

**Statement of Preliminary Issues**  
**FedEx Corporation / TNT Express N. V.**

**14 August 2015**

**Introduction**

1. On 30 July 2015, the Commerce 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.
2. The public version of the application is available on our website at:  
<http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/detail/866>
3. This Statement of Preliminary Issues outlines the key competition issues we currently consider will be important in deciding whether or not to grant clearance. The issues highlighted in this statement are based on the information available at the time of publication and may change as our assessment of the application for clearance progresses. Therefore, the issues highlighted in this statement are not binding on us.
4. We invite interested parties to make comment on the likely competitive effects of the proposed acquisition and request that parties who wish to make a submission do so by **26 August 2015**.

**The transaction and the parties**

5. 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.
6. In New Zealand, FedEx provides inbound and outbound international air delivery services for both small packages and freight. FedEx operates one weekly flight into and out of Auckland but most of its inbound and outbound business is carried by third-party commercial airlines.
7. TNT is a Netherlands-based company that provides international delivery services for small packages and freight to over 200 countries.
8. In New Zealand, TNT provides inbound and outbound international air delivery services for goods ranging from documents and small packages to palletised freight. 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 transport its consignments.
9. FedEx submitted that the merging parties overlap in the broader market for the provision of international air delivery services (including freight and small packages),

with the largest potential competitive impact being on international air express delivery services for small packages.

## Our framework

10. As required by the Commerce Act 1986, we assess whether an acquisition of shares is likely to result in a substantial lessening of competition. How we assess this is set out in our Mergers and Acquisitions Guidelines.<sup>1</sup>
11. We ask 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).<sup>2</sup>
12. Market definition is a tool that provides a framework to help identify and assess the close competitive constraints the merged firm would likely face.<sup>3</sup> A market is defined in the Commerce Act as a market in New Zealand for goods or services as well as other goods or services that are substitutable for them as a matter of “fact and commercial common sense”.<sup>4</sup>
13. 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.
14. We analyse the extent of competition in each relevant market both with and without the acquisition to determine whether the acquisition would be likely to substantially lessen competition. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.<sup>5</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.<sup>6</sup>
15. When making that assessment, we consider, among other matters:
  - 15.1 Existing competition – the degree to which existing competitors compete.

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<sup>1</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>2</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>3</sup> *Commerce Commission v New Zealand Bus Limited* (2006) 11 TCLR 679 (HC), at [123]. *Brambles New Zealand Ltd v Commerce Commission* (2003) TCLR 868 (HC) at [137].

<sup>4</sup> Similarly, the courts have said that “[t]he boundaries of the market are defined by substitution between one product and another and between one source of supply and another, in response to changing prices”. See *Commerce Commission v New Zealand Bus Limited* (HC), above n 3 at [123] citing *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,247.

<sup>5</sup> Commerce Act 1986, s 66(1).

<sup>6</sup> 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”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

- 15.2 Potential competition – the extent to which existing competitors would expand their sales or new competitors would enter and compete effectively if prices were increased.
- 15.3 The countervailing market power of buyers – the potential for a business to be sufficiently constrained by purchaser’s ability to exert substantial influence on negotiations.

### **Preliminary issues**

- 16. We will investigate whether the proposed acquisition is likely to substantially lessen competition in the relevant markets by focusing on the unilateral and coordinated effects that might result from this acquisition. In particular, we will consider:
  - 16.1 whether there is a single differentiated product market for the supply of international air delivery services or whether separate differentiated markets exist for such services, depending on:
    - 16.1.1 the nature of the consignment, for example perishable;
    - 16.1.2 the size/weight of the consignment;
    - 16.1.3 the speed of delivery; and
    - 16.1.4 any other relevant criteria, for example tracking and tracing services.
  - 16.2 the closeness of competition between the merging parties and other suppliers of international air delivery services, including integrators,<sup>7</sup> air freight forwarders<sup>8</sup> and postal operators;
  - 16.3 the ability for new suppliers to enter or for existing suppliers to expand, by extending the range and geographic coverage of their operations;
  - 16.4 the ability of customers to exert substantial influence on the price the merged entity charges and on other terms; and
  - 16.5 whether the merger is likely to increase the ability of the merged entity and all or some of its remaining competitors to coordinate their behaviour on price or any other dimension of competition.

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<sup>7</sup> Integrators are providers of international delivery services that have full operational control over the transportation of the cargo from origin to destination, including air transport. However, in New Zealand, integrators do not have ownership or full operational control over all the assets involved in providing these services.

<sup>8</sup> Air freight forwarders arrange for all facets of the carriage of goods from origin to destination but, unlike integrators, freight forwarders generally outsource each of the individual steps in the delivery process to third party operators.

## Market definition

17. FedEx submitted that when assessed on a narrow market definition the merger parties overlap in the following national markets:
  - 17.1 the supply of international air delivery services for small packages, which in turn can be broken down separately into express and standard delivery services; and
  - 17.2 the provision of international air freight delivery services.
18. We will consider:
  - 18.1 whether separate markets exist for the delivery of freight and small packages, or whether a single differentiated market exists;
  - 18.2 whether the delivery of small packages can be differentiated into express and standard services;
  - 18.3 the various customer types and characteristics, including their size, requirements (frequency of use, origin-destination choices); and
  - 18.4 the geographic dimension.

## Existing competition

19. FedEx has indicated that the major area of overlap between the merger parties is in the provision of international express air delivery services for small packages. FedEx submitted that post-acquisition it will continue to face strong competition from a number of firms that offer international express air delivery services for small packages, including:
  - 19.1 DHL (the largest competitor) and UPS;
  - 19.2 various air freight forwarders, such as Cameron Air & Sea Freight, DB Schenker and Kuehne+Nagel; and
  - 19.3 New Zealand Post (NZ Post).
20. Our investigation will focus on the closeness of competition between the merging parties, and between the merging parties and other competitors, including other integrators, air freight forwarders, and postal service operators.
21. We will consider whether the merged entity would be effectively constrained from raising its prices above the competitive level, or reducing the quality of its services by the remaining integrators (DHL and UPS), air freight forwarders and other market participants, such as NZ Post.
22. We will also assess whether there are any major costs or other impediments involved in customers switching between the suppliers of these services.

### Potential competition

23. FedEx submitted that there are a number of existing providers of international express air delivery services for small packages that could readily expand. This combined with the prospect of entry by other market participants would, in FedEx's view, provide a further competitive constraint on the merged entity.
24. We will assess whether entry by new competitors or expansion by existing competitors is likely, of sufficient extent and would occur in a timely fashion to prevent a substantial lessening of competition.

### Countervailing power

25. We will consider whether customers will be able to sufficiently constrain the merged entity from profitably increasing prices or reducing the quality of its services, including for instance by disciplining (for example, by diverting consignments away from) the merged firm in geographic markets outside of New Zealand.

### Coordinated effects

26. FedEx submitted that the conditions necessary for effective and sustainable coordinated behaviour are not present in the market for international air express delivery services for small packages.
27. We will consider whether the merger increases the potential for the merged entity and all or some of its competitors to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across the markets.
28. We will also assess:
  - 28.1 whether the market is vulnerable to coordination; and
  - 28.2 whether the merger is likely to change the conditions in the market so that coordination is more likely, more complete or more sustainable.

### Next steps

29. We are currently aiming to make our decision by **25 September 2015**. However, this date may change as the investigation progresses.
30. To keep up to date with any changes to our deadline and to find relevant documents, visit our clearance register on our website at <http://www.comcom.govt.nz/clearances-register/>
31. As part of our investigation, we will identify the parties we believe will provide the best information to help us assess the preliminary issues identified above. We will be contacting those parties over the next few weeks.
32. We also invite submissions from any other parties who consider they have information relevant to our consideration of this matter. If you wish to make a

submission, please email it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference FedEx/TNT in the subject line of your email, or post it to us at The Registrar, PO Box 2351, Wellington 6140 by close of business **26 August 2015**. Please clearly identify any confidential information contained in the submission and provide contact details.

33. 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, if disclosure would unreasonably prejudice the supplier or subject of the information.