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Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
By email commerceact@mbie.govt.nz

DLA PIPER NEW ZEALAND - FURTHER SUBMISSION ON THE COMMERCE COMMISSION'S LETTER TO THE MINISTER OF COMMERCE AND CONSUMER AFFAIRS - TARGETED REVIEW OF THE COMMERCE ACT 1986 ISSUES PAPER

1 Thank you for the opportunity to comment on the submissions received by the Ministry and in particular the Commerce Commission's letter to the Minister of Commerce and Consumer Affairs in relation to the market power aspects of the targeted review.

2 In summary, our views remain as stated in our submission of 9 February 2016.

2.1 There is no 'perfect' test for unilateral misuse of market power. Particularly at the margins, it is very difficult to distinguish between pro-competitive conduct and damaging exclusionary behaviour.

2.2 There are important differences between structured contracts or arrangements involving multiple parties and unilateral decisions involving key competitive matters such as price and whether or not to deal with third parties.

2.3 These differences justify a different approach between section 27 and 36.

2.4 With regard to section 36, a causal link between market power and competitive harm is appropriate.

2.5 On balance, the existing test seems to provide a satisfactory basis for assessing unilateral conduct by a firm. If any change is viewed as necessary, we suggest this is delayed until the position has been clarified in Australia. We would also favour a modified status quo where the Court has greater flexibility to judge whether there has been an unlawful taking advantage of market power (while retaining both the purpose and the taking advantage requirement).

FURTHER COMMENTS

Identity of submitters

3 Both large and small businesses have an interest in section 36 being fit for purpose. Many large businesses often have a portfolio of products supplied to a range of markets. In some of these markets even a large business may be a new entrant and have no meaningful market power. In short, it should not necessarily be assumed that a 'large business' would automatically favour a more lenient application of section 36. Similarly we do note that a number of the business groups that have concerns regarding an 'effects test' have both large and many small members.

Inconsistencies in approach of submitters

4 It is suggested that submitters have failed to describe pro-competitive conduct they could not undertake with a reformed section 36 (i.e. with an effects test).

5 There seems to be a number of scenarios where firms could be discouraged from undertaking legitimate competitive responses. For example, a firm may be reluctant to introduce a low pricing regime if there is a real chance that pricing could result in a material (albeit potentially inefficient) competitor leaving the market. A firm may be reluctant to bargain rigorously with suppliers out of concern that an effect of that bargaining might be to reduce competition in the downstream market at least in the short to medium term (2-3 years).

6 These examples highlight the undesirable special responsibility that would be imposed on firms with market power, in the absence a suitable causal nexus between market power and harm to competition.

7 Further, our submission is not that section 27 and 36 are perfectly substitutable. Merely that true unilateral conduct that falls outside the ambit of section 27 has special characteristics and should be viewed through different lenses.

Practical examples

8 Two out of the three examples referred to by the Commission involve both section 27 and section 36. It is unclear to us whether these examples highlight any particular problems with the outcomes generated by the existing section 36 analysis. In its application of section 27 in each case, the Commission found no substantial competitive harm resulting from the conduct. The Commission's section 36 analysis applied a different test but this substantively resulted in the same outcome (i.e. a conclusion that the conduct was not unlawful).

9 The third example (Air New Zealand/Origin Pacific) does highlight the challenges in applying the existing section 36 test. However, it is not clear to us that applying an 'effects test' as proposed or the test under US or EU law to the fact scenario would be materially more effective. Also, the fact that the outcome of the Commission's investigation appears to have turned on a single assumption is perhaps not, in itself, of particular concern. It is

relatively common for finely balanced cases to turn on one or more findings or assumptions. It is the quality of the outcome which is the ultimate test.

Concluding comments

10 We agree with the Commission and submitters that reform of section 36 is not straight forward. We suggest that any changes are delayed until the position has been clarified in Australia.

11 Also, if section 36 is not effective 'primarily because of the way the courts have interpreted the "taking advantage" part of s36', the solution would appear to be for Parliament to direct those Courts to interpret those words in a more flexible manner rather than removing the test entirely.

12 Please do not hesitate to contact us if there are any queries regarding this submission.

Yours sincerely

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