

Proposed changes to Commerce Act could inhibit competition

Stephen Summers

MBIE and the Commerce Commission are seeking to change the law on market power and anticompetitive behaviour.

Proposals for changes to section 36 of the Commerce Act have been consulted on and the Minister of Commerce and Consumer Affairs will decide whether to continue with the changes recommended.

The proposals include changing the definition of anticompetitive behaviour and changing the test for determining whether anticompetitive behaviour has occurred.

BusinessNZ is concerned that the proposed changes would widen the definition of anticompetitive behaviour and introduce a looser test for determining whether anticompetitive behaviour had occurred.

Currently, anticompetitive behaviour is described as a firm abusing their market power or taking advantage of their market power to purposely prevent or deter competition.

The current definition of anticompetitive behaviour makes a connection between having market power and having the intention to use it for anticompetitive purposes.

The court is required to infer from the conduct and circumstances involved whether there has been such intention, using the test of whether a firm without substantial market power would have acted similarly.

While this test rests on a hypothetical consideration it nevertheless works reasonably well in practice.

MBIE's proposal would remove the need to show anticompetitive intention, and would remove the test of whether a firm without substantial market power would have acted similarly.

Business is concerned that this would widen the definition of anticompetitive behaviour so much that normal competitive conduct could be judged anticompetitive, and simply having market power could open up a firm to a charge of anticompetitive behaviour.

MBIE proposes to rely on an 'effects' test – whether the conduct in question had the effect of substantially lessening competition.

With this proposed test, the court would be required to judge whether anticompetitive behaviour had occurred on the basis of what happened in the market – the market outcome, regardless of intention.

Effects tests are used in a number of countries usually in combination with some kind of test of intention.

But here in New Zealand, MBIE proposes to rely solely on an effects test.

We consider this would be a vaguer test than the current one which includes both the need to show intention as well as considering circumstances including effects.

Simply looking at effects, or market outcomes, is not enough to determine whether anticompetitive behaviour has occurred.

‘Market outcomes’ in cases of alleged anticompetitive behaviour would usually be the outcomes resulting from a competing company losing sales to the company with market power.

But normal competitive behaviour has the same effect. Observing this effect does not tell us whether the competition was legitimate or anticompetitive.

BusinessNZ believes the effect of a competitor losing sales shouldn’t be sufficient to prove that anticompetitive behaviour has occurred. Market power alone doesn’t mean abuse.

We are concerned that an effects test alone could result in any firm with market power being judged to have acted anti-competitively.

This could have a chilling effect on business and investment, particularly in New Zealand’s small market. Businesses would be faced with greater uncertainty, finding it harder to predict what specific business activity could result in infringement. Firms might compete less vigorously to ensure they were not in breach of the law.

The proposals convey a message that there is something undesirable about competing to gain market power. But such competition encourages efficiency and innovation, to the benefit of consumers.

Firms shouldn’t be punished for competing to achieve market power, and having achieved market power, firms shouldn’t be prevented from competing further.

We believe the proposed changes would inhibit rather than promote competition.

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