Report on the Competition Assessment of the NMIA Proposed Concession

Prepared by the

Fair Trading Commission

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TABLE OF CONTENTS

I. INTRODUCTION 3

Background 3

Issues 3

II. LEGAL ANALYSIS 4

Jurisdiction 4

Sections 17 and 19-21 of the FCA 5

III. OVERVIEW OF AIRPORT SERVICES INDUSTRY 17

IV. ECONOMIC ASSESSMENT 21

A. The challenged economic transaction 21

B. Relevant market definition 21

C. Market Structure 22

D. Market Share and Concentration 26

E. Effective Entry 27

F. Assessment of competitive effects 28

G. Efficiencies 33

H. Exiting Assets 33

I. Remedies 33

V. CONCLUSION 33

I. INTRODUCTION

Background

1. The Government of Jamaica (GOJ) via the Airport Authority of Jamaica (AAJ) has invited bids for the grant of a concession to operate the Norman Manley International Airport (NMIA). One bidder, a consortium (referred to herein as "the Bidding Consortium") has among its members Grupo Aeropuerto Del Pacifico (GAP), a company which is also a member of another consortium (referred to herein as "the SIA Consortium") by way of its wholly-owned subsidiary "DCA" which has a majority (74.5%) shareholding in a 30 year concession to operate the Sangster International Airport (SIA).

2. Prior to 2003, SIA and NMIA were owned and operated by the AAJ. In 2003, the operation of the SIA was divested to the consortium Montego Bay Jamaica (MBJ) Airports Limited under a Public-Private-Partnership (PPP) agreement which has as its purpose, the upgrade of SIA through a build, operate and transfer basis.

3. In 2015, the GOJ failed in its attempt to privatise the operations of NMIA after none of the pre-qualified bidders followed through with an offer. The failed attempt reportedly cost tax payers One Million United States Dollars.

4. In October 2016, the GOJ approved a new PPP tender for the NMIA. The Fair Trading Commission (FTC) has received complaints from at least two entities regarding the announced second divestment exercise. The essence of both complaints is that a consortium of which GAP is a member was selected to participate in this second attempt to divest the NMIA; and that should this consortium be selected as the winner, then such a situation would significantly lessen competition in the airport industry.

5. By way of letter dated May 25, 2018 the FTC sought from the Development Bank of Jamaica, documents in relation to the bidding for the NMIA concession since 2016 as well as information on the timeline for selection of the successful bid and confirmation of the date when such a decision will be made. The documents were requested to facilitate an assessment by the FTC of the likely competitive effects of the proposed divestment exercise, specifically in relation to the potential for cross-membership in the consortia controlling the operations of each airport.

Issues

6. The issues which arise and which are addressed in this opinion are:

7. Whether GAP being a party of the bidding process for NMIA in circumstances whereby it is the party with the concession for SIA would constitute a breach of the Fair Competition Act (FCA).

8. Whether GAP being part of the bidding process in circumstances where it is also the party that has the concession for SIA constitutes a breach of section 17 of the FCA and/or alternatively sections 19 – 21 of the FCA.

9. Whether the likely agreement (i.e. resulting from the possible grant of the concession for NMIA by the AAJ to the Bidding Consortium and hereinafter referred to as "the proposed Concession Agreement") constitutes a breach of section 17 of the FCA and/or alternatively sections 19 – 21 of the FCA.

II. LEGAL ANALYSIS

Jurisdiction

10. It must first be determined whether the proposed Concession Agreement falls within any of the exclusions to the FCA contained in section 3. Section 3(f) provides that the Act does not apply to '*activities expressly approved or required under any treaty or agreement to which Jamaica is a party*'. The Staff concludes that this provision applies to international agreements. This conclusion is supported by section 54 of the FCA which stipulates that the Act binds the Crown in circumstances where it acts as an enterprise. According to the Interpretation Act "*No Act shall in any manner whatsoever affect the right of the Crown, unless it is therein expressly stated…that the Crown is bound thereby.*" If section 3(f) were applied to exclude the proposed Concession Agreement, section 54 would be rendered meaningless as all business transactions involving Government entities would be excluded from the FCA. It is the Staff´s view that this is clearly not the intention of Parliament as reflected in the plain and ordinary meaning of section 54 to apply to the Crown.

11. The proposed Concession Agreement must relate to a relevant market in Jamaica for goods and services as defined in section 2(3) of the FCA, and by an enterprise which carries on business as defined under section 3 of the Act. Further, it bears noting that, as mentioned above, the Act binds the Crown pursuant to section 54 and therefore an enterprise owned by Government, such as the AAJ, is subject to being disciplined by the provisions of the FCA. With respect to the proposed Concession Agreement, it is the Staff's opinion that the above criteria are likely to be satisfied. As indicated in the economic assessment herein, both the product and geographic markets are in Jamaica and, *prima facie*, the relevant parties are enterprises carrying on business in Jamaica. The FTC Staff concludes that the proposed Concession Agreement would be reviewable by the FTC under the FCA and assumes jurisdiction pursuant to section 5(1)(a) and (d) of the FCA:

> '*5(1) The functions of the Commission shall be –*

12. (a) to carry out, on its own initiative or at the request of any person such investigation or inquiries in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;

> *(d) to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise'*

13. Further, in the Privy Council case of ***FTC v Digicel & Anor***[1] the Court stated that:

> *"there is no provision of the Fair Competition Act excluding any particular sectoral market from the Commission´s powers of intervention, and it has not been suggested that any such provision can be implied from the Act itself".*

[1] [2017] UKPC 28 at para 12

14. The presumption, therefore, is that in the absence of any express exclusions or exemptions, the FTC´s jurisdiction extends to all markets.

15. In addressing the issues identified, the Staff considers provisions under sections 17 and 19 - 21 of the FCA beginning with section 17.

Sections 17 and 19-21 of the FCA

Section 17

16. Section 17 prohibits agreements which have as their purpose or effect the substantial lessening of competition in a market. Section 17 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.*
>
> *(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—*

(i) the improvement of production or distribution of goods and services; or

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

- *imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or*
- *does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.*

17. The types of conduct listed in section 17(2) are not exclusive but illustrative only and include other types of conduct – not listed - which affect competition in a relevant market and which satisfy section 17(1). It may be construed as presumptive in its effect so that, without more, each conduct *ipso facto* is proof of substantially lessening of competition without the need for further proof of their actual economic effect. In other words, in the language of competition law, section 17(2) contemplates a *per* se liability as opposed to the *rule of reason* liability contemplated under sections 17(1) and (4).

Requirements

18. For a claim to succeed and liability established under the provision, the following elements must be demonstrated under section 17:

19. An agreement must exist whose purpose, or effect, or likely effect – either by itself or by any of its terms - is to substantially lessening competition in a market; and

20. The absence of authorization under section 29 or any efficiency justification under 17(3).

Agreements

21. Section 2(1) broadly defines an agreement as including 'any agreement, arrangement or understanding whether oral or in writing or whether or not it is intended to be legally enforceable'.

22. The tender for bids and current bidding process do not constitute an agreement under the above definition and therefore do not form the basis for this analysis; hence the issues as framed above. The possible circumstances whereby GAP, being a member of the SIA Consortium, is successful in its bid for the NMIA and subsequently enters into the proposed Concession Agreement with the AAJ, are likely to satisfy the definition for agreement under section 2(1). More specifically, if the Bidding Consortium wins the bid for the NMIA and is granted a concession, the resulting concession agreement ("the Proposed Concession Agreement") and the FTC´s jurisdiction to review it under section 17 would arise based on one or other of the following legal theories.

Legal theory

23. Firstly GAP, being a party to the concession for SIA, and also being a party to the bidding process for NMIA, wins the bid and thereby enters into an agreement with the AAJ. Merely by being party to both Agreements, GAP *ipso facto* raises competition concern as the

relevant market is highly concentrated and new entry is unlikely due to legal barriers to entry.

Both Agreements taken either together with the AAJ, or separately in light of surrounding circumstances, would raise competition issues.

24. A second possibility for approaching a review is on the basis that GAP, as a member of the SIA Consortium and being the parent company of DCA its wholly owned subsidiary which has a 74.5% shareholding in the concession, would be considered as an interconnected company within the meaning of section 2(a) of the FCA and under 2(b) would be treated as a single enterprise. Regarding the Bidding Consortium, the Staff has no information regarding the specific nature of the legal relationship between GAP and the other companies within the Bidding Consortium; however, if they are subsidiaries within the meaning of 2(a), they would also be treated as a single enterprise. On this basis, should the Bidding Consortium win the bid, both the SIA Consortium and the Bidding Consortium would be treated as a single enterprise.

25. Although the latter scenario is a possibility, the Staff does not have sufficient information concerning the precise legal nature of the relationship between GAP on the one hand and the other members of the Bidding Consortia on the other, and therefore need to go no further than the first theory which would satisfy section 2(1) *prima facie*.

26. An agreement between GAP and the AAJ would be an agreement within the meaning and contemplation of the Fair Competition Act[2] and would therefore be the subject of a review under section 17 and any other relevant section of the Act.

The proposed concession agreement

27. As indicated, the current bidding process does not constitute an agreement under the FCA and is not addressed as an issue within the context of this analysis; however, the likely resulting agreement in circumstances where GAP (i.e. the Bidding Consortium) wins the bid for the NMIA would constitute an agreement under section 2(1) of the FCA. The Staff has examined the draft Concession Agreement in light of this and has used it as a proxy to assess the terms of the Agreement when substantiated and to determine whether it is likely that such an agreement or any of its terms would contravene section 17 or 19 – 21 of the FCA.

28. Having reviewed the proposed Concession Agreement, the following clauses and/or terms were identified as potentially raising concern: Clause 38.1.2 under the heading ´Material Government Action´ (MAGA) at clause 38.

29. The Staff is of the view that the parties' characterisation of the terms of an agreement is not controlling on the nature of the term of an agreement; and that all terms of the agreement are to be examined to determine their nature and scope for the purposes of their likely effect on a market, if that agreement were to take effect.

30. Examination of the relevant conditions of the subject agreement under heading '*Material Government Action*' shows that they could operate to effectively shield the Bidding Consortium from future competition and thereby are likely to create barriers to new entry as further explained in the economic analysis below.

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[2] Fair Competition Act, section 2(1).

31. In the absence of terms in the agreement which expressly, pursuant to section 17(2)(b) and (c) refer to limiting, controlling or sharing markets in Jamaica, the proposed Concession Agreement is not in conflict with section 17 of the FCA unless the effect of the Agreement is likely to lessen competition substantially in a market. This is examined below.

Purpose or effect

32. In interpreting section 17 of the FCA the Commission relies on the decisions of other Courts regarding provisions which are in *pari materia* to section 17 of the FCA. In particular, the Commission relies on the jurisprudence of the European Court of Justice (ECJ) and this interpretation has been endorsed by the Privy Council in ***FTC v Digicel & Anor[3].*** The Staff also relies on jurisprudence in other Courts in the Commonwealth in interpreting provisions in *pari materia* to section 17 of the FCA. The word "purpose" is not defined under the FCA; however, the New Zealand Court of Appeal, in interpreting the word which is also not defined under that Act, established the principle[4] that the assessment and determination of a "purpose" to substantially lessen competition is an objective exercise which focuses on the terms or the agreement viewed in the context of surrounding circumstances such as the business and/or commercial realities faced by the parties.[5]

33. Article 101 of the TFEU (formerly Articles 85 and 81 of the Treaty establishing the European Economic Community (EEC) is in *pari materia* with section 17 of the FCA and has been interpreted by the ECJ so that if the agreement has as its purpose the restriction of competition an economic analysis is not necessary.[6]

34. However, recent case law from the ECJ would seem to suggest a departure from this traditional view. For example, in ***GlaxoSmithKline v Commission[7]*** the ECJ laid down two bases in examining agreements by object. First, on its objective purpose and second, on the economic and legal context in which it is to be adopted, the latter basis incorporating an effects approach in determining whether there is a breach of the purpose provision. This position was taken in *Allianz Hungaria* where the ECJ held that an assessment of the economic context involves assessing "*the structure of the market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned*".[8]

35. At its core, the objective approach presumes the subjective intention of the parties to restrict competition on the basis of the objective (factual and legal) circumstances in which an agreement or its provision(s) is adopted.[9]

36. This "effects" approach is also endorsed by the New Zealand Court of Appeal. In the New Zealand Court of Appeal case of ***ANZCO Foods Ltd. v AFFCO NZ Ltd.[10]*** it was indicated that if

[3][2017] UKPC 28, para 27 at pg 28.
[4]Tui Foods v New Zealand Milk Corporation, 4 NZBLC 103, 335 at 103, 338
[5] See also GlaxoSmithKline Services Unlimited v Commission, Case C-501/06 at para 58
[6] VdS v Commission, Case 45/85 [1987] ECR 405, 4 CLMR 264 para 39

[8] Case C-3211, Allianz Hungária Biztositó Zrt and other v Gazdaság Versenyhiratal judgment 14 March 2013 para 48
[9] Note the High Court of New Zealand in Union Shipping v Port Nelson Ltd [1990] 2 NZLR 662 per JJ McGechan and Blunt JJ at 709 "*Proof or purpose, in the nature of these cases often will turn upon inferences and correspondence. Protestations of inner thoughts which do not reconcile with objective livelihoods are unlikely to carry much weight. In many cases, and this ultimately is one, both objective and subjective standards are met.*"
[10] [2006] 3 NZLR 351 per Glazebrook J at para 257

an agreement or any of its provisions, when implemented, would not substantially reduce or diminish the structural elements necessary for competition in the relevant market(s), then it may not be found to have as its purpose the substantial lessening of competition:

> *(a) "the purpose that must be proved for ss 27 and 28 is one that has, an end in view, the substantial lessening of competition in a market. Where it is obvious that could not be achieved if the provision or the covenant were implemented then, assessed objectively, the provision or the covenant cannot have that purpose".*

37. This reasoning applies to section 17 of the FCA and the assessment of purpose would be relevant where a party argues that there is no possibility of implementation of the agreement.

Effect

38. 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.[11]

39. Effect on competition is determined by an economic analysis of the relevant product and geographic market and which considers whether access to the relevant market is impeded and, where it is, whether the subject agreement has contributed to that foreclosure effect.[12] If so, the agreement is treated as being in contravention of the statute.

40. The term is not defined under the FCA, however, the Australian case of ***Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd.***[13] has provided guidance in its interpretation of the Trade Practices Act and applied the ´but for test´ which requires that the Staff, by way of economic analysis, must establish that ´but for´ an agreement or impugned provisions in an agreement, competition would not have been affected in a relevant market. This test was later clarified in ***Stirling Harbour Services Pty Ltd v Bunbury Port Authority***[14] where the Federal Court stated that the test requires courts to consider:

> *"the likely state of future competition in the market ´with and without´ the impugned conduct. The test is not a ´before and after test´, although, as a matter of fact, the existing state of competition in the market may throw some light on the likely future state of competition in the market absent the impugned conduct".*

41. The FTC Staff in determining whether the proposed Concession Agreement could contravene section 17 of the FCA, is required to conduct an economic assessment prospectively, comparing the structure of the relevant market with and without the Agreement. If the comparison reveals a substantial reduction in the structural elements

[11] Javico v Yves St. Laurent, Case C-306/96 [1998] ECR 1 – 1983, [1998] 5 CMLR 172
[12] Delimitis v Henninger Braüer AG, Case C-234/89 [1991] ECR – I – 935, [1992] 5 CLMR, 210, para 24 - 27
[13] [1982] FCA 1381 at 178 per Smithers J.
[14] [2000] FCA 1381 at para 12

that are assessed then, subject to any efficiency defence under section 17(4), the section is likely to be contravened.

42. The Staff´s application of this test has led to the conclusion, as indicated in the Economic analysis below, that coordinated anticompetitive conduct is more likely to occur if the proposed Concession Agreement is implemented and that there are likely to be greater incentives to engage in anticompetitive conduct.

Substantially lessening competition

43. The term "substantial lessening of competition" constitutes the legal standard by which agreements or their provisions can be reviewed under section 17 FCA; however, the FCA does not define the term and the Staff has found it necessary and useful to rely on statute and case law in other jurisdictions for guidance as to its meaning.

44. Section 79(1)(c) of the Canadian Competition Act has a similar provision.[15] The Canadian Competition Tribunal has interpreted the term 'substantial lessening of competition' to be proved in the following manner:

> *"...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 market in the presence of the anti-competitive acts and its likely competitiveness in their absence".*[16]

45. 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. In ***Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.***, [17] 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",[18] and not whether substantial competition continued to exist in the relevant markets following the occurrence of the challenged conduct.

46. In addition, the Federal Court of Appeal 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.[19] The Federal Court

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[15] 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.

[16] See decision of *The Director of Investigation and Research v. Laidlaw Waste Systems Limited*, CT-91/2, at p.101. 1992.

[17] *Canada (Commissioner of Competition)* v. *Canada Pipe Company Ltd*., 2006 FCA 233 (23 June 2006).

[18] Ibid, at para. 38.

[19] Ibid, paras.36 and 37.

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.[20]

47. The Staff is of the view that a causal relationship must exist between the agreement or offending provisions of the agreement and substantial lessening of competition in a market. Further, the test to be used to establish whether 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 agreement and the likely competitiveness of the market in the absence of the agreement.

48. It should be noted that, although statutes in other jurisdictions such as the European Union[21] are similar to section 17 of the FCA, they are not identical in important respects and are generally unhelpful tools in interpreting the meaning the term.

49. Consequently those treaty provisions may not offer the best guidance in determining the legal standard connoted by the phrase "substantially lessening competition" under section 17of the FCA. In this regard, legislation from other jurisdictions, which employ similar wording to the phrase under consideration, may provide better guidance on this issue.

50. In that regard, the Trade Practices Act 1974 of Australia is replete with references to "substantially lessening competition".[22] While the Australian statute rather unhelpfully defines "competition" as including "*competition from imported goods or services rendered by persons not resident or not carrying on business in Australia*"; like the FCA it also does not define what is meant by "substantially" or "lessening".

51. Recourse may therefore be had to relevant jurisprudence which clarifies the phrase "substantially lessening competition" under the Trade Practices Act 1974, and therefore by extension the FCA. Notably, the Court of Appeal of Jamaica has previously relied on Australian jurisprudence in interpreting another provision of the FCA, on the basis that both statutes are *in pari materia*.[23]

52. In ***Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd*** the Trade Practices Tribunal of Australia elaborated on the content of the concept of "competition" under the Trade Practices Act. The Tribunal explained that:

> "*Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:*

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[20] Ibid.

[21] Articles 101 TFEU and 85 EEC are *in pari materia* to section 17 FCA but neither uses the term "substantially lessening competition".

[22] See for example section 45 of the Act which proscribes contracts, arrangements or understandings which have the effect of "substantially lessening competition".

[23] **The Fair Trading Commission v SBH Holdings Ltd & Anor** S.C.C.A 92/2002, Judgment Delivered March 30, 2004, per Harrison JA at page 3.

1) *the number and size distribution of independent sellers, especially the degree of market concentration;*

2) *the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;*

3) *the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;*

4) *the character of "vertical relationships" with customers and with suppliers and with the extent of vertical integration; and*

5) *the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.*

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of any new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct."[24]

53. An important point which arises from the above passage is that the word "competition" as used in the Trade Practices Act, and arguably also in the Fair Competition Act, holds a technical meaning as opposed to its ordinary dictionary meaning. In terms of its ordinary dictionary meaning, "competition" has been defined to mean a "contest between two rivals".[25]

54. However, the passage from the Tribunal's judgment in *Re Queensland* indicates that the statutory concept of "competition" means, or at least relates to, the structure of markets. This in turn implies that the focus of review under the standard of "substantially lessening competition" is the structural elements of the relevant market which may or may not facilitate rivalry among firms, as opposed to a specific relationship or individual case of rivalry between firms. This much was also said by the New Zealand Court of Appeal in ***Port Nelson Ltd v Commerce Commission***.[26] In ***Port Nelson*** the New Zealand Court of Appeal had occasion to consider the concept of "competition" under section 27 of the Commerce Act 1986 of New Zealand, which also uses the phrase "substantially lessening competition". The Court opined that:

> *"One further point arises of the legal submissions relating to section 27. The relevant inquiry is as to substantially lessening competition. That is not the same as substantially lessening the*

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24 **Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd** (1976) 25 FLR 169, 189.

25 Joseph Nolan and Jacqueline Nolan-haley, *Black's Law Dictonary* (6th edn, West Publishing Co 1990) at page 284.

26 **Port Nelson Ltd v Commerce Commission** [1996] 3 NZLR 554.

> *effectiveness of a particular competitor. Competition in a market is a much broader concept...that encompasses a market framework which participants may enter and in which they may engage in rivalrous behaviour with the expectation of deriving advantage from greater efficiency. There appears to have been consistent acceptance of the elements of competition explained in the Queensland Co-operative Milling Association case (p 17,246) and further quotation is unnecessary."*[27]

55. The upshot of this technical meaning of "competition" under the FCA is that, arguably, as a general matter there must be some nexus (whether by way of purpose, effect, or likely effect) between an agreement, or provision of an agreement, and the structural elements of the relevant market necessary for competition therein. In other words, if an agreement, or a provision of an agreement, is unlikely to have any impact, potential or otherwise, on the structural elements of the relevant market (in particular those elements identified as being relevant by the Tribunal in ***Re Queensland****, supra*) then it is unlikely that liability will attach under section 17.

56. Notably, the impact on market structure that is required is in the nature of a "lessening" of competition. While the FCA does not define or otherwise indicate what is meant by "lessening" in this context; it is observed that in considering the "substantially lessening competition" standard under the Trade Practices Act 1974 the Federal Court of Australia in ***Stirling Harbour Services Pty Ltd v Bunbury Port Authority*** explained that:

> *"Conduct has the effect of lessening competition in a market only if it involves a reduction in the level of competition which would otherwise have existed in that market but for the conduct in question."*[28]

57. Arguably, therefore, an agreement, or a provision of an agreement, 'lessens competition' within the meaning of section 17 where its purpose, effect or likely effect involves a reduction (whether quantitatively or qualitatively), in the structural elements of a relevant market which are necessary for rivalry among firms.

58. Of course not every agreement, or provision in an agreement, which involves a "lessening of competition" will attract liability under section 17. In this regard, the word "substantially" while not defined in the Act, is an important qualifying term. The meaning and effect of "substantially" was the subject of judicial pronouncement when the ***Port Nelson Ltd*** case was in the High Court of New Zealand. At that stage in the proceedings, McGechan J explained that:

> *"...[the] reference in s 27(1) to 'substantially lessening competition' is taken as meaning 'lessening competition in a way which is more than insubstantial or nominal.' The merely ephemeral or minimal will not suffice. Inevitably, that will involve*

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27 **Port Nelson Ltd v Commerce Commission** [1996] 3 NZLR 554, 564-565.

28 **Stirling Harbour Services Pty Ltd v Bunbury Port Authority** [2000] FCA 1381 at para 66.

some attention to relativity; and in the end be a question of judgment on a matter of degree."[29]

59. Notably, this statement of principle in the High Court was not disturbed when the case went to the Court of Appeal. Arguably, on the basis of the foregoing explanation, while the word "substantially" communicates the idea that "lessening of competition" should be more than *de minimis*, it also indicates that the standard for review under section 17 is flexible insofar as it involves a degree of relativity according to the circumstances of particular cases.

60. The foregoing review of Australian and New Zealand jurisprudence regarding the "substantially lessening competition" standard under their respective competition legislation has provided some relevant guidance on the meaning of that standard under the FCA.

61. Consequently, it may be said with respect to the application of section 17 of the FCA in this case, that the review herein should focus on whether the proposed Concession Agreement has as its purpose, effect or likely effect a more than *de minimis* reduction in any of the structural elements necessary for competition in a relevant market (in particular those elements identified as being relevant by the Tribunal in ***Re Queensland**, supra*).

62. Notably this standard of review, being "evaluative" as French J said in *the* ***Stirling Harbour Services*** case[30], means that in a given case information about the relevant market(s) is required to arrive at a final determination about liability under section 17. This is because an agreement, or provision of an agreement, must be understood in the context of the surrounding business and/or commercial realities of the parties for the Staff of the FTC to form an opinion on whether or not it can have an impact on market structure, whether by way of "purpose" or "effect".

Substantial lessening of competition – conclusion on analysis

63. Section 2(3) of the FCA stipulates that the word 'market' in the FCA refers to a market in Jamaica. The subject agreement must, therefore, limit or control markets in Jamaica or share markets in Jamaica under section 17(2)(b) and section 17(2)(c) respectively.

64. There is no provision in the agreement that expressly limits or control markets or provides for the sharing of markets in Jamaica; however, examination of the relevant conditions of the subject agreement under heading '*Material Government Action*' shows that they could operate to effectively shield the Bidding Consortium from future competition and thereby are likely to create barriers to new entry.

65. The terms of an agreement may render the entire agreement unenforceable if there are conditions of the agreement that have as their purpose or effect the substantial lessening of competition in a market.

Sections 19 - 21

66. This aspect of the analysis is considered under sections 19 – 21 of the FCA.

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29 **Commerce Commission v Port Nelson Ltd** (1995) NZBLC 103,762 at 433-434.

30 **Commerce Commission v Port Nelson Ltd** (1995) NZBLC 103,762 at 433-434.

67. Further to these powers and based on the information currently available to it, the Staff has considered preliminarily whether the proposed Concession Agreement could lend itself to competition concerns arising under sections 19 - 21 of the FCA. These sections establish the offence of Abuse of a Dominant Position.

68. This offence is 'rule of reason' and therefore relies on findings of fact and law provable primarily on the basis of economic assessment; and the conclusion of which must show that there is, has been, or is likely to be the substantial lessening of competition in the relevant market. The three key elements for proof are (1) dominance in an appropriately defined market; (2) abuse of that dominant position; and (3) the actual or likely effect of lessening competition substantially in that market. These elements being provable (or having been proved) the Staff subsequently must consider whether the Respondent's practices resulted in superior competitive performance; and falls within the available defences under section 20(2); however, these further elements will not be addressed in the context of this preliminary opinion.

Market definition

69. Market definition is the essential first step in confirming jurisdiction and delineating the boundaries within which an assessment of competition is relevant. Under Section 2(3) of the FCA:

> *'Every reference…to the term "market" is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.'*

70. In addition to the above definition, which encompasses the product and geographical aspects of the market, the FTC relies on economic analysis in identifying the boundaries of the relevant market.

Dominance

71. According to section 19 of the FCA:

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

72. The term 'interconnected company' is addressed under section 2 of the Act which provides in relevant part:

- *any two companies are to be treated as interconnected companies if one of them is a company of which the other is a subsidiary of [or] if both of them are subsidiaries of the same company;*
- *a group of interconnected companies shall be treated as a single enterprise.*

73. As a member of both the MBJ (through its wholly owned subsidiary which has majority shareholding) and Bidding Consortia, GAP upon the conclusion of the proposed Concession agreement and on the basis of either of the legal theories above, would be defined as an

enterprise within the meaning of the FCA and capable of a finding of dominance within the relevant market as defined herein.

74. The case of ***Re Continental Can Company Inc***.[31] has been relied on by Commonwealth countries such as New Zealand and Australia for the test of dominance. That case established that, an enterprise is dominant where it has the power to control production or distribution for a significant part of the relevant product(s), as a result of market share, or market share combined with technical knowledge, raw materials or capital. Accordingly, the minimum indicator is that the enterprise be strong enough to ensure an overall independence of behaviour. Other case law[32] has indicated that, generally, a dominant position may result from a combination of several factors which may be considered disjunctively or cumulatively. Taken together, case law has recognized some factors as determinative of dominance; these include: market share exceeding 50%[33]; exclusionary/exploitative conduct in the market;[34] commercial advantages including vertical integration[35], technological lead, superior sales force and high good will;[36] the strength and number of competitors in the market;[37] entry barriers for potential competitors (including the need for exceptionally large capital investment and the risk of sunk costs)[38]. Market concentration and relative market shares of competitors are also considered.[39]

Abuse of dominance

75. Section 20 of the FCA sets out the circumstances in which an 'abuse' would be deemed to have taken place and contains a non-exhaustive list of examples. The section provides, in relevant part:

> 20(1) *'An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular…if it –*
>
> *(a) restricts the entry of any person into that or any other market;*
> *(b) prevents or deters any person from engaging in competitive conduct in that or any other market,*
> *(c) eliminates or removes any person from that or any other market…*
> *(d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;*
> *(e) limits production of goods or services to the prejudice of consumers;*

[31] [1972] CMLR D11 at pg. D27
[32] AKZO v Commission Case C-62/86 at para 60
[33] Ibid
[34] United Brands Co. v Commission Case C-27/76 at para 68
[35] Ibid at paras 70 - 81
[36] Hoffman-La Roche v Commission Case 85/76 at para 48
[37] United Brands Co. v Commission Case C-27/76 at para 110
[38] Supra at para 122
[39] Re News Ltd. – Independent Newspapers Ltd. (1987) 1 NZBLC (Com) 104, 051 at p 105, 055; (1986) 6 NZAR 47 at p. 50, Decision No. 164 of the Commerce Commission, 9 May 1986, para. 9/

(f) makes the conclusions of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements'

76. Assuming a finding of dominance, these factors would be applied on the basis of the likely agreement and would require economic analysis evaluating, inter alia, whether or not consumers and rivals are harmed. Such an analysis falls outside the scope of this preliminary opinion.

Substantial lessening of Competition

77. The same test applied above would apply under this section of the FCA.

Conclusion regarding abuse of dominance

78. The market definition provided by the economic analysis has identified the product and geographic markets and clearly establishes jurisdiction of the FTC in accordance with the provisions of the FCA.

79. The evidence establishes that the relevant market is located in Jamaica as required by section 2(3) of the FCA and has considered substitutability in accordance with fact and established economic principles.

80. This element of the offence cannot be determined at this stage of the transaction as there is no information to conduct an analysis, however it should be noted that based on the economic theory, GAP, upon the conclusion of the proposed Concession Agreement, could be considered a single enterprise pursuant to section 2 of the FCA and therefore capable of a finding of dominance in the relevant market. There is, however, no indication or evidence at this stage of any conduct amounting to an Abuse of Dominance.

III. OVERVIEW OF AIRPORT SERVICES INDUSTRY

81. International travel is big business. It is reported that there were over 300 million international tourists across the globe in 2016 (JTB. Annual Travel Statistics 2016). In the Caribbean region, international tourist arrival was recorded at 29.3 million. Since Jamaica is surrounded by sea, the most popular means of travelling to and from the island is through the airports.

Expenditure

82. Jamaica earns significant foreign currency from international travellers. During 2016, there were 2.2 million tourist arrivals in Jamaica. This was approximately 2.8% higher than the previous year. A significant amount of these arrivals would have come from the United States of America (65%), Canada (17%) and Europe (14%). It is estimated that these visitors, who stayed on average of just over one week during 2016, spent approximately United States Dollars 2.6 million. This expenditure was approximately 8.6% higher than visitor expenditure during 2015.

Preferences

83. Tourists travel to Jamaica primarily for vacation purposes. In particular, in a 2016 Visitor Satisfaction Survey, approximately 77% of visitors indicated that their main purpose for

visiting Jamaica was to take a vacation. The other leading reasons were visiting friends and relatives (22%) and beaches (20%).

Disposable Income

84. The disposable income of a given traveller to Jamaica has declined over time. In particular, the median annual income of passengers to Jamaica was estimated between USD 80,000 – 89,999. By 2016, however, the mean annual income declined to USD 70,000 - 79,999.

Port of first Entry

85. A significant proportion of tourists arrive in Montego Bay. During 2017, approximately 81% of tourists arrived in Montego Bay whilst 19% arrived in Kingston.

Accommodation

86. There were approximately 30,402 accommodation bookings by tourists during 2016, an increase of 7% over 2015. Hotel rooms was the most popular accommodation type (75%) with the least popular being apartments (2%). Notwithstanding, the fastest growing segment of tourist accommodation during 2016 was 'apartment' which grew by 10.6% over the previous year.

Growing demand

87. The number of travellers visiting Jamaica has consistently increased in recent years. In particular, a 2016 survey shows that there was a 6% increase in the number of first time visitors to Jamaica.

General development in the airport industry

88. There are a number of entities with oversight responsibilities over various aspects of the operations of Norman Manley International Airport (NMIA) and Sangster International Airport (SIA) in Jamaica. These include the Airports Authority of Jamaica (AAJ); the Jamaica Civil Aviation Authority of Jamaica (JCAA); the Town Planning Department; the Ministry of Transport and Works; the Ministry of National Security; the Ministry of Finance and the Public Service; Jamaica Customs Department, the Immigration Department, the Jamaica Tourist Board.; the National Environmental and Planning Agency (NEPA); Ministry of Health; and the Fair Trading Commission.

89. Since 2003, the NMIA Airports Limited has been in charge of the operations of the NMIA.

Service quality upgrades

90. Both the NMIA and SIA offer similar services to passengers and have improved these over time. Improvements include:

    - Unlocked Wi-Fi at the airport;
    - Passenger Lounge Services (both operated by VIP Attractions); and
    - Customer Service training to airport workers.

91. Both airports benefit from revenue generated from commercial activities. These revenues flow from commercial concessionaires at the airport as well as rental income from tenants on the Airport estate. A break-down of the number and types of concessionaires available at each airport is presented in the table below.

92.

Table 1. Commercial Concessionaires Available at SIA and NMIA

	SIA	NMIA
Concessionaires		
Specialty Retail Shops	31	17
Duty Free Shops/ Kiosks	5	4
Food & Beverage Outlets	30	10
Car Rentals	5	5

Source: AAJ.

93. In addition to the services listed above, the following are services available at both airports:

- Cambios (Foreign Currency Exchange)
- Automated Banking Machines (ABMs)
- Ground Transportation (Taxi and Tour Operators)
- Hotel Welcome Desks
- Passenger/ VIP Lounge Services
- Refuellers
- Gas Station
- Hangers
- Porter Service
- Cargo Handlers
- Advertisement- Internal and External
- Baggage Wrapping
- Entertainment (Go Kart Track)
- Aircraft Maintenance

Business model of multi-sided platforms

94. Airport operators offer a multi-sided platform with each side of the platform representing a distinct customer segment (airlines, travellers, food concessionaries, etc.). The primary business model for platform operators is to facilitate the interaction of the customer segments with the platform (in this instance, the airport) serving as the primary point of contact. In such business models, as any side becomes larger, the more attractive the platform will be to other sides of the platform which may want to interact with it. For example, an airport which has a gateway to more airlines and destinations would be more attractive to travellers seeking to get away; by similar reasoning, an airport with more passengers passing through it will be more attractive to airlines and food concessionaires seeking to serve the passengers as they make their way through the airport.[40] In seeking to increase profits, therefore, airport operators have an incentive to grow the various sides of the platform. This would be consistent with attempts by airport operators to attract more airlines; encourage airlines to develop new destinations (route development initiatives); or for airports to attract more passengers.

[40] This relationship between the value of a platform and the size of a particular side of the platform is generally discussed as network effects in the economics literature.

Route development initiatives

95. Over the years, NMIA and SIA have engaged in similar route development activities which encourage airlines to service unserved or underserved destinations.

96. For instance, MBJ Airports Limited participates annually in Route Development conferences. Similarly, NMIA participates in the annual Routes Americas conference to increase traffic to Kingston.

97. Both airports also offer (temporary) incentives to airlines to encourage them to serve underserved or unserved destinations. These include:

- Landing Fee discount
- Aircraft Parking Fee discount
- Jet Bridge fee discount
- Marketing support (to promote the flights within the destinations)
- Space rental waivers

Building passenger loyalty

98. It is recognized that airports could gain significant economic advantage by fostering passenger loyalty. As such, over the years both airports have been taking steps to foster passenger loyalty. Probably one of the most effective means of growing the customer base is to offer a high quality customer experience. With respect to passengers, the Airport Service Quality (ASQ) is a global benchmarking programme measuring passenger satisfaction while they are at the airport.[41] Studies have shown that a 1% increase in the global passenger, as measured by the ASQ, is associated with a 1.5% growth in non-aeronautical revenue.

99. Both international airports in Jamaica receive favourable reviews from passengers, based on the ASQ awards received by NMIA and SIA in recent times. In particular, in 2012 and 2013 SIA received the 3rd place award for the best airport in Latin America and the Caribbean. By way of comparison, the Grantley Adams International Airport in Barbados received the 5th place award in 2012.

100. In 2015, the NMIA received the ASQ award for the Best Improved Airport in Latin America and the Caribbean (Karena Bennett, NMIA ranks as most improved airport in LAC, Jamaica Observer, March 1, 2016. Access at http://www.jamaicaobserver.com/business/NMIA-ranks-as-most-improved-airport-in-LAC-region------- 53336). NMIA said that in securing that award, they responded to feedback from passengers and implemented numerous measures geared towards "…making our passengers feel comfortable and special…" At that time, NMIA indicated that they planned to continue making improvements so that they could achieve the rank of the best airport in the region.

[41] The questionnaire requires passengers to respond to 55 questions, covering 34 service attributes. It is used by 85 over 300 participating airports in 85 countries.

IV. ECONOMIC ASSESSMENT

A. The challenged economic transaction

101. The economic transaction being challenged by the Fair Trading Commission is the divestment exercise which could result in a member of the consortium selected to operate the NMIA being also a member of the consortium operating the SIA.

B. Relevant market definition

Analysis framework

102. To evaluate the potential effects of the challenged economic transaction, we start by identifying the relevant markets in which the parties to the challenged transaction compete. The relevant market identifies the products and the section of the country which could be harmed by the challenged transaction. It is customary to identify at least one market in which the challenged conduct may substantially lessen competition.

103. Market definition is a consumer-oriented exercise. It seeks to identify a set of products such that consumers are willing and able to substitute away from one product to another in response to a small but significant price increase or a commensurately adverse non-price change such as a reduction in quality or service.

104. Once the relevant market(s) has (have) been indentified, analyses will proceed to determine whether and the extent to which incumbent suppliers would have competitive constraints from present or future suppliers. The identification of the relevant market is also useful in assessing efficiencies as well as aid in the designing of appropriate remedies to mitigate, if not avert, anticompetitive effects of the challenged economic transaction.

Conclusion

105. In this section, we conclude that the relevant market comprises airport services provided in several overlapping geographic markets in Jamaica within a 3 hour drive radius of each airport.

Discussion

106. The following paragraphs identify the issues which informs the conclusion presented above.

Product market

107. Passengers and airlines are the primary users of airport services. Airlines use airport services to transport passengers by air from one destination to another. Similarly, passengers use airport services as they travel from one destination to another.

108. As far as airlines are concerned, there is no close substitute for airport services.

109. Passengers, on the other hand, have several options available to them as a substitute for travelling by air. In general, transportation by sea and ground are options which may be available to passengers seeking to travel from one destination to another. To the extent that Jamaica is surrounded by water, however, ground transportation is not an alternative for passengers whose place of departure or final destination is located beyond the boundaries of Jamaica. For such individuals, transportation by sea is the closest alternative.

To the extent that travel by sea (cruise ships) places significant limitations on the experiences of passengers at the destinations visited by the cruise ship, however, it is unlikely that travelling to a destination by sea would be considered a reasonably close substitute to travelling to the destination by air.

110. Based on the above, we conclude that airport services are in a product market by itself.

Geographic market

111. The geographic market identifies the area(s) in which competition takes place among suppliers of the relevant products. In the previous section, the relevant product was defined to be the market for airport services.

112. Passengers have to consume airport services at supplier's location. As such, competitors in the relevant market are airports within proximity of each other. The maximum distance (or time) passengers are willing and able to travel between airports to avoid a small but significant price increase (or and other adverse non-price change) will depend on consumer preferences and therefore essentially is a matter for empirical determination.

113. In studies of the airport market conducted by competition authorities in Europe, each airport was modelled to operate in a geographic region within a fixed radius of the airport. The length of the radius represents the maximum distance the passengers would be willing to travel from one airport to the next for a better travel experience.

114. While there is no standard benchmark for the appropriate distance, studies of European countries use 2 hours as the benchmark. These studies also indicate that the threshold maybe of a shorter duration (in the case of business travellers) or may be even longer (in the case of leisure travellers).

115. The Staff of the Fair Trading Commission did not review any document indicating how far (or long) passengers using international airports in Jamaica are willing and able to travel and still consider both international airports as close substitutes. It is known that approximately 3 out of every 4 air passengers to Jamaica travel for leisure purposes. Leisure passengers would be in a better position than business passengers to travel for longer distances between airports to avoid a higher price. It is reasonable to consider, therefore, that the geographic markets for airport services in Jamaica extend beyond 2 hours driving time.

116. Based on the above we conclude that the relevant market comprises several overlapping geographic markets each coinciding with a region within a 3 hour drive radius.

C. Market Structure

Analysis framework

117. Competition authorities routinely assess whether and the extent to which participants in the relevant market is likely to exercise market power individually, through their actions taken independently of other participants (unilateral conduct) and/ or collectively, through the coordinated interaction among the group, or sub-group, or participants (coordinated conduct). It is typical for such assessments to rely on the Herfindahl Hirschman Index (HHI) which measures concentration, as is outlined in the US Horizontal Merger Guidelines. The

Staff's interest in the seller concentration is underpinned by the observation that unilateral conduct and coordinated conduct which give rise to adverse competitive effects are more likely in markets which are highly concentrated, especially when there are impediments to entry, am

Conclusion

118. The Staff concludes that there are several markets that could be harmed by the challenged transaction. These markets coincide with the ten overlapping destinations served by NMIA and SIA.

Discussion

119. The following paragraphs identify the issues which informs the conclusion presented above.

Structure of the Relevant Market

120. There are sixteen airports operating in Jamaica. Of this total, there are three international airports, three domestic airports, two military airports and eight private airports. The airports are identified by names in the table below.

Table 2. Airports located in Jamaica

Location (City/town)	Airport Name
International Airports	
Kingston	Norman Manley International Airport (NMIA)
Montego Bay	Sangster International Airport (SIA)
Ocho Rios/Boscobel	Ian Fleming International Airport (IFIA)
Domestic Airports	
Kingston	Tinson Pen Aerodrome
Negril	Negril Aerodrome
Port Antonio	Ken Jones Airport
Military Airports	
Kingston	Up Park Camp
Moneague	Moneague Training Camp
Private Airports	
Bath	Bath Airfield
Bog Walk	Tulloch Airfield
Discovery Bay	Puerto Sico Airstrip
Ewarton	Ewarton Airstrip
Manchioneal	Manchioneal Airstrip
Nain	Nain Airstrip
Old Harbour Bay	Port Esquivel Airstrip
Williamsfield	Kirkvine Airstrip

Source: Wikipedia

121. The NMIA is the subject of this investigation. To identify other suppliers in this market it is instructive to describe the main purpose for which passengers utilize the NMIA. In particular, air passengers use the NMIA as a gateway between Jamaica and international destinations (markets). The SIA is the only other airport which offers this service. This means that when travelling between Jamaica and international destinations by air, SIA is likely to be considered by passengers as the closest substitute for NMIA.

122. There are at least three dimensions of "closeness" that passengers are likely to consider when assessing the degree of substitutability between SIA and NMIA: (i) *proximity*: passengers must consider the airports to be located reasonably close to each other; (ii) *product offerings*: both airports must offer access to the passengers international destination of choice; and (iii) *convenience*: the routes should be comparable in terms of airlines, air fares, frequency and flying time.

Overlapping Product Offerings

123. Data show that in 2016, NMIA had 10 airlines covering 13 destinations (excluding Jamaica) in the Caribbean, United States of America, Canada and England. At SIA, passengers had a choice between 20 airlines serving 57 destinations in the Caribbean, United States of America, Canada, England, Belgium, Scotland, Ireland, Wales, Peru, Germany, Finland, Denmark, Italy and Sweden.

124. Regarding overlap, it is noted that seven of the ten airlines (70%) which operate out of NMIA, also operate out of SIA. Further, ten of the thirteen destinations (77%) served by airlines at NMIA are also served by airlines at SIA.

125. In principle, therefore, passengers flying between Jamaica and these ten destinations could consider NMIA or SIA as substitutes for international travel.

126. At a minimum, therefore, the set of markets which could be harmed by the challenged transaction includes these 10 markets served by both NMIA and SIA. To the extent that the challenged conduct could influence consumer choice in these markets, we conclude that the relevant product market comprises at least these 10 overlapping destinations.

Proximity of airports

127. The distance between SIA and NMIA is an important factor when passengers are assessing how closely substitutable the two airports in Jamaica are. The distance is important because passengers have to travel to airports to consume the service. SIA is located in St James on the North Coast of Jamaica whereas NMIA is located in Kingston on Jamaica's South Coast. In assessing whether the two airports are close substitutes, we must determine willingness and ease in which customers could substitute (or shift) one airport for the other. As discussed in a previous section, SIA and NMIA are within 3 hours drive of each other.

128. Driving between the NMIA and SIA takes approximately 2 hours 53 minutes (covering 189 km). Whether a given passenger would consider this distance to be reasonably close ultimately depends on the sensitivity of the passenger's demand to changes in price and non-price determinants of demand.[42] In general, air passengers may be classified into two groups: Business passengers and leisure passengers. Numerous studies have demonstrated that as a group, business passengers are less sensitive, relative to leisure passengers, to changes in the price and non-price determinants of demand. This means that business travellers, are less likely than leisure travellers to alter travel plans to avoid paying a small but significant price increase, or a commensurately adverse change in non-price determinants of demand. Equivalently, leisure travellers are more likely to alter travel itinerary to take advantage of any promotions (or avoid small but significant price increases). The increasing popularity of online ticket purchasing means that more passengers are able to take advantage of lower price flights. Common strategies used by leisure travellers to avoid high prices include: [43]

129. Travelling through nearby airports rather than closest airport;

130. Choosing itineraries with significantly lengthy layovers at airports (often in excess of three hours);

131. Choosing itineraries with connections rather than direct flights; and

132. Travelling during off-peak season, off-peak days or off-peak hours.

133. As mentioned in a previous section of this report, the NMIA and SIA currently cater to distinct profile of passengers. SIA currently caters to leisure passengers whilst NMIA currently caters to business passengers and those visiting friends and relatives. Some persons have used current distinct profile of arriving passengers at the SIA and NMIA, to infer that SIA and NMIA are not in the same market. The Staff is of the view that this is not

[42] Non-price determinants of demand include product quality and customer service.

[43] Internet based flight reservation systems is making making it easier for passengers to identify "more affordable" itineraries based on built in "nearby" airports and "number of connections" search preferences.

the only way to interpret the differences in the profile of passengers arriving at the airports. In particular, if there is no significant difference in travelling through two competing airports, then passengers will select the airport which is closest to their final destination. Once there is a small but significant increase in the price (or commensurate non- price determinant of demand), however, some passengers would seek not to travel to the closest airport to avoid the high prices. As mentioned in a previously, leisure passengers are more likely than business passengers to switch to nearby airports rather than use the closet airport to final destination.

134. To the extent that a significant portion (77%) of passengers travels to Jamaica for leisure purposes, they may consider 3 hours to be a reasonable distance to travel to take advantage of any favourable terms at a given airport (or avoid unfavourable terms at a airport). In other words, if there is a small but significant reduction in price at NMIA (or commensurate improvement in quality or customer service), we could observe a greater fraction of leisure passengers arriving at NMIA.

135. This position is reinforced by the fact that recent developments in the public ground transportation network have made it easier to travel between the main international airports in Jamaica. In particular, travelling between the airports using public ground transportation is more convenient as the Knutsford Express established a new station at the SIA in January 2018 which facilitated a more direct route for approximately 35 USD for passengers moving between NMIA and SIA.[44]

136. Based on the information above, it is reasonable to conclude that for passengers, the SIA is a close substitute for NMIA in certain sub-markets (destinations). These sub-markets arise from the fact that a significant portion of airlines which operate at NMIA also operate out of SIA, and a significant portion of the destinations served by airlines at NMIA are also served by airlines in SIA. In particular, it is seen that 70% of the airlines available at NMIA also operate out of SIA. Also, 77% of the destinations served by NMIA are also served by SIA.

137. In contrast, only seven of the twenty airlines (35%) which serve SIA also serve NMIA. Further, only ten of the fifty-seven (18%) destinations served by SIA are also served by NMIA.

138. The conclusion in this section, therefore, is that SIA and NMIA are in the same relevant market and submarkets (overlapping destinations).

D. Market Share and Concentration

Analysis framework

139. Market concentration level, when considered in tandem with other market characteristics, is an important feature for assessing the scope for adverse competitive effects of any challenged conduct. When markets are unconcentrated, this indicates that incumbent suppliers place strong competitive constraints on the each other. When markets are highly concentrated, it suggests that there may be only weak competitive constraints on

[44] The bus ticket price from NMIA to the Kingston station is about 10 USD while a ticket from Kingston office to SIA is about 25 USD.

an incumbent supplier. Market concentration is typically measured using the distribution to market shares in the relevant market. Market share calculation could be based on a variety of measures used to reflect competitive significance; these include revenue, turnover, capacity and assets.

140. The Herfindahl-Hirschman Index (HHI) is a widely accepted measure of market concentration. Guidelines used by most competition authorities dictate that a measurement of the HHI exceeding 2,500 is indicative of a highly concentrated market whilst HHI below 1,500 is indicative of an unconcentrated market. Markets with an HHI between 1500 and 2500 are considered moderately concentrated.

Conclusion

141. The Staff concludes that the market is highly concentrated.

Discussion

142. The following paragraphs identify the issues which informs the conclusion presented above.

143. The market share and concentration, based on stopovers (tourists) is presented in Table 3 below.

Table 3. The Relevant Market is Highly Concentrated

	Market Share (%)
	Passengers*
SIA	81
NMIA	19
TOTAL	**100**
HHI	6,952

**Based on data for the year 2016. Source: JTB, Total Stopover Arrivals by Port of Arrival 2008 to 2017. Downloaded from jtbonline.org*

144. The table shows that the relevant market is highly concentrated. SIA has approximately 81% of tourists travelling to Jamaica whereas NMIA has 19%. In this instance, the HHI is calculated as 6,952 points, significantly above the 2,500 threshold used to classify highly concentrated markets.

E. Effective Entry

Analysis Framework

145. Competition Authorities routinely assess whether and the extent to which the top supplier in a given market is likely to face competitive constraints from potential (future) suppliers. It is typical for such assessment to rely on conditions of entry, expansion and exit. Suppliers in markets with negligible impediments to entry, expansion and exit, are unlikely to exercise market power, even if the market is highly concentrated.

Conclusion

146. The Staff's conclusion is that entry is unlikely to mitigate any adverse competitive effects arising from the conduct of incumbent suppliers. The Materially Adverse

Government Action (MAGA) clause in the NMIA Concessionaire agreement serves to raise impediments for entry.

Discussion

147. The following paragraphs identify the issues which informs the conclusion presented above.

Prospects for new entry

148. While the Staff is unaware of plans for any airport to enter the market in the foreseeable future, the draft NMIA Concessionaire agreement suggests that prospective bidders hold a firm belief that new entry is likely. In particular, clause 38.1.2 of the draft NMIA concessionaire agreement includes a term identified as the MAGA clause. This clause effectively shields the NMIA Concessionaire from competition for commercial passengers from any future operator. In particular, the MAGA clause requires Government to compensate the Concessionaires of NMIA for any revenue diverted to any airport other than the other international airports already in the market: SIA and IFIA.

149. To the extent that prospective investors argue that NMIA would be a significantly less attractive investment if the MAGA clause was excluded from the concessionaire agreement, it can be reasonably deduced that investors believe that the entry in the relevant market would be likely, timely, and sufficient to compete with NMIA.

Prospects for expansion

150. The Ian Fleming International Airport (IFIA) is the only other international airport operating in Jamaica but not yet operating in the relevant market because it does not facilitate international flights to and from Jamaica. In March 2018, work began to "…expand the Ian Fleming International Airport…to make it a regional hub…" [Jamaica Information Service, "Work to Expand Ian Fleming Airport Begins March 12." View at https://jis.gov.jm/work-to-expand-ian-fleming-airport-begins-march-12/ (last accessed: July 6, 2018)]. The project includes expanding the terminal building and widening the runway.

151. Notwithstanding the above, it is unlikely that IFIA would expand to offer scheduled commercial flights in a manner which would be sufficient to compete with NMIA and SIA in the next two years. Therefore, it is unlikely that the IFIA will provide a competitive constraint to NMIA and SIA in the foreseeable future.

F. Assessment of competitive effects

Analysis framework

152. In general, anticompetitive conduct may be characterised in two broad categories: unilateral and coordinated actions. Unilateral action refers to the conduct undertaken by an individual supplier whereas coordinated action refers to conduct undertaken jointly by two or more suppliers. The anticompetitive effects arising from unilateral conduct is commonly referred to as unilateral effects while the anticompetitive effects from coordinated conduct is commonly referred to as coordinated effects. (See US DoJ and FTC (2010), Horizontal Merger Guidelines for discussion on Coordinated and Unilateral Effects).

153. In assessing the likelihood that economic agents would engage in any specified conduct, economists rely on the incentives and opportunities available to the agent. An agent is considered to have incentives to engage in a conduct if such conduct would result in an economic benefit to the agent. An agent is considered to have an opportunity to engage in a conduct if that agent is able to take action that would lead to such a conduct. An economic agent would be considered likely to engage in a given conduct only if there are adequate incentives and opportunities to engage in the conduct.

154. Accordingly, to assess the likely effect of the challenged transaction on competition in the relevant market, we analyze how the challenged conduct is likely to alter the incentives and opportunities for airport operators to engage in anticompetitive conduct. If the challenged conduct increases the incentives and/or opportunities to engage in anticompetitive conduct, we would conclude that the challenged conduct is likely to have anticompetitive effects; otherwise, we would conclude that the challenged conduct is unlikely to have anticompetitive effects.

155. In determining competitive effects, we compare the incentives and opportunities for airports to engage in anticompetitive conduct in two alternative forecasts of how the present relevant market will evolve into the foreseeable future. These hypothetical markets both evolved from the present relevant market but differ in the future based solely on an assumption about the implementation of the challenged economic transaction. In particular, in one hypothetical market (the counterfactual) the challenged economic transaction is assumed to have been blocked while with the other hypothetical market (the factual market) the challenged economic transaction is assumed to have been accommodated.

156. A conduct is anticompetitive if it is likely to result in harm to suppliers (current or future) and harm to consumers in a given market.

Conclusion

157. The Staff's conclusion in this section is that the challenged economic transaction is likely to have adverse competitive impact on competition in the relevant market.

Discussion

158. The following paragraphs identify the issues which inform the conclusion presented above.

<u>Competition versus Regulation</u>

159. Economic regulation is a poor substitute for competition. It has been shown in theory and in practice that regulated markets do not perform as well as competitively organised ones do. Consumers are typically better off in competitive markets because price is lower, quality is higher, there are greater varieties of products, and innovation takes place at a faster pace, relative to markets which are not competitively organised. Once competition is feasible in a given market, it should be facilitated, preserved and promoted over regulation. In this counterfactual market, both airports are subject to the regulatory oversight of the A(ER)A.

160. Information failure is the primary reason that preserving competition is preferred to enforcing the A(ER)A. By information failure, economists refers to a situation in which one party to an economic transaction (say, the operator), possesses materially greater information than the other party (say, the regulator). In this instance, there is likely to be information failure because any airport operator is more knowledgeable than the regulator about, say, the cost structure of operating the airport. Since the regulator relies on information provided by the operator in establishing the price cap, the operator has an incentive to overstate these costs to the regulator and therefore earn supernormal profits while operating even within the regulatory maximum prices. In the regulatory environment, prices reflect the regulator's estimate of the cost which is likely to be higher than the true costs known only to the operator. In a competitive environment, however, price reflects the true cost which is likely to be lower than the cost reported by the operator.

161. As discussed earlier in the report, competition in this market takes place among platforms (airports) for aeronautical and commercial services seeking to attract airlines, passengers and concessionaires. In general, enterprises respond to competition with adjustments to price or service quality. Competition in the provision of aeronautical services could take place by airports charging below the price cap and/or operating at levels above the minimum levels established by the operator. In the United Kingdom, for example, Manchester's airport charges have been below the price cap. (See Office of Fair Trading, UK Airports: Report on the Market Study and Proposed Decision to Make a Market Investigation Reference, p. 107).

162. It is clear that the regulatory processes governing NMIA and SIA deliver important benefits to consumers by capping charges to airport users and providing incentives for a minimum level of product quality and customer service. Once the market remains amenable to competition however, competitive would deliver even more benefits as it would provide adequate incentives for airport operators to, say, charge below price cap levels and/or improve product and customer service quality beyond that which would satisfy regulatory obligations.

The counterfactual market

163. In this section, we describe the counterfactual market- i.e., our characterisation of how the extant relevant market is likely to develop in the foreseeable future if the NMIA divestment exercise does not result in a market in which any member of the consortium which operates SIA being also a member of the consortium selected to operate NMIA.

Changes in the incentives and opportunities for anticompetitive conduct

164. In the counterfactual market, the challenged economic transaction alters neither the incentives nor opportunities to engage in anticompetitive conduct. Relative to the present market, each airport in the counterfactual market has unaltered incentives to continue to develop the airport facilities to the benefit of passengers as this will increase the number of loyal passengers and ultimately generate increased revenues for the respective platform. If either airport decides to reduce the pace at which its facilities are developed, it risks losing passenger traffic to the other airport which might be developing its facilities at a faster pace.

165. It is also true that, relative to the present market, each airport in the counterfactual market has unaltered opportunities to engage in anticompetitive conduct.

166. Accordingly, competition between the airports takes place in both the aeronautical services and commercial services, despite the regulatory oversight in the provision of aeronautical services. The fact that aeronautical services are subject to economic regulatory oversight does not necessarily preclude competition from disciplining the conduct of both operators. In previous studies, it has been shown that competition among regulated airports might manifest in operators opting not to charge the maximum fees permitted under regulations.

Conclusion

167. We conclude that neither the incentives nor opportunities to engage in anticompetitive conduct in the counterfactual market would be different from that which currently obtains in the market. In particular, both airports would continue to have comparable incentives and opportunities to enhance the experience for passengers, among other things. Therefore, competition for passengers is expected to continue primarily on the basis of improvements in airport facilities designed to enhance passenger experience.

The factual market

168. In this section, we describe the factual market- i.e., our characterisation of how the relevant market is likely to develop in the foreseeable future if any member of the consortia which wins the bid to operate the NMIA is also a member of the consortia which operates the SIA.

169. In the factual market, the challenged economic transaction *increases* the opportunities and therefore the likelihood for competing platforms to engage in anticompetitive conduct, relative to the incentives and opportunities to do so in the present market.

170. As discussed earlier in the report, anticompetitive effects might result from unilateral or coordinated conduct. Changes in the incentives and opportunities to engage in both category of anticompetitive conduct are discussed below.

Prospects for unilateral effects

171. Neither the incentives nor opportunities for either airport to engage in unilateral anticompetitive conduct are altered in the factual market, relative to the present market.

Prospects for Coordinated Effects

172. The economic literature has identified numerous market characteristics which make it easier for the sustained coordinated conduct among competing suppliers which harm consumers. Coordinated effects typically occur in markets which are either highly or moderately concentrated; as discussed earlier in the report, the relevant market is highly concentrated. The US FTC Horizontal Merger Guidelines points out that "…a market is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by the firm's rivals." (Section 7.2, pg 26)

173. The common consortium member would be well positioned to at least observe important significant competitive initiatives of both the SIA and NMIA. Accordingly, the

cross-membership of the consortia which operate each airport makes the factual market more vulnerable to coordinated effects.

174. The increased transparency of each rival's operations, among other things, provides greater opportunities for platforms to engage in coordinated conduct in the factual, relative to the present market. In the factual market, the coordinated conduct could manifest with airport operators agreeing to slow down the pace at which infrastructural development takes place, relative to the pace at which it could have developed absent the coordination, or organise a coordinated increase in the price of aeronautical services to airlines.

175. In the counterfactual market, each airport would represent the most significant constraint against anticompetitive conduct. In this factual market, however, this competitive constraint is weakened by cross-membership of the consortia operating the airports which increases the opportunities, and therefore likelihood, for coordinated effects.

Regulatory Oversight

176. The opportunities for coordinated effects will be greater in the factual market, relative to the present market, notwithstanding that both airports are governed by the A(ER)A and the FCA, among others. As discussed in the section above, no centrally organised market system, such as that contemplated by the A(ER)A, could reasonably be expected to replicate the performance of the competitive process in organising economic activities. Further, coordinated conducts, are by nature, extremely difficult to detect and only some of them would breach competition legislation. This means that even when the FTC has the authority to challenge coordinated conducts, it would be a more efficient use of resources for any competition authority to discourage such conduct by removing the conditions which make such conduct more likely rather than having to detect and prosecute them after the fact.

Conclusion

177. One important way in which the challenged economic transaction increases the opportunities for anticompetitive conduct is that it makes it easier for competing platforms to coordinate and monitor each other to the detriment of consumers. In particular, anticompetitive strategies could be devised and communicated through the entity with cross-membership of the consortia operating the competing platforms. Similarly, the common member will have an incentive to ensure that the coordinated conduct is sustained.

178. We conclude that the opportunity to engage in anticompetitive coordinated conduct is greater in the factual market, relative to the present market. As such, coordinated anticompetitive conduct is more likely to occur in the factual market, relative to the present market.

Assessment of Competitive Effects

179. In this section of the report, it was shown that the counterfactual market would have the same incentives and opportunities to engage in anticompetitive conduct, relative to the present market. Contrastingly, it was demonstrated that operators in the factual market would have greater opportunities to engage in anticompetitive conduct, relative to the present market.

180. Based on these results, the anticompetitive conduct is more likely in the factual market, relative to the counterfactual market. Accordingly, we conclude that the challenged economic transaction is likely to have anticompetitive effects in the relevant market.

G. Efficiencies

181. We are unable to identify any cognisable efficiency arising from the challenged conduct.

H. Exiting Assets

182. There is no evidence that any assets would leave the market but for the challenged economic transaction.

I. Remedies

183. If the NMIA divestment process results in an entity having cross-membership in the consortia which operate the NMIA and SIA, without more, then the divestment is likely to lead to a substantially lessening of competition in the supply of airport services in Jamaica. Further, no efficiencies were found that could offset the anticompetitive effects.

184. Based on analyses described earlier in this report, the FTC's primary concern is that the cross-member in the consortia operating SIA and NMIA will have adequate opportunity to coordinate on a sustained basis, the operations of both airports to the detriment of consumers of airport services (air passengers, airlines, concessionaires, etc.) in Jamaica.

185. Arising from findings described in this Report and a review of the draft Concession Agreement, the FTC recommends behavioral remedies in the event that the entity which is a member of the consortium which operates SIA, is successful in its bid to undertake the management of the NMIA.

186. These remedies comprise provisions to be included in the Concession Agreement expressly recognizing the jurisdiction of the Fair Trading Commission (FTC) and allowing the FTC to closely monitor strategies implemented by the consortia operating NMIA; this includes the entering into of subcontracts or amendments thereto. The provisions are described in greater detail in the Appendix to this report.

V. CONCLUSION

187. The Staff concludes that, without more, regarding the divestment of the operations of the NMIA, there is consumer harm or the likelihood of consumer harm as demonstrated by an economic analysis conducted, that is sufficient for the determination of a breach of section 17 of the FCA assuming in the case of section 17 that there is an agreement with provisions likely to lead to anticompetitive effects, or the establishment of dominance and the existence of provisions in an agreement, or possible conduct, that provide incentives and opportunities to engage in anticompetitive conduct.

188. The FTC, however, has proposed remedial measures which could be taken to mitigate, if not avert, the likelihood of the anticipated anticompetitive effects.

189. We conclude, therefore, that if the remedies are adopted, the challenged economic transaction is unlikely to result in a substantial lessening of competition.

APPENDIX: Proposed Revisions to the Concessionaire Agreement

Clause	Proposed Amendment	Justification
1.1 – Applicable Laws	under "Applicable Laws" and after the word "Agreements" in the last line add the words *"and the Fair Competition Act and any regulations thereunder"*	Where the Agreement mandates compliance with "Applicable Laws" the inclusion of the FCA in the definition of that term will ensure that the Concessionaire as well as other interested stakeholders will pay due attention to competition law as a relevant body of regulations.
22.2(b) – Permitted Subcontracting	after the words "Contracting Standards" in the last line add the words *"and the Fair Competition Act and any regulations thereunder"*	This will promote competition considerations in the subcontracting process which can be beneficial in terms of efficiency and transparency especially in the procurement of goods and services.
22.2(e) - Permitted Subcontracting	after the word "Owner" in the second line add *"and the Fair Trading Commission"*	This will address any competition concerns which may arise from vertical integration where subcontracting is done with a Connected Person as defined under the Agreement.
22.2 - Permitted Subcontracting	after 22.2(e) add a new 22.2(f) which reads: *"before signing or otherwise concluding any subcontract of a value of at least US$5,000,000 or amendment thereto, the Concessionaire shall provide the Fair Trading Commission with reasonable advance notice of the proposed subcontract or amendment thereto together with a copy of same."* After the new 22.2 (f), insert a new 22.2(g) which reads "*The Concessionaire shall take into account any recommendation or directive of the Fair Trading Commission (in accordance with*	This behavioural remedy will ensure that the Fair Trading Commission is in a position to monitor the Concessionaire's relationship with firms in the various downstream markets attendant to the market for airport services.

Clause	Proposed Amendment	Justification
	the Fair Competition Act) regarding the entering into of any subcontracts of a value of at least US$5,000,000, or amendments thereto."	
23.2 – Human Capital Management Plan	after 23.2.1 add a new 23.2.2. which reads: *"the Human Capital Management Plan shall not permit, as far as commercially reasonable, any cross subsidization of the cost of services in the employment or engagement of employees who are otherwise employed or engaged at Sangster International Airport."* renumber the existing 23.2.2 as 23.2.3	Where both SIA and NMIA Concessionaires share a common member, this amendment will help to address some competition concerns about the potential for coordinated conduct while promoting independence of decision-making, at least at the level of management.
41.1 – Concessionaire Events of Default	after paragraph (m) add a new paragraph (n) which reads: *"the Concessionaire breaches any provision of the Fair Competition Act, any regulation under the Fair Competition Act or fails to comply with any direction of the Fair Trading Commission made pursuant to any provision of the Fair Competition Act."*	This will ensure compliance with the Fair Competition Act, which will at least maintain competition as it exists in the market for airport services, which is of particular importance under a scenario where both SIA and NMIA Concessionaires share a common member.
45.1 – Retendering of Concession	after the word "Business" in the last line add the words *"such retendering to comply with the Fair Competition Act and any regulations thereunder"*	This will ensure that going forward the tender process for the NMIA Concession will be sensitive to competition law implications.