18 November 2022

Project Lead (Misuse of Market Power Guidelines)
Commerce Commission
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Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Draft Misuse of Market Power Guidelines*.

Yours sincerely

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Draft Misuse of Market Power Guidelines

Submission by the New Zealand Food & Grocery Council

18 November 2022

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council ("**NZFGC**") welcomes the opportunity to comment on the *Draft Misuse of Market Power Guidelines* (the "**Draft Guidelines**").

2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over $40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over $34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

OVERARCHING COMMENTS

3. NZFGC strongly supports the Draft Guidelines. The amendments made to s36 of the *Commerce Act 1986* are an important element in addressing the exercise of significant market power in New Zealand. We see the value of the Guidelines not only as a deterrent to the exercise of such market power but also as providing confidence to suppliers and consumers in specific markets about what is not acceptable in that exercise.

4. With regards to market share, we suggest it would be helpful to include a description of "creeping acquisition" and the treatment of its impact. The cumulative effect of a number of such acquisitions expands market share of the ownership entity such that the business interests of an ownership entity in related markets should also be considered when assessing substantial market power.

5. The Draft Guidelines might also benefit from including a discussion of the application of the "LET test"[1] (entry of market participants must be Likely, sufficient in Extent and Timely) in relation to the impact market share might have on barriers to entry.

6. We suggest it would also be helpful to point to or replicate Attachment D from the *Mergers and Acquisitions Guidelines* which sets out an example of how the Commission calculates market share and concentration indicators.

7. 'Indirect supply' includes the prospect of the degree of influence or control through contractual arrangements over another entity. It would be helpful to have an example that illustrates this aspect in addition to the IT example.

8. NZGFC considers an example in the Draft Guidelines of a market participant exercising activity that would limit competition in a physical platform (such as a warehouse or retail outlet), in addition to the IT example, could be instructive.

9. The Draft Guidelines recognise that firms may have market power as purchasers of goods and services and that a firm with substantial purchasing market power might have the ability to worsen prices or terms of trade to sellers with adverse impacts on consumers. More commentary on such demand side theories of competition harm would be helpful.

10. NZFGC is pleased to note that market share is not the sole indicator of market power in the Commission's view but that other factors such as barriers to entry and expansion can contribute. Vertical relationships in such situations appear to intensify market power and an/some example(s) of how the Commission might assess this would be helpful (noting the description in para 89 of the Guidelines).

[1] Barriers to entry. OECD, 2006. p193 58 - Barriers to Entry.doc (oecd.org)

11. Price squeeze in the Draft Guidelines (paras 90 – 93) does not adequately cover the situation of a firm with substantial market power across the entire supply chain exercising price squeeze against suppliers that has the additional impact of limiting consumer choice and availability. The addition of a description of this practice, including economies of scope such as market portfolio investment and interlocking shareholding, and consequence /impact would be helpful.

12. Another related area is contracting terms. In markets where very few purchasing firms operate, suppliers are compelled to agree to terms that would not be required in a more competitive market. In our view, the terms imposed contractually (and non-contractual threats) are further indicators of market power and warrant description in the Draft Guidelines.

13. The list of 'Other Conduct' is helpful but we consider would benefit from further expansion/ description and examples particularly for 'self-preferencing', 'brand proliferation/saturation' and 'forced free riding'.

DETAILED COMMENTS

Role of the Guidelines

14. NZFGC notes the role of the Guidelines is to set out a broad overview of the Commerce Commission's approach to the amended prohibition as set out in section 36 of the *Commerce Act 1986* ("**the Act**"). The amendments made to s36 are an important element for many sectors operating in New Zealand. We see the value of the Guidelines not only as a deterrent to the exercise of market power but also as providing confidence to suppliers and consumers about what is not acceptable in that exercise.

15. We strongly support the provision of the Guidelines and note particular areas below where additional comment or illustration/example may assist.

How Markets are Assessed in Misuse of Market Power Case

<u>*Markets*</u>

16. We note that the approach to market definition is set out in the Commission's *Mergers and Acquisitions Guidelines* which have been applied over almost two decades and updated twice. The test of market definition therefore has a strong basis and history in application. It could be helpful to reflect a similar description in the Draft Guidelines especially by reflecting the prospect of substantial market share potentially being 20-40% depending on other contributing factors. The point to emphasise is that 50% or more should not be assumed to be the threshold for market share. It also may be helpful to point to or replicate Attachment D from the *Mergers and Acquisitions Guidelines* in these Misuse of Market Power Guidelines (for completeness) which sets out an example of how the Commission might calculate market share and concentration indicators.

17. Related to this and worthy of description in the Draft Guidelines is the impact of "creeping acquisition". There is no prohibition on "creeping acquisitions" in New Zealand. Small acquisitions are technically governed by the merger control law in section 47 of the Act but often small acquisitions will not offend. The cumulative effect of a number of such acquisitions expands market share of the ownership entity by stealth. In this case, the business interests of an ownership entity in related markets should also be considered when assessing substantial market power.

18. The importance of barriers to entry are described in paragraph 45 of the Draft Guidelines. We note that the Commission favours application of the "LET test"[2] (entry of market participants must be Likely, sufficient in Extent and Timely) in relation to the impact mergers might have on barriers to entry. If the intention is similar when considering misuse of market power, then some additional discussion on such aspects of assessment in the Draft Guidelines would be worth including.

Indirect supply

19. NZFGC notes that 'indirect supply' will be covered by the provisions of section 36. Indirect supply in the Consultation refers to comments made when equivalent amendments to section 36 were made in Australia, that this could relate to the degree of influence or control through contractual arrangements over another entity. It would be helpful to have an example that illustrates this aspect in addition to IT example.

Platforms

20. It would be helpful if the Commerce Commission defined what was meant by a platform and/or included other examples to illustrate the extent of this category. Retail outlets (including catalogues) are, in our view, 'platforms' owned by the retailers but in which many other small and large firms might operate. The online and physical platforms are critical in the retail environment and an example in the Guidelines of a market participant exercising activity related to the physical platform (in addition to the IT example) could be instructive.

Person with Substantial Market Power

Indicators of market power

21. We are pleased to note that market share is not the sole indicator of market power. Confirmed high market share, coupled with barriers to entry and expansion, are likely to be reflective, according to the Draft Guidelines, of firms that "will have a substantial degree of market power"[3].

22. We are also pleased to see that the Draft Guidelines recognise firms may have market power as a purchaser of goods and services and that a firm with substantial purchasing market power might have the ability to worsen prices or terms of trade to sellers with adverse impacts on consumers. It would be helpful for the draft Guidelines to have more commentary on demand side theories of harm on how use of this substantial purchasing power can translate to a substantial lessening of competition in a market.

23. Vertical relationships in such situations appear to intensify market power and an/some example(s) of how the Commission might assess the impact of vertical relationships as an indicator of market share would be helpful.

Checklist identifying impacts of market power

24. The Draft Guidelines are helpful not only in identifying 'the ultimate question'[4] for the misuse of market power as whether conduct has lessened or is likely to lessen the constraints that operate on the firm with market power. They are also helpful by providing a series of questions that might then be asked to identify impacts eg on costs, innovation, supply power and duration of effects.

25. In terms of conduct that might substantially lessen competition, we note the inclusion of price/margin squeeze. We find the description in para 89 of the Draft Guideline does not capture the situation of suppliers into a market where the upstream wholesale markets and the downstream retail market are owned by a single entity.

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[2] Barriers to entry. OECD, 2006. p193 [58 - Barriers to Entry.doc (oecd.org)]

[3] Para 44 Draft Guideline

[4] Para 75 Draft Guideline

26. Within some retail markets, the margin squeeze may be excessively high when applied to suppliers to the extent of removing several products, and therefore competition, from the shelves. Rather than consumer preferences choosing which products prevail as in a workably competitive market, it is retailer margins. An example that illustrates impact on product range and quality for the consumer could be helpful. Limited retail choice leads to poorer retail offer in the form of higher prices and lower-quality and a poorer range of products[5]: In our view, excessive margin squeeze is a significant feature of substantial market power.

Types of Conduct That May Substantially Lessen Competition

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Price Squeeze

27. The Guidelines (paras 89 – 93) covers the situation of a firm with substantial market power across the entire supply chain presenting barriers to entry for competitors. It is not just the users of an input for a downstream market but the supply at retail limiting consumer choice and availability. The economies of scope in this situation and the related anti-competitive effects could usefully be considered. The addition of a description of this practice, including market portfolio investment and interlocking shareholding, and consequence/impact such as price squeeze limiting the retail offering to consumers, would be helpful.

Predation

28. Predation focuses mainly on predatory pricing but in some sectors predation can also apply to the demands for supplier promotional cycles that increase the monopoly/duopoly firm's margin but delivers limited or no benefit to the consumer. This occurs where the supplier reduces its price but the retailer does not reduce the retail price.

29. Another related area is contracting terms. In markets where very few purchasing firms operate, the majority of suppliers are totally dependent on the those few firms such that the loss of the opportunity to supply one firm could threaten the supplier's business. In this situation, suppliers are compelled to agree to terms that would not be required in a more competitive market. In our view, the terms imposed contractually (and non-contractual threats) are further indicators of market power and warrant description in the Draft Guidelines.

Other Conduct

30. The list of 'Other Conduct' is helpful but we consider would benefit from further expansion and examples.

31. We would particularly encourage examples for:

   a) 'self-preferencing' – such as related to the placement and favouring of private label products or products from wholly or partially owned related companies
   b) 'brand proliferation/saturation'
   c) 'forced free riding' – such as supplying a retail product using copied, competing branded product packaging or content.

[5] para 2.17 NZFGC submission on Grocery Market Study Draft Report, July 2021