FAIR TRADING COMMISSION

In the Matter of

Radio Jamaica Limited

And

Gleaner Company Limited

And

Gleaner Company Media Limited

For approval to amalgamate their businesses

STAFF REPORT

November 23, 2015

Case # 7887-15

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I. **EXECUTIVE SUMMARY**

1. In this report, we consider the proposed agreement to amalgamate the businesses of The Gleaner Company Limited ('Gleaner'), Radio Jamaica Limited ('RJR'), and The Gleaner Company (Media) Limited ('the Media Company').

A. The Proposed Transaction

2. The scheme of arrangement and amalgamation contemplated under the proposed amalgamation agreement ('Agreement') is generally as follows: the Media Company will be incorporated as a wholly owned subsidiary of the Gleaner with a stated capital of $1.00 Jamaican dollar and with the same registered office as the Gleaner.[1] The Gleaner will then hive off its media business as a going concern. The media business consists of the assets and liabilities of the Gleaner as defined in the First Schedule to the Agreement.[2] The non-media elements will remain with the Gleaner, which after the scheme is effected will change its corporate name and become a company which only holds and makes investments in other businesses or companies.[3]

3. In furtherance of the scheme, the Gleaner will transfer its media business to the Media Company. In consideration for the transfer, the Media Company will issue 1,211,243,827 new ordinary shares to the Gleaner. The Gleaner will be the sole owner of those shares.[4] The Gleaner will then sell its entire shareholding in the Media Company (1,211,243,827) to RJR. The consideration for this sale will be the issuance of 1,211,243,827 new ordinary shares in RJR to Gleaner shareholders.[5]

B. Standard of Review and Analytic Framework

4. The Staff reports on its assessment of whether the proposed Agreement contravened Section 17 of the Fair Competition Act (FCA), which prohibits agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a

[1] Annex 1, Part D of the Agreement.
[2] Clause 1 of the Recital to the Agreement.
[3] Clauses 14 and 15 of the Agreement.
[4] Clause 5 of the Agreement.
[5] Annex 1 of the Agreement, the scheme, clause 1.

market. An agreement may be considered void under the FCA if the competition authority establishes that the Agreement (i) has the "purpose" of substantially lessening competition in a market; and/or (ii) is likely to have the "effect" of substantially lessening competition in a market.[6] Further, an agreement which has as its purpose and/or effect of substantially lessening competition in any market may not be treated as being void if it generates sufficient economic or technical efficiencies to overcome the anticompetitive effects. Further, section 29 of the FCA allows for entities to obtain authorization from the FTC to engage in conduct that would otherwise be considered a breach of the FCA, once the FTC is satisfied that such conduct is likely to promote the public benefit.

C. Analysis of the Purpose of the Agreement

5. In assessing the purpose of the proposed transaction, the Staff reviewed the Agreement as well as numerous other documents which the Staff found useful to the assessment of the purpose of the proposed transaction.

6. The Staff determined that the Agreement does not have as its *purpose*, the substantial lessening of competition in any market.

7. Pursuant to Section 17 of the FCA, therefore, the Staff assessed whether the Agreement is likely to have the *effect* of substantially lessening competition in any market.

D. Analysis of the Effect of the Agreement

8. The participants in many technologically driven industries operate what economists refer to as multi-sided platforms (MSPs). MSP operators generate revenue by facilitating the interaction of one side of its platform (i.e., group of customers) with

[6] The "purpose" of an agreement is assessed by way of a legal analysis of the provisions of the agreement. The "effect" of the agreement is established by way of an economic analysis of the probable effect of the agreement on competition in any defined market(s).

other sides of its platform. A distinguishing feature of all MSPs is that the value of the platform to members of each side of the platform increases when the number of persons on other side(s) of the platform increases.

9. Media businesses such as RJR and Gleaner operate MSPs. Media businesses generate revenue primarily by charging advertisers to send messages to media audiences.

10. While RJR and Gleaner individually do not operate on all major media platforms, collectively they hold a significant share of the media audience across the major media platforms. RJR delivers content over the Internet, television and radio platforms but is not present on the newspaper platform. Gleaner delivers content over the Internet, radio and newspaper platforms but has no presence on the television platform.

11. Media audiences are typically attracted to media platforms based on the content and accessibility of a given platform.

12. Media businesses rely on content to build audience. Individuals have heterogeneous preferences for media content. Disseminating high valued specialized content, therefore, is an important element of building audience.

13. Media businesses rely on their audience pool to attract advertisers. An advertiser is willing to pay media businesses to communicate product information to the audiences on its behalf. As such, the value of a media business to an advertiser increases when the number of targeted consumer types in the audience increases.

14. Advertising services has the socially beneficial role of fuelling competition in the wider economy. A media business provides independent advertising agencies with access to media audiences as well as competes with them to advertise the product and services of advertisers.

15. Independent advertising agencies generate a significant portion of media businesses' advertising revenue. In particular, indirect advertising accounts for approximately 65% of RJR's total revenue.[7]

[7] Gary Allen, letter to author, October 20, 2015.

16. Independent advertising agencies, unlike media businesses, are media neutral in that they will recommend advertisements be placed on whichever media platform prospective customers are likely to access. Media neutrality in the advertising service market has implication for consumer welfare in the wider economy.

17. Advertising on media platforms is an important mechanism for informing consumers in the wider economy about the availability and/or terms under which advertisers are making products available to consumers.

18. Independent advertising agencies have argued that the proposed transaction will place RJR in a position where it can unduly increase the share of direct advertising sales revenue by offering advertisers packages and options that RJR would not also offer through independent advertising agencies.

19. RJR has argued that its plan is to expand its operations in overseas markets by exploiting the infrastructure which Gleaner already has in place.[8]

20. In assessing the proposed transaction, the Staff defines the markets which are likely to be affected and consider whether the transaction is likely to have the effect of substantially lessening competition in any defined relevant market.

E. Analysis of the Competitive Effects of the Proposed Agreement

21. By amalgamating the media assets of Gleaner and RJR the proposed transaction will create the only advertising service provider which has a significant presence in these four media platforms in Jamaica: namely (i) television (with a potential audience of 1,530,000 in Jamaica); (ii) newspaper (with a potential audience of 1,359,000 in Jamaica); (iii) radio (with a potential audience of 1,093,000 in Jamaica); and (iv) Internet (with a potential audience of 1,676,000 in Jamaica).[9] This means that the proposed transaction will create an entity which is deeply vertically integrated into the advertising media/ advertising service market. Accordingly, the amalgamated entity

[8] Ibid.
[9] Market Research Services Limited, "All Media Survey 2014," (Kingston: Market Research Services Limited, 2015).

will be in a position where it supplies independent advertising agencies with access to a critical input (advertising media platforms) and competes with independent advertising agencies in the market for advertising services.

22. A significant threat of anticompetitive effects arising from the proposed transaction is the potential for increased opportunity and incentives to engage in discriminatory conduct to the detriment of independent advertising agencies to secure higher prices and/or market share for its direct advertising services.

23. In assessing the likely competitive effects of the proposed transaction, the Staff undertook an analysis which entails: (i) identifying the relevant markets which are likely to be affected by the proposed transaction; and (ii) assessing whether and the extent to which the proposed transaction poses harm to both businesses and consumers in the identified market(s).

24. Within the framework of the FCA, the Staff concluded that the proposed transaction is likely to have the effect of substantially lessening competition in the following markets: (i) advertising market; and (ii) the radio platform and IP based media platform within the advertising media platform market. In arriving at the conclusion, the Staff considered and assessed the potential benefits from the transaction.

Assessment of Horizontal Effects

25. Amalgamations could have horizontal harmful effects if it significantly increases market concentration in a relevant market. Market concentration could increase only in relevant markets where both parties are participants.

26. Newspaper and Television Platforms Sub-markets. There could be no horizontal effects in the newspaper platform and television platform sub-markets since the parties do not both participate in either platform.

27. Radio Platform Sub-Market. The amalgamation caused the market concentration to increase significantly. Based on international best practices, the proposed transaction

is to be presumed to be likely to increase market power in the radio platform subject to persuasive evidence that the transaction is unlikely to enhance market power.

28. IP Based Media Platform Sub-market. Absent the proposed transaction, RJR would have had to develop new products to compete in this market with Gleaner in the foreseeable future. With the proposed transaction, however, Gleaner will be eliminated as a competitor in the future and therefore it is less probable that such plans will be implemented. The proposed transaction would eliminate Gleaner as a competitor in the relevant market and therefore likely reduce RJR's incentive to either acquire an improved IT infrastructure or at least delay the acquisition of such infrastructure.

29. Accordingly, the proposed transaction is likely to have significant horizontal effects in (i) the radio advertising platform market; and (ii) the IP Based Media Platform market.

Assessment of Vertical Effects

30. An integrated firm, as a result of the proposed transaction, may have increased incentives and/or opportunities to foreclose downstream competitors from important inputs. That is, when an integrated firm acquires a firm in the input market, to the extent that the acquisition results in the integrated firm acquiring, maintaining or extending market power in the input market, then the acquisition may increase the incentives and/or opportunity to raise rivals' costs by either (i) foreclosing supply of the input it sells downstream competitors; or (ii) raising the price at which it sells crucial inputs to rivals in the downstream market. As a result of the acquisition, therefore, the integrated firm could raise profits by raising prices in the downstream market and/or expand its market share in the downstream market.

31. A rational integrated firm would engage in permanent foreclosure activities in the downstream market only if the expected benefits of doing so exceed the expected costs. The expected benefits of foreclosure include the present value of the stream of future additional profits arising from operating in the downstream market without

rivals. The expected cost includes the present value of the stream of reduced profits arising from the reduced sales of input in the upstream market (to rivals in the downstream market).

32. Marginal Benefits of foreclosure. The Staff estimates that the main marginal benefit of foreclosing its advertising media services to independent advertising agencies would be an increased profit margin from advertising. The Staff estimates that the benefits to the amalgamated entity from foreclosure ranges between 5%-16% of advertising revenues earned.

33. Marginal Costs of foreclosure. The main marginal cost of foreclosing its advertising media services market to independent advertising agencies would be the likely reduction in advertising volumes in the absence of business from independent advertising agencies. The staff estimates that RJR would have to increase advertising revenue from its direct customers by 60%-77% to replace the revenue generated from independent advertising agencies.

34. On balance, the Staff is of the opinion that foreclosing its advertising media platforms to independent advertising agencies is unlikely to be a rational strategy for the amalgamated entity.

35. Discrimination is more likely to be a rational strategy than outright foreclosure. Discrimination may present itself in many obvious and a few not-so-obvious forms. The different ways in which discrimination could be implemented includes differences in the: (i) advertising options offered to direct and indirect customers; (ii) price and conditions under which the options are offered; and (iii) timing in which advertising options are made available to direct customers relative to indirect customers. The proposed transaction will make it less likely that advertisers could avoid being harmed by this conduct because the amalgamated entity would control a significant share of the four main advertising media platforms.

36. The Staff recognizes that discrimination is addressed by the Accreditation Agreement between the Media Association of Jamaica (MAJ) and the Association of advertising Agencies of Jamaica (AAAJ). The Staff concludes, however, that the Accreditation Agreement is an insufficient safeguard against discrimination in the market for advertising services for the following three reasons: (i) Non-Binding Accreditation Agreement. The Accreditation Agreement appears not to be binding on the part of media businesses and independent advertising agencies. Both sides have admitted to the breaches—with explanation; (ii) Incomplete Accreditation Agreement. The Accreditation Agreement does not cover all forms of discrimination. This loop hole would have to be addressed to mitigate any increased incentive for discriminatory conduct arising from the consummation of the proposed transaction; and (iii) Insufficient Sanctions. The Accreditation Agreement does not provide for any sanction for either media businesses or independent advertising agencies which may breach it.

37. We conclude in this section that discriminatory conduct made more likely as a result of the proposed transaction is likely to have the effect of substantially lessening competition by (i) harming independent advertising agencies in the market for advertising services; (ii) harming advertisers who are clients of independent advertising agencies; and (iii) harming some final consumers in the markets for goods and services produced by clients of independent advertising agencies.

F. Other Potential Public Interest Harm

38. Consolidated News Coverage. At least 20% of the population of Jamaica values diversity in the content disseminated from radio, television and television media platforms. Given that ‘news’ would be the main content common across three media platforms, it is reasonable to infer that a significant number of individuals would be adversely affected if the diversity in news offered across platforms was diminished by the proposed transaction.

39. Once the transaction is completed, there is no legal constraint preventing the amalgamated entity from consolidating news coverage. This means that the amalgamated entity will have the opportunity to consolidate the news coverage. Further, the amalgamated entity is likely to reduce operational costs from consolidating news coverage.

40. Since the amalgamated entity has the opportunity and incentive to consolidate news coverage, the Staff is of the opinion that a likely consequence of the proposed transaction is that there will be less diversity of views on news items as well as less variety of news items.

41. Inadequately Informed Consumers. The Staff is concerned that independent advertising agencies may be discriminated against, to the detriment of the interest of audiences (i.e., prospective consumers) who rely on advertisements to stay informed about the availability of products and services.

42. With fewer advertisements being channeled through independent advertising agencies, the Staff is of the opinion that another consequence of the proposed transaction is that fewer consumers are likely to be informed about the products most suited to their tastes and/or needs. This, in turn, is likely to reduce consumer welfare in markets in the wider economy.

G. Analysis of Potential Interest Benefits

43. RJR claimed that the merger will lead to significant reduction in the costs of operating radio services. In addition to benefits accrued by parties to the proposed transaction, RJR claims that the proposed transaction will generate benefits for (i) the public at large; (ii) advertisers; (iii) independent advertising agencies; and (iv) the Staff of RJR.[10]

44. In reviewing the claims, the Staff recognized only the reduction in operating radio services as a public benefit. All the other claims were discounted by the Staff because

[10] The claims of other benefits of the proposed transaction are outlined in letter dated October 28, 2015 from Gary Allen, Managing Director, RJR to David Miller, Executive Director, Fair Trading Commission.

they could have been realized through a means which is not as anticompetitive as the proposed transaction.

H. Balancing Potential Public Interest Harm and Benefit

45. The Staff is of the opinion that the sole recognized benefit that is considered merger-specific, that is the reduced costs of operating radio, is unlikely to off-set the considerable harm posed by the anticompetitive effects in the advertising services and advertising media markets. On balance, therefore, the Staff concludes that the potential public interest harms arising from the proposed transaction exceed the potential interest benefit.

I. Conclusion

46. The Staff concluded that the proposed transaction contravenes Section 17 of the Fair Competition Act since it is likely to have the effect of substantially lessening competition in the markets for: (i) advertising services; and (ii) radio and IP based platforms sub-markets in the advertising media platform market. Further, the anticompetitive effects are unlikely to be off-set by potential benefits of the proposed transaction.

J. Recommended Remedial Measures

47. The following measures are sufficient to mitigate, if not avert, the likely anticompetitive effects posed by the proposed transaction.

    a. The amalgamated entity commits to operating the newsroom of the newspaper entity independently of the newsrooms of the other media platforms;

b. The amalgamated entity commits to confine their creation of advertising content for television to 'low budget production' herein defined as content created using only still photography, voice over, video and basic desktop publishing (DTP) technologies costing less than $40,000.00;

c. The amalgamated entity commits to not engage in anticompetitive discriminatory conduct regarding its advertising packages available to its direct clients (i.e. advertisers) and indirect clients (independent advertising agencies) in good standing. Further, the availability of any advertising package created by the amalgamated entity must be communicated to independent advertising agencies before the amalgamated entity can offer it to any direct customer; and

d. The Spectrum Management Authority (SMA) completes the transition from analogue to digital radio signals at the earliest possible time. This will facilitate new entry in radio which would discourage any anticompetitive conduct on the part of incumbent providers.

II. DESCRIPTION OF THE PARTIES

A. Radio Jamaica Limited

48. Radio Jamaica Limited ('RJR'), whose registered office is at 32 Lyndhurst Road, Kingston 5, was established in 1950. RJR has controlling interests in media entities which operate radio [RJR94 FM, FAME95 FM and HITZ92 FM]; Free to Air television [Television Jamaica (TVJ)]; subscriber television channels [Reggae Entertainment Television Limited (RETV) and Jamaica News Network Limited (JNN)]; and multi-media production [Multi-Media Jamaica Limited].[11]

49. The Board of Directors and Ten Largest Shareholders are listed in Table 1.

Table 1 Board of Directors and Largest Shareholders of RJR

Directors	Largest Shareholders
J.A. Lester Spaulding, CD, JP (Chairman)	PAM/JPS Employees Superannuation Fund
Gary Allen, EMBA, JP	NCB Jamaica Limited
Carl Domville, BSc (Hons.), FCCA, FCA	Ideal Portfolio Services
Minna Israel L,CD, JP, BSc (Hons.), MBA	Mayberry West Indies Bank Limited
Lawrence Nicholson, BSc, MSc, PhD	Grace Kennedy Limited Pension Scheme
Glenworth Francis, EMBA, BSc	Jamaica Co-operative Credit Union League
Nadine A. Molloy, BA (Hons.), MA, MLS, JP	L.P. Azar Limited
Andrew Leo-Rhynie, MBA, BSc	Marlon C Blake
Peter D. Chin, BSc, MBA	King Alarm Systems
	VMBS A/C Contributory Pension Scheme

Source: RJR Annual Report 2014/15.

B. Gleaner Company Limited

50. The Gleaner Company Limited ('Gleaner'), whose registered office is at 7 North Street, Kingston, was established in 1834. Gleaner has controlling interests in media (newspaper and radio) and non-media entities, local and overseas. Its local subsidiaries include: (i) The Gleaner Online Company; (ii) Independent Radio Company Limited-which operates Power106 FM and Music99 FM; and (iii) Popular Printers Limited-which owns SELECTCO Publications Limited. Its overseas subsidiaries are listed as (iv)

[11] Radio Jamaica Limited, "67th Annual Report: 2014/15."

The Gleaner Company (Canada) Inc; (v) the Gleaner Company U.S.A Limited; and (vi) GV Media.[12]

51. The Board of Directors and the Largest Shareholders are listed in Table 2.

C. Gleaner Company Media Limited

52. The Gleaner Company Media Limited ('the Media Company'), whose registered office is at 7 North Street, Kingston, was established in 2015.

53. The Staff has not been provided with a breakdown of the ownership and management structure of the amalgamated entity which will result from this scheme.

54. In terms of ownership structure, it is likely that RJR will own the entire shareholding in the Media Company; and in turn the shareholders of what was formerly the Gleaner will hold a substantial stake in the shareholding of RJR.

55. Under Clause 13 of the Agreement, the proposed directors of the Media Company before the scheme becomes effective will be Oliver F. Clarke and Christopher Barnes. However, a search at Companies Office shows that two other directors have also been appointed, they are: Joseph Matalon and Elizabeth Jones.[13]

56. After the scheme becomes effective, clause 13 provides that RJR will determine who the directors of the Media Company will be. Also after the scheme is given effect, the board of directors of RJR will be expanded to increase the maximum allowable number of directors from 12 to 16.[14] In this regard, RJR's board will have a mix of existing RJR directors with the addition of directors from the Gleaner.[15]

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[12] Gleaner Company Limited, "Annual Report 2014."
[13] Notice of Appointment of/Change of Directors lodged at Companies Office on October 15, 2015.
[14] Clause 14.2 of the Agreement.
[15] Clause 13 provides that after the scheme becomes effective the proposed directors of RJR will be: J.A. Lester Spaulding, Gary Allen, Glenworth Francis, Carl Domville, John Andrew Leo Rhynie, Minna Israel, Lawrence Nicholson, Oliver F. Clarke, Christopher Barnes, Joseph M. Matalon, Elizabeth Ann Jones, Douglas Orane, Lisa Johnston and Carol Archer.

Table 2 Board of Directors and Largest Shareholders of Gleaner

Directors	Largest Shareholders
Hon. Oliver F. Clarke, OJ, JP, BSc. (Econ), FCA, Hon. LLD (Chairman)	Financial and Advisory Services Limited
Hon. John J. Issa, OJ, CD, JP, BSc, Hon. LLD	Pan Caribbean Financial Services A/C 1388842
Christopher Barnes, JP, BSc, MBA	Kaytak Investments Limited
Morin M. Seymour, CD, JP, BSc, MBA, FLMI	Oliver F. Clarke
Joseph M. Matalon, CD, BSc (Econ.) (Hons.)	Jamaica National Building Society
Herrick Winston Russell Dear, OD, JP, CLS	Medsalco Limited
Christopher S. Roberts, JP, CA	National Insurance Fund
Hon. Douglas R. Orane, CD, JP, BSc (Hons.), MBA, Hon. LLD	Sagicor PIF Equity Fund
Carol D. Archer, BA, MA, MURP, MPhil, PhD	JN Fund Managers Limited Investment MGRS
Lisa Johnston, BA, MA	Gleaner Co. Ltd. Employee Investment Trust
Earl M. Maucker, BA	
Elizabeth (Betty Ann) Jones, FCA (Ja.), FCCA (UK), BSc	

Source: Gleaner Annual Reports 2013 and 2014.

D. Proposed Transaction

1. The Agreement

58. The Agreement was entered into on August 5, 2015. The parties are the Gleaner Company Limited (hereinafter “the Gleaner”), Radio Jamaica Limited (hereinafter “RJR”) and the Gleaner Company (Media) Limited (hereinafter “the Media Company”).

59. The Media Company is in essence a special purpose vehicle incorporated for the purpose of the transaction; that is, the amalgamation of Gleaner and RJR.[16]

60. The Agreement contemplates a scheme of arrangement involving the members of both the Gleaner and RJR and ultimately an amalgamation of the companies. The scheme of arrangement and amalgamation is to be approved by the Court under the relevant sections of the Companies Act.

2. Resulting Ownership and Management Structure

61. The scheme of arrangement and amalgamation contemplated under the Agreement is generally as follows: the Media Company will be incorporated as a wholly owned

[16] Recital to the Agreement, clause 1.

subsidiary of the Gleaner with a stated capital of $1.00 Jamaican dollars and the same registered office as the Gleaner.[17] This has already been done as of June 2, 2015.[18]

62. The Gleaner will then hive off its media business as a going concern. The media business consists of the assets and liabilities of the Gleaner as defined in the First Schedule to the Agreement.[19] The non-media elements will remain with the Gleaner, which after the scheme is effected will change its corporate name and become a company which only holds and makes investments in other businesses or companies.[20]

63. In furtherance of the scheme, the Gleaner will transfer its media business to the Media Company. In consideration for the transfer, the Media Company will issue 1,211,243,827 new ordinary shares to the Gleaner. The Gleaner will be the sole owner of those shares.[21]

64. The Gleaner will then sell its entire shareholding in the Media Company (1,211,243,827) to RJR. The consideration for this sale will be the issuance of 1,211,243,827 new ordinary shares in RJR to Gleaner shareholders.[22]

65. The Staff has not been provided with a breakdown of the ownership and management structure of the amalgamated entity which will result from this scheme.

66. However based on the Staff's review of the Agreement, it appears that once the scheme is effected the resulting ownership is likely to be that the former media business of the Gleaner will be carried on through the Media Company which will be under the control of RJR.

67. Specifically, in terms of ownership structure, it is likely that RJR will own the entire shareholding in the Media Company; and in turn the shareholders of what was formerly the Gleaner will hold a substantial stake in the shareholding of RJR.

[17] Annex 1, Part D of the Agreement.
[18] A company search was done by the FTC on October 29, 2015 which located the Certificate of Incorporation for the Media Company.
[19] Clause 1 of the Recital to the Agreement.
[20] Clauses 14 and 15 of the Agreement.
[21] Clause 5 of the Agreement.
[22] Annex 1 of the Agreement, the scheme, clause 1.

68. In terms of the management that will result from the scheme, some indication of this is given in clause 13 of the Agreement. Under that clause the proposed directors of the Media Company before the scheme becomes effective will be Oliver F. Clarke and Christopher Barnes. However a search at Companies Office shows that two other directors have also been appointed, they are: Joseph Matalon and Elizabeth Jones.[23]

69. After the scheme becomes effective, clause 13 provides that RJR will determine who the directors of the Media Company will be. Also after the scheme is effected the board of directors of RJR will be expanded to increase the maximum allowable number of directors from 12 to 16.[24] In this regard, RJR's board will have a mix of existing RJR directors with the addition of directors from the Gleaner.[25]

III. STANDARD OF REVIEW AND ANALYTIC FRAMEWORK

70. The Staff must determine whether the proposed agreement contravenes any section of the Fair Competition Act (FCA). Any agreement which has as its purpose or effect, the substantial lessening of competition in a market, or is likely to have the effect, is void. Nonetheless, parties which enter into agreements which ordinarily would contravene the FCA may still be authorized to pursue such agreements where it has been shown that the likely public interests benefits from the transaction exceeds the public interests harm.

71. The proposed transaction is examined under section 17 of the FCA, 1993.

72. Section 17 of the FCA provides as follows:

17. (1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.

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[23] Notice of Appointment of/Change of Directors lodged at Companies Office on October 15, 2015.
[24] Clause 14.2 of the Agreement.
[25] Clause 13 provides that after the scheme becomes effective the proposed directors of RJR will be: J.A. Lester Spaulding, Gary Allen, Glenworth Francis, Carl Domville, John Andrew Leo Rhynie, Minna Israel, Lawrence Nicholson, Oliver F. Clarke, Christopher Barnes, Joseph M. Matalon, Elizabeth Ann Jones, Douglas Orane, Lisa Johnston and Carol Archer.

(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that—

a. *directly or indirectly fix purchase or selling prices or any other trading conditions;*
b. *limit or control production, markets, technical development or investment;*
c. *share markets or sources of supply;*
d. *affect tenders to be submitted in response to a request for bids;*
e. *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
f. *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, being provisions which have or are likely to have the effect referred to in subsection (1)*

(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied—

a. *contributes to—*

the improvement of production or distribution of goods and services; or

the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;

b.imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or

c.does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

73. Section 17 of the FCA, therefore, requires that an agreement is in breach of that provision if it has as its purpose or effect, the substantial lessening of competition in a market.

74. Section 17 of the FCA is similar in terms with Article 101 of the Treaty on the Functioning of the European Union (TFEU) which provides as follows:

75. Article 101

A. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

a.directly or indirectly fix purchase or selling prices or any other trading conditions;

b.limit or control production, markets, technical development, or investment;

c.share markets or sources of supply;

d.apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e.make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according

to commercial usage, have no connection with the subject of such contracts.

B. *Any agreements or decisions prohibited pursuant to this article shall be automatically void.*

C. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

a. any agreement or category of agreements between undertakings,
b. any decision or category of decisions by associations of undertakings,
c. any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

76. The interpretation of Article 101 of the EC Treaty by the European Court of Justice (ECJ) indicates that if the agreement has as its purpose the restriction of competition an economic analysis on its anticompetitive effect is not necessary.[26] An agreement that does not have as its purpose the substantial lessening of competition must thereafter be examined to determine if its effect is likely to lessen competition substantially in a market.[27]

77. Effect on competition is determined by an economic analysis of the relevant product and geographic markets whereby relevant issues for consideration are whether access

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[26] *VdS v. Commission*, Case 45/85 [1987] ECR 405, 4 CMLR 264, para. 39. In as much as section 17 of the FCA is in similar terms as Article 81 of the Treaty Establishing the European Community (EC Treaty), the FTC considers the jurisprudence developed by the European Court of Justice (ECJ) in its interpretation of this provision, if relevant, as guidance in its interpretation and application of section 17 of the FCA.

[27] *Javico v. Yves St.Laurent*, Case C-306/96[1998] ECR 1-1983, [1998] 5 CMLR 172.

to the relevant market is impeded and if so whether the subject agreement has contributed to that foreclosure effect.[28] Where the answer is in the affirmative to the above questions, the agreement is treated as being in conflict with Article 101 of the TFEU.

78. An important consideration in determining the effect of the agreement is the competition that would occur in the relevant market in the absence of the agreement.[29]

Substantial lessening of competition

79. The Staff notes that section 17 of the FCA is not identical to Article 101 of the TFEU. One important difference is the absence in Article 101 of the TFEU of the applicable standard under section 17 of the FCA for assessment of agreements, namely that the agreement has or is likely to have the effect of substantially lessening competition in a market.

80. Legislation from other jurisdictions may provide guidance on the interpretation of the term 'substantial lessening of competition', but before resorting to such guidance it bears noting that Article 101 of the TFEU, though without a similar wording, has a similar concept of effect on competition which may be deemed roughly analogous to or a proxy for substantial lessening of competition in a market.

81. This refers to the concept of 'appreciable effects' on competition which the ECJ has interpreted as an implied condition to be fulfilled for there to be a breach of Article 101, although the term 'appreciable effects' does not appear expressly in Article 101.[30]

82. Although, the concept of 'appreciable effects' may provide some guidance to an understanding of the term 'substantial lessening of competition, the Staff notes at least two shortcomings of adopting the jurisprudence of the ECJ, regarding the term

[28] *Delimitis v. Henninger Braüer AG*, Case C-234/89[1991] ECR I-935, [1992] 5 CMLR, 210, para. 24-27.
[29] *Société Technique Minière Maschinenbau Ulm* [1966] ECR 235, [1966]CMLR 357.
[30] *Volk v Vervaecke*, Case 5 of 69 [1969] ECR, 295.

'appreciable effects', on the meaning of the term substantial lessening of competition in section 17 of the FCA.

83. First, the term 'appreciable effects' is governed by published guidelines from the European Commission indicating a safe harbor for agreements between competitors whose combined share in a relevant market is below a certain percentage thereby creating a legitimate expectation that agreements between competitors whose market share is below such a percentage is entitled to a finding of no 'appreciable effect' on competition. The Staff of the FTC have not adopted similar published guidelines as a proxy for substantial lessening of competition.

84. Second, the published guidelines from the European Commission refer to 'appreciable effects' in the context of competition between Member States as distinct from competition within a Member State which is governed by the national competition legislation of the individual Member States.

85. For at least these two reasons, the Staff regards the concept of 'appreciable effects' as used in the EU jurisprudence as offering some, though no controlling guidance on the interpretation of the term 'substantial lessening of competition' in section 17 of the FCA.

86. Section 79 (1) (c) of the Canadian Competition Act has a similar provision.[31] The Canadian Competition Tribunal has interpreted the term 'substantial lessening of competition' to be proved in the following manner:

87. *"...the substantial lessening which is to be assessed need not necessarily be proved by weighing competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the*

[31] Section 79 of the Competition Act of Canada provides as follows: **79.** (1) Where, on application by the Commissioner, the Tribunal finds that:
(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market**,** the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice. Emphasis added.

market in the presence of the anti-competitive acts and its likely competitiveness in their absence".[32]

88. This test requires establishing that 'but for' the agreement or impugned provisions in an agreement competition would not have been affected in a defined market or, in the alternative the agreement is likely to affect competition that could have occurred in a defined market.

89. Further, in *Canada (Commissioner of Competition)* v. *Canada Pipe Company Ltd*., [33] the Federal Court of Appeal in Canada held that the correct test for establishing substantial lessening or prevention of competition is whether, but for the impugned conduct, the relevant market would have been "substantially more competitive",[34] and not whether substantial competition continued to exist in the relevant markets following the occurrence of the challenged conduct.

90. Also, the Federal Court of Appeal has held that whether or not competition is substantial in a relevant market does not determine whether a certain practice has resulted in, or is likely to result in, a substantial lessening or prevention of competition.[35] The Federal Court of Appeal held further that the correct approach is to compare the level of competition in the presence of the exclusive arrangement with what it would have been in the absence of the arrangement, and not to exclusively focus on entry by new firms and switching by incumbent firms.[36]

91. In investigations under section 17 of the FCA, the Staff determines if there is a causal relationship between the agreement or the impugned provisions of the agreement and substantial lessening of competition in a market. That is, it must be established that the agreement 'has had, is having, or is likely to have the effect of lessening competition substantially in a market'. Further, the test used to establish whether

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[32] See decision of *The Director of Investigation and Research v. Laidlaw Waste Systems Limited*, CT-91/2, at p.101. 1992.
[33] *Canada (Commissioner of Competition)* v. *Canada Pipe Company Ltd*., 2006 FCA 233 (23 June 2006).
[34] Ibid, at para. 38.
[35] Ibid, paras.36 and 37.
[36] Ibid.

there is a substantial lessening of competition in a market includes comparing past and present competitiveness and comparing present competitiveness with the existence of the impugned conduct and the likely competitiveness of the market in the absence of the impugned conduct.

IV. **ANALYSIS OF THE PURPOSE OF THE AGREEMENT**

92. In determining whether the Agreement has an anticompetitive purpose, the Staff examined the entire Agreement and, in particular, provisions which could potentially affect competition in the relevant market.

93. The Staff notes in particular, the non-compete provision in clause 14 of the Agreement which provides as follows:

<u>Amendments to Articles of Incorporation</u>

94. "The Transferor Company agrees that its Articles of Incorporation will be amended to have as its core business the holding and making of investments and to allow it to carry on or invest in businesses and companies save and except businesses or companies which carry on or may carry on business in competition with the Media Company or the Transferee Company for a period of twenty-four (24) months from the sanction of the Scheme by the Court to the intent that the Transferor Company shall not compete with Media Company or the Transferee Company during the said twenty four (24) month period. The Transferor shall take all necessary steps in the ordinary course of its business to divest itself of any media businesses not hived off to the Media Company."

95. The purpose of this provision is to prevent the Gleaner Company from competing with RJR or the Media Company for a period of two years after the scheme is sanctioned by the court. The Staff also notes that the final sentence in this non-competition provision, relating to media businesses not hived-off, may not necessarily be limited by the two year period, but may extend beyond such period.

96. Although non-competition provisions are not specifically listed in section 17 of the FCA as presumptively anticompetitive by object or purpose, the Staff notes that the scope of section 17 of the FCA is not limited to the types of conduct or the types of provisions specifically enumerated.

1. Non-Competition Clauses

97. The Staff now considers the issue of non-competition clauses in the context of business transfers and the circumstances under which such clauses may be deemed anticompetitive.

98. In **Remia BV & Others v Commission** the Court of Justice was concerned with non-competition clauses in two agreements for the sale of businesses involved in the production and sale of sauces and pickles.[37] The clauses in question prohibited the vendor from engaging in the production or sale of sauces for a period of ten years, and for a period of five years in relation to pickles, in the Netherlands.

99. The European Commission had ruled that the clauses constituted a restriction on competition within the meaning of Article 85(1) because their duration and scope was excessive. In upholding the European Commission's decision, the Court of Justice made the following general statement of principle:

100. "In order to determine whether or not such clauses come within the prohibition in Article 85(1), it is necessary to examine what would be the state of competition if those clauses did not exist.

A. If that were the case, and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business. Against that background non-competition clauses incorporated in an agreement for the transfer of an undertaking in

[37] *Remia BV & Others v Commission* Case 42/84 [1985] ECR 2545.

principle have the merit of ensuring that the transfer has the effect intended. By virtue of that very fact they contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market in question. Nevertheless, in order to have that beneficial effect on competition, such clauses must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose. The Commission was therefore right in holding that where those conditions are satisfied such clauses are free of the prohibition laid down in Article 85(1)."[38]

101. In essence the principle to be extracted from the foregoing reasoning of the Court of Justice is that a non-competition clause may not be held to be anticompetitive where it is necessary to the main transaction (for e.g. by preserving the goodwill of the business as at the date of transfer through limiting the risk of competition from the vendor). Additionally, the duration and scope of the clause must be limited to that purpose.

102. As the Court of Justice intimated in the above passage, in principle non-competition clauses are usually necessary in the context of business transfers. The issue then becomes whether or not in a given case the clause in question is proportionate to the aim of implementing the transaction. The assessment of proportionality involves evaluating the scope of the clause with regard to its duration, subject matter and geographical field of application to determine whether or not it exceeds what the implementation of the transaction reasonably requires.[39]

103. The European Commission, under the rubric of the **Remia** decision, has developed and refined the analysis of proportionality in a number of its decisions on non-competition clauses in business transfers. Those European Commission decisions can offer the Staff guidance in assessing the proportionality of clause 14.1 in the Agreement herein.

[38] *Remia BV & Others v Commission* Case 42/84 [1985] ECR 2545.
[39] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) at para 13.

2. Clause 14.1- proportionality of the restriction

104. The Gleaner's media business, which will be transferred as a going concern to RJR as part of the amalgamation, includes the goodwill attaching to that business.[40] In this regard, bearing in mind the principles from the **Remia** decision, the Staff appreciates that some restriction on competition from the Gleaner in relation to the media business is necessary in order to preserve the goodwill, and in turn the value of the business being transferred for the benefit of the transferee RJR/Media Company. The issue for determination is whether or not clause 14.1 is proportionate to this legitimate purpose.

105. It is observed at the outset that the prohibition on investment in competing businesses or companies will subsist for 24 months or 2 years. The question is whether or not this is a reasonable time period. The Staff considers to be applicable the guidance from the European Commission in **Reuter/BASF** where it indicates that the protection offered to the transferee by the non-competition clause "...must be limited to the period required by an active competitive purchaser for him to take over undiminished the undertaking's market position such as it was at the time of transfer."[41]

106. In a number of decisions in this field the European Commission has consistently taken the view that a 2 year non-competition clause is justifiable in a transfer involving the goodwill of the business. For example, in **KNP BT/Bunzl/Wilhelm Seiler** the European Commission observed that:

107. "Contractual prohibitions on competition which are imposed on the vendor in the context of a concentration achieved by the transfer of an undertaking are acceptable if they do not exceed the period of two years in the case of a transfer of good will..."[42]

108. Furthermore in **Kingfisher/Grosslabor** the European Commission did not oppose a notified sale and purchase agreement which contained a 2 year non-competition clause.

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[40] First Schedule of the Agreement, clause 1(a).

[41] *Reuter/BASF* Commission Decision No. 76/743/EEC, O.J. L 254/40 (1976).

[42] *KNP BT/Bunzl/Wilhelm Seiler* Case No IV/M.884.

109. In light of those decisions, which reflect the European Commission's experience in determining issues of this nature, the Staff concludes that the 2 year duration of the prohibition in clause 14.1 is not excessive.

110. In terms of the geographical scope of non-competition clauses the guiding principle culled from the European Commission decisions is that it should be limited "...to the area where the vendor had established the products and services before the transfer."[43]

111. In this case, clause 14.1 is silent on the geographical scope of the prohibition on the Gleaner. However this can be understood in light of the island wide extent of the Gleaner's media business.[44]

112. Based on the foregoing analysis of the duration and geographical scope of clause 14.1 the Staff concludes that the clause is not disproportionate to the legitimate purpose of implementing the amalgamation. On that basis the Staff does not find any anticompetitive purpose in clause 14.1.

113. On a final note the Staff observes that some parts of clause 14.1, although not drafted in terms that would make the clause disproportionate, are sufficiently vague to raise concerns if applied in ways that would disproportionately limit competition. In this regard, while the final sentence in the clause does not appear to extend the prohibition on competition to products and services that are not a part of the hived off media business, one interpretation could lead to the clause being so applied.[45] In such an event, any prohibition on competition in products and services that are not a part of the hived off media business could be regarded as a disproportionate application of the clause, and thereby anticompetitive.

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[43] *KNP BT/Bunzl/Wilhelm Seiler* Case No IV/M.884.

[44] The market analysis which follows in subsequent sections of this Report defines the relevant geographic market as being no smaller than Jamaica. It is important to note also that the relevant market under the FCA is limited to a market in Jamaica. See, for example, section 2(3) of the FCA.

[45] The final sentence of clause 14.1 reads: "The Transferor shall take all necessary steps in the ordinary course of business to divest itself of any media businesses not hived off to the Media Company."

114. At this point the Staff makes no conclusion on this part of clause 14.1 because of the absence of any evidence of what portion of the media business, if any, remains when the media business is hived-off.

115. Furthermore the part of clause 14.1 which prohibits the Gleaner from making and holding investments in businesses or companies which compete with RJR and/or the Media Company is justifiable so long as it is not applied in such a way as to prohibit investments for purely financial purposes which do not involve any management stake or influence in the competing businesses or companies.[46]

116. In light of the conclusion that neither the Agreement nor any of its provisions has any purpose to substantially lessen competition in a relevant market, the Staff now considers whether the subject Agreement has such an effect.

[46] Tesco Ltd/Cattaeau SA Case No IV/M.301.

V. INTRODUCTION TO THE ADVERTISING SERVICE AND ADVERTISING MEDIA MARKETS

A. Background

117. Participants in many technologically driven industries operate what economists refer to as multi-sided platforms (MSPs). A MSP is one where an operator generates revenue by facilitating the interaction of one group of its customers with another group of its customers. Each customer grouping is called a side of the platform. A distinguishing feature of all MSPs is that the value of one side of the platform increases when the other side(s) of the platform increases.

118. Media businesses such as RJR and Gleaner operate MSPs. Media audiences (readers, listeners, viewers and surfers) operate on one side of the media platform while advertisers (primarily merchants) operate on another side. Media businesses generate revenue primarily by charging advertisers to send messages to media audiences. Media audiences are charged to access the content available through some platforms (e.g., newspaper and subscriber television) while other platforms (e.g., radio and Free-to-Air television) are accessed free of charge.

119. While RJR and Gleaner individually do not operate on all major media platforms, collectively they hold a significant share of the media audience across the major media platforms. RJR delivers content over the Internet, television and radio platforms but is not present on the newspaper platform. RJR has the highest share of the television audience and the second highest share of the radio audience. Gleaner delivers content over the Internet, radio and newspaper platforms but has no presence on the television platform. Gleaner has the highest share of the newspaper audience and seventh highest share of the radio audience.

120. Audiences are typically attracted to media platforms based on the content and accessibility of a given platform. All other things constant, the media businesses which offer high valued content over a widely accessible media platform will attract a larger audience.

121. Media businesses rely on content to build audience. Individuals have heterogeneous preferences for media content. Some individuals enjoy listening to their favourite songs on radio, others may enjoy watching their favourite movies on television and others may enjoy reading about the latest developments in neighbouring communities in the newspaper. Disseminating high valued content, therefore, is an important element of building audience.

122. Media businesses rely on their audience pool to attract advertisers. An advertiser is mindful that certain consumer types of individuals may find its product more appealing than other types. As such, an advertiser may target these individuals to increase the likelihood that the advertisement will trigger additional sales of the product. Advertisers are attracted to media businesses based on the characteristics of the audience attracted to the media businesses. An advertiser is willing to pay media businesses to communicate product information to their target audience on its behalf. As such, the value of a media business to an advertiser increases when the number of certain consumer types in the audience increases.

123. Media businesses compete with independent advertising agencies in the market for advertising services. Advertisers may advertise directly through media businesses or indirectly through independent advertising agencies. Media businesses pays out a greater commission for indirect advertising sales compared to direct advertising sales. Each media business pays independent advertising agencies a commission ranging between 15% and 22% for indirect advertising sales they generate for the respective media business. For direct advertising sales, RJR pays its sales representatives a commission ranging between 6% and 10%.

124. Independent advertising agencies generate a significant portion of media businesses' advertising revenue. In particular, direct customers account for 35% of RJR's total revenue with the remaining 65% due to indirect customers.[47]

[47] Gary Allen, letter to author, October 20, 2015.

125. Media neutrality in the advertising service market has consumer welfare-enhancing effects in the wider economy. An advertising service provider is said to be media neutral if it has no interest in which media business an advertisement is placed. Independent advertising agencies, unlike media businesses, are media neutral in that they will recommend advertisements be placed on whichever media platform prospective customers of advertisers are likely to access.

126. Advertising services has the socially beneficial role of fuelling competition in the wider economy. Advertising on media platforms is an important mechanism for informing consumers in the wider economy about the availability and/or terms under which advertisers are making products available to consumers. For reasons developed later in this report, independent advertising agencies have consumer welfare-enhancing effect in the wider economy and so their continued participation in the advertising service market should be preserved and encouraged beyond the level a free market would otherwise dictate.

127. Independent advertising agencies have expressed concerns about the probable adverse effects of the proposed agreement on the advertising market. They argue that the proposed transaction will place the amalgamated entity in a position where it can unduly increase the share of direct advertising sales revenue by offering advertisers packages and options that it would not also offer through independent advertising agencies.[48] Advertising agencies also allege that advertisers and their final consumers would be harmed if independent advertising agencies were unduly impeded because the scope and quality of the management and production services offered by independent advertising agencies are superior to those offered by media businesses.

128. RJR claims that it has been unable to exercise market power in the recent past and the proposed transaction will not put it in a better position to do so. RJR has argued that it has been unable to keep its prices in domestic markets above the rate of inflation for

[48] Meeting between Arnold Foote, President of the Advertising Agencies Association of Jamaica and the Staff of the FTC held on September 4, 2015 at the Offices of the FTC. Representing the FTC were David Miller, Executive Director and Kevin Harriott, Competition Bureau Chief.

the better part of the last seven years and that the proposed transaction has not put it in a better position to do so. It asserts also that its business model is to secure greater profitability by expanding its operations in overseas markets by exploiting the infrastructure which Gleaner already has in place.[49]

129. In assessing the proposed transaction, the Staff defines the markets which are likely to be affected and consider whether the transaction is likely to have the effect of substantially lessening competition in any defined relevant market.

B. Relevant Markets

130. Radio platform. The media landscape is saturated with radio stations. RJR is one of twenty three entities that control twenty seven broadcast radio stations in Jamaica. The entities involved in the proposed transaction control five radio stations with a combined radio audience of 24%.[50] Specifically, RJR reaches 19% of the total (potential) radio audience with its three stations whilst the Gleaner reaches 5% with the two stations under its control. The stations offer different formats and therefore attract different audiences. In particular, RJR94 FM has a general format news and information station, whilst Power106 FM attracts high-end talk listeners. FAME 95 FM targets entertainment for young listeners. HITZ92 FM target reggae lovers and Music99 FM play music for easy listening.[51] RJR's share of audience is second only to Grove Broadcasting Group which reaches 28% of the (potential) radio audience with the two radio stations under its control.[52]

[49] Gary Allen, letter to author, October 20, 2015.
[50] RJR controls RJR 94FM, HITZ 92 FM and FAME FM. Gleaner controls POWER 106 FM and MUSIC 99 FM. For list of entities licensed by the Broadcasting Commission to broadcast in Jamaica, see http://www.broadcastingcommission.org/radio_tv_cable (last accessed: November 1, 2015).
[51] Gary Allen, letter to author, October 15, 2015.
[52] Grove Broadcasting Company Limited controls IRIE FM and ZIP103 FM. For list of entities licensed by the Broadcasting Commission to broadcast in Jamaica, see http://www.broadcastingcommission.org/radio_tv_cable (last accessed November 1, 2015).

131. Newspaper Platform. Gleaner produces two of the three daily nationally circulated newspapers in Jamaica.[53] A 2014 Media Survey conducted by Market Research Services Limited (MRSL) shows that the Gleaner reaches approximately 77.3% of the newspapers audience on Sundays.[54] RJR is not involved in newspaper medium.[55]

132. Television Platform. There are three free-to-air (FTA) television stations in Jamaica: TVJ, CVM and Love. A 2014 Media Survey indicates that TVJ, the station controlled by RJR, has approximately 72.5% of the television audience. Gleaner is not a participant in the television media platform.

133. Internet-Protocol (IP) Platform. Both RJR and Gleaner offer Jamaican-themed media content delivered over the Internet. RJR offers subscribers access to live broadcast programming across its radio, FTA and Cable TV channels. Similarly, Gleaner offers its subscribers access to news content emanating from Jamaica over the Internet.

134. To assess the competitive effects of the proposed transaction, the Staff will first describe the relevant product and geographic markets. Whenever a product sold by one of the parties competes with products sold by the other party, competition authorities define a relevant product market around that product to evaluate the importance of that competition. As such, more than one relevant product market could be defined in assessing the proposed transaction. A relevant product market comprises a group of products which consumers regard as close substitutes. The geographic region within firms which compete in supplying the relevant product is called the relevant geographic market. A relevant market is defined as one in which a relevant product is sold by firms located in the relevant geographic market.[56] Entities supplying the relevant market are called market participants.

[53] Gleaner controls The Daily Gleaner and the Star publications. (source: Gleaner's Annual report 2014/15)

[54] This figure represent readership on Sundays only. The media survey indicates that Gleaner's share during the other days of the week is significantly lower.

[55] Radio Jamaica Limited, letter to author, August 26, 2015.

[56] See a formal description in USFTC and DOJ "HMG".

1. Relevant Product Markets

135. The Staff has examined two separate but related markets: (1) The management and production of advertisements on behalf of advertisers ("advertising service"); and (2) the mass distribution of content ("advertising media platform service").

136. Whenever the output of one market is used as an input by a second market, competition authority describe these markets as being vertically related and describe the first market as the upstream market and the second market as the downstream market. In the present context, advertising media platform services (upstream) and advertising service (downstream) are vertically related since advertising services providers use advertising media platform services as an input.

137. The advertising media platforms utilized in Jamaica include (i) television; (ii) newspaper; (iii) radio; and (iv) Internet Protocol (IP) platform. The 2014 Media Survey indicates that television, newspaper and radio have a combined (potential) audience of 2,105,000 individuals. Advertising agencies seek to disseminate messages to prospective customers of advertisers, i.e. those individuals in the audience which would likely purchase the product of the advertiser.

138. It is unlikely that any given advertising medium could reach all the prospective customers of an advertiser. For example, the 2014 Media Survey indicates that up to 65% (1,359,000) of the public read newspapers, up to 61% (1,293,000) listen to the radio and up to 74% (1,530,000) watch television. This indicates that if an advertisement was sent through only one advertising media platform, it would probably not reach between 26% and 39% of the public. If the message was sent through two of the three advertising media platform, it would probably not reach between 7% and 13% of media audience.

139. To the extent that advertising is costly, for a given budget, a profit maximizing advertiser's objective would be to reach persons who are most likely to consume their product. For the most part, advertisers rely on observable individual characteristics as a rough indication of whether the individual is willing and able (speaking to

preferences and disposable income) to consume the advertiser's product. In this regard, alternative media platforms such as Internet, newspaper, television and radio are unlikely to be considered close substitutes by advertisers because of differences in important characteristics of their respective audiences. The differences in audience characteristics is revealed by the 2014 Media Survey which, among other things, reports on differences in audiences based on (i) income, (ii) location, (iii) age and (iv) gender. The results are summarized in Table 3 below.

Table 3 Distribution of (Potential) Audience by Advertising Media and Socio-Economic Characteristics

	Media Audience (in '000s)		
	Readers	Viewers (Free to Air)	Listeners
1. Income			
Upper middle to upper Income ('ABC1')	244	177	22
Middle Income ('C2')	426	417	365
Lower middle to low income ('DE')	689	936	706
	1,359	**1,530**	**1,093**
2. Location			
Kingston Metropolitan Area	511	512	442
Urban	623	705	595
Rural	225	313	256
	1,359	**1,530**	**1,293**
3. Age			
10-19	286	347	245
20-34	415	392	370
35+	658	791	678
	1,359	**1,530**	**1,293**
4. Gender			
Males	643	746	644
Females	716	784	649
	1,359	**1,530**	**1,293**

Source: All Media Survey 2014

140. All other things held constant, newspaper is more attractive than the other two media to advertisers courting individuals in the top income category while FTA television is

more attractive to advertisers targeting individuals in the bottom income category. This is because the potential audience falling into the ABC1 income category is 63,000 individuals greater for newspaper than it is for FTA television, and 222,000 individuals greater than it is for radio. Further, the potential audience falling into the DE income category is 247,000 individuals greater for FTA television than it is for newspaper, and 230,000 greater than it is for radio.

141. It is also seen that the potential audience of males is 102,000 individuals greater for television than it is for radio, and 103,000 individuals greater than it is for newspaper.

142. The table also shows differences in the distribution of audiences regarding location and age. To the extent that demand for an advertiser's product is driven by multiple socio-economic characteristics of consumers, the table suggests that advertisers would be unlikely to confine advertising to a single advertising media.

143. Since both parties are significant participants in both relevant markets, the transaction requires a more detailed analysis.

a. Advertising Services

144. For purposes of this analysis, we presume that the relevant downstream market is no broader than advertising services. By advertising, we mean the distribution and/or communication of information and/or education and/or entertainment to a wide public using mass media in all forms including but not limited to Internet, radio, television and newspaper.

145. Advertisers utilize advertising services to build awareness among prospective customers. There is a difference in the nature and scope of services offered by independent advertising agencies and those offered by media businesses.

146. Regarding the <u>nature</u> of the service, a media business assists advertisers to place advertisements ('book spots') on its platform only. Independent advertising agencies, on the other hand are described as being media neutral in that they typically book

spots across multiple media businesses.[57] Media businesses pay independent advertising agencies a negotiated commission, normally between 15% and 22%, for advertisements placed on their media.[58]

147. Regarding the scope of the services, independent advertising agencies offer a wider scope of services spanning management, cutting edge quality advertisement production, bookings, etc., whereas media businesses offer only booking and limited advertising content production capabilities.

148. An Accreditation Agreement governs the conduct of some media businesses and the Advertising Agencies Association of Jamaica (AAAJ). RJR and Gleaner are members of the Media Association Jamaica Ltd. (MAJ). In particular, in 1995, the MAJ and the Advertising Agencies Association of Jamaica Ltd. entered into an Accreditation Agreement.

149. Paragraph 12 of the agreement states that, "…No director or officer of any Member [of the MAJ] shall be a director or officer of any [Advertising] Agency nor shall they own any Agency nor shall any director or officer of any Agency serve in a similar capacity with a Member nor shall they own any member." Accordingly, the agreement prohibits media businesses from entering the independent advertising agency market.

150. Currently, RJR and Gleaner compete with independent advertising agencies. The scope of the competition could be described as being limited because (i) neither RJR nor Gleaner has a significant presence in all advertising media platforms and (ii) RJR and Gleaner place advertisements only in their media businesses. For example, RJR is second in terms of audience in the radio platform, has a 72.5% share in FTA television platform but is absent from the newspaper platform. Similarly, Gleaner has approximately 77.3% share of the newspaper platform but only a 5% share in the radio medium and is absent from the FTA television platform. The proposed transaction would increase the dependency of independent advertising agencies on any single

[57] Arnold Foote, letter to author, November 4, 2015.
[58] Gary Allen, letter to author, October 15, 2015.

media business in the sense that the amalgamated entity would be the only entity to control access to audiences across all media platforms.

b. Advertising Media Platform Market: Radio, Television, Newspaper, Internet Sub-Markets

151. Media businesses provide content catering to various needs including current affairs, information, education, entertainment, etc. The content is disseminated over media platforms such as newspaper, radio, television and the Internet. The content disseminated may be produced in-house (as is the case with “news” content) or purchased from external sources. For a fee, media businesses provide designated space (or “spots”) through which content is disseminated to their respective audiences on behalf of advertisers.

152. Advertising media services are valuable to advertisers seeking to establish, build or enhance product awareness. Accordingly, all other things held constant, media businesses which reach more potential customers are more valuable to advertisers than media businesses which reach fewer potential customers. The 2014 Media Survey indicates that FTA television has a total (potential) audience of 1,530,000 viewers; newspaper has a total (potential) audience of 1,359,000 readers; radio has a total (potential) audience of 1,293,000 listeners; and Internet has a total (potential) audience of 1,676,000 users in Jamaica.

153. Due to differences in the socio-economic characteristics of audiences across the various advertising media, advertisers tend to allocate advertising budgets across multiple media rather than rely on any single medium. In this sense, the various media platforms are considered more to be complements rather than substitutes on the part of advertisers as a single advertising medium is unlikely to reach a significant segment of prospective customers.

154. As such, the Staff considers the different advertising media platforms, i.e. radio, television, newspaper, Internet, as distinct sub-groups within this relevant product market.

2. Relevant Geographic Markets

a. Advertising Services

155. Since advertising services of the parties to the proposed transaction are not restricted to any particular region in Jamaica, we conclude that the relevant geographic market for advertising services is no smaller than Jamaica.

b. Advertising Media Platform Services

156. Since media audiences across Jamaica have access to the Gleaner and RJR platforms, we conclude that the relevant geographic market for advertising media platform services is no smaller than Jamaica.

VI. ANALYSIS OF THE COMPETITIVE EFFECTS OF THE AGREEMENT

A. Analytical Framework

157. In this section, we assess the potential harms that could occur from the proposed transaction in the relevant product markets which include advertising media services and advertising services. The Staff is interested in whether, as a result of the proposed transaction, the amalgamated entity will have increased incentives and/or opportunities to engage in anticompetitive "foreclosure" activities to the detriment of independent advertising agencies with respect to access to advertising media platforms. By foreclosure, the Staff refers to a situation in which rivals are forced to exit the market and/or potential rivals are prevented from entering the market.

158. Transactions involving the amalgamation of businesses could raise concerns regarding "horizontal" concentration and/or "vertical" integration- depending on the lines of business engaged by the parties to the agreement. A transaction is said to be horizontal when products of at least two entities in the transaction are sold in the same relevant market and are therefore viewed as reasonably close substitutes by consumers. Horizontal transactions are of concern to competition authorities because they directly eliminate competition between actual or potential rivals and therefore could cause consumers to face potentially higher prices, less variety and/or lower quality product.

159. A transaction is said to be vertical whenever the product of one firm is used as an input in the production process of the other firm. The concerns raised for vertical transactions differ from those raised about horizontal transactions because the firms involved in a vertical transaction do not compete with each other and therefore the transaction, in and of itself, would not lead to any reduction in competition in the relevant markets. In addition, vertical transactions may generate efficiencies to the benefit of consumers.

160. Notwithstanding the above, vertical transactions must still be assessed as they have the potential to cause anticompetitive horizontal effects. In particular, an integrated firm that competes in both an (upstream) input market and a (downstream) output market has the incentive and opportunity to (1) discriminate against particular rivals in the upstream and/or downstream markets (e.g. foreclosing rivals from input or customers); and (2) raising rivals costs in either upstream or downstream market.

B. Potential Horizontal Harmful Effects

161. As indicated earlier, amalgamations could have horizontal harmful effects if it significantly increases market concentration in a relevant market. Market concentration could increase only in relevant markets where both parties are participants. Market concentration levels are calculated using market shares. Market shares are based on "…the best available indicator of firms' future competitive significance in the relevant market."[59]

162. Generally, revenue is the best proxy of the attractiveness of a firm's product to customers because it captures the extent to which consumers are attracted not only to the product, but also to the terms and conditions that the products are made available to them.[60] Competition authorities typically assess horizontal effects by measuring the post-amalgamation concentration level as well as the magnitude of the increase in concentration.

[59] United States Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," 2010, accessed November 1, 2015, http://www.justice.gov/atr/horizontal-merger-guidelines-08192010.
[60] Ibid.

163. In general, amalgamations which result in unconcentrated markets or cause a small increase in the market concentration are less likely to raise competitive concerns than amalgamations which result in highly concentrated markets or cause a big increase in market concentration.[61] A more detailed guide for assessing how changes in market concentration may affect competition in a relevant market is set out in the Horizontal Merger Guidelines (HMG) published by competition authorities in the United States of America and relied upon by competition authorities across the world.[62]

164. In what follows, the Staff assesses the potential horizontal harmful effects in each of the submarkets in the advertising medium relevant markets identified earlier in the report.

1. Television Sub-Market

165. RJR is the only party to the proposed transaction which currently participates in the television advertising platform. As such, the amalgamation could not increase the market concentration level in this relevant sub-market hence we conclude that no competitive concerns are raised in the advertising medium television platform.

2. Newspaper Sub-market

166. Gleaner is the only party to the proposed transaction which is present in the newspaper advertising platform. As such, the amalgamation could not increase the market concentration level in this relevant sub-market hence we conclude that no competitive concerns are raised in the advertising medium newspaper platform.

3. Radio Sub-Market

167. Both RJR and Gleaner participate in this relevant sub-market. This means that the amalgamation will increase concentration in the radio advertising media. In calculating the change in the concentration level, we use advertising revenue generated from

[61] The concentration level is measured using the Herfindahl-Hirschman Index (HHI). The HHI is calculated by summing the squared market share of individual market participants. See HMG (2010, p.18-19) for details. The HMG states that an HHI below 1,500 points indicates that the market is unconcentrated; HHI between 1,500 and 2,500 indicates a market is moderately concentrated; and an HHI greater than 2,500 indicates that the market is highly concentrated.

[62] USFTC and DOJ, "HMG".

radio broadcasts as a measure of the market share of individual market participants. Data on advertising revenue were available for only 6 of the 23 entities licensed to broadcast radio. A more detailed account of the calculation of the concentration level is provided in **Appendix A** of this report.

168. There are a total of 23 entities licensed to broadcast a total of 27 radio stations in Jamaica. Based on advertising revenue generated via radio, RJR has the greatest market share of 42.1% compared to Grove Broadcasting Company Limited which has a market share of 31.8%.[63] Further, the two radio stations under the control of Gleaner (Power106 FM and Music99 FM) have a combined market share of 11.0%. Table A1 in **Appendix A** shows the distribution of market shares prior to the proposed transaction as well as the increase in concentration level resulting from the amalgamation.

169. Table A1 shows that the amalgamation caused the market concentration to increase from an HHI of 2,974 (highly concentrated market) to 3,904 (highly concentrated market). This means that the amalgamation will cause the HHI to increase by 928 points and result in a market which is highly concentrated.

170. Based on the HMG, the proposed transaction is to be presumed to be likely to increase market power subject to persuasive evidence that the transaction is unlikely to enhance market power.[64]

Entry Conditions

171. Even in highly concentrated markets, there is evidence that if entry is easy (i.e., likely, timely and sufficient) it is likely to mitigate if not avert anticompetitive conduct on the part of incumbent participants.[65] In what follows, we explore the conditions firms which are not participating in the market are likely to face when entering it.

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[63] This means that RJR generated approximately 32% more advertising revenue than Grove Broadcasting Company Limited earned over its radio platforms despite serving an audience 31% fewer than the audience of Grove Broadcasting Company Limited.

[64] USFTC and DOJ, "HMG", 19.

[65] This result is known as the Contestable Market Hypothesis.

172. The radio medium landscape is saturated with stations. There are currently 27 stations licensed to broadcast radio services in Jamaica. Further, for technical reasons, there is no space for another entity to enter and provide island-wide coverage. This impediment to entry has arisen because of the unavailability of sufficient spectrum, a crucial input to supplying the service.[66] The spectrum available, which is managed by the Spectrum Management Authority (SMA), can facilitate only localized coverage.

173. Regulatory intervention could lower the impediment to entry. The Staff was advised that a digital switchover from analogue to digital broadcast signals for radio services would significantly increase the number of radio stations which could operate in Jamaica, without disrupting the operations of incumbent operators.[67]

174. The Staff concludes that barring a timely digital switchover in radio, entry is not easy as it would be insufficient to mitigate any anticompetitive conduct which could arise in the radio platform.

4. Internet Protocol (IP) based Media Platform Sub-Market

175. In this report, 'Internet Protocol (IP) based media platform' refers to the platform which enables media businesses to deliver content through the Internet. The Staff describes 'JTCIP' as content reflecting Jamaican culture made accessible through any Internet enabled device.

176. RJR and Gleaner compete in this market. Evidence of this is gleaned from Marketing Plans which indicate that there is a significant overlap in the audience targeted by RJR with its OTT and that being targeted by the Gleaner with its e-Paper product. In particular, RJR explained that it was targeting the overseas market- Jamaicans living overseas as well as non-Jamaicans with a taste for Jamaican culture.[68] RJR announced that it was targeting "Jamaicans worldwide [who] maintain close ties with friends and families back home, and keep up with the news, TV programs and events that are

[66] Spectrum Management Authority, "Report on the FM Frequency Band," September 2015.
[67] Meeting between RJR, Gleaner and the Staff of the FTC held on Thursday, November 19, 2015 at the Offices of the FTC.
[68] "RJR goes live streaming, video on demand by Oct," *Sunday Observer*, April 6, 2014.

happening in Jamaica."[69] The Gleaner provides content on news and events happening in Jamaica and therefore places e-Paper in direct competition with RJRs OTT for audience. Further, both RJR and Gleaner offer their products for approximately Ten United States Dollars (10.00 USD) per month.

177. Gleaner is the first entrant in this market. In June 2012, Gleaner launched its e-Paper, a digital replica of its Daily Gleaner. RJR is the most recent entrant. In April 2014, RJR announced that by October 2014, it would introduce VOD (video on demand) and over-the-top content (OTT). RJR announced its plan to offer, among other things, pay-per-view events for sports and concerts produced by RJR.

178. The IP based platform is likely to become more attractive than the other media platforms in the near future because it is relatively more convenient for audiences to access. The importance of convenience in building audience was expressed by the Gleaner when its Managing Director, Christopher Barnes, exclaimed "…Readers will love this product [e-paper] because they will have the convenience of accessing their replica of **The Gleaner** anywhere in the world once they have Internet connection.."[70]

179. The value of this platform to advertisers is likely to be greater than other platforms based on the potential size of the audience. As indicated earlier in the report, competition for the advertising dollar in this market will be influenced by the size of the audience, which in turn will depend on the ability of market participants to deliver highly valued content.

180. To the extent that both parties to the Agreement are the only market participants, the proposed transaction will significantly increase market concentration. Based on the HMG, the proposed transaction is further scrutinized for potential adverse competitive effects by assessing the likelihood of (i) unilateral effects; (ii) coordinated effects; (iii) powerful buyers; and (iv) entry.

[69] UNIV. "Unified Video Technologies OTT Service enables RJR Communications to Stream Linear and VOD Content". Press Release dated April 2, 2014, accessed November 1, 2015, http://univtec.com/releases/

[70] "The Gleaner's E-Paper is Here!" *Daily Gleaner* June 25, 2012, accessed November 1, 2015, http://jamaica-gleaner.com/gleaner/20120625/lead/lead3.html.

I. Unilateral Effects

181. By unilateral effects, we refer to the increased incentive and/or ability of the amalgamated entity to engage in anticompetitive conduct on its own, without a need for a co-operative response from rivals.

Unilateral Innovation Effects

182. There is more than one dimension in which competition may take place. In some instances, competition takes place through product innovation. One of the potential adverse effects of the proposed transaction is that at least one party to the agreement may have reduced incentive to innovate subsequent to the consummation of the agreement. Reduced innovative efforts could manifest by (i) reduced incentive to continue an existing product-development effort; or (ii) reduced incentive to initiate the development of new products.[71]

183. In what follows, the Staff argues that in the absence of the proposed agreement, in the near future RJR and the Gleaner probably would have been direct competitors in the market to deliver JTCIP to Jamaicans living outside Jamaica. To remain competitive in the JTCIP market in the future, RJR would have had sufficient incentives to develop content options which would be comparable if not "superior" to the ones which would have been developed by Gleaner.

184. The proposed transaction is likely to have reduced the incentive for RJR to develop such innovative products and/or discontinue research and development products initiated by Gleaner. Further, even if RJR follows through to develop these content options, the urgency to do so would have been removed by the proposed transaction since the proposed transaction would have eliminated its main rival in this market. At the minimum, therefore, audiences within and outside Jamaica would have been

[71] USFTC and DOJ, "HMG," 23-24.

deprived of the product offerings which would have flowed from the earlier development of its innovative product offerings.

Gleaner's Track Record

185. In assessing the proposed transaction, it is useful to describe competitively relevant conditions and actual business conduct in the past.[72]

186. Mr. Moses Jackson, founding editor of the Business Observer offers an insightful summary of the Gleaner's operations in post independence Jamaica.[73] Among other things, Mr. Jackson contrasted the conduct of Gleaner with and without competition. Further, Mr. Jackson described the Gleaner's response when faced with financial constraints.

187. Capital Market Used to Strengthen Financial Position. Gleaner turned to the capital market to strengthen its vulnerable financial position. Mr. Jackson indicated that during the late 1970s, the Gleaner faced "…its most serious financial challenges since Independence…" In response, the Gleaner floated a debenture and thereby "…raising the requisite capital to help pull the newspaper out of its financial crisis…" .

188. Absence of Competition Stalled Innovation. Without competition, Gleaner had insufficient incentives to innovate. Mr. Jackson indicated that in the 1980s, the Gleaner took "…its first steps towards digitising aspects of its pre-press operation…but never went headlong into colour printing until faced with competition in the mid-1990s…" Gleaner had the opportunity to develop a new newspaper product (coloured press) in the 1980s but did not have sufficient incentive to complete the process until faced with competition from Jamaica Observer in the early 1990s. If the Jamaica Observer's entry in the newspaper market was blocked or delayed, for whatever reason, it is unlikely that coloured press would have been introduced to Jamaica as early as it was.

[72] See "HMG,"4, for a discussion on sources of reliable evidence for assessing mergers.

[73] Moses Jackson "Why the Gleaner Company Limited: Observer Business Leader Nominee #10" *Daily Observer*, November 27, 2012.

The implication of this observation is important for consumer welfare. Incentive and opportunity jointly are required to drive consumer welfare. While the proposed transaction will provide RJR with the opportunity to develop new products, as RJR has stated, the elimination of a competitor will lessen the incentives to do so. Indeed, for a discussion on the importance of both opportunity and incentives in driving down mobile phone rates in Jamaica's telecoms sector, see article entitled "The Benefits of Recent Interventions in Jamaica's Telecoms Sector" written by Kevin Harriott, Competition Bureau Chief at the Fair Trading Commission, and published in the *Daily Gleaner*, October 10, 2014.

189. Competition fuels Innovation. The Gleaner responded to the entry of new media by developing innovating product offerings. Mr. Jackson indicated that since the 1990s new media/Internet was threatening to displace traditional print media. In response, the Gleaner "…attempted to get ahead of the technology curve…[by launching in 2011]…a BlackBerry mobile news application…" to deliver developing stories to subscribers and managed popular social networking sites Twitter and Facebook. In 1997, Gleaner established the Gleaner Online Ltd. to provide online news coverage. Based on Mr. Jackson's account, therefore, Gleaner acquired the technology which would allow it to keep pace with the latest innovations. Mr. Jackson further asserts that "…[The Gleaner]…has been remarkably nimble for its age. It has been responsive to the many developments in media locally and globally and has evolved into a multi-faceted media organisation."

Recent Developments

190. The Staff is satisfied that RJR believes that the content available through Gleaner is highly valued by media audiences and access to such content would be important for media businesses to expand in the market in the near future. Lester Spaulding, Chairman of the RJR Group, commented that "The Gleaner also has a powerful archive of information about Jamaica since Emancipation in 1834. This archive is now at our

fingertips for us to make and own powerful television features and documentaries about pre- and post-independent Jamaica. This will be a critical part of the content we will create and sell to the world in our content expansion drive."[74] He further stated that "...The Gleaner Online services are the best and most expansive online media resources in and from Jamaica to the world. In this transaction, we now take control of that resource for growth and expansion globally…"[75]

191. The Gleaner had plans to develop further product innovations in the near future. In particular, in launching the product in 2012, Gleaner announced that "…The e-Paper…is the first in a long line of future innovations to expect from a company that has embraced this increasingly digital world…"[76] The Staff is unaware of any innovative product by the Gleaner since its e-Paper. It is unclear how far advanced Gleaner was in its plans to deploy new products. Based on the Gleaner's track record, however, it is highly likely that they would have followed through on their plans especially given RJR's entry in 2014.

192. It is likely that RJR would have developed new products in the foreseeable future, absent the proposed transaction. It is reasonable to infer that RJR anticipated that in the near future, absent the proposed transaction, it would have been competing in a market where (i) Gleaner had high valued content; and (ii) Gleaner was actively developing innovative product options for media audiences. To compete with Gleaner for the advertising dollar in the near future, therefore, RJR would have had the economic incentives to develop new products and content to compete for media audience. To the extent that the proposed transaction will eliminate a significant competitor, the amalgamation is likely to slow down the rate of technological innovation.

[74] Neville Graham, "RJR says merger will propel 'Going Global' strategy" *Daily Gleaner*, September 18, 2015.
[75] Ibid.
[76] "The Gleaner's E-Paper"

Entry Conditions

193. Even in highly concentrated markets, there is evidence that if entry is easy (i.e., likely, timely and sufficient) it is likely to mitigate if not avert anticompetitive conduct on the part of incumbent participants.[77] In what follows, we explore the conditions entrants are likely to face when entering and expanding in the market.

194. Participants in this market offer Jamaican-themed content, delivered through the Internet, primarily to Jamaicans and Jamaican-minded individuals residing outside of Jamaica. There are two critical aspects which have to be addressed by prospective entrants: (i) technological barriers; and (ii) creating content valued by Jamaicans in the Diaspora.

195. Technological barriers are likely to be an insignificant impediment. The technological barriers refer to access to technology which would allow entities to deliver content over the Internet. The Staff is of the opinion that the technological barriers are insignificant as there are entities that are able to provide that functionality in a relatively short period of time. Such entities include Unified Video Technologies (UNIV) which manages the delivery of OTT on behalf of RJR.[78]

196. Content development is likely to be a significant impediment to expansion. Entities which already create Jamaican-themed content, such as media businesses, would be most likely to enter this market in a relatively short period. While entry by existing media businesses in Jamaica is considered timely and likely, it is not considered easy since it is unlikely that they could attract sufficient audience to mitigate any anticompetitive conduct by incumbents.

197. The Staff is of the opinion that the proposed transaction is likely to have anticompetitive effects since it (i) is likely to harm consumers (audiences) by delaying, if not stalling, the introduction of innovative products; and (ii) eliminates a significant rival (i.e., Gleaner) from the relevant market.

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[77] This result is known as the Contestable Market Hypothesis.
[78] UNIV, “Unified Video Technologies.”

198. In this section, the Staff concludes that the proposed transaction is likely to have significant horizontal effects in (i) the radio advertising platform sub-market; and (ii) the IP Based Media Platform sub-market.

C. Potential Vertical Harmful Effects

1. Background

199. In this section we consider the potential vertical harms which could arise as a result of the proposed transaction. In particular we are interested in whether, as a result of the proposed transaction, the amalgamated entity will have increased incentives and/or opportunities to engage in anticompetitive foreclosure activities to the detriment of independent advertising agencies with respect to advertising media services via Internet, newspaper, radio and television.

200. Regarding foreclosure, an integrated firm, as a result of the proposed transaction, may have increased incentives and/or opportunities to foreclose downstream competitors from important inputs. That is, when an integrated firm acquires a firm in the input market, to the extent that the acquisition results in the integrated firm acquiring, maintaining or extending market power in the input market, then the acquisition may increase the incentives and/or opportunity to raise rivals' costs by either (i) foreclosing supply of the input it sells downstream competitors; or (ii) raising the price at which it sells crucial inputs to rivals in the downstream market. As a result of the acquisition, therefore, the integrated firm could raise profits by raising prices in the downstream market and/or expand its market share in the downstream market.

201. A rational integrated firm would engage in permanent foreclosure activities in the downstream market only if the expected benefits of doing so exceed the expected costs. The expected benefits of foreclosure include the present value of the stream of future additional profits arising from operating in the downstream market without rivals. The expected cost includes the present value of the stream of reduced profits

arising from the reduced sales of input in the upstream market (to rivals in the downstream market).

2. Discussion

202. The Staff reviewed the Accreditation Agreement between the MAJ and the AAAJ.[79] This agreement is important to assessing the likely effect of the proposed transaction because it addresses potential sources of anticompetitive conduct by prohibiting: (i) the vertical integration of media businesses and independent advertising agencies; and (ii) discriminatory conduct on the part of media businesses regarding making booking spots available to advertisers and independent advertising agencies. In what follows, the Staff assesses each relevant product market in turn. For each market, the Staff determines whether (1) the parties to the proposed transaction possesses market power; and (2) the proposed transaction will increase the opportunities and incentives for the entity to gain from withholding advertising media services, in such a manner that leads to higher prices for advertisers.

3. Accreditation Agreement between MAJ and AAAJ

a. Background

203. On November 20, 1995, the MAJ and the AAAJ entered into an agreement outlining, among other things, the terms and conditions under which members of the MAJ will publish advertisements at the request of members of the AAAJ.

204. Section 25 of the agreement lists five covenants of members of the MAJ. An important provision of the agreement is that media businesses agree not to engage in discriminatory conduct regarding access to their respective platforms. In particular, Section 25(b) prohibits any media business from "…[arranging] with an Agency or Advertiser to grant an advantage or concession in rates for space or time or other advantages not included in the Member's published rates and conditions…unless a

[79] "Agreement for Accreditation of Advertising Agencies terms and conditions under which the Media Association Jamaica Limited will accredit members of the Advertising Agencies Association of Jamaica Limited."

similar advantage or concession is available to other Agencies or Advertisers." This provision is important because it limits the ability of media businesses to foreclose independent advertising agencies from a crucial input, i.e. the advertising services market.

205. The other important provision is Section 12 which prohibits media businesses from owning any advertising agency. The section reads "…No director or officer of any [media business] shall be a director or officer for any Agency nor shall they own any Agency nor shall any director or officer of an Agency serve in a similar capacity with a [media business] nor shall they own any [media business]."

206. This provision is important because it eliminates a potential incentive to engage in anticompetitive conduct which could arise from the vertical integration of media businesses and advertising agencies. An integrated media business would have the incentives to foreclose rivals in the advertising services market from access to its advertising media. Prohibiting media businesses from owning advertising agencies therefore removes the incentives of media businesses to foreclose independent advertising agencies from the advertising services market.

207. At this time, it is unclear to the Staff whether the accreditation agreement, as is, is an effective instrument to mitigate the potential anticompetitive effects which could arise from the proposed transaction. The Staff's reservation stems from the fact that it is unclear of the extent to which the conduct of the media businesses and advertising agencies are bounded by the agreement. For example, the agreement is silent on the sanctions attached to breaching any provision of the agreement. Further, the agreement allows for disputes between parties to be settled by arbitrators determined by the parties. This is problematic for the Staff because it is not obvious that the arbitrators selected would be mindful of competitive concerns when deliberating on such disputes.

4. Discrimination against Independent Advertising Agencies[80]

208. Competition concerns could arise if the proposed transaction were to create an entity with sufficient market power across various mass media markets, that it would have the incentives and opportunity to foreclose independent advertising agencies from a crucial input in advertising services, i.e. advertising media platform.

209. Currently, media businesses benefit from all advertisements placed on their platforms irrespective of whether advertisements are placed directly by the advertiser or through an independent advertising agency. Based on an Accreditation agreement between the Media Association of Jamaica and the Advertising Agencies Association of Jamaica, there should be parity in media pricing- that is, an advertiser should pay the same rate to place an advertisement whether the advertiser goes directly to the media business or through an independent advertising agency.[81] In contrast, the media business earns more revenue from a direct advertisement because a portion of the advertising revenue from an indirect advertisement placement is withheld by independent advertising agencies as commission.

210. Foreclosure of media spots to independent advertising agencies would be a rational strategy only if the marginal benefits of doing so (in terms of avoiding the payment of commissions to independent advertising agents) exceed the marginal costs (increased costs associated with handling more direct customers).

211. Apart from outright foreclosure, the amalgamated entity could harm competition by favouring advertisers who place advertisements directly relative to advertisers who place advertisements indirectly through independent advertising agencies. Such discriminatory conduct could be implemented by (i) offering advertising packages on terms which are more favourable to direct customers. This could be implemented by

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[80] In a letter dated October 5, 2015 to Mr. Arnold Foote, President of the Advertising Agencies Association of Jamaica (AAAJ), the Staff of the Fair Trading Commission requested from the AAAJ, information that would assist the Staff to understand how the proposed transaction would affect its members. Mr. Foote responded to the request in letter dated November 4, 2015.

[81] In a letter of complaint to the Fair Trading Commission dated November 24, 2014, The Advertising Agencies Association of Jamaica complaint that, among other things, RJR was offering advertisers a discount for placing advertisements directly rather than going through an independent advertising agency.

rebating to direct customers, a fraction of fees it would have paid to an independent advertising agency; and (ii) making certain advertising packages available only to its direct customers. Indeed, RJR informed the Staff that this situation occurred in the past;[82] and (iii) making certain advertising packages available to direct customers before it makes it available to independent advertising agencies.

D. Discussion

212. Foreclosure is unlikely to be a rational strategy because the marginal benefit is not expected to exceed the marginal costs.

213. Marginal Benefits. The main marginal benefit of foreclosing its advertising media services market to independent advertising agencies would be an increased profit margin from advertising. In particular, the amalgamated entity would avoid paying independent advertising agencies a commission ranging between 15% and 22%.[83] These benefits would be reduced, however, since the amalgamated entity would have to pay its sales representatives commissions ranging between 6% and 10% to negotiate advertising contracts with direct customers.[84] Hence the savings to the amalgamated entity from foreclosure would range between 5%-16% of advertising revenues earned.

214. Marginal Costs. The main marginal cost of foreclosing its advertising media services market to independent advertising agencies would be the likely reduction in advertising volumes in the absence of business from independent advertising agencies. The amalgamated entity would have to take steps to increase sales from direct customers through their sales representatives. In the case of RJR, the staff estimates that RJR would have to increase advertising revenue from its direct customers by 60%-

[82] Meeting between RJR and the Staff of the FTC held on Tuesday, October 13, 2015 at the Offices of the FTC. Representing RJR was Gary Allen, Managing Director, representing FTC were David Miller, Executive Director and Kevin Harriott, Competition Bureau Chief. Mr. Allen explained that in 2014, RJR directly offered to the Jamaica Manufacturers' Association a 'special' advertising package to support its "Buy Jamaica" campaign- this package was not made known to independent advertising agencies. Complaints of discriminatory conduct were documented in a letter dated November 4, 2015 from Arnold Foote, President of the Advertising Agencies Association of Jamaica to David Miller, Executive Director of the Fair Trading Commission.

[83] Gary Allen, letter to author, October 15, 2015.

[84] Meeting between RJR and the FTC (October 13, 2015).

77% to replace the revenue generated from independent advertising agencies. It is therefore unlikely that advertising revenue from media sales representatives would replace the revenue from independent advertising agencies.

215. On balance, the increased revenue arising from higher advertising profit margins is unlikely to offset the reduced revenue arising from less advertising volumes. As such, the Staff is of the opinion that foreclosing its advertising media platforms to independent advertising agencies is unlikely to be a rational strategy for the amalgamated entity.

A. Discrimination

216. Discriminatory conduct on the part of the amalgamated entity is more likely to be a rational strategy than outright foreclosure. The most visible form of discrimination is price discrimination whereby a supplier generates greater profit returns from selling one group of customers compared to other groups of customers.[85] Discrimination, however, is a broader concept in competition law and may be implemented in many obvious and a few not-so-obvious forms. The different ways in which discrimination could be implemented includes differences in the: (i) advertising options offered to direct and indirect customers of the amalgamated entity; (ii) price and conditions under which the options are offered to direct and indirect customers of the amalgamated entity; and (iii) timing in which advertising options are made available to direct customers relative to indirect customers of the amalgamated entity.

217. The proposed transaction will make it more likely that some advertisers will be harmed by this conduct because the amalgamated entity would control a significant share of the four main advertising media platforms. In particular the amalgamated entity would control 24% of the radio audience, 77% of the newspaper audience and

[85] For a useful general description of price discrimination and its potential effects on markets, see Kevin Harriott, "Anti-Dumping Enforcement Bad for Consumers," *Sunday Gleaner*, May 3, 2015. & R. Preston McAfee, "Price Discrimination" in Issues in Competition Law and Policy, 465 (ABA Section of Antitrust Law 2008).

73% of the television audience. This makes it likely that only a few advertisers, if any, could avoid advertising through the discriminatory conduct of the amalgamated entity.

218. To the extent that only a few advertisers could avoid advertising through the amalgamated entity, there will be increased incentives for the amalgamated entity to offer favourable packages to its direct customers to the detriment of its indirect customers.

219. Harm to Suppliers in Advertising Service Market: Several groups of suppliers are likely to be harmed by discriminatory conduct on the part of the amalgamated entity. (i) Primary line injury occurs to independent advertising agencies which compete against the amalgamated entity in the market for advertising services. If the amalgamated entity offer favourable advertising options to induce high-end advertisers to advertise directly, then a significant revenue stream will be diverted away from independent advertising agencies to the amalgamated entity; and (ii) Secondary line injury would occur in the group of clients of independent advertising agencies which would be competing against (advertiser) clients of the amalgamated entity in a market for final goods and services but which would be accessing advertising services under more favourable options.

220. Harm to Final Consumers: Tertiary line injury may occur in final consumers which may face higher prices for, or be less informed about, goods sold by clients of independent advertising agencies.

221. Based on the above, we conclude in this section that discriminatory conduct made more likely as a result of the proposed transaction is likely to have the effect of substantially lessening competition by (i) harming independent advertising agencies in the market for advertising services; (ii) harming advertisers who are clients of independent advertising agencies; and (iii) harming some final consumers in the markets for goods and services produced by clients of independent advertising agencies.

A. Available Remedies

222. The Staff recognizes that discrimination is prohibited by the Accreditation Agreement between the MAJ and the AAAJ. For several reasons itemized below, however, the Staff is of the opinion that the Accreditation Agreement is an insufficient safeguard against discrimination in the market for advertising services.

223. (i) Non-Binding Accreditation Agreement. The Accreditation Agreement appears not to be binding on the part of media businesses and independent advertising agencies. In fact, the Staff of the Commission has received complaints from the AAAJ claiming that RJR is engaging in discriminatory conduct in breach of the Accreditation Agreement. Further, RJR have complained that some members of the AAAJ are not settling their accounts in a timely manner, as set out in the Accreditation Agreement. Both sides have admitted to the breaches—with explanation.

224. (ii) Incomplete Accreditation Agreement. The Accreditation Agreement does not cover all forms of discrimination. Firstly, the Accreditation Agreement covers only members of the MAJ and the AAAJ. Secondly, the Accreditation Agreement seems to prohibit discrimination regarding advertisers who have independent advertising agencies on record. The agreement is silent on discriminatory conduct as it relates to advertisers who have no independent advertising agency on record. This loop hole would have to be addressed to mitigate any increased incentive for discriminatory conduct arising from the consummation of the proposed transaction.

225. (iii) Insufficient Sanctions. The Accreditation Agreement does not provide for any sanction for either media businesses or independent advertising agencies which may breach it. Without any sanctions, there is little incentive to adhere to the agreement and this is most likely the reason member of both parties to the Accreditation Agreement have admitted to breaches.

226. In Section XI of this Report, the Staff recommends remedial actions designed to mitigate, if not eliminate, the incidence of anticompetitive discriminatory conduct.

VII. OTHER POTENTIAL PUBLIC INTEREST HARM

A. Impact on News Diversity

227. Background. The Staff's public interest's review includes an evaluation of the proposed transaction's effect on the quality and diversity of media business services to its consumers. A newspaper report states that "…Media mergers have become more prevalent in recent years…[and]… has people wondering about the negative effects including lack of [program] diversity and competition as well as political bias, that could be caused by media ownership becoming more concentrated…"[86]RJR and Gleaner currently operate the two largest newsrooms in Jamaica.

B. Discussion

1. Consolidated News Coverage

228. The 2014 Media Survey indicates that 602,000 individuals watch FTA television, listen radio and read newspaper. This implies that at least 20% of the population of Jamaica values the diversity in the programming content disseminated from the three advertising media platforms. Given that 'news' would be the main content common across three media platforms, it is reasonable to infer that a significant number of individuals would be adversely affected if the variety in news across platforms was diminished by the proposed transaction.

229. RJR has indicated that it has no intention to merge the newsrooms of the radio and newspaper entities. [87] It should be noted, however that once the transaction is completed, there is no legal constraint preventing amalgamated from consolidating news coverage. This means that the amalgamated entity will have the opportunity to consolidate the news coverage. Further, the amalgamated entity is likely to reduce operational costs from consolidating news coverage. This means that the amalgamated entity will have the economic incentive to consolidate newsrooms.

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[86] Balfour Henry, "RJR, Gleaner Merger Raises Questions," *Sunday Observer*, August 9, 2015.
[87] Gary, Allen, letter to author, October 15, 2015.

230. Since the amalgamated entity has the opportunity and incentive to consolidate news coverage, the Staff is of the opinion that less diversity of views on news items are likely consequences of the proposed transaction.

2. Inadequately Informed Consumers

231. The amalgamated entity will have a significant presence in the four advertising media platforms (radio, television, news paper and Internet). The Staff is concerned that independent advertising agencies may be discriminated against, to the detriment of prospective consumers who rely on advertisements for information about the availability of products and services. It is detrimental to consumer interest to the extent that independent advertising agencies are likely to be media neutral whereas media businesses are not media neutral. For example, an independent advertising agency would advertise on any media business(es) the agency believes will reach the most prospective customers. Media businesses are unlikely to recommend that an advertiser place an advertisement with another media business.

232. Media neutrality enhances consumer welfare in the wider economy. The consumer benefits arise out of the relationship between consumer information and competition. When advertising service providers are media neutral, they place advertisements on any media platform(s) which prospective customers are more likely to access, subject only to budgetary restrictions of the Advertiser. Accordingly, consumers in the wider economy are more likely to be informed about the products most suited to their tastes when advertising service providers are media neutral. When more consumers are informed, competition in that market is more intense as every merchant will have the proper incentive to offer consumers more affordable high quality products. To the extent that advertisers do not consider this positive effect that advertisement has on the wider society, left on its own, the resources allocated to offer advertising services will be less than the level that would be optimal for the wider society.

233. The Staff is of the opinion that if fewer advertisements are channeled through media neutral independent advertising agencies, as a result of discriminatory conduct on the part of the amalgamated entity, there will be fewer informed consumers in the wider

economy and, by extension, less competitive markets in the wider economy. This would result in a significant reduction in consumer welfare across the economy.

VIII. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

A. Analytical Framework[88]

234. Amalgamations typically generate efficiencies internally for the parties. In assessing the proposed transaction, however, competition authorities are concerned with the extent to which the internal benefits generated are significant enough to increase the amalgamated entity's ability and incentives to compete. With greater competition, prices may be lower, output and product variety and new products may be introduced sooner. Competition authorities recognize only those efficiencies which are likely to flow from the amalgamation and are unlikely to have been realized absent the amalgamation or another means having comparable anticompetitive effects.

235. Competition Authorities will not challenge amalgamations in which the recognized efficiencies are likely and would be sufficient to reverse the merger's potential to harm customers in the relevant market(s).

B. Discussion

1. Claimed Benefits

236. RJR claims that the proposed transaction will generate significant benefits for the amalgamated entity.[89]

237. <u>(i) Increased pace of technological adoption</u>. RJR claims that the proposed transaction will speed up the country's transition to the Digital age by providing both entities with the capital required to fund such a changeover. In particular, "…the transaction

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[88] See USFTC and DOJ, "HMG," 29-30.

[89] The claims of benefits to RJR are outlined in letters dated October 15, 2015, October 20, 2015 and October 28, 2015 from Gary Allen, Managing Director, RJR to David Miller, Executive Director, Fair Trading Commission.

provides…[RJR]… with the $665.5M in cash, which is needed to accelerate the Digital Switch Over (DSO) process…that will cost about $750M. [90] This will allow RJR to acquire a new platform and diversify its product offerings.

238. (ii) Greater variety, quality and access. RJR claims that "…Under DSO, consumers will have more content choices, better quality service, greater coverage …"[91] For example, RJR plans to exploit the Gleaner's 180 year archives to "…develop and present programmes and documentaries about our history and events in our history that has not as yet been done on radio and television…"[92]

239. (iii) Strengthened financial position. RJR claims that the transaction will "…allow new options for raising financing to expand through investments and acquisitions regionally and in the Diaspora…" Further, RJR contends that the amalgamation will "…boost revenue options, business with independent producers and other producers in Jamaica, allowing… [RJR and other producers]… to earn more from hard-currency markets which is the essence of developing the cultural industries we target…"

240. (iv) Advertiser and Independent Advertising Agencies Benefits.

241. RJR contends that the "…New platforms will offer more opportunities for advertisers and their agencies to increase business." RJR further claims that when it expands to consumers in the diaspora, independent advertising agencies will have the option to recruit clients from outside Jamaica which seeks to do business in Jamaica.[93]

242. (v) Productive efficiencies. RJR claims that consolidation of the businesses will reduce expenses and augment the resource base available to improve business returns on investment. In particular, RJR claims that the proposed transaction will lower operation costs for the amalgamated entity by between 15% and 20% for radio. Operating costs is the second largest line item representing 22% of the costs of

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[90] Gary Allen, letter to author, October 28, 2015.
[91] Ibid.
[92] Ibid.
[93] Ibid.

operating the radio stations. The efficiencies would stem from reduction in transmission and miscellaneous costs. [94]

2. Discussion of Claimed Benefits

243. The Staff now discusses each claim of benefit. The main arguments relied on in this section was developed in greater detail in Section VI earlier in this Report.

244. (i) Increased pace of technological adoption. RJR claims that the amalgamation will provide the funds needed by both parties to complete the digital switch over. This benefit is not recognized as a cognizable efficiency by the Staff, however, because less anticompetitive means are available to both parties to secure the required funds. In particular, as has happened in the past, the parties could have sought to raise the required funds on the capital market.

245. (ii) Greater variety, quality and access. RJR claims that "…Under DSO, consumers will have more content choices, better quality service, greater coverage …"[95] For example, RJR plans to exploit the Gleaner's 180 year archives to "…develop and present programmes and documentaries about our history and events in our history that has not as yet been done on radio and television…"[96] The Staff accepts that the amalgamated entity will have the opportunity to deliver more content, better quality service and greater coverage. However, without sufficient incentives, opportunity alone will not guarantee that the announced course of action will be pursued.

246. As discussed in Section V of this report, the merger has lessened the incentives for RJR to follow through on these plans by eliminating a significant rival (Gleaner) in the market for Jamaican-themed content delivered over the IP based media platform. The Gleaner had announced comparable plans from as far back as 2012. The Staff is of the opinion that the Gleaner's plans are credible because of Gleaner's history of keeping up with technological advances as described in Section V of this report.

[94] Gary Allen, letters to author, October 15 and 20, 2015.
[95] Gary Allen, letter to author, October 28, 2015.
[96] Ibid.

247. Accordingly, the Staff does not recognize these plans as merger-specific benefits because (i) RJR would have had greater incentives to implement these plans in the absence of the merger; and (ii) comparable benefits were being contemplated by Gleaner from as early as 2012.

248. (iii) Strengthened financial position. RJR claims that the transaction will "…allow new options for raising financing to expand through investments and acquisitions regionally and in the Diaspora…" Further, RJR contends that the amalgamation will "…boost revenue options, business with independent producers and other producers in Jamaica, allowing… [RJR and other producers]… to earn more from hard-currency markets which is the essence of developing the cultural industries we target…"

249. As discussed in Section V of this report, in the past the Gleaner went to the capital market to bolster its financial position.

250. Accordingly, the Staff does not recognize these plans as merger-specific benefits because there is a means available to each party to bolster its financial position in a manner that would have less anticompetitive effects in the relevant markets.

251. (iv) Advertiser and Independent Advertising Agencies Benefits. RJR contends that the "…New platforms will offer more opportunities for advertisers and their agencies to increase business." RJR further claims that when it expands to consumers in the Diaspora, independent advertising agencies will have the option to recruit clients from outside Jamaica which seeks to do business in Jamaica.[97]

252. The Gleaner had already made significant connections with Jamaicans in the Diaspora. As discussed earlier, the mere opportunity to establish a new platform and offer more opportunities to advertisers and agencies is not sufficient for the Staff to conclude that such actions are probable. By eliminating a significant rival in the relevant market, the merger has in fact reduced RJR's incentives to develop and/or implement such plans. Accordingly, the Staff does not recognize these plans as merger-specific benefits.

[97] Ibid.

253. (v) Productive efficiencies. RJR claims that consolidation of the businesses will reduce expenses and augment the resource base available to improve business returns on investment. In particular, RJR claims that the proposed transaction will lower operation costs for the amalgamated entity by between 15% and 20% for radio. Operating costs is the second largest line item representing 22% of the costs of operating the radio stations. The efficiencies would stem from reduction in transmission and miscellaneous costs. [98]

254. The Staff has not verified these figures. If these figures were substantiated, however, the Staff would recognize them as merger-specific efficiencies because their realization is driven by a more efficient use of technical equipment used to operate radio stations and not driven by the elimination of a significant competitor in any relevant market. Further, a significant reduction in costs to the amalgamated entity would reduce any pressure on RJR to increase advertising rates in the near future and therefore benefit advertisers and consumers.

IX. BALANCING POTENTIAL PUBLIC INTEREST HARM AND BENEFITS

255. As described earlier in this report, many Jamaicans value diversity of news and viewpoints. Any reduction in this diversity is likely to result in significant harm to media audiences.

256. It was also stated earlier in this report that the proposed agreement is likely to adversely affect the extent to which consumers are informed about products available in Jamaica. Competition is a public good which is generated most efficiently by a preponderance of well informed consumers. Any deficiency in the advertising market, the primary means of timely information dissemination, is likely to have a ripple effect in the wider economy because it reduces the incidence of comparative shopping and thereby unduly restricts competition in markets throughout the Jamaican economy.

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[98] Gary Allen, letters to author, October 15 and 20, 2015.

When competition is restricted throughout the wider economy, consumers are likely to be deprived of significant consumer surplus.

257. Conclusion The Staff is of the opinion that the sole benefit that is considered merger-specific, that is the reduced costs of operating radio is unlikely to off-set the considerable harm posed by the anticompetitive effects in the advertising services and advertising media markets. On balance, therefore, the Staff concludes that the potential public interest harms arising from the proposed transaction exceed the potential interest benefit.

X. CONCLUSION

258. We conclude that the proposed transaction contravenes Section 17 of the Fair Competition Act since it is likely to have the effect of substantially lessening competition in the relevant markets described in this report. Further, the adverse competitive effects are unlikely to be off-set by the potential public interest benefits of the proposed transaction.

XI. RECOMMENDED REMEDIAL MEASURES

259. Based on our review of the matter, it is the Staff's position that the following measures, if adopted, would be sufficient to mitigate, if not avert, the likely anticompetitive effects of the proposed transaction while preserving the potential benefits:

A. For the amalgamated entity

A. The amalgamated entity commits to operating the newsrooms of the newspaper platform independently of the newsrooms for its television and radio platforms;

B. The amalgamated entity commits to confine their creation of advertising content for television to 'low budget production' herein defined as content created using only still photography, voice over, video and basic desktop publishing (DTP) technologies costing less than $40,000.00; and

C. The amalgamated entity commits to not engage in discriminatory conduct regarding its advertising packages available to its direct clients (i.e. Advertisers) and indirect clients (independent advertising agencies) in good standing. Further, the availability of any advertising package created by the amalgamated entity must be communicated to independent advertising agencies before the amalgamated entity can offer it to any direct customer.

B. For the Spectrum Management Authority

D. The Spectrum Management Authority should complete the transition from analogue to digital radio signals at the earliest possible time. This will facilitate the entry of additional radio stations which would discourage any anticompetitive conduct on the part of incumbent providers.

APPENDIX A: Calculating Market Concentration levels in Radio Sub Market

Table A1. Market Shares (Based on Advertising Revenue from Broadcasting Radio)

Licensed Entity	Share of radio audience.[a] (%)	Share of Advertising Revenue.[b] (%)
RJR: RJR FM, FAME FM, HITZ FM	19.1	42.1
Grove Broadcasting Co. Ltd.: IRIE FM, ZIP FM	27.7	31.8
Independent Radio (Gleaner): POWER FM, MUSIC 99 FM	5.2	11.0[c]
Island Broadcasting: KLAS FM	1.5	4.4
Cornwall: Mello FM	8.0	1.8
Aeronautical: KOOL FM	5.2	2.1
	66.7	

HHI before amalgamation: 2,976
Increase in concentration: 928
HHI after amalgamation: 3,904 (highly concentrated)

Notes:
a. Source: MRSL 2014 All Media Survey
b. Source: Compiled by the Staff of the FTC from Financial Statements submitted to the Broadcasting Commission for Financial year ending in 2014. Note that entities differ in the start of their accounting year.
c. Advertising revenue for Independent Radio is overstated as it includes revenue from production sales.

1. The HMG indicates that in general, revenue is the most appropriate measure of market share.[99] To compile data on advertising revenue from radio services, the Staff reviewed Financial Statements filed with the Broadcasting Commission. In many instances, the Staff was unable to isolate adverting revenue due to radio services from revenue generated from other activities by the license entity.

2. In the end, the Staff extracted advertising revenue from 6 of the 23 entities licensed to broadcast radio in Jamaica. For three reasons the Staff will now discuss, we believe that the information from only this 6 entities still provide a reasonable reflection of market share distribution. Firstly, the information includes revenue from RJR and Grove

[99] HMG (2010, p.17).

Broadcasting Company Limited which account for 36.8% of the total (potential) radio audience. Secondly, the 6 entities for which we have data account for 66.7% of the total (potential) radio audience with the other 17 entities accounting for 33.3% of the total (potential) audience. Thirdly, the market share of total (potential) radio audience was below 3% for 14 of the 17 radio stations whose data are unavailable to the Staff.

3. This information used to calculate market concentration levels based on advertising revenue for radio services is summarized in Table A1. All other things constant, entities with the greatest audience share will generate greater advertising revenue. The Table shows, however, that audience share is not a reliable reflection of strength of revenue collections. For example, the two most popular radio entities (RJR and Grove Broadcasting) control 73.9% of the advertising revenue even though they reach only 36.8% of the total (potential) radio audience. Similarly, Cornwall has only 1.8% of the advertising revenue in radio despite having 8.0% of total (potential) radio audience. The non-linear relationship between audience size and revenue is most likely reflecting differences in the demographics of audiences across media businesses.

4. Based on the information in the table above, it should be noted that the parties to the proposed amalgamation, RJR and Gleaner, respectively generated the highest (42.1%) and third highest (11.0%) share of advertising revenue over the radio platform.

5. Based on share of advertising revenue, the HHI is calculated by squaring the market shares of the six entities listed in the table above and then summing these results. The HHI is thus calculated as 2,976 points; over 450 points above the 2,500 point threshold recommended for classifying a market as being highly concentrated. As a result of the amalgamation, we can further calculate that the HHI will increase by 928 points to 3,904 points.

6. Based on the HMG (2010, p.19), there is a presumption that the amalgamation is likely to enhance market power.