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Determination

FedEx Corporation and TNT Express N.V. [2015] NZCC 24

The Commission:	Dr Mark Berry Elisabeth Welson Dr Jill Walker
Summary of application:	FedEx Corporation seeks clearance to acquire all of the shares in TNT Express N. V.
Determination:	Under s 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	1 October 2015

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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The proposed acquisition

1. On 30 July 2015, the Commerce Commission (the Commission) received an application from FedEx Corporation (FedEx), seeking clearance to acquire all of the shares in TNT Express N.V. (TNT). The acquisition forms part of a global merger that is currently being considered by several other competition authorities.

The decision

2. The Commission gives clearance to the proposed merger. The Commission is satisfied that the proposed merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

3. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in the Mergers and Acquisitions Guidelines.[1]

The substantial lessening of competition test

4. As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.

5. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[2]

6. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),[3] or reduce non-price factors such as quality or service below competitive levels.

7. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.

8. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. 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 Act, as a matter of fact and commercial common sense.[4]

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[1] Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.
[2] *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].
[3] Or below competitive levels in a merger between buyers.
[4] Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

When a lessening of competition is substantial

9. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[5] Some courts have used the word 'material' to describe a lessening of competition that is substantial.[6] A lessening of competition in a significant section of a market, may, according to circumstances, be a substantial lessening of competition in that market.[7]

10. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

11. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.[8]

The clearance test

12. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[9] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.[10]

13. The burden of proof lies with FedEx as the applicant to satisfy us on the balance of probabilities that the acquisition is not likely to have the effect of substantially lessening competition.[11] The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence.[12]

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5 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

6 Ibid at [129].

7 *Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260; 44 ALR 173, 192; ATPR 40-315, 43,888 as cited by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at 435.

8 *Woolworths & Ors v Commerce Commission* (HC) above n 5 at [111].

9 Commerce Act 1986, s 66(3)(a) of the Commerce Act 1986.

10 In *Commerce Commission v Woolworths Limited* (CA), above n 2 at [98], the Court held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition".

11 *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [97].

12 *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [101].

Industry background

Overview

14. This merger relates to international air delivery services with the primary focus on the express delivery of small packages. More specifically, the merger deals with the collection of a consignment from the point of origin in one country and the transportation of the goods using international air services for delivery to a point of destination in another country. The contents of such consignments vary considerably. The factor that appears to distinguish express delivery services from standard services is the time critical nature of consignments with delivery guaranteed within a specified time and date (eg, frequently one to three days).[13]

15. Typically, the delivery process involves the following steps:

    15.1 collection of the goods from the customer;

    15.2 transportation of the goods to an international airport using ground handling services;

    15.3 transportation of the goods by air to the country of destination;

    15.4 customs clearance and processing of other documentation to meet export/import requirements; and

    15.5 transportation of the goods to the destination using ground handling services.

16. International air delivery services are evolving in response to technological change with e-commerce services and on-line shopping contributing to change the nature and volume of goods carried by these services. Another development has been the emergence of "virtual" intermediaries which outsource all components of the delivery process to third-party carriers.

Industry participants

17. There are a range of industry participants involved in the provision of international air delivery services, including small packages, each with a different operating model. The following is a summary of the major categories of providers.

<u>Integrators</u>

18. There are four global integrators that provide international air delivery services into and out of New Zealand (FedEx, TNT, DHL Express (New Zealand) Limited and United Parcel Service Inc).

19. In Europe the term integrator refers to a firm that provides full operational control over the carriage of goods from origin to destination, including air transport.

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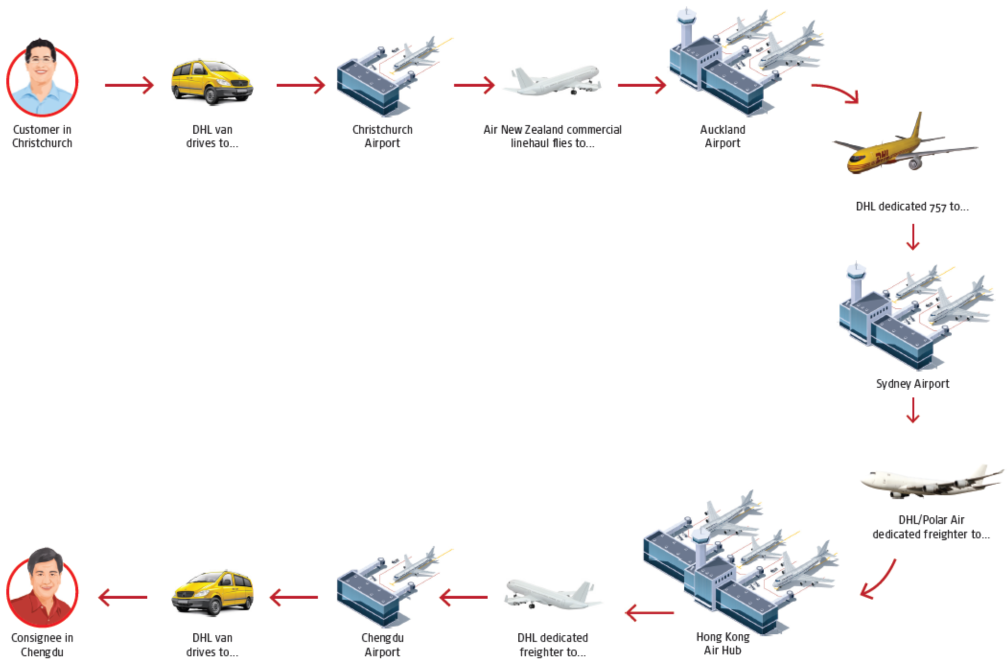
[13] For example, under its International Priority service FedEx offers time-definite delivery typically in one to three business days to and from New Zealand for packages weighing 68kgs or less.

However, in the New Zealand context, integrators differ in that they do not have full operational control over all components of the delivery process. Instead, integrators sub-contract components of the delivery process to third-party commercial airlines and ground handling providers. However, they still retain operational control over elements of the delivery process, including specific air and ground sectors of the journey. This tends to distinguish them from other providers, such as freight forwarders and postal service operators that sub-contract all or most components of the delivery process.

20. FedEx submitted that the increase in the number of commercial airlines operating wide-bodied aircraft has increased the belly-space freight capacity available to suppliers of international air delivery services such as integrators and other providers of such services.[14] This in turn has assisted integrators providing services to and from New Zealand to compete as they have more air transport services available internationally.

21. Below is a diagram showing the typical journey of a consignment using the delivery services of an integrator.

Figure 1: Integrator - Christchurch to Chengdu



Source: Application

[14] Application at [7.7].

Freight forwarders

22. There are approximately 300 air freight forwarding companies that currently operate in New Zealand, although only around 70 of these freight forwarders are IATA-registered.[15] [16] Our focus in this decision is on those freight forwarders that are IATA-registered. Unlike integrators, freight forwarders generally sub-contract or enter partnerships with third parties for all or most aspects of the delivery process, including air delivery.[17] Freight forwarders also tend to focus on larger items of freight and while they provide international air delivery services for small packages, this is often undertaken in their capacity as resellers or partners of integrators.

Postal service operators

23. Like its overseas counterparts, New Zealand Post (NZ Post), provides international and domestic air delivery services for small packages. Frequently, such operators work closely in conjunction with other overseas postal service operators. For example, NZ Post has a close relationship with Australia Post. NZ Post also has a strategic partnership with DHL Express, which NZ Post uses for its small package international express air delivery services.

Key parties

The merging parties

24. FedEx and TNT are two overseas-based companies that supply international air delivery services for freight and small packages to and from a number of countries, including New Zealand. As noted, both companies are referred to as integrators.

FedEx

25. FedEx is a USA-based company that provides global transportation and e-commerce services, including international air delivery services through its subsidiary Federal Express Corporation.

26. In New Zealand, FedEx provides international air delivery services for documents, small packages and freight to and from over 220 countries. FedEx operates one weekly flight into and out of Auckland, the flight originating in Los Angeles, and then departing from Auckland for Sydney. FedEx also operates its own cargo aircraft on various other routes throughout the world. However, most of FedEx's New Zealand inbound and outbound business is carried by third-party commercial airlines.

27. In addition, FedEx has a ground handling network comprising 'pick-up and delivery' depots in Auckland, Wellington and Christchurch with third-party carriers providing ground handling services elsewhere in the country.

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15 Commerce Commission Investigation Report on Freight Forwarding (11 November 2009). On the basis of the information available there is no reason to believe that that these figures do not still broadly apply.

16 IATA-registered means that a freight forwarder has a licence to purchase airline capacity.

17 Some freight forwarders employ their own assets at certain stages of the delivery process.

TNT

28. TNT is a Netherlands-based company that provides international delivery services for small packages and freight to over 200 countries.

29. In New Zealand, TNT provides international air delivery services for goods ranging from documents and small packages to palletised freight. Like FedEx, it has a ground handling network with depots in Auckland, Wellington and Christchurch, supplemented by local TNT drivers in Hamilton, Tauranga and Napier, and third-party carriers elsewhere in the country.

30. However, unlike FedEx, TNT does not operate any aircraft into or out of New Zealand. Instead, it uses a variety of third-party commercial airlines to carry its goods, although it operates its own aircraft on certain routes outside New Zealand.

Other integrators

DHL Express (New Zealand) Limited

31. DHL Express (New Zealand) Limited (DHL Express), which forms part of the Deutsche Post DHL group, provides international air delivery services for documents and small packages to over 220 countries. In New Zealand, DHL Express operates a dedicated cargo aircraft five times a week between Auckland and Sydney as well as using its own air cargo aircraft on other parts of its network. DHL also makes extensive use of third-party commercial airlines to carry its consignments.

32. DHL has a ground handling network in New Zealand comprising its own 'pick up and collection services' in the major centres with third-party carriers providing such services outside of those centres. DHL partners with NZ Post in those parts of the country where it does not operate pick-up and delivery services.

33. DHL previously owned 50% of Express Couriers Limited, an express courier, logistics and distribution company, the other 50% being owned by NZ Post. Although DHL sold its 50% shareholding in Express Couriers back to NZ Post in 2012, DHL and NZ Post entered into a strategic partnership. [ ].

34. In New Zealand, the DHL group of companies also operates DHL Global Forwarding, which provides freight forwarding services, and DHL Logistics, which provides warehousing, freight transportation and other logistics services.

United Parcel Service Inc

35. United Parcel Service Inc (UPS) is a US-based company that provides international delivery services for small packages and air freight services to over 200 countries.

36. In New Zealand, UPS uses third-party commercial passenger airlines and a mixture of its own and third party ground handling services to pick up and deliver its consignments. UPS operates its own air cargo aircraft on other parts of its network.

37. In New Zealand, UPS is a 50% shareholder in United Parcel Service–Fliway (NZ) Limited (UPS-Fliway), a joint venture company which offers small package international express air delivery services worldwide using UPS's aircraft and ground handling services. The other 50% of UPS-Fliway is held by Fliway Transport Limited, which provides international air and ocean freight forwarding services, logistics services and domestic line-haul transport and courier services.

Other suppliers/resellers

38. Other suppliers of small package international air delivery services in New Zealand include:

    38.1 freight forwarders, such as Kuehne + Nagel, Camerons, DB Schenker and Agility. However, these companies generally provide small package international air delivery services as an ancillary activity to their core air and ocean freight forwarding services. Freight forwarders frequently use one or more of the integrators, and/or other third-party carriers, to provide these services so in that context they can be viewed as customers of integrators rather than as direct competitors.

    38.2 NZ Post, a state owned enterprise, provides amongst other things, international air delivery services for small packages to over 220 countries, often in conjunction with other national postal service operators, such as Australian Post. However like freight forwarders, NZ Post uses third-party carriers to provide international air delivery services outside of NZ Post's network. They also utilise integrators with NZ Post employing DHL Express to provide such services when express delivery is required.

    38.3 virtual intermediaries, which do not own any of the assets but outsource each individual component of the process, from the pick up to delivery, to a third party provider.

Customers

39. There is a diverse range of customers that use the providers of small package international air delivery services. As such, the contents of small packages can vary considerably from spare parts, to apparel and other goods.

With and without scenarios

With the acquisition

40. As noted, FedEx is proposing to acquire all of the shares in TNT with the effect that TNT will become a 100%-owned subsidiary of FedEx.

Without the acquisition

41. Without the acquisition, we consider that the status quo is likely to prevail.

Market definition

Our approach to market definition

42. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

43. We define markets in the way that best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

How the Commission views the relevant markets

44. In considering the relevant markets that may be affected by this transaction, we have assessed a number of market characteristics, including the product, geographic and temporal dimensions.

45. The proposed acquisition involves overlap in the supply of international air delivery services for both inbound and outbound freight and small packages.[18] However, as the core business of the merging parties is confined largely to small packages and since the aggregation resulting from this merger in air freight delivery services is only minimal, we do not consider that market further in these reasons. Therefore, the focus in the remainder of this Decision is on international air delivery services for small packages.

46. The European Commission (EC) has previously identified a market for small parcel international air delivery services based on speed of delivery (ie, express delivery services which are usually regarded as next day services and standard/deferred delivery services.)[19] While we consider that such a definition provides a useful starting point for considering the competitive effects of this merger, the market environment in New Zealand is different given New Zealand's isolation from most of the rest of the world compared to the geographical proximity of countries in the EC region.

Overview

47. We consider that small package international air delivery services can be separately differentiated along a continuum depending on the consignment's:

    47.1 size/weight;

    47.2 speed of delivery;

[18] See paragraphs 48 and 49 for a discussion on the distinctions between air freight and small packages.
[19] COMP/M.6570- UPS/TNT Express (30 January 2013).

47.3 geographic origin/destination; and

47.4 service features, such as reliability, track and trace capability, door-to-door delivery and other qualitative features.

Product dimension

48. When considering previous cases, the EC has identified a separate product market for small package delivery services up to 31.5 kg, and any package that weighs any more is generally classified as freight.[20] However, FedEx typically uses 68kg (150 lbs) as the cut-off to distinguish freight from small packages. FedEx notes that this weight corresponds with the limitations of the equipment used for sorting small packages. Such equipment is capable of handling packages weighing up to 70 kgs.[21]

49. In considering the proposed merger, we do not consider that it is possible, nor is it necessary, to delineate precisely a weight between small packages and freight. This is because the weight may vary depending on the circumstances. For instance, we were told that the weight for small packages can range up to about 70 kgs.

50. While inbound delivery services are not substitutable for outbound services and are characterised by different dynamics, the same market participants generally provide both services to and from New Zealand. Therefore, we do not propose to consider these markets separately.

51. Other characteristics that potentially distinguish small package international air delivery services include the requirement for door-to-door delivery, reliability and track-and-tracing capability. The advice from industry participants indicated that the integrators were the only parties that were capable of providing such requirements on a consistent basis.[22]

Time dimension

52. International air delivery services for small packages can be segmented by the speed with which they can be delivered. For instance, the EC has previously identified separate markets for express delivery services and for standard (or deferred) delivery services.[23] However, as noted by FedEx, the distinctions are not as clear cut when considering the market in New Zealand.[24] FedEx notes, among other things, that New Zealand's geographic isolation means that with the exception of the east coast of Australia, same day/next day delivery is not achievable to the same extent as in Europe, in which the member countries are geographically closer.[25]

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20 For example, see COMP/M.6570- *UPS/TNT Express* (30 January 2013) at [164].

21 Application at [8.7].

22 For instance telephone calls with [ ] (21 September 2015) and [ ](22 September 2015).

23 COMP/M.6570- *UPS/TNT Express* (30 January 2013).

24 Application at [8.10].

25 Application at [8.11ff].

53. We agree with FedEx's view that express international air delivery comprises a continuum of services that range from the most urgent delivery services, with guaranteed delivery times, to services that, although still express (with delivery times of three to five days for more distant destinations), are offered as less expensive options.[26] For example, FedEx offers "International Priority" and "International Economy" services. However, FedEx notes that its International Economy services delivers worldwide within five business days, which is as quick as some other providers market as "express services."

54. Given the apparent fluidity between express and standard delivery services, we do not propose to differentiate between the two categories. Rather, we propose to consider them as part of a continuum of services. However, we would expect the upper limit for the delivery time of express parcels to be no more than seven days. What is important is that such goods are time sensitive but as the degree of urgency becomes more variable, the distinctions are less clear cut.

Geographic dimension

55. We consider that for the purpose of considering the proposed merger, the appropriate geographic dimension is the supply of international express air delivery services from the point of origin in one country to the point of destination in another country.

56. We note that the merging parties and its competitors generally service all parts of New Zealand and the world so we consider the relevant market is a national market into and out of New Zealand. However, we recognise that certain competitors may have differing competitive strengths depending on the trade lanes in which they operate. To the extent that this is relevant, we consider it further in the competition analysis section of these reasons.

Conclusion on the market

57. For the purpose of analysing this merger, we propose to define the relevant market as a national market for the supply of international express air delivery services for small packages into and out of New Zealand.

How the acquisition could lead to a substantial lessening of competition in the relevant markets

58. We have considered two potential theories in assessing the competitive effects of the proposed acquisition. These theories are that the acquisition could substantially lessen competition through:

    58.1 unilateral effects that could arise by FedEx acquiring TNT and removing that company as a significant competitive constraint such that FedEx can

[26] Application at [8.11].

profitably increase price above or reduce quality below the competitive level; and

58.2 coordinated effects that could arise if the proposed merger is likely to increase the ability of the merged entity and its rivals to coordinate their behaviour post-merger.

Competition analysis

Overview

59. The acquisition would result in the amalgamation of two of the four global suppliers of small package express international air delivery services to and from New Zealand. This would leave DHL as the largest market participant together with one smaller operator (UPS). So effectively the acquisition would reduce the number of integrators from three to two with a fringe player.

60. FedEx submitted that there are a large number of market participants competing in the international air delivery industry in New Zealand, including for the express delivery of small packages. This includes not only other integrators, of which DHL Express is the largest, but freight forwarders and NZ Post.

61. FedEx considers that, unlike Europe, integrators in New Zealand lack full operational control over the delivery of the package from its origin to delivery, including air transport, so their mode of delivery is little different from that used by freight forwarders, which arrange to deliver freight and small packages without having operational control over the whole process. FedEx also considers that NZ Post operates in a similar fashion by sub-contracting elements of the delivery process for small packages and so can be considered as a competitor for similar reasons.

62. However,
[ ].[27]
[
].[28]

63. We consider that while integrators providing services to and from New Zealand do not have full operational control from the point of collection to the point of delivery, they retain control over the assets used in specific legs of the journey, which may include ground handling services and the use of their own cargo aircraft. This in turn appears to give integrators an advantage over other providers, including freight forwarders and postal service operators, particularly when managing the process from the collection of the package to delivery within the specified time period.

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27 [ ].

28 Ibid.

64. Therefore, we adopt a conservative approach and to treat integrators as being 'inside' the market but also consider the extent to which other 'outside' suppliers provide an external constraint on the market. As noted, what is important is that we consider all the relevant constraints irrespective of whether they fall inside or outside of the market.

Existing competition

Closeness of competition between the merging parties

65. The merging parties are two of the four integrators that provide small package express international air delivery services to and from New Zealand. To that extent they appear to be close competitors and compete for business with each other.

66. However, based on information we have received from industry participants, the parties are not necessarily seen as being each other's closest rival.[29] [[30]].[31]

67. [[32]][33] [34]

68. This may be due in part to the merger parties having strengths in different trade lanes with FedEx having a strong North American/Asian focus while TNT is relatively strong in Europe and Asia Pacific (including Australia). It may also suggest some complementarity in terms of trade lanes between the merging parties.

Closeness of competition between the merging parties and other competitors

69. Estimated market shares for the integrators that supply small package international express delivery services are provided in Table 1 below.

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[29] For example, telephone call with [ ] (3 September 2015).
[30] [ ]
[31] Ibid.
[32] [ ]
[33] Ibid.
[34] [ ]

Table 1: Estimated market shares for small package express air delivery services (sub-31kgs)[35] provided to and from New Zealand by integrators for the 2014 calendar year

Supplier	Revenue ($USm)	% (approx.)
FedEx	$[ ]	[ ]%
TNT	$[ ]	[ ]%
Merged entity	**$[ ]**	**[ ]%**
DHL Express	$[ ]	[ ]%
UPS	$[ ]	[ ]%
Total	$[ ]	100

Source: Application.

70. This table shows that post-merger, DHL will remain by far the largest competitor holding around a [ ]% share. The merged entity will account for the second largest market share with around [ ]%. UPS will hold the balance of the market, although its share is relatively small ([ ]%).

71. Below is our assessment of the competitive constraints provided by the remaining integrators.

DHL

72. The customers we spoke to during our investigation viewed DHL as the closest competitor to the merger parties. As noted, [ ].

73. DHL has stated that it maintains a competitive service offering in the air express segment with an excellent global network that extends to every country on the globe.[36] Evidence provided by FedEx supports this when it stated [ ][37]

74. [ ] informed us as that it views DHL as the better provider in terms of service and is the more aggressive competitor.[38] It considers that if the merged entity attempted to increase prices they would quickly lose customers to DHL. Therefore, [ ] was of

35 FedEx noted in its application that the market shares of the merger parties are [ ]if a 68 kg cut-off is adopted.

36 Email from DHL in response to the Commission's information request (24 September 2014)

37 [ ]

38 [ ].

the view that the express small parcel segment will continue to be extremely competitive post–merger.

75. [ ][39]

76. We consider that DHL would remain a vigorous competitor in the affected market post-merger. This is due to the following factors:

  76.1 DHL appears to operate an aggressive pricing strategy and is incentivised to maintain volumes on its dedicated cargo aircraft between New Zealand and Australia which operates five flights a week between Auckland and Sydney;

  76.2 DHL's existing infrastructure in New Zealand. For example we note DHL Express's plans to increase its investment, including enlarging its warehouse space and sorting capacity;[40]

  76.3 DHL's extensive global networks which service over 220 countries with a strong presence especially in Europe and the Asia/Pacific region (including on the trans-Tasman lane);

  76.4 DHL's long standing relationship with NZ Post, which gives it, amongst other things, access to NZ Post's ground handling network throughout New Zealand, and particularly where DHL does not operate itself; and

  76.5 the ability of customers to switch between different integrators is relatively straightforward as most customers are not typically bound by any fixed contracts so can terminate arrangements relatively quickly with existing suppliers and transfer their business to alternative suppliers.

77. Taking into account these factors, we consider that DHL is likely to continue as the closest competitor to the merged entity and provide the strongest constraint post-merger.

UPS

78. As noted, UPS is currently a small market participant in the affected market with a market share of approximately [ ]%. UPS advised us that the New Zealand market is identified as [ ][41]
[
].[42]

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[39] [ ]

[40] Application at [10.5].

[41] Telephone call with UPS (2 September 2015).

[42] Ibid.

79. UPS also advised us that [ ][43] [ ].[44]

80. Customer switching data provided by TNT and FedEx shows that while [ ].[45] [46] [ ].[47]

81. Our view is that while UPS is a large global integrator, and has the potential to expand, its minor existing presence suggests it is likely to provide a limited constraint on the merged entity post-merger.

Competition from outside the market

82. In addition to considering the likely constraint provided by integrators, we have also assessed the likely competition from operators supplying small package express air delivery services outside of the main providers. Our focus has been on NZ Post and freight forwarders.

NZ Post

83. FedEx submitted that NZ Post makes use of its own network, as well as strategic partnerships and sub-contracts to offer customers access to anywhere in the world.[48] It considers that these arrangements enable NZ Post to offer a similar speed of service for small package international express delivery. FedEx's view is that NZ Post is the largest single participant outside of the integrators.

84. [ ].[49] [ ][50]

85. [ ].[51] Rather, NZ Post advised us it offers a standard international package delivery service (which is typically up to seven days delivery time), but not the faster or express delivery services. Currently,

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43 [ ]
44 Ibid.
45 [ ]
46 Response from TNT to the Commission's information request (3 September 2015) at para 8.2.
47 Ibid.
48 Application at [10.14].
49 Telephone call with DHL (12 August 2015).
50 Email from DHL in response to the Commission's information request (24 September 2015).
51 Meeting with NZ Post (19 August 2015).

[ ].[52] NZ Post advised that its primary focus is on consumer-to-consumer delivery services and business-to-consumer services whereas it considers that the integrators are predominantly active in business-to-business services.[53]

86. Based on the feedback we received from customers of international express delivery services, NZ Post was not viewed as an option (actual or potential) for such services.

87. We consider that given NZ Post lacks the capability to provide comparable express small package delivery services it remains a limited competitive constraint in the affected market. This is because NZ Post only provides the domestic ground handling component of the delivery services but relies on DHL to provide small package express international air delivery services. Given NZ Post's role as largely a customer and partner with DHL's integration services, we consider that NZ Post is only likely to provide a limited independent constraint on the merged entity.

Freight forwarders

88. As noted, FedEx considered that freight forwarders compete for small package express delivery business with integrators. To support this view it has provided [ ].[54] TNT has also provided data to show that it has [ ].[55]

89. We have also been told by one user of international air delivery services ([ ]) that in some situations it may be cost effective to use a freight forwarder rather than an integrator to provide small package express international air delivery services, particularly for consignments in the 20-50 kg range.[56]

90. We contacted five large air freight forwarders, including four large global firms with extensive worldwide operations (Kuehne + Nagel, DB Schenker, Panalpina and Agility), and one large New Zealand–owned and based firm (Camerons). All of the freight forwarders we contacted during the investigation indicated that they were not directly in competition with integrators for express delivery services for small packages.[57] Rather the freight forwarders advised us that:

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52 Ibid.
53 Ibid.
54 Response from FedEx to the Commission's information request (1 September 2015) at Appendix 7.
55 Response from TNT to the Commission's information request (3 September 2015) at para 8.2.
56 Telephone call with [ ](23 September 2015).
57 Telephone calls [ ].

90.1 they are not set up to provide door-to-door express services of the type provided by integrators;[58]

90.2 it is not as cost effective to use a freight forwarder for such services compared to an integrator;[59]

90.3 they will either direct customers requiring such services for small packages to the integrators,[60] or arrange delivery themselves as a value-add service but even then would likely sub-contract in varying degrees with integrators and other third-party carriers.[61]

91. Therefore, we consider that while freight forwarders may compete on occasions with integrators, they are, for the most part, customers and resellers of international air express delivery services. Even when freight forwarders provide such services, this was not viewed as core business but rather an add-on and to provide a "one-stop solution" for their customers.

92. Freight forwarders advised us that the merger was unlikely to cause concerns for them as buyers of integration services, as other integrators would remain post-acquisition for them to use.

93. While we found that there is some evidence of switching to freight forwarders, we consider that freight forwarders are similar in some respects to NZ Post in that they are customers of integrators. Therefore, we consider that as freight forwarders are fringe competitors they are only likely to provide a limited constraint on the merged entity post-acquisition.

Potential competition

Likelihood of entry and/or expansion

94. We have found no evidence to indicate that new entrants would consider entry into the affected markets so as to effectively constrain the merged entity. In particular, we consider that new entrants would face high entry barriers, including having to make a significant sunk cost investment to establish the infrastructure and networks necessary to provide express services.

Expansion

95. FedEx has submitted that there are many companies that are well placed to upscale or expand their small package international express air delivery services if FedEx increased prices post-merger.[62] It identified DHL, UPS, freight forwarders and NZ Post as firms well positioned to expand.

58 For example, [ ].
59 For example, [ ].
60 For example, [ ].
61 For example, [ ].
62 Application at [10.28].

DHL

96. As noted, DHL has a strong competitive presence in the affected market which is due, amongst other things, to the strengths of its trans-Tasman network, its other infrastructure, and wider global networks.

97. [ ].[63] [ ]

98. Given DHL's position as the largest competitor in this market, with the infrastructure and networks it has developed, we consider it has the capacity and incentive to expand its existing operations if the merged entity were to raise prices post-acquisition.

UPS

99. We have also considered the potential for UPS to expand if the merged entity were to increase its prices or reduce the quality of its services post-merger.

100. [ ][64] [ ] [ ].[65]

101. [ ]

102. [ ]

103. [ ]

[63] Email from DHL (24 September 2015).
[64] [ ].
[65] Ibid.

104. The Commission considers that while UPS is currently a small competitor, it has [ ]and the Commission considers that with the merger, UPS would have the same (or perhaps greater) incentive [ ].

Conclusion on unilateral effects

105. The merger would result in two of the major participants combining their activities in the affected market. However, given the limited presence of UPS, the merger would effectively reduce the number of competitors from three to two.

106. Nevertheless, we consider that the merger is unlikely to reduce the range of competitive options available to customers such as to result in a substantial lessening of competition. In particular, we consider that DHL, the largest existing provider in this market, will continue as a vigorous competitor by aggressively seeking business. It already has a strong presence, including through its trans-Tasman and wider global network, and has the capacity to expand.

107. We view UPS as providing a limited competitive constraint, but it has some potential to expand. In particular, UPS has an existing infrastructure and extensive global network which potentially enables UPS to expand, if given the appropriate incentives.

108. For the reasons outlined above, we consider that NZ Post and a number of freight forwarders are primarily buyers/resellers of integrators' services, so are likely to only provide a limited constraint post-merger. In the case of NZ Post, the major limitation appears to be NZ Posts' inability to provide express delivery services itself while for freight forwarders it is their limitations in providing express door-to-door services for small packages.

109. Taking into account all of these factors, we do not consider that the proposed merger is likely to result in a substantial lessening of competition as a result of the unilateral effects in the affected market.

Coordinated effects

110. As noted, the merger would effectively reduce the number of major competitors in the small package express international air delivery services market from three to two major participants plus UPS as a fringe player, with the merged entity and DHL accounting for over [ ]% of the total market.

111. We have therefore assessed whether the merger may give rise to coordinated effects. This included consideration of whether the merger may provide the conditions for the merged entity and its rivals to coordinate by allocating customers between themselves.

112. However, we do not consider that such effects are likely to arise. This is because of:

112.1 the highly differentiated nature of the products which would make coordination difficult to achieve;

112.2 the lack of price transparency with most customers negotiating prices based on a rate card with significant discounting based on such factors as the volume of business transacted;

112.3 asymmetries in the market share and cost structures which would make coordination more difficult; and

112.4 the presence of fringe competitors, such as UPS and freight forwarders, which are likely to prevent or disrupt any attempted coordination.

113. For these reasons, we do not consider that any coordinated effects arising from the merger would result in a substantial lessening of competition in the affected market.

Determination on notice of clearance

114. We are 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.

115. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance for FedEx to acquire all of the shares in TNT.

Dated this 1st day of October 2015

Dr Mark Berry
Chairman