



Staff Opinion on DHL's Implementation of a Broker Turnover Fee

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FAIR TRADING COMMISSION

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I. THE RESPONDENT

1. DHL (Jamaica) Limited (“DHL” or “the Company” or “the Respondent”) is an international shipping platform with international cargo services. Its primary line of business is freight forwarding services but it offers optional add-ons such as customs brokerage and last mile delivery services.

II. THE CHALLENGED CONDUCT

2. DHL briefly implemented an administrative fee (the “Broker Turnover Fee”) of Twenty Five United States Dollars (USD 25.00) per air waybill (AWB). This fee was applicable only to customers of its freight forwarding services using third party customs brokers at the ports of entry in Jamaica; these third parties compete directly with DHL for customs brokerage and last mile delivery services.
3. The Fair Trading Commission (FTC) understands that DHL voluntarily withdrew the broker turnover fee without collecting any sums arising from its implementation.
4. DHL subsequently requested the opinion of the FTC as to whether subsequent implementation of the broker turnover fee would contravene the Fair Competition Act (FCA).

III. THEORIES OF HARM

5. The FTC identified that challenged conduct was potentially in breach of sections 19-21 of the FCA which limit the conduct of an enterprise in a position of economic strength that allows it to act independently of rivals in a market. The FCA prohibits such an enterprise from engaging in conduct that, without economic justification, is considered abusive and which has as its purpose or likely effect, the substantially lessening of competition in that or any other market.
6. The FTC pursued the theory that the Respondent holds a position of economic strength in a market which includes the provision of freight forwarding services to Jamaica. The theory maintains that the challenged conduct would allow the Respondent to use its economic strength as a provider of freight forwarding services to Jamaica to substantially lessen competition in a market which includes the provision of customs brokerage services.
7. The effect of the challenged conduct in substantially lessening competition would be demonstrated by harm to consumers of customs brokerage services (importers) and rival customs brokers.

8. The harm to consumers would include (i) higher prices or (ii) lower quality services, relative to what is likely to prevail in the market for customs brokerage services in the absence of the challenged conduct. In particular, the challenged conduct harms those consumers whose preferred customs broker is not DHL and would be forced to either (i) pay the broker turnover fee to secure their preferred customs broker or (ii) choose to use DHL's service rather than their preferred customs broker.
9. The harm to rival customs brokers would include the diversion of significant revenue, relative to what is likely to prevail in the absence of the challenged conduct. In particular, customers of freight forwarding services represent the customer base for customs brokers. The challenged conduct erects an artificial fence around DHL's freight forwarding customers by increasing the overall charges to importers choosing competing customer brokers. This limits the opportunity for customs brokers to compete for these customers and therefore reduces the number of importers who use competing customs brokers.
10. In summary, the investigation sought to assess whether the challenged conduct would allow the Respondent to leverage its dominance in the provision of freight forwarding services to distort competition in the provision of customs brokerage services to the detriment of final consumers (importers).

IV. **OVERVIEW**

11. Economists have shown that the circumstances under which suppliers tend to operate efficiently are when they are subjected to competitive market forces. Thus a competitive market gives rise to efficient performance and consequently consumers benefit from lower prices, higher quality, increased rate of innovation and product diversity compared to what would have existed otherwise.
12. In forming an opinion concerning a challenged conduct, the FTC seeks reliable information from a variety of sources; these include business documents, testimony of industry participants and information concerning the markets at issue. In preparing this opinion, the FTC would have benefitted from interviews with the *Customs Brokers & Freight Forwarders Association of Jamaica* as well as interviews with importers.
13. Documents of industry participants that were created during the normal course of business are often an important and reliable source of information about patterns of behaviour and specific decisions in an industry. Consequently, the FTC often use the information in such documents to

test and develop hypotheses regarding each of the major topic areas involved in evaluating the potential anticompetitive effects of the conduct of an individual supplier.

14. For the rest of the report, the FTC describes the industry background in Section V. Section VI sets forth a legal discussion on the challenged conduct. In section VII, the relevant markets are defined while in Sections VIII and IX, an assessment of the market structure and an analysis of entry condition are conducted respectively. Section X presents the FTC's findings from analyses of the competitive effects and Section XI evaluates efficiency claims. A summary of the main findings is presented in Section XII with a remedy designed to avoid anticompetitive measures described in Section XIII. The report concludes in Section XIV with the FTC's recommendation arising from the opinion.

V. **INDUSTRY BACKGROUND**

15. The shipping industry answers a basic question for exporters and importers: How does one move goods from one point to any other point in the world?
16. Freight forwarding involves the movement of goods from ports of origin to ports of destination. Goods may be moved through various means of transport including air, sea and ground transport. Importation of goods into Jamaica relies on sea or air transport. Importation of goods comprises approximately half of world trade which enhances consumer welfare relative to an autarky. During 2019, freight forwarders transported goods to Jamaica with a declared Cost, Insurance and Freight (CIF) value exceeding USD 53.5 million.
17. The industry is characterized by a logistic chain interlinking the various players in the industry. In the Jamaican context, the movement of goods is first prompted by a local importer who purchases goods from a supplier in another country. The freight forwarder have such goods picked up from the supplier, customs clearance performed at the port of origin, shipped, cleared again at the port of destination (Jamaica) and delivered to the importer. The activities involved in moving the goods from the supplier to the importer may not necessarily be conducted by a single entity but may be carried out by several entities along the logistic chain. Such entities include shipping agents, shipping lines, airlines, rail lines, truckers and customs broker.
18. Customs brokerage service is a set of activities that involve preparing and submitting documents to facilitate imports. Customs brokers provide services such as taking custody of their clients cargo; preparation of documents for export and import; preparation of customs declaration; coordinating with freight forwarders on behalf of importers; clearing goods, paying requisite

fees such as handling fees and customs fees, filling out and submitting required documents and/or applying for relevant permits to facilitate clearing of the cargo.

19. Freight forwarders coordinate with agencies abroad to move cargo from suppliers abroad to ports in Jamaica. Some freight forwarders provide both freight forwarding and customs brokerage services. Some customs brokers have extended their services to include trucking imported goods from the port to importers' doorsteps. When an enterprise offers all three services as a bundle (i.e., freight forwarding, customs brokerage and trucking), the bundled package is called *end to end* (or *door to door*) service because the cargo is taken from point of origin (the supplier's location) to final destination (buyer's location).

VI. LEGAL ANALYSIS

20. The FCA prohibits the abuse of dominance if it is found that such abuse had, is having or is likely to have the effect of substantially lessening competition in a market. Section 19 – 21 of the Act addresses the abuse of a dominant position.

21. Section 19 states:

“An enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors”.

22. Importantly, the definition of the relevant market is of essential significance, as it provides an understanding of the scope of competition and the competitive constraints that limit a firm's ability to exercise market power¹. Dominance has to be determined by identifying the relevant market, as an enterprise can only be dominant in a market.

23. European Case Law has laid down a test for dominance that encapsulates the principle stated in section 19 of the FCA. In the cases of **United Brands**² and **Hoffman-La Roche**³, the European Court of Justice (ECJ) reasoned that a dominant position is a position of economic strength that enables a firm to prevent effective competition on the relevant market; a firm with a dominant position has the power “to behave to an appreciable extent independently of its competitors, its

¹ International Competition Network, Unilateral Conduct Workbook, Chapter 3: Assessment of Dominance, May 2011

² Case 27/76, United Brands Co. and United Brands Continental BV v. Commission [1978] ECR 207, [1978] 1 CMLR 429.

³ Case 35/76, Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, [1979] 3 CMLR 211.

customers and ultimately of its consumers.⁴ In economic terms, one would, hence, say that a dominant position is one in which the firm has a “reasonably large” degree of market power.

24. In assessing dominance, it is imperative to consider whether the enterprise faces constraints on its ability to behave independently. There are several factors that lead to a determination of dominance, including but not limited to the market position of the enterprise and its competitors, barriers to entry and barriers to expansion as well as countervailing buyer power. Notably, as the court in **Hoffmann-LaRoche**⁵ stated “the existence of a dominant position may derive from several factors which taken separately are not necessarily determinative”.

25. Additionally, the ECJ has stated that dominance can be presumed, in the absence of evidence to the contrary, if a business has a market share persistently above 50 per cent. If the firm's market share is not overwhelming, other factors indicative of market power may be examined; for example, relative market share; relations of the market leader with competitors, suppliers and customers; time scale over which the leading position has been enjoyed; the possession of material technology; and barriers to entry. These factors are rooted in economics and as such, the determination of whether an enterprise holds a dominant position requires economic analysis.

26. Where dominance is established then, the conduct of the enterprise is assessed to determine if they are anticompetitive. This is done in accordance with section 20 which speaks to the abuse of dominant position. It states that an enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market. Section 20(1) details the practices and arrangements that are categorized as an abuse of dominant position. The list is not exhaustive and includes the following:

- Restrict the entry of any person into that or any other market;
- Prevent or deter any person from engaging in competitive conduct in that or any other market.
- Eliminate or remove any person from that or any other market; directly or indirectly impose unfair purchase or selling prices or other uncompetitive practices;
- Limit production of goods or services to the prejudice of consumers;

⁴Case 27/76, United Brands Co. and United Brands Continental BV v. Commission [1978] ECR 207, [1978] 1 CMLR 429, para. 65.

⁵Case 35/76, Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, [1979] 3 CMLR 211.

- Make the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

27. The question of what constitutes abuse can be garnered from Hoffmann-LaRoche. The ECJ at paragraph 91 states that:

“The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market, where as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

28. Elements that are taken into account so as to determine abuse of dominant position according to literature includes but is not limited to the following:

- (i) Inferred largely on the basis of a large market share;
- (ii) Consideration of entry conditions and other factors which may influence the ability of firms with large market shares to exercise market power;
- (iii) Charging of high prices or the carrying out of other exploitative acts;
- (iv) Exclusionary conduct by firms that harms the competitive process (that is conduct preventing competing firms from entering the market.

An examination of case law reveals that abusive behaviour consists mainly of exclusionary practices such as predatory pricing⁶, exclusive dealing, refusal to supply⁷, and tying⁸.

29. The applicable legal standard in determining whether a conduct is an abuse of a dominant position is laid down in section 21 of the FCA. The section states that the abuse of dominant position must either have had, is having, or is likely to have the effect of lessening competition substantially in the market.

30. The FCA does not define the term “lessening competition substantially”. Nonetheless, an examination of Australian decisions assists in providing guidance in regard to this standard. The Trade Practices Act, 1974 (repealed, now the Competition and Consumer Act 2010) of Australia utilized the term and the case law involving the statute is instructive. The Federal Court of

⁶ Case C62/86, AKZO v Commission, and Tetra Pak v Commission [1997] 4 CLMR 662.

⁷ Cases 6/74, Commercial Solvents v Commission [1974] ECR, 223, [1974] 1 CMLR 309.

⁸ Case C-333/94P Tetra Pak International SA v Commission [1996] ECR I-5951, [1997] 4 CMLR 662.

Australia in **Stirling Harbour Services Pty Ltd v Bunbury Port Authority**⁹ Justice French reasoned that to determine whether competition has been substantially lessened “there [must] be a purpose, effect or likely effect of the impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process.”

31. On appeal to the Full Court, Justices Burchett and Hely agreed that Justice French applied the correct test in his determination of whether there was a substantial lessening of competition. The Court stated that:

“Conduct has the effect of lessening competition in a market only if it involves a reduction in the level of competition which would otherwise have existed in that market but for the conduct in question.”¹⁰

32. In the **Australian Gas Light Company v ACCC**¹¹ which utilized the substantially lessening of competition test. The Court examined a number of previous decisions and agreed that “in determining whether it could be said that there is likely to be a substantial lessening of competition in a market it is necessary to consider the future state of the relevant market with and without the proposed acquisition.”¹²

33. Accordingly, an evaluation of whether DHL’s broker turnover fee will have the effect or likely effect of substantially lessening competition involves an analysis to determine the pro and anticompetitive effects. The particular facts of the case will be assessed to determine whether the ultimate or net effect is to lessen competition substantially. Additionally, section 21(2) of the FTC provides that in determining whether the conduct of an enterprise has had, or is likely to have the effect of lessening competition in the market, it should be ascertained whether the conduct is as a result of superior competitive performance.

34. Consequently, in order to determine abuse of dominant position, the FCA requires an assessment of:

- (i) Whether the enterprise is dominant in an appropriately defined market(s);
- (ii) Where the enterprise is dominant, whether its conduct constitutes an abuse of that dominant position;
- (iii) Whether such abuse of dominance has had, or is having, or is likely to have the effect of lessening competition substantially; and

⁹ [2000] FCA 38.

¹⁰ [2000] FCA 1381 at 66.

¹¹ (No. 3) [2003] FCA 1525.

¹² *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259; *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) 44 ALR 667 at 669-70.

(iv) Whether there are any pro-competitive efficiencies resulting from the conduct of enterprise.

35. In circumstances where the elements listed at (i) – (iii) above are found to exist after a detailed examination of the market and the effects of the enterprise’s conduct, the FTC conducts an economic assessment of whether the dominant position attained by the enterprise falls within the available defenses under section 20(2). These defences provide that an enterprise may not be considered to be abusing a dominant position where:

- (a) Its behavior was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and
- (b) Consumers were allowed a fair share of the resulting benefit.
- (c) By reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark.

36. Consequently, the FTC may in its analysis determine that the enterprise’s conduct is necessary of that any exclusionary conduct on the market is counterbalanced or outweighed, by advantages in terms of efficiency that also benefits consumers¹³. Where it is concluded that the conduct of the enterprise satisfies a defence(s), then it will be considered not to have abused or to be abusing its dominant position.

VII. MARKET DEFINITION

A. Analytic Framework and Overview

37. To evaluate the challenged conduct, it is useful to identify the boundaries within which the Respondent competes. This process is known as defining the relevant market. Market definition allows for the assessment of competitive harm and is helpful in examining efficiency claims and designing a remedy to avoid or reverse anticompetitive effects of the conduct, if any.

38. The internationally accepted definition for a relevant market for economic analysis is a product (or group of products), a geographic region and time dimension in which it is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, that was the only present and future producer or seller of those products likely would impose at least a small, but significant and non-transitory increase in price on at least one product in that market, assuming the terms of sale of all other products are held constant.

¹³ Case C-209/10, *Post Danmark A/S v Konkurrenceriat* ECLI:EU:C:2012:172.

B. Product Markets

39. Based on the theory of harm, the challenged conduct raises concern in: (i) the market for freight forwarding services to Jamaica; and (ii) the market for customs brokerage at Jamaica's ports.

B1. The Market for Freight Forwarding Services to Jamaica

40. The concern arises in the market for freight forwarding services to Jamaica. Freight forwarding services to Jamaica typically involves the movement of cargo from other countries to Jamaica by air or sea. Cargo moved by air are typically light weight, small and/or of high value. Freight forwarding by sea involves the movement of bulky, heavy weight and/or low value items.

41. There is no commercial substitute for the services offered by freight forwarders. The next best alternative to freight forwarding services would be for importers to do it for themselves ('self-service'). This would involve travelling by air to the place of origin, collecting the cargo and arranging to transport it back to Jamaica. The additional cost of airfare and/or the logistics involved in transporting the cargo to Jamaica may make self-service an unlikely close substitute for freight forwarding.

42. Accordingly, the FTC concludes that there are no close substitutes for freight services to Jamaica and therefore freight services to Jamaica are in a market by itself.

B1. The Market for Customs Brokerage

43. All goods coming into the island is required legally to be cleared by customs at all ports of entry. There is no commercial substitute for the services offered by licensed customs brokers in Jamaica. The next best alternative to customs brokerage services would be for importers to clear the goods with the Jamaica Customs Agency themselves. This option is available, however, only for cargo other than motor vehicles with a declared CIF value not exceeding USD 5,000.00.

44. Cargos with a CIF value below USD 50.00 do not attract customs duties. As such, it is relatively straight forward for importers to clear these goods themselves. For cargo with CIF value between USD 50.00 and USD 5,000.00, knowledge of the relevant tax codes becomes important and self-service becomes a less practical substitute.

45. Accordingly, the FTC concludes that customs brokerage service is a market by itself as there is no close substitute in Jamaica; especially for motor vehicles and any other cargo with CIF value exceeding USD 5,000.00.

C. Geographic Market: Jamaica

46. The services identified in the relevant product markets are supplied to customers located throughout Jamaica.
47. Accordingly, the relevant geographic market comprises the entire Jamaica.

VIII. MARKET STRUCTURE

A. Analysis Framework

48. Competition authorities tend to assess whether and the extent to which the relevant market's participants are likely to exercise market power. The exercise of market power is done either through any participant's individual action which is independent of other participants, or through the coordinated interaction among multiple participants, or both. Such assessments rely typically on the Herfindahl-Hirschman Index (HHI) which measures supplier concentration, as is outlined in the *US Horizontal Merger Guidelines*. Of note is the observation that unilateral actions and coordinated interactions which give rise to adverse competitive effects are more likely in highly concentrated markets, especially when there are significant impediments to entry, among other factors.
49. Markets with HHI below 1,500 are classified as being unconcentrated and are typically considered to be competitive. Markets with HHI between 1,500 and 2,500 points are considered to be moderately concentrated and raise some concern for anticompetitive conduct. Markets with HHI above 2,500 points are classified as highly concentrated market and are presumed to enhance market power, unless there is persuasive evidence to the contrary.

B. Structure of the Relevant Markets

50. In this section, the FTC describes features of the relevant markets reflecting the nature of competition.

Freight Forwarding Services

51. The freight forwarding market is supplied by a few suppliers including DHL, UPS, ShipMe and Mailpac. DHL is considered the market leader due to its extensive shipping platform, worldwide network and relatively low prices; DHL has cargo services to 120,000 destinations in more than 220 countries and territories. DHL operates a global system of 238 gateways and more than 440

hubs, warehouses and terminals. Accordingly, suppliers (exporters) outside Jamaica, especially in the eastern parts of the world, tend to engage the Respondent for freight services to Jamaica.

Table 1 CIF Value of Items Shipped to Jamaica in 2019

Top Freight Forwarders to Jamaica	CIF Value (in USD)	Share (%)
DHL	██████████	██████████
FedEx	██████████	██████████
ShipMe	██████████	██████████
UPS	██████████	██████████
Mailpac	██████████	██████████
	53,523,511	100.0

Source: Jamaica Customs Agency

52. The distribution of market share reflects the relative economic strength of DHL. During 2019, DHL accounted for ██████ per cent of the value of cargo shipped to Jamaica. ██████████ the second largest freight-forwarder (FedEx) to Jamaica ██████ accounted for only ██████ per cent of the value of cargo shipped to Jamaica (see Table 1).

Table 2 Share of Cargo Value Shipped to Jamaica During 2019

Freight Forwarder	Share of Cargo (in %) with CIF value...		
	Not exceeding USD 50 (2% of market)	USD 50 – 5,000 (40% of market)	Exceeding USD 5,000 (58% of market)
DHL	██████████	██████████	██████████
FedEx	██████████	██████████	██████████
ShipMe	██████████	██████████	██████████
UPS	██████████	██████████	██████████
MailPac	██████████	██████████	██████████
Total	100.0	99.9	100.0

53. DHL's economic strength is even more pronounced when one segments the market based on cargo value (See Table 2). For cargo with CIF value less than USD 50.00, representing 2 per cent of the value of goods shipped to Jamaica, DHL accounts for ██████ per cent of this segment. For cargo with CIF value between USD 50.00 and USD 5,000.00, comprising 40 per cent of market, DHL accounts for ██████ per cent. For goods valuing more than USD 5,000.00, representing 58 per cent of the market, DHL accounted for ██████ per cent with its closest rival (FedEx) accounting for ██████ per cent.

54. Accordingly, the market for freight-forwarding services is highly concentrated. The top two participants (DHL and FedEx) control at least 90 per cent of the market and the HHI is significantly above the 2,500 points threshold used to classify markets as being highly concentrated.
55. In summary, the FTC presumes that, without more, DHL is dominant in the market for freight forwarding services. This as the significant gap in market shares between the top participant (DHL) and its closest rival (FedEx) indicate that, without more, DHL occupies a position of economic strength such that it can act independently of rivals. In a later section of this Report, the FTC discusses whether persuasive evidence exists to make it unlikely that DHL could exercise market power.

Customs Brokerage Services Market

56. Importers with cargo CIF value exceeding USD 5,000.00 need the services of a customs broker. Customs brokerage fees are comparable in the market as brokers traditionally compete based on service standards.¹⁴ Differences in service standards are driven by differences in knowledge/familiarity with the classification of various dutiable cargo items which result in some customs brokers being more proficient than others (i.e., they process cargo relatively more quickly) and are more cost-effective (i.e., they clear the goods for lower customs charges for importers).
57. The market for customs brokerage services is likely to be competitive. While the FTC did not obtain data which would allow for the calculating of the distribution of market shares, the FTC notes that there at least 200 licensed customs brokers in Jamaica with no individual participant having a significant share of the market and indicative of an unconcentrated market.

IX. EFFECTIVE ENTRY ANALYSIS OF COMPETITIVE EFFECTS

A. Analysis Framework

58. Competition authorities routinely assess whether and the extent to which the top supplier in a given market is likely to face competitive constraints from potential suppliers. Such assessment relies on conditions of entry, expansion and exit. Suppliers in markets with negligible

¹⁴ Based on FTC interviews with three commercial importers in business collectively for over 40 years.

impediments to these conditions are unlikely to exercise market power for a sustained period even in a highly concentrated market.

59. Entry must be likely, timely and sufficient to mitigate effectively and/or to avert anticompetitive conduct. To be likely, there must be an expectation that entry is profitable at prices prior to the conduct; to be timely, entry must take place within two years; and to be sufficient, incumbent suppliers should not have exclusive control over critical inputs and the entrant should have the capacity to accommodate consumers who may seek to avoid the high prices associated with anticompetitive conduct on the part of incumbent suppliers. (*US Horizontal Merger Guidelines*).
60. In the Section VIII of the report examining the *Market Structure*, the FTC presumed that DHL was dominant in the market for freight forwarding to Jamaica given the high level of market concentration observed.
61. In this section, the FTC examines whether conditions of entry could confirm or refute this presumption.

B. New Entry into the Relevant Market

a. History of Entry

62. A review of the history of entry may inform our assessment of the prospects for timely entry in the future, subject to there being no technical or other changes which would alter the speed of new entry, relative to the speed of past entry.
63. In recent times, only locally based freight forwarders have entered the market. They provide services on a much smaller scale than DHL and major shipping lines. For example, most local freight forwarders move goods from the United States; specifically, Florida. Also, they tend to focus on small, non-dutiable cargo (i.e., cargo with CIF value less than USD 50.00).
64. Entry of locally-based participants has not had any significant impact on DHL's position of economic strength in the market for freight forwarding services to Jamaica.

b. Timeliness of Entry

65. A timely entry would be more likely to mitigate and/or reverse adverse competitive effects which may arise from the challenged conduct, when compared to a market where entry is prolonged.
66. Freight forwarding on an international scale requires a strong presence in both exporters' and importers' locations. To do so takes substantial amount of time to build relationships and trustworthiness. Additionally, building such a network requires large capital outlays.

67. This could be a likely reason why recent local entrants have not expanded their network beyond transporting goods from their Florida warehouses into Jamaica. Through interviews with custom brokers, the FTC was made to understand that UPS has reduced the number of service locations in Jamaica. The interviewees expressed their opinion that the demand for freight forwarding to Jamaica, by air, is insufficient to accommodate more than two suppliers.
68. Accordingly, the FTC concludes that entry in this market is unlikely to be timely.

c. Likelihood and Sufficiency of Entry/Expansion

69. The likelihood and sufficiency of effective entry are dependent on (i) demand conditions in the relevant market, and (ii) the ability to build out an extensive network in the freight forwarding markets.
70. As stated above, historically, the entry we observe is on a small scale and is likely insufficient to combat or reverse any adverse effect from the Respondent's conduct.
71. Since competitive entry is unlikely in the highly concentrated market for freight forwarding services in Jamaica, the FTC concludes that DHL occupies a dominant position in this market.

X. ANALYSIS OF COMPETITIVE EFFECTS

A. Analytic Framework

72. The main objective of antitrust analysis is to identify conduct which is likely to injure competition. Its purpose therefore is to protect competition and not necessarily competitors. Competition law typically requires proof of injury to both competitors and consumers to demonstrate harm to competition. Injury to competitors requires proof that the challenged conduct is likely to unduly induce the exit of current rivals; prevent the entry of potential rivals; or raise rival's costs, relative to a market in which the challenged conduct did not take place. Examining the effect of the challenged conduct on an equally efficient rival, and not necessarily on existing rivals, is consistent with the objective. If an equally efficient rival (i.e. one which has a similar cost structure as the Respondent) would not become less competitive as a result of the Respondent's conduct, the conduct is unlikely to be described as being injurious.
73. Injury to consumers requires proof that the challenged conduct allowed the Respondent to raise or maintain price above the competitive level. Further the competitive level should be interpreted as the price which would have prevailed in the absence of the challenged conduct.

74. Integral to the assessment of competitive effects, therefore, is the comparison of two hypothetical alternative evolutions of the relevant markets: the factual and counterfactual markets. The factual market represents how the relevant market will evolve in the foreseeable future if the challenged conduct remains unchallenged. The counterfactual market represents, however, the evolution of the relevant market in the absence of the challenged conduct.

B. Introduction

75. Competition law is based on the principle that a competitive market provides sufficient incentives and opportunities for businesses to operate efficiently to meet consumers' demand for quality, quantity, variety and innovation at the lowest possible price. Thus, substantially lessening of competition is linked to inefficiencies and consequently a waste of resources. Consumers are adversely impacted by less of their demands being met with the available labour, capital and natural resources.

76. Anticompetitive effects are classified into two broad categories: unilateral and coordinated interaction. Unilateral competitive effects arise when a supplier profitably effect harm to consumers and competitors on its own without coordination with other suppliers. Coordinated interaction effects arise when at least two independent suppliers cause harm by coordinating their conduct.

77. DHL occupies a dominant position in the market for freight forwarding services and also participates in the market for customs brokerage services. Based on the theory of harm being investigated, the Respondent's economic strength in the freight forwarding market may allow it to distort competition in the customs brokerage market and allow it to acquire market power therein.

C. Harm to Rivals in the Customs Brokerage Market

78. One of the prerequisites for establishing adverse competitive effects is the demonstration of harm to rivals. Harm to rivals will be assessed by comparing the welfare of rivals in the factual and counterfactual markets.

Factual Market

79. In the factual market, DHL charges a broker turnover fee of USD 25.00 per AWB for its importers who use the services of a rival customs broker. This fee effectively gives DHL a significant

advantage over rival customs brokers as the fee could amount to as much as 50 per cent of the charge for brokerage services.

80. The broker turnover fee effectively hinders rival customs brokers from competing for a significant segment of the market, given that the fee would be applicable to between [REDACTED] of potential customers.
81. To avoid the potential harm caused by the broker turnover fee, even equally efficient customs brokers would be faced with either reduced revenue flows or increased investment costs. In particular, one way in which customs brokers could attempt to mitigate the distortion caused by the broker turnover fee is to pay the fee on the importer's behalf or lowering their brokerage charges to offset the broker turnover fee. Either way, the fee would result in a transfer of producer surplus from rivals to DHL.
82. Alternatively, an equally efficient customs broker could attempt to avoid the potential harm of the broker turnover fee by entering the market for freight forwarding service. This means that to mitigate the distortion caused by the introduction of the brokerage turnover fee, an equally efficient customs broker would have to undertake the required investment to vertically integrate back to the market for freight forwarding to Jamaica.

Counterfactual Market

83. In the counterfactual market, DHL does not charge its customers for using third party customs brokers. In this market, equally efficient customs brokers compete against DHL without offering rebates or undertake significant investment costs to enter the market for freight forwarding services.
84. The FTC concludes that the challenged conduct is likely to harm even equally efficient customs brokers by reducing revenue flows and/or increasing investments costs.

D. Harm to Consumers

Factual Market

85. In the factual market, DHL charges a broker turnover fee of USD 25.00 per AWB for its importers who use the services of a rival customs broker.
86. The extent to which importers can avoid the potential harmful effects of the broker turnover fee depends on the value of the good and the point of origin. It would be relatively difficult for

importers to avoid using DHL as freight forwarders for large or high valued goods originating in the Far East region. This is the case as DHL extensive network makes it the only freight forwarder capable of transporting cargo to and from this region in particular.

87. Due to the Respondent's extensive network worldwide and its general position in the freight forwarding market, it is often impractical for suppliers (and importers, by extension) to use alternative freight forwarders.
88. Some importers using DHL's freight forwarding service to Jamaica would still choose to pay the broker turnover fee to use third party customs brokers to take advantage of perceived higher quality of service. Based on FTC's interviews, some importers are of the view that rival brokers are more efficient than DHL at clearing goods at the ports. They cite the following reasons: (i) customs brokers provide timely updates and the status of goods being imported; (ii) customs brokers ensure that the appropriate customs charges are applied to goods when goods attract varying customs charges; and (iii) importers and brokers engage in a more personal and flexible relationship. Importers derive great value from these attributes and are willing to pay more to brokers instead of accepting the complete end to end service offered by DHL and other international freight forwarders.

Counterfactual Market

89. In the counterfactual market, DHL does not charge its customers for using third party customs brokers. In this market, importers select customs brokers based on service quality as there will be no difference in fees to access this service.
90. In comparing the welfare of importers in the actual and counterfactual markets, it is evident that the challenged conduct is likely to harm final consumers by creating a disincentive for importers to use their preferred customs broker. Importers would have to pay higher prices or access lower quality customs broker services.
91. Accordingly, the FTC concludes that the challenged conduct is likely to harm final consumers.
92. The challenged conduct is likely to have the effect of substantially lessening competition in the market for customs brokerage services in Jamaica by (i) diverting revenues from rival customs brokers and/or raising the investments cost required to compete in the market for customs brokerage; and (ii) increasing the price for importers (final consumer) to access customs brokerage services or reducing the quality of customs brokerage services received by final consumers.

XI. EFFICIENCY CLAIMS

93. In this section, the FTC examines whether and the extent to which the challenged conduct is justified on grounds of efficiencies. The FCA permits conduct which has had, is having or likely to have the effect of substantially lessening competition, if the conduct generates efficiencies to overcome the anticompetitive effects identified.

94. The FTC invited DHL to explain the motivation for implementing the broker turnover fee. In its response, DHL advised that charging the broker turnover fee is necessary as it represents compensation for the additional time and administrative work involved in conducting the transfer of goods and documents. These are identified as follows:

- (i) Delay of DHL shipments due to the process of identifying and removing goods being transferred to the nominated customers broker from the DHL consolidated manifest;
- (ii) Gathering and verifying the related customers documents for turnover to the nominated customs broker to receive the shipment;
- (iii) Preparation of additional paperwork and carrier certificate for the nominated customs broker to receive the shipment; and
- (iv) Required follow-up with the nominated customs broker until the shipment is ultimately released to the customer.

95. In evaluating the claim, the FTC notes that DHL offers freight forwarding as a standalone service, which requires that all administrative obligations identified in (i) to (iv) in the preceding paragraph be carried out for such a service to be considered complete.

96. As such, it is not immediately obvious to the FTC that the activities identified are inextricably linked to the handing over of the relevant documents to facilitate a third party customs broker. Accordingly, the FTC does not recognize recovering the costs associated with the carrying out of these activities as an efficiency emanating from the challenged conduct.

97. Accordingly, the FTC concludes that there is no economic justification for implementing the broker turnover fee.

XII. SUMMARY AND OVERALL CONCLUSION

98. The information reviewed is consistent with the theory that the challenged conduct constitutes rent-seeking behavior on the part of DHL designed to extract surplus from competing customs

brokers by using its dominant position in the freight forwarding market to create disincentives for importers to choose rival customs brokers.

99. The challenged conduct is reviewable under sections 19-21 of the Fair Competition Act.

100. The markets which are relevant to assessing the competitive effect of the challenged conduct are:

- a. The market for freight forwarding services to Jamaica; and
- b. The market for customs brokerage services in Jamaica.

101. DHL is dominant in the market for freight forwarding services to Jamaica.

102. DHL's implementation of the broker turnover fee was determined to be an abuse of its dominant position as it is likely to restrict entry or expansion in the market for customs brokerage services in Jamaica.

103. The challenged conduct is likely to have the effect of substantially lessening competition in the market for customs brokerage services in Jamaica by (i) diverting revenues from rival customs brokers and/or raising the investments cost required to compete in the market for customs brokerage; and (ii) increasing the price for importers (final consumer) to access customs brokerage or reducing the quality of customs brokerage services received by final consumers.

104. There is no economic justification for implementing the broker turnover fee.

105. The overall conclusion of this investigation, therefore, is that the challenged conduct breaches section 19-21 of the Fair Competition Act.

XIII. REMEDIAL MEASURES

106. In this section, the FTC designed a remedy to avoid or reverse anticompetitive effects of the conduct.

107. The broker turnover fee should not be implemented.

XIV. RECOMMENDATION

108. DHL should be informed that the FTC is likely to challenge any subsequent implementation of the broker turnover fee as a contravention of sections 19-21 of the Fair Competition Act.