Link Economics submission on the Targeted Review of the Commerce Act

February 2025

1. Link Economics welcomes the opportunity to make a submission to MBIE on the Targeted Review of the Commerce Act. Ensuring that the Commerce Act (the Act) helps to deliver competitive markets and provides an effective deterrent of anti-competitive conduct, including concerted practices, is critical to ensuring optimal long-term benefits for consumers and for ensuring that markets work well to deliver innovation, productivity improvements, and economic growth.

2. Link Economics specialises in competition economics and economic regulation. Our directors have provided expert analysis for market studies (personal banking services and grocery), mergers clearances, and authorisation processes, and are also experienced in the application of regulation under Part 4 of the Commerce Act.

3. This submission is informed by the work we have carried out for clients, however it represents our own views and is not client-commissioned. Our views draw on our expertise and knowledge as economists and so we do not comment on legal interpretation, which a number of the consultation questions centre on.

4. We would be happy to discuss the comments presented in this submission.

1 Overview - strengthening competition in New Zealand

5. Recent competition concerns have centred on high levels of market concentration in key sectors that have been the subject of the Commerce Commission's market studies. There are numerous prongs needed to address concentrated markets. These include:

    a. Encouraging entry, by lowering entry barriers (including regulatory barriers).

    b. Monitoring behaviour of firms and intervening where needed, whether that is through regulatory means or enforcement of anticompetitive conduct rules to address both unilateral and coordinated conduct.

    c. Ensuring appropriate scrutiny of mergers, to avoid exacerbating existing competition problems (or creating new ones).

    d. Addressing buyer power by finding ways to ameliorate the imbalance in bargaining power than can occur in highly concentrated markets.

6. It is encouraging to see recent government announcements that show a focus on finding ways to encourage entry and expansion in concentrated markets. The ideal way to address concerns associated with unilateral market power, concerted practices, and buyer power is to address

the underlying market structure. New Zealand has seen success stories in improving market structure – for example, the structural separation of Telecom and the entry of 2degrees have both brought huge benefits through strong price competition and innovation, providing marked flow-on effects to the economy.

7. However, the market entry needed to improve the structure of concentrated markets takes time, particularly in markets with high fixed costs and capital requirements, strong customer inertia, high switching costs, and/or other high entry barriers. Even with competitive entry some markets will remain reasonably highly concentrated – for example, even with entry of a new player into supermarkets there would be only three major suppliers. As a result, we consider it particularly important that the government is reviewing those aspects of the Commerce Act that can help address the harm that results from market concentration.

8. Below we provide comments on behavioural undertakings, concerted practices, and code/ rule-making powers. We do not have definitive views on some matters but trust that our observations will be of use to MBIE.

2 Behavioural undertakings for mergers

9. The discussion paper considers whether the Commission should be able to accept behavioural undertakings to address concerns with mergers. Our views generally align with the points made in the discussion paper. In particular, we consider that while there may be some cases in which a behavioural undertaking would be useful and appropriate, there also are a number of reasons why we would be cautious about their use, particularly where the undertaking effectively establishes quasi-regulation of an access regime.

10. Behavioural remedies are used by competition authorities in other jurisdictions, such as the ACCC, CMA and the European Commission, albeit fairly sparingly. These international competition authorities have favoured structural remedies – for example, the ACCC Merger Guidelines state a strong preference for structural undertakings, because they provide "an enduring remedy with relatively low monitoring and compliance costs".[1] However, a number of commentators have observed that there may be somewhat of a recent increase in the use of behavioural undertakings.[2] In addition, the CMA has recently announced that it will review its approach to merger remedies, including when behavioural remedies may be appropriate.[3]

11. In comparison with these other competition authorities, the Commerce Commission does have one less tool in the kit it can use to approve mergers. However, there are obvious scale and resourcing differences between the Commerce Commission and competition authorities/regulators in those larger competition jurisdictions. For example, the CMA recently approved the merger of Vodafone and Three, with undertakings on network commitments, retail price caps, and wholesale access prices and terms that would be overseen by both the

[1] ACCC Merger Guidelines, para 11 https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF

[2] https://www.aoshearman.com/en/insights/shifting-sands-uk-cma-to-review-approach-to-behavioral-merger-remedies
https://pulse.kwm.com/in-competition/no-longer-a-deal-breaker-recent-accc-merger-cases-signal-increasing-willingness-to-accept-behavioural-undertakings/

[3] https://www.gov.uk/government/speeches/driving-growth-how-the-cma-is-rising-to-the-challenge

sector-specific regulator (Ofcom) and the competition authority (CMA). Each of these authorities has more than twice the number of FTE employees of the Commerce Commission, despite the Commission having regulatory responsibilities for a greater number of sectors.

12. Given the comments discussed in section 1, the Commission's resources may be better focussed on addressing competition in highly concentrated sectors as well as carrying out its other roles (such as developing economic regulation of water services) and in engaging in more active enforcement of s.36, rather than having to divert resources to the monitoring and enforcement of behavioural undertakings for mergers.

13. We note that the discussion paper mentions the Sky-Vodafone merger application as an example that some commentators consider would have been cleared if a behavioural undertaking could have been used. We are not convinced that this is the case. A behavioural undertaking could have required resale of Sky services, however, details of the terms on which it was resold, including price, whether customers of resellers received the same level of service, and more generally whether the services were provided in a non-discriminatory manner, are issues that would have required quasi regulation. In the telecommunications context, the NZ government and the Commerce Commission stepped away from a non-discriminatory framework for wholesale access (operational separation), to structural separation as a way to best support competition. Accepting a behavioural undertaking in the Sky-Vodafone proposed merger would have been at odds with the view that structural measures provide significantly better competition outcomes than non-discrimination rules.

14. We are inclined towards the view that the current approach of allowing structural remedies but not behavioural remedies may be more pragmatic for New Zealand. However, we also think that it is important to examine the trade-offs involved with an eye to the future – that is with a forward-looking view of whether behavioural undertakings are likely to be more relevant for digital markets and, more generally, in the context of changing technology. The lack of flexibility in behavioural undertakings to adapt to fast-changing circumstances in digital markets may well mean that they are not likely to be more relevant.

3 Anti-competitive conduct – concerted practices

15. In answer to the first consultation question on concerted practices, we do not think that the Commerce Act adequately deters forms of tacit collusion between firms that are designed to lessen competition between them.

16. Regardless of the form of collusion (explicit or tacit, or some variation), from an economics perspective, the effects are largely the same. As a result, we think it is important to ensure that the legislation captures concerted practices and that the legislation and/or guidance is sufficiently clear that firms can understand what types of behaviour are not permitted.

17. The criminalisation of cartels and the actions of the Commerce Commission to enforce that would presumably have a strong deterrent effect on explicit collusion. We note that when there is an increased focus on addressing explicit collusion this can give rise to an increased

use of concerted effects.[4] As a result, ensuring that there are adequate rules to address concerted practices could be thought of as being a necessary measure to complement the cartel rules.

18. As the discussion paper highlights, concerted practices can include competitors sending price lists or manuals to each other or an industry association collecting commercially sensitive information from its members and publishing price forecasts to assist members. Concerted practices can also occur through firms' public announcements and statements, including press releases, investor briefings, presentations at industry conferences, financial or annual reports, interviews, or public advance notifications of price changes.

19. While there is some appeal to having concerted practices rules that prohibit specific actions, as the discussion paper acknowledges, this is likely very difficult to do. In addition, it would not capture public communications that are well-recognised as providing a means for price signalling. This all suggests that, similar to s30, there would need to be a general rule prohibiting concerted practices, rather than a rule prohibiting specific actions.

4 Addressing access issues and buyer power

4.1 Addressing access issues

20. The discussion paper asks whether industry codes could fill a gap in the competition conduct regime, and what matters of classes or rules could be included. We have come across a number of access issues that we think would be best resolved through code or rule-making powers.

21. In particular, there are access issues in markets that are not large enough to justify either regulatory intervention under Part 4 of the Act, or action under s.36. However, the difficulties in obtaining access on reasonable terms hold back competition and result in harm to consumer outcomes in those markets. In practice, this can mean that access to an input or facility is not provided, or that where access is provided, the only constraint on the terms of access is s.36.

22. There is uncertainty about how the current version of s.36 would apply to access pricing – there is case law on ECPR and the counterfactual test under a purpose test, but there has not been a Court decision on access terms under the effects test. As a result, ECPR or a variation of it continues to be applied for some access services. Industry access codes or rules (and the threat of their use) would be a much more appropriate means for guiding market access negotiations and addressing problems with access terms than s.36.

4.2 Addressing buyer power

23. Another competition issue that may be alleviated to at least some extent through industry codes or rule-making is buyer power. An imbalance in bargaining power such that the buyer is in a substantially stronger position than the seller, can lead to harm to consumer outcomes in

[4] For example, see the discussion of airline collusion on page 60 of the presentation of Joe Harrington (U. of Pennsylvania- Wharton) at the 2021 CRESSE conference: https://joeharrington5201922.github.io/pdf/Harrington_CRESSE-JUFE_05.21_Slides.pdf

the form of higher prices, less innovation, lower quality, and less choice. Buyer power can arise, for example, when the buyer controls the only effective channel to end-consumers.

24. The grocery market study provided an example of how buyer power can harm competition and consumer outcomes. For example, the Commerce Commission highlighted that "for most suppliers, particularly smaller suppliers, there appears to be an imbalance of bargaining power in favour of the major grocery retailers."[5] As a result, the Commerce Commission recommended introducing a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers.

25. Another measure to address buyer power is the use of collective bargaining. The discussion paper asks whether further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without the risk of breaching the Commerce Act. The process of achieving authorisation is costly and time-consuming, particularly for very small businesses. Moreover, the imbalance in size and resources that can be present when small suppliers are dealing with a monopsonist buyer can make the option of seeking authorisation daunting and out-of-reach. This is not only because of the authorisation application fee, but also because of the cost of seeking the advice that is required throughout the authorisation process. The introduction of a statutory notification regime for specified classes of arrangements, as is available to the ACCC, is a pragmatic way to help address and prevent the harm that buyer power can create.

[5] NZ Commerce Commission (8 March 2022), "Market study into the retail grocery sector – Final Report", Para 860

Contact:

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