations that impose higher costs on new entrants. In evaluating entry barriers, U.S. courts also consider frequency and success of competitors who have sought to enter the market. There is no offense of "abuse of dominance" in the United States, but in jurisdictions that prohibit that offense, "dominance" typically requires a market share of about 30%, although this varies among jurisdictions.

Further, the Guidelines provide that a firm's market power may be considered together with other firms in the same "interconnected group of companies."[9] To provide greater clarity to the business community and the bar, the Sections respectfully suggest a more precise definition of "an interconnected group of companies."[10]

Similarly, the Sections believe that businesses would benefit from, and recommend that the Guidelines provide, a more detailed discussion of the evidence that the Commission would consider in assessing market power, including the roles that both direct and indirect evidence play in its analysis. The Sections welcome the Guidelines' recitation of factors that bear upon market power,[11] but suggest that the Commission also explain the significance of relying on direct evidence, including using data analysis to demonstrate anticompetitive effects—such as price increases—and demand elasticity, rather than relying on indirect evidence alone.

The Sections also respectfully recommend that the Commission include in the definition of "substantial market power" a safe harbor threshold, such as 20-30%, as other jurisdictions have adopted.[12] The Commission has, in its draft, pointed out that in certain

[8] *See, e.g.*, United States v. Columbia Steel, 334 U.S. 495, 527 (1948); *see also* Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (8th Cir. 1982).
[9] *See* Paragraph 37, Guidelines.
[10] Compare the definition of interconnected bodies corporate in Section 2(5) of the Commerce Act, which addresses related subsidiaries and other relationships.
[11] *See* Paragraphs 41 – 43, Guidelines.
[12] *See e.g.*, Japan, Japan Fair Trade Commission, *Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act*, available at https://www.jftc.go.jp/en/legislation_gls/210122.pdf; Brazil, Competition Law N° 12.529/2011; Korea, Monopoly Regulation and Fair Trade Act.

instances, a firm with market share below 30 percent has been found to have substantial market power.[13] Adding a safe harbor would enable businesses to better assess their risk under the Guidelines and take steps to prevent violations of the Commerce Act 1986 ("Commerce Act").

II. The Guidelines' Discussion of the "Substantial Lessening of Competition" Requirement Would Benefit From Further Clarification

A firm with substantial market power is prohibited under Section 36 of the Commerce Act from engaging in conduct that (a) has the effect of substantially lessening competition, (b) is likely to have the effect of substantially lessening competition, or (c) has the purpose of substantially lessening competition. The Guidelines reflect this, of course, but add (at paragraph 61) that, as the Commission interprets the Commerce Act, "Conduct can have a purpose of substantially lessening competition in a market even if it does not have that effect or ***is not likely*** to have that effect" (*emphasis added*). This interpretation brings a risk of uncertainty, which the Sections believe the Commission should consider addressing. It is notoriously difficult to attribute a purpose or intent to a company or other organization that includes multiple advisors and decisionmakers writing scores of strategy documents. The Guidance would benefit from greater clarity with respect to the treatment of purpose to avoid creating legal jeopardy for any firm that engages in conduct that might be judged, after the fact, to have been motivated by an anticompetitive purpose even though there was never any likelihood of lessening competition, as this could result in chilling competition itself.

The goal of competition law is to encourage competition on the merits—the competitive process. Yet, distinguishing between vigorous competition on the merits and misuse of market power can be a difficult task, and over-enforcement of misuse of market power provisions can reduce competition. Though the Guidelines acknowledge this (at paragraph 115), they stop short of encouraging firms with substantial market power to compete vigorously, and, as drafted, may even serve to discourage it.

The Guidelines recognize that "It is not unlawful for a firm with substantial market power to compete strongly, even where that causes competitors to lose sales or even to exit" (paragraph 118). This reflects the widespread recognition that a firm competing vigorously typically will have as its aim to win sales from and possibly even to eliminate its rivals. As Canada's Competition Bureau recognizes in its Abuse of Dominance Enforcement Guidelines, "it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market."[14] Thus, reliance on intention, or "purpose" alone, in the absence

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[13] *See e.g.,* Australian Competition and Consumer Commission v. Australian Safeway Stores Pty Limited (2003) FCAFC 149 at (307); *see also* Paragraph 46, Guidelines.

[14] *See* Paragraph ix, Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (March 7, 2019), *available at* https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/abuse-dominance-enforcement-guidelines.

of any likelihood of a substantial lessening of competition, can be a poor indicator of the misuse of market power.

In addition, it can be extremely difficult to assess when a firm, or any organization, has as its purpose to lessen competition substantially. The Guidelines specify that if a firm has multiple reasons for engaging in certain conduct, and one of its "motivating purposes" is anticompetitive, the existence of other motives becomes "irrelevant." This may be interpreted to foreclose a firm from successfully offering justifications for its conduct once there is any evidence that anyone in authority had an anticompetitive motive. Such an approach, if that is what is intended, would run counter to the many instances in which evidence could show that different employees within the same organization may have different objectives and that lessening competition was not the predominant motivating factor in adopting particular conduct.

The combined effect of the resulting uncertainty may lead firms with a market share of more than about 30 percent to conclude that they should not compete as vigorously as they otherwise might. The Sections therefore recommend that the Commission provide additional detail on how businesses should draw the line between permissive (and indeed encouraged) aggressive competition and prohibited abuse. The Sections also believe that the statement at paragraph 119 that "[f]irms and advisors should reassess their position at appropriate intervals, and consider whether conduct remains unlikely to breach s 36 of the Commerce Act" would benefit from greater clarity, especially regarding the Commission's expectations about how businesses should determine the "appropriate interval" between assessments. The Sections appreciate that changing market conditions can impact the evaluation of conduct under s 36 of the Commerce Act, but the threat of missing a reassessment at an unspecified "appropriate" time may cause businesses to attempt ongoing monitoring (which is costly and frequently impractical) or to compete less vigorously (contrary to the Guidelines' express acknowledgement that such competition is "desirable").

III. The Guidelines' Discussion of "Types of Conduct that May Substantially Lessen Competition" Includes Potential Ambiguity or Tension with How Refusals to Supply and Price Squeezes Could Substantially Lessen Competition

The Sections agree with the Commission's recognition that "[f]irms are generally entitled to choose who they will supply," but that "when a firm with substantial market power refuses to supply an input to downstream firms(s), it may hinder or prevent those firms from competing in the downstream market."

The Sections note that paragraph 80.2 of the Guidelines clarifies that the prohibition does not cover "exploitative conduct," where market power is used against customers. It would follow from this clarification that a producer that has achieved market power lawfully is free to charge a price that maximizes its profits, even if that price is at a monopoly level. However, paragraph 86.2 indicates that there may be a constructive refusal to supply if the customer or prospective customer is a competitor and the producer offers it terms that no competitor would reasonably be willing to accept.

We note that a tension exists between these two paragraphs in cases where the profit-maximizing price for a firm with market power in the upstream market may be one that one or more downstream competitors reasonably would not be willing to accept. This would be especially true if the competitor in the downstream market is not as efficient in its downstream operations as a vertically integrated firm with market power in the upstream product.

In such cases, the Guidelines currently appear to indicate that the general freedom to charge a profit-maximizing price in paragraph 80.2 is suspended when only a lower price would permit another firm to compete in the downstream market. If so, this would require the upstream firm to forgo short-run profits and subsidize the downstream competitor.

The same tension arises in the section on Price Squeezes. Paragraph 90 indicates that a "firm with substantial market power in the supply of an important input can disadvantage its competitors in downstream markets by charging a high wholesale price that reduces the margin available to these competitors in the downstream market." However, charging any price at all for the upstream product necessarily would reduce the margin available to competitors in the downstream market. As drafted, paragraph 90 appears to suggest abandoning the principle inherent in paragraph 80.2, that a firm with lawfully-acquired market power may charge a profit-maximizing price. Instead, the Guidelines could be interpreted to suggest that an upstream firm possessing market power must assure downstream competitors asking to purchase an input a sufficient margin to compete in the downstream market.

The Sections agree with the Commission at paragraph 24 that "prohibitions on misuse of market power exist to protect the competitive process, not to protect individual competitors. Lessening the effectiveness of a competitor is not necessarily the same as lessening competition."

Consonant with this principle, U.S. antitrust law does not recognize price squeeze as an independent offense but analyzes such claims under refusal to deal and/or predatory pricing principles.[15] In the U.S., if the conduct in the upstream market, *i.e.*, setting the price of supplies too high to competitors in the downstream market, would not amount to an illegal refusal to deal, and conduct in the downstream market, *i.e.*, pricing too low, does not amount to illegal (below-cost) predatory pricing, the conduct does not violate the antitrust law.[16] Just as a firm has no general duty to deal with a competitor, it has no duty under U.S. antitrust law to offer to sell its products or services at a price that maintains its rivals' margins.[17]

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[15] *See* Pacific Bell Telephone Co. v. linkLine Communications, Inc., 555 U.S. 438, 449-52. *But see* International Competition Network, *Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws* (April 2010), available at https://centrocedec.files.wordpress.com/2015/07/report-on-the-analysis-of-refusal-to-deal-with-a-rival-2010.pdf (noting that most agencies seek to distinguish margin squeeze from predatory pricing).
[16] *Id.* at 452.
[17] *Id.*

Accordingly, the Sections suggest that the Guidelines provide further clarification and one or more examples of circumstances in which a refusal to supply a downstream competitor would not be prohibited. This would help to limit the ambiguity identified and provide greater guidance to the business community as to how the Commission would likely determine whether the price offered by the upstream firm is simply a permissible profit-maximizing price, or is instead deliberately designed to make it impossible for a downstream competitor to compete.

IV. The Guidelines Would Benefit From Providing Examples of Indirect Supply

Paragraphs 32-35 broadly describe the concept of indirect supply, but this potentially could cover a wide variety of situations. The Sections suggest that this discussion would benefit from adding greater specificity. In particular, identifying "a degree of influence or control" as an indication that market power can be exercised through indirect supply leaves open the issue of how great a degree of influence or control is enough. The Sections recommend that this issue be clarified through further discussion or examples.

V. The Guidelines Would Benefit From Clarifying the Discussion of Counterfactual Analysis

Paragraph 72 describes consideration of the "but for world" as not constituting a "before and after" test. The Sections suggest that this discussion be expanded to acknowledge that a "before and after" counterfactual approach may be less relevant in fast-changing innovative markets. Also, to the extent the conduct at issue increases barriers to entry and reduces potential entry, the "before" world may not provide a meaningful "absent the conduct" benchmark, because absent the conduct there could be increased entry and dynamism.

VI. The Guidelines Would Benefit From More Expansive Explanation of the Procompetitive Effects the Commission Will Consider

Paragraph 77 states that the Commission will consider pro-competitive effects. The Sections believe it would be useful for the Commission to list examples of some procompetitive effects that the Commission would find persuasive, *e.g.*, elimination of free riding by one brand owner on the efforts and investments of another brand owner.

VII. The Guidelines Would Benefit From Clarifying the Issues Raised By the Example on Refusal to License

On page 29, in the illustration of the types of conduct that are unlikely to significantly lessen competition, the last bullet point states that a "refusal to license could raise issues over time if market dynamics were to" make the use of certain technology "sufficiently desirable as to give rise to its own product market, or a substantial part of a market." In the United States and other jurisdictions, compulsory licensing is largely disfavored in the absence of a prior commitment to license. Indeed, in the interest of protecting incentives to innovate, courts in the United States have rejected claims that a refusal to license IP is anticompetitive absent evidence that the invocation of IP rights was pretextual, and generally reject any duty to deal -- even when

IP is not involved -- absent a prior voluntary course of dealing. The Commission may want to clarify the issues being addressed in this bullet point.

VIII. The Guidelines Would Benefit From Clarifying Certain Points Concerning Remedies

In paragraph 144, the Sections suggest that clarification of the reference to “10 percent of turnover” as geographically limited to New Zealand, rather than the entire world, would be helpful.

Also, in paragraph 149, on Enforceable Undertakings, subparagraph 149.6 provides for a firm to “[p]ay to the Commission all or part of the Commission's costs incurred in investigating, or bringing proceedings in relation to, its conduct.” The Sections are concerned that a provision of this kind could result in conflict of interest issues, in which firms could be perceived to “get away” with conduct by offering to pay the Commission directly for investigation (or other) costs. The Commission may want to consider whether this option opens the prospect of criticism over potential capture by regulated firms.

IX. Conclusion

The Sections welcome the Commission’s decision to engage in this consultation and appreciate the opportunity to comment on the Guidelines. The Sections would be pleased to respond to any questions regarding these comments.