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Statement of Preliminary Issues

NZ Post/PBT

7 December 2023

Introduction

1. On 20 November 2023, the Commerce Commission registered a clearance application (the Application) from New Zealand Post Limited (NZ Post) seeking clearance for it, or any interconnected body corporate, to acquire certain courier business assets of PBT Group Limited (PBT) (the Proposed Acquisition). Specifically, NZ Post seeks to acquire PBT's existing contracts with businesses who have signed contracts to use PBT's courier services.[1]

2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.[2]

4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **21 December 2023**.

The Parties

5. NZ Post and PBT (together, the Parties) are both suppliers of courier services in New Zealand.

NZ Post

6. NZ Post is a delivery and eCommerce logistics company, providing mail, courier and logistics services. It is a state-owned enterprise under the State-Owned Enterprises Act 1986.[3]

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[1] As noted in the Application, NZ Post would not be acquiring any assets associated with PBT's other businesses, or PBT's contractual arrangements with the courier van owner-operators PBT currently contracts to provide local delivery services. However, NZ Post submits that it may enter into contracts with some former PBT drivers (the Application at [19.3]).

[2] The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

[3] The Application at [6]-[7].

7. Relevant to the application, NZ Post operates a domestic small parcel courier business.[4] It is the largest provider of such services in New Zealand.[5] NZ Post formerly operated this courier business through three delivery brands: NZ Post, Courier Post and Pace. However, following a rebrand in 2021, NZ Post now operates solely using 'NZ Post' branding.[6]

8. NZ Post also owns Fliway Group Limited (Fliway). According to the Application, Fliway specialises in the delivery of items that are typically too big to be carried by courier networks but are still transported as individual items rather than in bulk.[7]

PBT

9. PBT operates an express freight network in New Zealand. It is 75% owned by Waterman Capital, and 25% owned by Brendon Thomas, Chris Western, and Dave Lovegrove (or their nominees).[8] PBT provides a range of services including freight, logistics, third-party logistics, storage and distribution services.[9] However, of most relevance to the Application, PBT operates a courier business that provides courier services to primarily business customers throughout New Zealand.[10]

10. According to the Application:[11]

    10.1 PBT has branches in 17 urban centres and contracts approximately 200 courier van owner-operators to deliver its services;

    10.2 PBT does not operate in rural or remote areas itself; rather, PBT purchases NZ Post wholesale courier services to deliver to these rural and remote addresses; and

    10.3 PBT's focus is on providing services to sophisticated businesses in New Zealand's major urban centres. PBT does not offer services to personal customers.

Our framework

11. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[12] As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.

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4 The Application at [8].
5 The Application at p.4.
6 See https://www.nzpost.co.nz/about-us/delivering-together#what-is-changing.
7 The Application at [9].
8 The Application at [12].
9 The Application at [15].
10 The Application at [16].
11 The Application at [16]-[17].
12 Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022). Available on our website at www.comcom.govt.nz.

12. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).[13] This allows us to assess the degree by which the Proposed Acquisition might lessen competition.

13. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:

    13.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;

    13.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and

    13.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser's ability to exert substantial influence on negotiations.

Industry background

14. NZ Post and PBT are two of the well-known suppliers of courier services in New Zealand. Other well-known suppliers are:

    14.1 Freightways Group Limited (Freightways), which operates several courier brands, including New Zealand Couriers, Post Haste, Castle Parcels, Now Couriers, Sub 60 and Kiwi Express; and

    14.2 Aramex New Zealand Holdings Limited (Aramex), which entered the New Zealand market in 2016 when it purchased Fastway Couriers.

15. Beyond these suppliers of courier services, there are also a number of smaller suppliers of courier services.

16. In addition to suppliers that provide courier services direct to customers, we understand that there are active resellers which negotiate rates with courier companies and then resell or broker those courier services to customers.[14] NZ Post submits that these resellers do not provide any aspect of the courier services themselves, and include:[15]

    16.1 aggregators such as Online Distribution, Vertical Logistics, R3pack, GoSweetSpot, Parcel Port, Trade Me, and others; and

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[13] *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

[14] The Application at [66].

[15] The Application at [66]-[67].

16.2 pick and pack logistics providers who typically bundle their logistics services with courier services provided by others, such as DHL Supply Chain, Schenker, Smartbox, Supply Chain Solutions, and others.

17. Courier services are demanded by and supplied to both businesses and consumers. Services can be:

17.1 business-to-business (B2B), where a parcel or package is couriered from one business to another business;

17.2 business-to-consumer (B2C), where a parcel or package is couriered from a business to a consumer (eg, for delivery of online shopping);

17.3 consumer-to-business (C2B); or

17.4 consumer-to-consumer (C2C).

18. PBT offers both B2B and B2C courier services, but does not offer C2B or C2C services. The Application states that PBT’s courier services are 70% B2B and 30% B2C. In contrast, NZ Post submits that its services are mostly B2C (70%), with the balance being B2B.[16]

19. Courier services can involve parcels or packages being picked up and delivered within the same city, between major cities, or from one location to another in New Zealand. In terms of timeframe, services can be urgent (picked up and delivered within a few hours), same day, overnight or within a few days. Although, PBT does not offer all these delivery options.[17]

Market definition

20. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.[18]

21. NZ Post submits that the relevant market for the purpose of assessing the Proposed Acquisition is the national market for the provision of domestic courier services (the courier services market), which involves the pickup and delivery of ambient parcels under 25kg in weight.[19] It further submits that:

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16 The Application at [64].

17 The Application at [83].

18 Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

19 The Application at [44]. We understand that ambient parcels are parcels that do not require temperature controlled environments (ie, are not chilled or frozen).

21.1 all major courier providers operate in the same or similar urban areas across New Zealand as PBT, and the fact that there are some locally-focused couriers in a region does not mean the market is not New Zealand-wide;[20]

21.2 given all couriers offer B2B and B2C, defining separate B2B and B2C customer markets would not assist in informing the competition analysis;[21] and

21.3 there would be limited overlap between NZ Post and PBT if markets were defined more narrowly based on delivery timeframes/distance.[22]

22. We will consider whether a national market for the provision of domestic courier services is the most appropriate market for assessing the competition effects of the Proposed Acquisition, or whether its impact is better assessed with reference to other markets. For example, we will consider whether the Proposed Acquisition is better analysed by reference to narrower markets, such as separate markets for:

22.1 courier services acquired by businesses for delivery to businesses (B2B) versus consumers (B2C);

22.2 different delivery timeframe types (such as urgent, express, overnight and deferred delivery); and

22.3 different regions in New Zealand.

23. We will also consider the extent to which there are relevant market(s) for the wholesale supply of courier services to aggregators, resellers and/or courier companies that utilise the wholesale services of other courier companies.[23]

Without the acquisition

24. NZ Post submits that the Proposed Acquisition is best assessed against a status quo counterfactual, ie, NZ Post operating as it currently does and PBT retaining its courier business (under current or new ownership).[24]

25. We will consider what the Parties would likely do if the Proposed Acquisition does not go ahead, as well as the competitive position of each. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo or whether the Parties would likely seek alternative options, for example, finding an alternative buyer for PBT's courier business assets.

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20 The Application at [57] and [59].

21 The Application at [65].

22 The Application at [47]-[48].

23 In the Application, NZ Post submits that to the extent there is a wholesale market, the courier providers or potential courier providers are the same as in the retail market, such that the competition analysis should not differ between these functional levels. The Application at [71].

24 The Application at [43].

Preliminary issues

26. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral, coordinated or vertical effects might result from the Proposed Acquisition. The questions that we will be focusing on are:

    26.1 Unilateral effects: would the loss of competition between the Parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?[25]

    26.2 Coordinated effects: would the Proposed Acquisition change the conditions in the relevant market(s) so that coordination is more likely, more complete or more sustainable?

    26.3 Vertical effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to foreclose rivals?

Unilateral effects: would the merged entity be able to profitably raise prices by itself?

27. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger, without the profitability of that increase being thwarted by rival firms' competitive responses.[26]

28. NZ Post submits that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects because, in its view:[27]

    28.1 PBT is not a particularly strong or aggressive competitor in the courier market, which is illustrated by its modest market share;

    28.2 there is nothing to suggest that PBT's competitive significance is greater than its existing market share, or any reason to believe that PBT would become more competitively significant in the future;

    28.3 NZ Post will continue to be constrained by the strong competition currently provided by Freightways, which is a clear leader in B2B and an increasingly significant force in B2C;

    28.4 NZ Post will also continue to be constrained by competition from Aramex, while other smaller competitors also provide some constraint on NZ Post and

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25 For ease of reference, we only refer to the ability of the merged entity to "raise prices" from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, ie, it could increase quality-adjusted prices.

26 *Mergers and Acquisitions Guidelines* above n12 at [3.62].

27 The Application at [72].

face no barriers to grow to replace the level of constraint currently provided by PBT; and

28.5 large customers will continue to be able to exercise countervailing power to constrain NZ Post.

29. We will consider the closeness of competition between the Parties in any relevant market(s) and therefore, what competition would be lost due to the Proposed Acquisition if clearance is granted. For example, we will look at the extent to which the Parties compete closely to supply courier services to customers in New Zealand.

30. To the extent that any constraint imposed by the Parties on each other is material, we will assess the impact of the loss of competition having regard to the remaining constraints in the market. In doing this, we will consider the following factors:

30.1 the degree of constraint that existing competitors would impose on the merged entity for the supply of domestic courier services, including how rivals would compare to the merged entity in regard to price, quality and service (or any other relevant factor);

30.2 how easily rivals could enter and/or expand in the relevant market(s), and whether barriers to entry or expansion may differ for different types of courier operators (eg, network and point-to-point operators) or business models; and

30.3 countervailing power and whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

Coordinated effects: would the Proposed Acquisition make coordination more likely?

31. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to act in a coordinated way.[28]

32. NZ Post submits that the Proposed Acquisition would not be likely to substantially lessen competition due to coordinated effects because, in its view, there are several features of the market that make coordination impossible. It submits that:[29]

32.1 market prices are not readily observable;

32.2 the market is differentiated in terms of service levels;

32.3 market shares are asymmetrical;

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[28] *Mergers and Acquisitions Guidelines* above n12 at [3.84].

[29] The Application at [123]-[130].

32.4 Aramex and other point-to-point operators would provide a strong moderating influence on any attempted coordination;

32.5 margins have been driven towards and remain at marginal cost; and

32.6 there is nothing to suggest PBT has been, or could become, a key driver of competition or be a rogue or disruptive force.

33. We will assess whether any relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in these markets so that coordination is more likely, more complete or more sustainable.

Vertical effects: would the merged entity foreclose rivals?

34. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical effects. This can occur where a merger gives the merged entity a greater ability and/or incentive to engage in conduct that prevents or hinders rivals from competing effectively (which we refer to as "foreclosing rivals").[30]

35. NZ Post submits that the Proposed Acquisition would not be likely to substantially lessen competition due to vertical effects because, in its view:[31]

35.1 the acquisition will not give NZ Post the ability to foreclose resellers – Freightways, Aramex and other smaller providers would still remain an option for resellers with the Proposed Acquisition; and

35.2 the acquisition will not give NZ Post the incentive to foreclose resellers – NZ Post's resellers help increase NZ Post's volumes and the Proposed Acquisition would not change NZ Post's incentives to deal with resellers.

36. As part of our assessment of these issues, we will consider whether as a result of the Proposed Acquisition:

36.1 NZ Post would have the ability and/or incentive to foreclose resellers; and

36.2 any competition lost due to any foreclosure would amount to a substantial lessening of competition.

Next steps in our investigation

37. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **7 February 2024**. However, this date may

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[30] *Mergers and Acquisitions Guidelines* above n12 at [5.1]-[5.15].
[31] The Application at [133]-[135].

change as our investigation progresses.[32] In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

38. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

39. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "NZ Post/PBT" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **21 December 2023**.

40. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.

41. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

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32 The Commission maintains a clearance register on our website at http://www.comcom.govt.nz/clearances-register/ where we update any changes to our deadlines and provide relevant documents.