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## STAFF REPORT

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Acquisition of Post to Post Betting Limited by Supreme Ventures Limited

November 6, 2019

Case Number: 8102-19

**FAIR TRADING COMMISSION**

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## **I. INTRODUCTION**

1. On May 8, 2019, The Gleaner published an article entitled “Supreme Ventures Acquires Sports Betting Rival Any Bet.” This article provided the catalyst for the initiation of an investigation on May 15, 2019 by the Fair Trading Commission (FTC), to assess the transaction being undertaken by the parties. The FTC is empowered by section 5 of the Fair Competition Act, 1993 (FCA) to investigate on its own initiative conduct of business in Jamaica in order to determine whether any enterprise is engaging in business practices in contravention to the Act.
2. Supreme Ventures Limited (SVL), which is a company incorporated in Jamaica, operates in the betting, gaming and lottery industry. Through its wholly owned subsidiary Supreme Ventures Racing and Entertainment Limited (SVREL), SVL promotes horseracing and provides betting services on local and simulcast horseracing. SVL also provides lottery games and slot machine gaming service as well as betting services on virtual games and sports events. SVL provides betting services on sports events under the trading name “JustBet.” Similarly, PosttoPost Betting Limited (PTP), a company incorporated in Jamaica and trades as “AnyBet”, operates within the betting, gaming and lottery industry; and provides services such as betting on virtual games, sports events, local and simulcast horseracing and dog racing. Also provided is slot machine gaming service.
3. The two parties are major players in the same industry. For the period 2018-2019, SVL had a 77.46 per cent share of bets placed on local horseracing. PTP is the major player in accepting bets on sports events. For the period 2018-2019, its sales amounted to 55.3 per cent. To provide betting services on local horseracing, PTP obtains video feed and odds from SVL.
4. By way of a Share and Purchase Agreement and a Shareholder’s Agreement, SVL acquired the majority shareholdings in PTP with the purchase of 51 per cent of the shares in PTP. These Agreements are examined based on the well established principle that where one firm acquires another firm that produces or sells in an identical or similar product in the same geographic area, the transaction may eliminate competition between the firms and in circumstances, is likely to create anticompetitive effects. This is so as the purchase of a competitor increases the likelihood of substantial harm to consumers from coordinated and unilateral effects. Unilateral effects refer to the circumstances created or enhanced by the transaction whereby the acquirer is able to exercise market power independently. The transaction may also change the structure of the industry so as to create or

enhance the ability of the remaining firms to act in a coordinated way on some competitive dimension. This is described as coordinated effects.

5. Regardless of the manner in which market power may manifest, transactions are assessed based on their impact on consumers. Harm to consumers may take the form of higher prices, lower product quality, slower rates of technological innovation or adoption, lower quality service and fewer varieties or choices.
6. An agreement should not be permitted to create, enhance or entrench market power or to facilitate its exercise. In this regard, Part III of the FCA which speaks to the Control of Uncompetitive Practice becomes applicable under section 17, in particular, which apply to agreements which have as their purpose or effect the substantial lessening of competition. Accordingly, the purpose of this assessment is to evaluate whether the transaction between the SVL and PTP will result in anticompetitive effects in the relevant market(s).

## II. LEGAL ANALYSIS

7. The Staff seeks to determine whether SVL's acquisition of the majority shareholding in PosttoPost Betting Limited, as contained in a Share Sale and Purchase Agreement and the Shareholder's Agreement (the Agreements), contravenes the Fair Competition Act, 1993 (FCA). The FCA stipulates that an agreement which has as its purpose or effect the substantial lessening of competition in a market or is likely to have such is effect is void. However, the FCA allows for exemptions as it empowers the FTC to provide authorizations to such agreements in certain circumstances, particularly where the likely benefits from the transactions exceeds the public interests harm.
8. Section 17 of the FCA is an applicable provision of the FCA under which the Agreements are examined. Section 17 states 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 of 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 other resulting benefit;

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

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

9. The jurisdiction of the FTC to examine any sector where there was the existence or the likelihood of anticompetitive practices occurring was clearly enunciated in the **Fair Trading Commission v Digicel Jamaica Limited and another**.<sup>1</sup> The Privy Council held that:
10. “The provisions of Part III of the Fair Competition Act are in wholly general terms. The Commission is empowered to investigate whether ‘any enterprise’ is engaging in business practices contravening the Act. The contraventions in question include giving effect to any agreement with an anti-competitive purpose or effect in “a market.” And sections 19 and 20 apply to firms operating or distorting competition in any market. 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.”<sup>2</sup>
11. This decision by the Privy Council clearly demonstrates that the FTC is not precluded from examining the betting, gaming and lotteries industry within which the Agreements fall. This is particularly so, as the legislation governing the sector, the Betting, Gaming and Lotteries Act (BGLA), does not prohibit or displace the jurisdiction of the FTC to investigate anticompetitive activities within the sector.
12. The Privy Council further reasoned that:

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<sup>1</sup> [2017] UKPC 28.

<sup>2</sup> Ibid at 12.

13. “[Section 17] applies to any agreement falling within the definition in subsection (1). That means any agreement containing provisions having as their purpose or likely effect the substantial lessening of competition in the relevant market. Subsection (2) gives examples of such provisions, all of which are indeed concerned with concentration between distinct firms pursuant to the provision in question. But subsection (2) is not exhaustive. It is expressed to be without prejudice to the generality of subsection (1), because the reduction in the number of significant competitors in a market is self-evidently likely to have the effect of lessening competition. It follows that even if this result was not intended, it is the subject to the prohibition in subsection (3), unless authorized by the Commission under subsection (4).”<sup>3</sup>
14. Based on the foregoing, the presumption is that the ability of the FTC to examine all markets unless there is an expressed exclusion or exemption stating otherwise.
15. It is contended that for an action to be successful under this section, the following must be proved:
- i) The existence of an agreement;
  - ii) The terms and conditions of the said agreement must have
    - (a) the purpose of substantially lessening competition in a market; or
    - (b) the effect of substantially lessening competition in a market or
    - (c) the likely effect of substantially lessening competition in a market.
  - iii) The absence of authorization under section 29 or any of the efficiency justification enunciated in section 17(3).
16. Accordingly, an assessment based on section 17 involves determining whether the agreement has as its purpose, effect or likely effect, the substantial lessening of competition. Each of these limbs is disjunctive. Arguably, the purpose limb captures agreements that the effect and likely effect limbs would not capture and vice versa.
17. The interpretation of section 17 involves a reliance on jurisprudence of other jurisdictions whose provisions are largely similar to the FCA. This is so as the definitions of key words and terms are not laid down in the FCA. In this regard, the FCA relies on jurisprudence from the Courts of Australia, New Zealand and the European Court of Justice. In respect of the latter, this reliance has been endorsed by the Privy Council in the **Fair Trading Commission v Digicel Jamaica Limited and another**.<sup>4</sup>

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<sup>3</sup> Ibid at 26.

<sup>4</sup> [2017] UKPC 28.

18. The word 'purpose' is not defined by the FCA and as a result, Article 101 of the Treaty on the Functioning of the European Union (TFEU) which is similar in terms to section 17 of the FCA is examined to provide guidance in interpreting and applying the section.
19. Article 101 TFEU prohibits any agreement, concerted practice or decisions of undertakings that has as its object, or effect the prevention, restriction or distortion of competition within the internal market. Once it has been established that the object of an agreement is to restrict competition, it is irrelevant, for the purposes of determining whether an infringement of Article 101 has occurred, whether the agreement in question actually had an anti-competitive effect in the marketplace. In other words, for the purpose of applying Article 101(1) TFEU, no actual anti-competitive effects need to be demonstrated where the agreement constitutes a restriction of competition by object.<sup>5</sup>
20. The ECJ in **Consten and Grundig v Commission**<sup>6</sup> ruled that for the purpose of the application of article 85(1) (now Article 101) there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of competition. Accordingly, where it is determined that an agreement by its very nature is anticompetitive and it is apparent that the object is to prevent, restrict or distort competition then, it would be unnecessary to consider the actual effects of the Agreement.<sup>7</sup>
21. Australasian decisions have also provided instructive guidance in defining 'purpose' in anticompetitive considerations. In **News Limited v South Sidney District Rugby League Football Club Ltd**<sup>8</sup>, Glesson CJ defined purpose as the end sought to be accomplished by the conduct. This definition has been adopted and applied in several cases. In **Seven Network Limited v News Ltd**<sup>9</sup>, for example the Full Federal Court observed that: "The purpose will be identified by examining the end sought to be accomplished by the provision."<sup>10</sup>
22. In the New Zealand case of **Union Shipping NZ Limited v Port Nelson Limited**<sup>11</sup>, the High Court examined the meaning of purpose within the context of section 27 of the Commerce Act, which states that it is illegal to "enter into a contract or arrangement, or arrive at an understanding, containing a

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<sup>5</sup> Peter Alexiadis & Pablo Figueroa, *Mixed Messages in the "By Object" vs "By Effects" Saga: The Enigma of Lundbeck*, February 2018. Retrieved from [https://www.competitionpolicyinternational.com/mixed-messages-in-the-by-object-vs-by-effects-saga-the-enigma-of-lundbeck/#\\_ftn2](https://www.competitionpolicyinternational.com/mixed-messages-in-the-by-object-vs-by-effects-saga-the-enigma-of-lundbeck/#_ftn2)

<sup>6</sup> Cases 56 and 58/64, *Consten and Grundig v Commission*, 1966 ECR 301.

<sup>7</sup> Case 85/45 *VDS v Commission*, [1987] ECR 405.

<sup>8</sup> (2003) 215 CLR 563.

<sup>9</sup> [2009] FCAFC 166.

<sup>10</sup> *Ibid* at [852].

<sup>11</sup> [1990] 2 NZLR 662.



provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.” The Court made the following pronouncement:

“The word is not merely “intention”. Intention to do an act, which is known will have anticompetitive consequences, in itself is not enough. “Purpose” implies object or aim. The requirement is that “the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences.”<sup>12</sup>

23. An agreement that does not have as its purpose the substantial lessening of competition must be examined to determine if its effects is likely to lessen competition substantially in a market. Effect on competition is determined by an economic analysis of the relevant product and geographic market and which considers whether the access to the relevant market is impeded and, where it is, whether the subject agreement has contributed to that foreclosure effect.<sup>13</sup> It is also of significance, in determining the effect of an agreement to examine the actual context in which competition would occur in the absence of the agreement.<sup>14</sup>
24. In circumstances, where the assessment of the agreement involves determining whether it is likely to substantially lessen competition, it is stated that the word ‘likely’ has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration.<sup>15</sup>
25. The FCA also does not define the meaning of “substantially lessen competition”. Nonetheless, an examination of Australian decisions assists in providing guidance in regard to this standard. The Trade Practices Act, 1974 (repealed, now the Competition and Consumer Act 2010) of Australia utilized the term and the case law involving the statute is instructive. The Federal Court of Australia in **Stirling Harbour Services Pty Ltd v Bunbury Port Authority**<sup>16</sup> Justice French reasoned that to determine whether competition has been substantially lessened “there [must] be a purpose, effect or likely effect of the impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process.”
26. On appeal to the Full Court, Justices Burchett and Hely agreed that Justice French applied the correct test in his determination of whether there was a substantial lessening of competition. The Court stated that:

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<sup>12</sup> Ibid at [882].

<sup>13</sup> Case C-234/89, *Delimitis v Henninger Brauer AG* [1991] ECR – I – 935.

<sup>14</sup> *Société Technique Minière Maschinenbau Ulm* [1996] ECR 235.

<sup>15</sup> *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA at [41].

<sup>16</sup> [2000] FCA 38.

“Conduct has the effect of lessening competition in a market only if it involves a reduction in the level of competition which would have otherwise have existed in that market but for the conduct in question.”<sup>17</sup>

27. In the **Australian Gas Light Company v ACCC**<sup>18</sup> which utilized the test of substantially lessen competition test, the Court examined a number of previous decisions and agreed that “in determining whether it could be said that there is likely to be a substantial lessening of competition in a market it is necessary to consider the future state of the relevant market with and without the proposed acquisition.”<sup>19</sup>
28. Accordingly, an evaluation of whether an agreement has the effect or likely effect of substantially lessening competition involves an analysis of the pro and anticompetitive effects. The Courts will decide on balance whether the ultimate or net effect is to lessen competition substantially. In so doing, the anticompetitive effect is analyzed by comparing the market with and without the provision in the agreement. This is called “counterfactual analysis”. Courts consider the future state of competition in the relevant market with and without the challenged provision in the agreement.<sup>20</sup>
29. It is therefore contended that the Staff in conducting its assessment has taken into account that the substantially lessening of competition test lies predominantly on the impact of the Agreements on existing competitive constraints and on measuring market power post transaction. Further, it involves an assessment of the ability of the firm to profitably divert price, quality, variety, service, innovation or any other aspect of the competitive process or its performance outcomes from their competitive levels for a significant period.
30. Where an agreement is found to contravene section 17, it is not enforceable and shall be deemed void. This is so unless, it falls within the efficiency justification stipulated in section 17(4). There are as follows:
  - (a) [The agreement] contributes to:
    - (i) the improvement of production or distribution of goods and services; or
    - (ii) the promotion of technical or economic progress,

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<sup>17</sup> [2000] FCA 1381 at 66.

<sup>18</sup> (No. 3) [2003] FCA 1525.

<sup>19</sup> *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259; *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) 44 ALR 667 at 669-70.

<sup>20</sup> Paul G. Scott, “The Purpose of Lessening Competition: The Divergence of New Zealand and Australian Law” (2011) 19 Waikato Law Review, 168.

while allowing consumers a fair share of the resulting benefit;

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

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

31. Accordingly, in determining whether an agreement substantially lessens competition, an overall competitive assessment is conducted, in which various factors are taken into account, among them the efficiency justifications stated in section 17(3).
32. The FCA provides the medium whereby any person who proposes to enter into or carry out an agreement or to engage in a business practice which in the opinion of that person is an agreement or practice affected or prohibited by the Act may apply to the FTC for an authorization.<sup>21</sup> In regard to the Agreements, the FTC has no records have obtaining a request for authorization from the parties. However, it is noted in the Share Sale and Purchase Agreement, particularly clauses 2.5 through to 2.8 the parties acknowledged that final transfer of sums is based on obtaining regulatory approval from the FTC.
33. An overall examination of the Agreements was conducted to determine whether they had an anticompetitive purpose. It was observed that both Agreements contained non-compete provisions, specifically clause 5 of the Share Sale and Purchase Agreement and clause 9 of the Shareholder's Agreement. The content of the provisions are identical in substance and states "...for a period of 24 months thereafter either alone or jointly with or as manager, agent, consultant or employee of any person, firm or company:
  - (a) directly or indirectly carry on or be engaged in any activity or business in Jamaica which shall be in competition to the Restrained Business;
  - (b) at any time after completion date disclose any Confidential Information (as defined in clause 10) to any person or use it for any purpose;
  - (c) directly or indirectly enter into any commercial arrangement with any customers, agents, suppliers or advisers in respect of a business similar to, or competitive with, the Restrained Business;
  - (d) directly or indirectly cause or encourage any of the suppliers or advisers of the Restrained Business to cease or restrict or reduce their suppliers, services or advice;

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<sup>21</sup> Section 29.

- (e) at any time after the Completion carry on business or trade under any name, style, logo, set-up or image which is or had been used in respect of the Restrained Business or which is calculated to cause confusion with such a name, style, logo, get-up or image or infer a connection with the Restrained Business; and/or
- (f) directly or indirectly solicit, canvass or entice away (or endeavour to solicit, canvass or entice away) any employee from the Restrained Business”.
34. The purpose of these provisions is to prevent competition with SVL for a period of 24 months. Arguably, non-compete provisions are not listed in exhaustive detail in section 17 of the FCA, however, as stated previously, the ruling of the Privy Council in the **Fair Trading Commission v. Digicel and Another** establishes that the FTC has the authority to investigate a wide range of conduct, once it raises anticompetitive concerns.
35. In this regard, the Staff examined the non-compete provisions surrounding this economic transaction within the parameters of business transfers and the circumstances under which such provisions may be deemed anticompetitive. Arguably, it has been recognized that it may be necessary in certain cases to incorporate safeguards within an Agreement to preserve the transferred worth of the undertaking and ensure the effective performance of an agreement. These may take the form of contractual non-compete provisions, where not only the material assets are transferred but also, the goodwill of the business, for example.
36. The case of **Remia BV & Others v Commission**<sup>22</sup> concerned whether a non-compete clause inserted into two sale and purchase agreements regarding two businesses provided such restriction as necessary for the successful transfer of the businesses. Both agreements included non-compete clauses to protect the purchasers from the competition from the vendor for a period of ten and five years respectively, in the Netherlands. The ECJ agreed with the European Commission’s ruling that the clauses restricted competition within the meaning of Article 85(1) because of their duration and scope. The ECJ whilst recognizing that non-compete clauses could promote competition by enabling new undertakings to enter the market, because there are instances where agreements could not have been implemented without these restrictions. However, in order to have a beneficial effect on competition, a non-compete clause besides being necessary, must also be strictly limited to that purpose when it comes to its duration and scope.<sup>23</sup>

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<sup>22</sup> Case 42/84, *Remia and Others v Commission* [1985] ECR 2545.

<sup>23</sup> *Ibid.*

37. Accordingly, the European Commission established the principle that a non-compete clause may not be held to be anticompetitive where it is necessary to the main transaction. Importantly, a restriction cannot be considered merely because it made the main agreement more commercially beneficial for the parties.<sup>24</sup> Notably, the preservation of the goodwill of the business as at the date of transfer through limiting the risk of competition from the vendor has been considered as being necessary. It has also been determined that the non-compete clause duration and scope must be limited to what is objectively necessary for the purchaser to assume, by active competitive behaviour, the place in the market previously occupied by the competitor.
38. It has become generally understood that in principle non-compete clauses are usually necessary in the context of business transfers. The issue then becomes whether or not in a given case the clause in question is proportionate to the aim of implementing the transaction. The assessment of proportionality involves evaluating the scope of the clause with regard to its duration, subject matter and geographical field of application to determine whether or not it exceeds what the implementation of the transaction reasonably requires.<sup>25</sup>
39. Subsequent to the Remia decision, there has been the development and refinement of the analysis of proportionality in a number of its decisions on non-compete clauses in business transfers by the European Commission. In the circumstances, these decisions can offer the Staff guidance in assessing the proportionality of clauses 5 and 9 of the Agreements herein.
40. It is observed that the prohibitions will subsist for 24 months or 2 years. The question is whether or not this is a reasonable time period. The Staff considers to be applicable the guidance from the European Commission in Reuter/BASF where it indicates that the protection offered to the transferee by the non-compete clause "...must be limited to the period required by an active competitive purchaser for him to take over undiminished the undertaking's market position such as it was at the time of transfer."<sup>26</sup>
41. In a number of decisions in this field the European Commission has consistently taken the view that a 2-year non-compete clause is justifiable in a transfer involving the goodwill of the business. For example, in KNP BT/Bunzl/Wilhelm Seiler the European Commission observed that:

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<sup>24</sup> Case T-112/99 *Metropole television (M6) and Others v Commission*, EU:T:2001:101. PARA 109.

<sup>25</sup> Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) at para 13.

<sup>26</sup> *Reuter/BASF* Commission Decision No. 76/743/EEC, O.J. L 254/40 (1976).

"Contractual prohibitions on competition which are imposed on the vendor in the context of a concentration achieved by the transfer of an undertaking are acceptable if they do not exceed the period of two years in the case of a transfer of goodwill..."<sup>27</sup>

42. In light of those decisions, which reflect the European Commission's experience in determining issues of this nature, the Staff concludes that the 2-year duration of the prohibition in clauses 5 and 9 is not excessive.
43. The noncompetition provision in both Agreements specifically limits their geographic scope to Jamaica, which is the area where the vendor had established its operations before the transfer. In this regard, this occurrence is tandem with guiding principle garnered from the European Commission decisions is that it should be limited "...to the area where the vendor had established the products and services before the transfer."<sup>28</sup>
44. It is therefore contended that neither the Agreements nor any of its provisions has any purpose to substantially lessen competition. The Staff, therefore, now considers whether the subject Agreements have the effect or likely effect of substantially lessening competition in the relevant market.

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<sup>27</sup> *KNP BT/Bunzl/Wilhelm Seiler* Case No IV/M.884.

<sup>28</sup> *KNP BT/Bunzl/Wilhelm Seiler* Case No IV/M.884.

### **III. ASSESSMENT OF COMPETITIVE EFFECTS**

45. Agreements, including mergers and acquisitions, that have the effect or likely effect of substantial lessening of competition in a market are prohibited under s17 of the FCA. Agreements between competitors can lessen competition and harm consumers (i) by allowing one of the parties to the transaction to raise prices profitably on its own, through the creation or enhancement of market power: Unilateral Effect; or (ii) by creating or enhancing the ability of the remaining firms to act in a coordinated way: Coordinated Effect. In both effects, consumers may be harmed through higher prices, reduction in choices or lower quality services as a result of the transaction.
46. An assessment of the effect of the transaction between SVL and PTP is therefore required to determine its effect on competition. Essential to this assessment is the definition of the relevant market(s) within which SVL and PTP operate.

#### **A. RELEVANT MARKET**

47. The relevant market is the smallest group of products which compete with one another within a geographic area. Firms in the relevant market offer the most immediate and direct competition to those being investigated. Market definition sets the stage on which competition takes place and is important because only after the scope of the market has been defined can market shares, of each market participant, be calculated and market power assessed. Two components of the relevant market are the product market and the geographic market. In essence, the relevant market for economic analysis is defined as a product (or group of products), a geographic region and time dimension in which the product is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, could profitably raise prices above the competitive level.

#### **Relevant Product Market**

48. The relevant product market defines the product boundaries within which competition meaningfully exists and includes only those products that are reasonably interchangeable by consumers for the same purpose. The product market is therefore taken to comprise all those products which are regarded by consumers as reasonable substitute by reason of the products' characteristics, their prices and intended use. The definition of the relevant product market necessarily starts with the products of the merging firms.

49. SVL is a promoter of local horseracing and provides bookmaking services for local and simulcast horseracing, betting services on sports events and virtual games, slot machine gaming services (SMG) and lottery services.<sup>29,30,31,32</sup> PTP offers betting services on local and simulcast horseracing, sports events and virtual games.<sup>33</sup> PTP also provides SMG services.
50. Since both parties offer slot machine gaming services and betting services on sports events and virtual games and betting service on local and simulcast horseracing, these services will be the focus of this assessment to determine the relevant product market(s).

### **Slot machine gaming service**

51. Slot machine gaming generally speaks to gaming using machines found in lounges, bars, hotels, and other similar locations. These machines can be categorised as either locally made gaming machines, which are typically found in bars and non-locally made gaming machines, which are found in established gaming lounge or non-gaming lounge locations.<sup>34</sup> SVL and PTP both operate locally made slot machine games. SVL has one gaming lounge but PTP has none. They both have non-gaming lounges. Slot machines have varying payout percentages, which range from 75 per cent to approximately 98 per cent. Payout percentages vary depending on the slot machine game and the owner/operator. The minimum required percentage payout set by the BGLC is 75 per cent. It is likely that punters, generally, would see slot machine games provided by SVL and PTP to be substitutable, given that the games provided are the same and they have the guarantee of the minimum payout percentage. Given that consumers would find betting services with respect to slot machines of SVL and PTP to be substitutes, betting services on slot machines forms a relevant product market.

### **Betting services on virtual games and sports events**

52. Betting services is the taking of bets and paying out of winnings. In the gaming industry, virtual games can be described as the use of software simulations of games for the purpose of betting. Racing and

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<sup>29</sup> Horseracing is defined as a sport in which horses and their riders take part in races, either on a flat course or over hurdles or fences, typically with substantial betting on the outcome.

<sup>30</sup> Simulcast horse racing is defined as a simultaneous transmission of horseracing across different geographic locations. In this case races overseas are shown and are bet on live in Jamaica.

<sup>31</sup> Slot machine gaming generally speaks to the machines that are used for gaming in lounges, bars etc. These machines are categorised as 1) local gaming machines (found in bars and other locations other than gaming lounges) and 2) other gaming machines, which are found in established gaming lounges and non-gaming lounges.

<sup>32</sup> Lottery is a means of raising money by selling numbered tickets, drawing random numbers and giving prizes to the ticket holders who have matching numbers based on the numbers drawn.

<sup>33</sup> The use of the term betting services relates to the taking of bets and paying out of winnings. To be considered a bookmaker, the company must undertake betting services plus make odds for its gaming options.

<sup>34</sup> A gaming lounge is a location that has over 19 non-locally made gaming machines in operation. Locations with less than 19 non-locally made gaming machines are classified as non-gaming lounges/under-19s.



football are two of the more popular virtual games offered. Virtual games are the gaming industry's solution to plug the demand gap of the limited number of live sports events available for betting at a frequency desired by punters. As such, for the purpose of this assessment betting on virtual games is considered substitutable for live sports betting.

53. SVL and PTP offer betting services on a wide range of sports events which include: National Hockey League, National Football League, National Basketball Association, Premier League Football and Major League Baseball. Similarly, both SVL and PTP offer betting on similar virtual games which include dog racing and football.
54. For punters to consider SVL and PTP offerings as close substitutes, the following must be true: i) punters must consider the rewards from engaging the services of both as being reasonably close and ii) the gaming options offered by both parties should have considerable overlap. Punters can generally place a bet on major sports event internationally with both SVL and PTP. The betting offerings are similar, brands are differentiated through marketing, range and types of bets as well as the range and types of sports events offered. Odds or payouts are determined by the overseas partner of SVL and PTP, who provides a video and odds feed under an exclusive agreement.<sup>35</sup> These odds are referred to as fixed odds.<sup>36</sup> Under the terms of their respective agreements, SVL and PTP are not able to vary or change the odds that are given to them.
55. Given the similarity of the betting services offered by both SVL and PTP and therefore substitutability between the services offered by the two firms, it is concluded that betting service on virtual games and sports events form a relevant product market.

#### **Betting services on local and simulcast horseracing**

56. Horseracing is defined as a sport in which horses and their riders take part in races, either on a flat course or over hurdles or fences, typically with substantial betting on the outcome. Both SVL and PTP provide betting services on local and simulcast horseracing. As with betting services on virtual games and sports events, for punters to consider SVL and PTP offerings on horseracing as close substitutes, punters must consider the betting options and odds or payouts to be substitutable. Punters can generally place a bet on local and simulcast horseracing with both SVL and PTP.

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<sup>35</sup> SVL's Agreement with Intralot S.A. Integrated Systems and Services expires on December 31, 2019. Important to note: as at 2015, Intralot was the single largest owner of SVL with a stake of just under 50 per cent. PTP's Agreement with Sportsbet International does not have a fixed termination date. Either party may terminate the Agreement with 24 month's written notice.

<sup>36</sup> Fixed odds betting margins are set by the overseas partner.

57. For local horseracing, SVL and PTP both offer bets on the same horse races. SVL offers a different range of betting options than that offered by PTP; but they both offer some betting options that are the same. SVL charges a rights fee to PTP as well as to three other firms for using the Tote generated odds as well as for live video feeds.<sup>37</sup> SVL therefore generates the odds whereas PTP accepts the Tote generated odds after betting on a race has closed. The rights fee does not affect the Tote generated odds and payouts to punters.
58. SVL is therefore a supplier of a critical input into the betting service offered by PTP and the three competitors. Accordingly, PTP and the three competitors are also business customers of SVL.
59. For simulcast horseracing the betting offerings differ between SVL and PTP. Similar to betting services on sports events, each entity has an overseas partner that provides a video feed under an exclusive agreement.<sup>38</sup> In addition to the video feed PTP is given its odds from its overseas partner, which it is not able to vary; and which is referred to as fixed odds. SVL generates its own odds through the Tote system.<sup>39</sup> Odds generated by the Tote system are typically different from the fixed odds provided by overseas partners. SVL offers a wider range of betting options than that offered by PTP; but there are some betting options which are offered by both SVL and PTP.
60. Notwithstanding that the range of betting options are different, betting services on horseracing are considered to be substitutable as punters are likely to switch between SVL and PTP if the range of betting options and the odds are to their liking on a particular horserace. Consequently, it is concluded that betting services on local and simulcast horseracing constitute a relevant product market.

#### **Relevant Geographic Market**

61. Having identified the relevant product market(s), it is now important to define the relevant geographic market, which comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently similar. This area is a geographical territory, which can be distinguished from neighbouring areas, in which competition conditions in a relevant market of a product are sufficiently the same for all participants in such

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<sup>37</sup> The 3 competitors are Jamozzie, Capital Betting & Wagering Limited and Ideal Betting Company Ltd.

<sup>38</sup> SVL & PTP obtains video feed for simulcast horseracing under agreements with different overseas entities who offer horseracing from different countries and/or different horseracing promoters. In addition to the video feed PTP also obtains an odds feed under its agreements.

<sup>39</sup> Tote system: wagers made at SVREL authorized agent betting shops (OTBs) are electronically transmitted to the Tote prior to the running of races, with the racing promoter paying its agents a fixed commission on sales. This system sees all punters being paid the same amount according to their bets. Punters accept the Tote generated odds. Additionally, the system is such that bets are pooled, odds are generated and payouts to punters are then made based on Tote generated odds in proportion to their wagers up to the exhaustion of the pool minus the established takeout.

market.<sup>40</sup> For each relevant product markets in which the parties to the transaction participate, the geographic market must be defined.

62. Regarding slot machine gaming service, both SVL and PTP operate in several parishes across the island. The service is offered in gaming lounges and bars. PTP operates non-gaming lounges in five parishes (St. Catherine, St. Andrew, Manchester, St. James and Clarendon). SVL owns and operates one gaming lounge and two non-gaming lounges – one in St. Catherine and the other in St. Andrew. There is no restriction in terms of areas within which either firm may operate.
63. For betting services on virtual games and sports events and betting services on local and simulcast horseracing, both players have an island wide network of locations. Concentrations of these locations in the metropolitan areas of Kingston and St. Andrew and Montego Bay are significantly higher than in other areas. SVL has 91 locations, through which they offer betting services on sports events and 93 Off Track Betting (OTB) parlours, as at October 2019, through which they offer bets on local and simulcast horseracing.<sup>41</sup> PTP has 38 locations, through which they offer betting services on virtual games and sports events as well as local and simulcast horseracing.
64. Noteworthy, there are several suppliers of betting services that have an online presence, which offers betting services on sports events, virtual games and simulcast horseracing. In 2018 SVL launched its mobile and online betting platform, to offer betting on sports events. It had also launched MBet in 2018, its mobile and online betting platform for betting on local and simulcast horseracing.<sup>42</sup> SVL stated that expansion into mobile and online gaming across all its products is critical to its growth strategy. A requirement of using SVL's online betting platform is that punters must first have a National Commercial Bank Quisk account to register for an online betting account. PTP does not have any online facilities to accept bets; all bets must be placed at a physical location.
65. Local punters are also able to place bets internationally through online platforms with suppliers of betting and bookmaking services.<sup>43</sup> However, international suppliers are not registered and are not required to register with the BGLC to provide betting or bookmaking services in Jamaica and they do not promote their services in Jamaica.

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<sup>40</sup> Geographic Market Definition in European Commission Merger Control  
[http://ec.europa.eu/competition/publications/reports/study\\_gmd.pdf](http://ec.europa.eu/competition/publications/reports/study_gmd.pdf) Retrieved August 8, 2019

<sup>41</sup> SVL has a network of authorized agents referred to as Off Track Betting (OTB) parlours. Bets placed at OTBs are directed to the Tote system in real time, and are paid a commission based on sales.

<sup>42</sup> Prior to the switch to AMTOTE for its Tote system, SVL used another mobile and online betting platform for punters to place bets into its Tote system.

<sup>43</sup> Access is available to suppliers such as Betfred, Bet365, William Hill, Ladbrokes.

66. Based on the foregoing it is concluded that the relevant geographic market for all betting services is Jamaica.

#### **B. FIRMS IN THE RELEVANT MARKETS**

##### **Market for slot machine gaming service**

67. BGLC reports that, as at March 2018, inclusive of SVL and PTP, there were 16 non-gaming lounge operators that operate a total of 464 slot machines in Jamaica; as well as 12 gaming lounge operators that operate a total of 1,999 slot machines.
68. The payout rates among gaming lounge operators has been consistently above 90 per cent for the financial years 2014-2015 and 2015-2016 and in some instances, payouts went as high as 96 per cent.<sup>44</sup> Similarly, for non-gaming lounge the payout ranged from 91-94 per cent during the same period. The required minimum payout set by the BGLC is 75 per cent.

#### **IV. OVERVIEW OF MARKET FOR BETTING SERVICE ON VIRTUAL GAMES AND SPORTS EVENTS AND HORSERACING**

69. There are eight companies in Jamaica registered to provide betting and bookmaking services. Two companies are not currently operational. The remaining six suppliers are as follows:

<b>Table 1. Betting services providers (BSPs)</b>		
<b>Suppliers</b>	<b>Betting services</b>	<b>Number of Locations</b>
SVL	horseracing, sports events and virtual games	163
PTP	horseracing, sports events and virtual games	38
Jamozzie	horseracing, sports events and virtual games	3
Capital Betting and Wagering	horseracing	13
Ideal Betting Company Limited	horseracing	12
Island Bet	Sports events and virtual games	3

<sup>44</sup> This according to published reports by BGLC FY2013-2017

### C. MARKET SHARE AND CONCENTRATION

70. The extent to which a firm may face competitive constraints from current rivals is indicated by market concentration. Market concentration level is measured by the Herfindahl-Hirschman Index (HHI) which is based on the distribution of market shares. HHI is calculated by squaring the market share of each firm in a market and then summing the resulting numbers. It ranges between a maximum of 10,000 (where there is only one firm) and a minimum of zero (where there is a large number of equally sized firms). The range of market concentration as measured by the HHI can be classified as follows:
- HHI less than 1,500. Market is considered unconcentrated and transactions resulting in unconcentrated markets are not likely to have adverse competitive effects.
  - HHI between 1,500 and 2,500. Market is considered moderately concentrated.
  - HHI greater than 2,500. Market is considered highly concentrated and transactions that increase the HHI by more than 200 points in highly concentrated markets generally raise competition concerns as they are assumed to enhance market power.<sup>45</sup>
71. Horizontal merger assessment considers both the post-merger concentration and the increase in concentration as a consequence of the transaction.

#### Market for slot machine gaming service

72. The market for slot machine gaming service consists of 28 operators: 16 non-gaming lounge operators and 12 gaming lounge operators.

Table 2. Market shares for sports betting services providers – FY2016		
Providers	Number of non-gaming lounge	Number of gaming lounge
SVL	2	1
PTP	5	0
Others	9	11
TOTAL	16	12

73. Given the size of PTP's gaming machine operations (all locations having under 19 slot machines) and the number of other competitors of a similar size and influence in the market it is unlikely that the actions of any one of the parties to the transaction either collectively or independently could have an appreciable impact on the market. It is notable that SVL's gaming lounge was ranked 7<sup>th</sup> in the top 10 gaming lounge rankings based on sales and 6<sup>th</sup> in declared gross profits for the Financial Year 2016. A

<sup>45</sup> The US Horizontal Merger Guidelines (2010)].

signal of the intensity of competition and the lack of market power by SVL in the market is that, in 2015, it closed two locations. Given the unlikelihood of market power before or after the transaction, there is no need to consider the competitive effect of the transaction on this market.<sup>46</sup>

### **Market for betting services on virtual games and sports events**

74. The pre-transaction and post-transaction market shares, measured by sales from betting services on sports events are given in Table 3.<sup>47</sup> (There was insufficient data available for virtual games from the BSPs to conduct a similar analysis). The HHI, pre-transaction, is 3,646 points for FY2016, which indicates a highly concentrated market. Post-transaction, the concentration of the betting services market for FY2018 increased to 7,581 points, which represents an increase by 3,935 points.
75. Given the post-transaction concentration of 7,581 points and the accompanying 3,935-point increase, the transaction is likely to raise competition concerns and therefore warrants further consideration.

<b>Table 3. Market shares for betting services on sports events – FY2018</b>	
Betting Services Provider	Market Share
<b>Pre-Transaction</b>	
SVL	✂✂✂✂
Post to Post	✂✂✂✂
Island Bet	✂✂✂✂
Jamozzie	✂✂✂✂
<b>HHI</b>	<b>4,127</b>
<b>Post-Transaction</b>	
SVL + Post to Post	✂✂✂✂
Island Bet	✂✂✂✂
Jamozzie	✂✂✂✂
<b>HHI</b>	<b>7,581</b>

<sup>46</sup> Market power refers to the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition. It is a position equivalent to dominance under competition law. There is no universally accepted definition of dominance, however a firm is generally considered to be dominant based on its market share. Under competition law, holding a position of dominance is not penalized; only abuses of dominance are deemed unlawful. Price effects includes all other manifestations of the exercise of market power such as reduction of output, lowering of quality, variety or innovation.

<sup>47</sup> A market share of 50 per cent is given as a threshold for a firm to be considered dominant, but this may vary depending on the particular facts. (a) It must be proven that a firm abuses its dominant position – that is, “impedes the maintenance or development of effective competition in a market”. (b) It must be proven that the abusive conduct “has had, is having or is likely to have the effect of substantially lessening competition in a market”. It is noteworthy that intent is not a factor to be considered in assessing the impact on competition. For the purpose of this report, premerger market shares represent the market shares that each firm would control absent the merger and post-merger market share represents the market shares that would prevail in the event the merger was consummated.

### Market for betting services on local and simulcast horseracing

76. The pre-transaction and post-transaction market shares, measured by sales from betting services on local and simulcast horseracing are given in Table 4.<sup>48</sup> The HHI, pre-transaction, is 4,127 points for FY2018, which indicates a highly concentrated market. This increased significantly post-merger, with the HHI moving to 7,581 points, which represents a 3,454-point increase.
77. Given the post-transaction concentration of 7,581 points, the transaction is likely to raise competition concerns and therefore warrants further consideration.

Table 4. Market shares of local and simulcast horseracing services providers – FY2018		
Betting Services Provider		Market Share
Pre-Transaction		
pSVL		✂✂✂
Post to Post		✂✂✂
OCapital Betting		✂✂✂
s Ideal Betting		✂✂✂
Island Bet		✂✂✂
t Jamozzie		✂✂✂
	HHI	6,260
Post-Transaction		
t SVL + Post to Post		✂✂✂
r Capital Betting		✂✂✂
r Ideal Betting		✂✂✂
alsland Bet		✂✂✂
n Jamozzie		✂✂✂
	HHI	8,652

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action the parties to the transaction will have a combined market share of approximately 86.53 per cent and 92.90 per cent of the markets for betting services on sports events and horseracing, respectively. The concentration in these markets are also high, 7,581 points and 8,652 points respectively. Both the market share and the concentration levels indicate that SVL has market power and therefore the opportunity to act unilaterally to injure competition in the markets for betting services on sports events and horseracing.

79. Given the level of inequality in the size of the players in the relevant markets, coordinated effects are not of concern as a result of the transaction. The transaction however gives rise to unilateral effects.

### D. ASSESSING UNILATERAL EFFECTS

<sup>48</sup> For the purpose of this report, premerger market shares represent the market shares that each firm would control absent the merger and post-merger market share represents the market shares that would prevail in the event the merger was consummated.

80. Given the increase in concentration and the relative size of the participants in the markets for betting services on sports events and local and simulcast horseracing, the transaction therefore raises concerns relating to unilateral conduct. It is necessary therefore to assess the ability of SVL to exercise market power. The exercise of market power includes increased prices above the pre-transaction level, reduced output, quality or capacity, diminished innovation, or exclusion of competitors from the market.
81. The exercise of market power of a firm is directly related to the strength of the other market participants and the threat of potential entry by other firms. The strength of other players is directly correlated to the share of the market that they control, while the threat of entry is dependent on the ease of entry. In particular, whether entry into the market is likely, timely and sufficient.
82. The transaction is likely to lessen competition in the markets for betting services on virtual games and sports events and betting services on local and simulcast horseracing by giving SVL the opportunity to exercise its market power to the detriment of consumers. However, the extent to which SVL can exercise its market power is constrained by the Shareholders' Agreement which reserves the rights of the minority shareholders, PTP St. Lucia, by preventing any injurious corporate decisions, policies and/or strategies by SVL.<sup>49</sup>
83. It was further observed that, at this time, PTP St. Lucia has been conferred the right to appoint two (2) Directors in circumstances where shareholders shall not appoint less than 5 nominated directors. The removal of a Director is subject to rights stipulated in Clause 7. Additionally, corporate decisions made by the business are subject to the minority shareholder's veto rights stated in Clause 7. This protection extends to pre-emptive rights and the right to first refusal, among others. Accordingly, it appears that the minority shareholders are protected against the broad powers normally vested in majority shareholders and directors. The FTC's concern is the competitive effect on rivals of PTP, post-transaction.

#### **Market for betting services on virtual games and sports events**

84. Betting services on sports events offered by SVL and PTP are considered close substitutes. Punters can therefore obtain these betting services at outlets operated by either SVL or PTP. The odds or payouts are determined by their overseas partners, who provides the respective parties with a video and odds

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<sup>49</sup> Clause 7 of the Shareholders' Agreement stipulates that the parties have agreed that certain decisions falling within the parameters of constitutional documents, capital and business actions requires the written permission of PTP St. Lucia. This veto right subsists so long as PTP St Lucia holds any shares in PTP.



feed. The partners provide fixed odds and therefore neither SVL nor PTP can vary or change those odds. The transaction therefore is unlikely to enhance SVL's ability to unilaterally increase price (reduce odds) as it is not able to change the odds provided by the overseas partner.

85. SVL, now with an interest in PTP, has the incentive to influence the suite of bets that were offered by PTP prior to the transaction as well as influence any sales condition, by reducing the number of options to consumers.<sup>50</sup> Accordingly, the transaction allows SVL and PTP the opportunity to exercise market power in this market.

#### **Betting Service on local and simulcast horseracing**

86. SVL and PTP offer betting services on both overseas (simulcast) and local horseracing. Additionally, SVL is the sole operator and promoter of horseracing locally and utilizes the Tote system to offer a suite of bets and to generate odds on these bets. Through the Tote system SVL takes bets on local horseracing as well as overseas horseracing.<sup>51</sup> PTP and the other three market participants take bets on local horseracing independent of the Tote system but pay a rights fee to SVL for the use of its video feed and odds.<sup>52</sup> Bets on overseas horseracing are facilitated by overseas partners, who provide a video feed and odds for use by each market participant.
87. All bookmakers or BSPs who take bets on simulcast horseracing are required to pay a rights fee to its respective overseas partner for simulcast horseracing.<sup>53</sup> Through their respective overseas partners both SVL and PTP are able to compete for local punters who are desirous of betting on simulcast horseracing. The main differences between SVL and its four competitors, are: (a) the computation of the payouts based on the odds; and (b) the suite of bets offered. SVL channels bets through its Tote system, which limits the amount of payout to that which is collected from all punters, while PTP offers fixed odds with conditional limits on the payouts.<sup>54</sup> The latter appears to be a more attractive option to punters as they are not susceptible to changes in the odds and therefore their rate of return after placing their bets is more certain. The former option is attractive to those who are interested in the

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<sup>50</sup> The suite of bets offered includes "exotic bets." In the betting services on sports events markets these could include "exact scores," "home team to score first," "over and under" for corners, fouls etc.

<sup>51</sup> Bets on overseas horse racing are facilitated by its overseas partner.

<sup>52</sup> Rights fee charged by the local horse racing promoter is a private arrangement/agreement between the promoter and its competitors. However, the same fee is charged to BSPs who use the video and odds feed.

<sup>53</sup> Simulcast horse racing is defined as a simultaneous transmission of the horse racing across different geographic locations. In this case, races overseas are shown live locally.

<sup>54</sup> Conditional limits are predetermined by PTP based on the maximum risks per betting voucher that they are willing to assume, but is not limited to the total amount of bets collected, as is the case with the Tote system. Punters are made aware of the conditional limits.

suite of bets that are offered through the Tote system or the perception that the Tote generated odds will be higher than the fixed odds from PTP and the three other competitors.

88. The risks associated with the fixed odds system are higher as there is a possibility that suppliers of betting services may pay out more than they collect in bets. This is not the case for SVL who do not accept fixed odds but instead determines their odds through the Tote system which limits payout to amounts collected from punters.
89. Subsequent to the transaction, the parties have the incentive to terminate one of the agreements with one of the overseas partners as there would be efficiencies to be attained through a lowering of their costs of operations. Competition is likely to be negatively affected if PTP's agreement with its overseas partner is terminated, since customers of PTP would have fewer options as they would now be directed to either SVL's Tote system or to one of the other three competitors that offer simulcast racing through their respective overseas partners. If PTP's customers bet through the Tote system, the volume of funds that are channelled through the Tote system would increase. Pre-transaction, punters would have found PTP's fixed odds a more attractive option than the Tote-generated odds, albeit the range of bets offered by PTP is different from that of SVL. If as a result of the transaction the option of obtaining fixed odds is no longer available to punters, punters could be diverted to betting through the Tote.
90. SVL's reason for promoting the Tote is two-fold: (1) the Tote is less risky than its fixed odds alternative and (2) it benefits directly from increasing the size of the Tote. Notably, a percentage of all bets channelled through the Tote are retained by SVL: a) to cover its overheads and run its operation, b) to contribute to prize monies paid on the horse races it promotes, c) to pay commission to its sales agents; and d) ultimately towards its profit. This percentage is known as the takeout.
91. Regarding betting on local horseracing, SVL and PTP have a more direct relationship. SVL charges a rights fee to PTP and the three other competitors for use of the Tote generated odds as well as for live video feeds. Without payment of this rights fee suppliers of betting services cannot legally use the SVL's odds. Presently the rights fee charged by SVL to suppliers of betting services is 7.5 per cent of the value of bets sold.
92. PTP's participation in negotiations over the years has been considered as a factor in limiting the magnitude of the increase in the rights fee. Prior to 2011 rights fee stood at 3.5 per cent. In 2010 attempts by the then promoter of horse racing, Caymanas Track Limited (CTL), to increase the rights

fee was curtailed by bookmakers, which included PTP.<sup>55</sup> Arguably, the case demonstrates that Rights Fee Agreements, specifically the increase of fees may become a contentious issue. This is so as these Agreements form the basis on which the suppliers of betting services are permitted to operate within the betting on local horseracing sector. Following negotiations, the rights fee was agreed at 5 per cent. Subsequently, the fee was increased to 7.5 per cent.

93. Section 26 of the BLGA empowers SVL, as the operators of the race track, with the exclusive right to authorize bookmaking activities as well as to determine the payments (rights fee) made to them by rival bookmakers. Arguably, SVL may increase the rights fee to the market participants, thus making their product less attractive to punters. However, the exclusive right ascribed to SVL to determine rights fee is subject to the powers provided to the BGLC, and is stated in section 26(3) of the BGLA. Notably, section 26(3) gives the BGLC the right to intervene and set the rights fee charged by SVL to rival bookmakers.<sup>56</sup>
94. The BGLC contends that the negotiations of the rights fee are a commercial transaction between SVREL and the rival bookmakers. This has been the established practice of the entity as demonstrated in the case of **United Bookmakers Association v Caymanas Track Limited**<sup>57</sup> where it was noted by the Courts that the BGLC's position regarding intervention into disputes regarding rights fee was that it has a practice of refraining from intervening in commercial arrangements. In their letter of October 9<sup>th</sup>, the BGLC indicated that its role is one of an arbiter/mediator where disputes arise which cannot be resolved by the parties.
95. Generally, the BGLC has been authorized to ensure that the industry is regulated and is controlled using best practices. It works in conjunction with relevant parties, stakeholders and entities to achieve this endeavour and to resolve issues that may arise within the industry. It is therefore contended that the BGLC is bound to act where there are disputes between market participants.

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<sup>55</sup> **United Bookmakers Association v Caymanas Track Limited** 2011 HCV 01496. Notably, the members of United Bookmakers Association included Track Price Plus, Markham Betting Company Ltd and Champion Betting Limited later conjoined to PTP Limited.

<sup>56</sup> This has been confirmed by the BGLC by way of letter dated October 9, 2019 to the FTC where it was acknowledged that the BGLC has the power to prescribe the rights fee.

<sup>57</sup> 2011 HCV 01496. The case arose due to CTL increasing the fees surrounding the Agreements for Authority to Receive or Negotiate pursuant to section 26 of the Betting, Gaming and Lotteries Act (Rights Fee Agreements). CTL requested that all BSPs pay a fee of ten percent (10%) which would reflect an increase from 3.5% of sales in 2010 and was to take effect on April 1, 2011. The United Bookmakers Association (UBA), an unincorporated association comprising of Track Price Plus, Markham Betting Limited and Champion Betting Limited, believed that CTL's action constituted an abuse of its dominant position, particularly as CTL had a monopoly in respect of the provision of local horseracing and were the bookmakers' competitors. Further, that the increase would have a significant negative impact on their business. The UBA sought, among other things, a declaration that the action of CTL was an act in excess of the authority conferred by the Betting, Gaming and Lotteries Act. Ultimately, the Court found that CTL's rising of the fees constituted a private right with which the Court could not intervene.

96. Additionally, the Shareholders Agreement limits SVL's ability to lessen competition, to the extent that the parties remain competitors as is described in the Agreement. The Shareholders' Agreement preserves the rights of the minority shareholders, PTP St. Lucia, by preventing any injurious corporate decisions to PTP. Accordingly, the institution of an inequitable Rights Fee Arrangement would negatively affect the operations of PTP.
97. With controlling interest in PTP, and therefore the removal of a significant constraint, SVL now have both the opportunity and the incentive to increase the rights fee, given that the three remaining competitors have a small market share hence limited negotiating power.<sup>58</sup> However, recall that, section 26(3) gives the BGLC the right to intervene and set the rights fee charged by SVL to bookmakers. The BGLC therefore constrains the ability of SVL to unilaterally affect other market participants by requiring the payment of a disproportionate rights fee. The opportunity for a supplier to exercise market power depends on competitive constraints from potential rivals, which are reflected by the conditions of entry. When conditions of entry are easy, the threat of entry by potential rivals is more likely to constrain the exercise of market power on the part of current suppliers even without actual entry taking place, all other things constant.

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<sup>58</sup> An increased rights fee will lower the profitability of the three remaining competitors; and if the rights fee is set at a high rate over a prolonged time period, the three competitors could be removed from the market. There would therefore be no competitor and therefore a reduction in choice of suppliers for punters.

## **V. ENTRY**

98. When assessing whether or not potential rivals pose a competitive constraint to the merged entity, consideration is given to the ease with which new competitors can enter, and the capacity of incumbent firms to expand. Impediments to entry are to be considered when assessing competitive constraints. An impediment refers to factors which would make (i) entry by new competitors difficult; or (ii) expansion by incumbents difficult. Even if a firm is determined to have a persistently large market share, it may be subject to competitive pressure from outside of the market if it is easy to enter the market i.e. impediments are low. Impediments are considered to be low if entry is effective in constraining anticompetitive conduct. Entry is effective if it is likely, sufficient, and timely. Entry is likely when it is profitable to enter, based on pre-entry prices; entry is sufficient when critical inputs are not controlled by existing market participants and entrants have the capacity to accommodate additional demand; and entry is timely when it occurs within two years. In assessing the effectiveness of entry, the Staff examines the extent to which the merged entity faces competitive constraints from (i) current rivals; (ii) potential rivals; or (iii) suppliers and buyers. Entry is deemed to be effective if potential entrants are considered to be a binding competitive constraint.
99. Competition authorities consider entry into the relevant market critical to its competitiveness. The US Horizontal Merger Guidelines (2010) states that “the prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.”
100. Betting services in Jamaica is done either through a local provider or an international provider. The nature of betting services means that capacity is virtually limitless and any number of punters can be accommodated by each BSP once the games and odds interest them. Except for betting on local horse racing, BSPs generally take their odds from a signal broadcaster and therefore their action to influence the odds is limited. These signal broadcasters generally operate on an international level and therefore are not limited by capacity to take bets from punters.
101. Once a BSP is registered as a bookmaker it can offer services in both sports betting and horseracing. Therefore, the analysis covers entry into both relevant markets.

### **Entry must be Timely**

102. Between 2014 and 2018, two firms entered the betting services sector, Island Bet and Jamozzie Jamaica.<sup>59</sup> Island Bet takes bets only on sports events, while Jamozzie takes bets on both sports events and horseracing. Two BSPs exited the market between FY2014 and FY2018: Summit Betting Ltd and Caribbean Turf Service Limited. Summit Betting Ltd was a comparatively smaller operation, operating from one location and only took bets on local horseracing; and exited the market in 2014.<sup>60</sup> Caribbean Turf Service Limited exited even after making gross profits of J\$30 million in 2013 and J\$34 million in 2014. No records of operations were reported for Ideal Betting Company Limited (operates primarily in the betting on horseracing market) for 2013 and 2014, however they re-entered the market in 2015.
103. A bookmaking permit is required to enter and operate as a supplier of betting services in Jamaica. The requirements for applying for a bookmaking license are as follows:
- a permit fee of two hundred thousand dollars (J\$200,000)
  - a business plan
  - proof of a prospective arrangement with an overseas partner, where necessary
  - Certificate of Incorporation
  - certified copies of Bookmaker's Memorandum and Articles of Association
  - Names and addresses of directors and secretary
  - A statement showing authorized capital, the issued capital, the paid-up capital and a list of the shareholders of the company and their relevant information
  - Most recent audited Financial statements, if not available, in house or draft financial statements
  - Profit and loss account and balance sheet.
  - Documentary evidence to substantiate the filing of Income Tax returns for the company and its directors
  - Passing the BGLC's due diligence test on all shareholders/directors associated with the company to determine if they are "fit and proper" based on the guidelines of the BGLA.

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<sup>59</sup> Island Bet had a permit to supply bookmaking services prior to 2015 but only became operational in 2015.

<sup>60</sup> According to information published by the regulator in FY 2013/2014, the firm's sales, payouts and profits were significantly lower than all the eight other BSPs at the time.

104. This process is said to take up to six months but there are instances where it may take longer due to challenges in completing the due diligence process. There has been at least one instance where the process took close to two years to be completed.<sup>61</sup> Prior to granting the permit, the due diligence phase of the exercise is conducted by the BGLC to verify the applicant's integrity, technical competence, financial ability, standard operating procedures, the service providers to be used, whether premises are "fit for purpose," among other stipulations.
105. Even if the prospect of entry does not deter the parties to the transaction from behaving in a way that injures competition, post-merger entry could lessen the impact of any attempts to do so. Rapid entry, which is possible by the two holders of the non-operational permits, could also constrain the behaviour of the parties to the transaction. For this to be the case, potential entrants would have to be sufficiently large enough to make the overall actions by the parties to the transaction that injures competition be unprofitable post entry. Even if this is not the case, new entrants could still limit the harm to competition by the parties to the transaction by counteracting them.
106. Based on the aforementioned, entry is considered to be timely given that even after an extended due diligence period the permit will likely be granted within a two-year period. There is also the fact that two non-operational licensees exist and if the holders of either or both licenses were to be operationalised, this could further increase the number of competitors in a relatively short time period.

#### **Entry must be Likely**

107. Entry is considered to be likely if it would be profitable. In 2014, PTP merged with three of the island's other BSPs: Track Price Plus, Markham Betting and Champion Betting. The reasons for merging, as cited by the owners were: a reduction in administrative costs, increased competitiveness through the sharing of resources and improved ability of the company to offer innovative products to better serve customers.<sup>62</sup>
108. As a whole, sales in the betting services market have been increasing. For example, from 2013 to 2016 the betting services market saw a 363 per cent rise in sports betting revenues. While past results are not a signal of future results, observing the impact of entry in the past on the actions of the incumbent is a useful guide to assess the potential impact of entry. Following the entry of Island Bet and Jamozzie in 2015, the incumbent BSPs in the betting services on sports events market saw their share of the market reduce by 3.4 per cent in the year that the two BSPs entered the market (2015) and this share

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<sup>61</sup> One competitor advised that its license process took approximately two years to be completed.

<sup>62</sup> Michelle Chin, CEO of PTP (2014) Retrieved August 2, 2019 <http://jamaica-gleaner.com/gleaner/20130409/sports/sports1.html>

was further reduced the following year as the new competitors increased their market share to a combined 20.5 per cent.

109. The narrative is similar in horseracing. For the years 2014-2016, all but one BSP, saw an increase in gross profits and sales. Notably, after not operating for two years, Ideal Betting was able to re-enter the betting on horseracing market in 2015 and immediately amassed share of 1.4 per cent which translated into gross profits of over J\$37 million. The following year its share increased to 2.2 per cent and gross profits were over J\$63 million.
110. Accordingly, entry into the betting services market is considered to be likely.

#### **Entry must be Sufficient**

111. The critical inputs for entering the market for accepting bets on sports events and simulcast and local horseracing are the bookmaker's license, the capital and agreements to obtain odds and video feed with either overseas or local partners. The first requirement is under the remit of the BGLC and the second is determined by the BSP's financial wherewithal, evidence of which must be provided when applying for the first. For the markets of betting services on sports events and simulcast horseracing, the third requirement is not controlled by any incumbent, however for local horseracing it is controlled by an incumbent (SVL). The services of several overseas partners are available to potential entrants. BSPs in the markets for betting services on sports events and simulcast horseracing have, in the past, switched between overseas partners.
112. To operate in the markets for betting services on sports events and simulcast horseracing, BSPs partner with overseas partners/signal broadcasters who supply them with odds and video feed. These overseas partners/signal broadcasters generally operate on an international level and therefore are unlikely to limit the capacity of BSPs to take bets from local punters. The concern, however, is would punters be likely to switch between parties to the transaction and other BSPs? If BSPs are not able to attract sufficient punters away from existing market participants the market could be characterised by consumer inertia, which would make entry unlikely.<sup>63</sup> Based on punters response to previous entry, it could be argued that the market is not characterised by consumer inertia. In 2015 when Island Bet and Jamozzie entered the segment of the market for betting services on sports event, at the end of their first year of operation they had a combined market share of 3.4 per cent. The three year period following their entry has seen their combined share of the market growing to 13.47 per cent in FY2018,

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<sup>63</sup> Consumer inertia is the tendency for consumers not to switch suppliers even when a superior product exists.



peaking at 20.5 per cent in FY2016. Over the same period, the parties to the transaction experienced a combined decline in their market share of 10.1 per cent.

113. Total sales of betting on sports events over the period 2015 to 2018 grew by 219 per cent with SVL sales increasing by 108 per cent and PTP sales increasing by 135 per cent; with Island Bet and Jamozzie growing sales by 565 percent and 1,464 per cent, respectively. Admittedly, this growth in total sales could be a result of new customers coming into the market and not necessarily punters switching between BSPs. The possibility does however exist that punters may find rival bookmakers' offering more attractive than that of the parties to the transaction. Given these two distinct possibilities the Staff cannot decisively state based on the data, that entry is sufficient in the market for betting services on sports events.
114. In the market for betting on simulcast horseracing there are a number of overseas partners/signal broadcasters. In 2015, Ideal Betting and Jamozzie entered the market for betting on horseracing and at the end of their first year of operation they had combined market share of 1.4 per cent. At the end of their second year of operation, 2016, they had a combined market share of 2.2 per cent, this grew to its peak of 4.58 per cent in 2018. Over the same period, the parties to the transaction experienced a combined decline in their market share of approximately 5.1 per cent. Consequently, entry into the market for betting on simulcast horseracing is sufficient as competitors SVL and PTP were able to enter the market and gain market share at the expense of the parties to the transaction. Additionally, the SVL and PTP have no control over the rival bookmaker's relationship with their overseas partners.
115. In the market for betting on local horse racing, SVL controls the critical input of video and odds feed. Post-transaction, SVL would have the incentive to exercise its market power. The opportunity to do so however would be constrained by the BGLC who is empowered to settle any complaints that rival bookmakers may have regarding SVL exercising its market power in this regard. Entry into the market for betting on local horse racing is therefore considered to be sufficient.
116. Entry is considered to be timely and likely in the three market segments: betting services on sports events, simulcast horseracing and local horseracing. In respect of betting on simulcast and local horseracing entry it is considered to be sufficient. Notably, it is inconclusive as it relates to sufficiency in the market for betting services on sports events.

## **VI. SUMMARY OF COMPETITIVE EFFECTS**

117. For the markets for betting services on sports events and virtual games and betting service on simulcast horseracing, while there is an enhancement of market concentration, the analysis as to whether competitive entry is likely is inconclusive. Therefore, there is no basis to support a conclusion that the transaction is likely to lead to a substantial lessening of competition in those markets.
118. Regarding the market for betting service on local horseracing, there is an enhancement of market concentration as a result of the transaction, but it is unlikely that the parties to the transaction are able to exercise market power given the role of the regulator in protecting the interest of the smaller players in the market where the setting of rights fee is concerned. The Staff concludes that the Agreements are unlikely to have the effect of substantial lessening of competition in the relevant markets.

## **VII. EFFICIENCIES**

119. Competition authorities recognize that mergers and acquisitions as well as transactions of this type can generate significant efficiencies that would otherwise not be possible.<sup>64</sup> Agreements which are found to substantially lessen competition could nonetheless be approved if cognizable efficiencies are demonstrated to outweigh the anticompetitive effects. Competition generally encourages firms to seek to attain efficiency internally. This efficiency is realized either through lowering production cost, improving the quality of the product, enhancing the quality of the service or creating a new product. Merger-generated efficiencies can enhance competition by enabling two ineffective competitors to join forces to create one effective company. This is possible as the companies, through merging, could combine the best of both companies to produce a better product than they could have done individually.
120. In the context of unilateral effects, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to increase price. Efficiencies may also lead to new or improved products, even if they do not immediately and directly affect price.<sup>65</sup>
121. Given that there is no substantial lessening of competition in any of the markets identified, there is no need to consider efficiencies.

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<sup>64</sup> Only cognizable efficiencies are recognized by competition authorities.

<sup>65</sup> US Horizontal Merger Guidelines (2010)

## **VIII. CONCLUSION**

122. The Staff concludes that the Agreements are unlikely to be in breach of section 17 of the FCA.

# IX. APPENDIX

Sports Betting Sales										
Pre-Transaction										
BSPs	2018-2019		2017-2018		2016 - 2017		2015 - 2016		2014 - 2015	
	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share
SVL	✂✂✂	✂✂✂	✂✂✂	✂✂✂	611,036,282	28.3	558,402,840	37.7	628,417,470	53.9
Post to Post	✂✂✂	✂✂✂	✂✂✂	✂✂✂	1,108,618,010	51.3	873,934,120	59.0	536,633,705	46.1
Island Bet	✂✂✂	✂✂✂	✂✂✂	✂✂✂	259,947,513	12.0	31,394,054	2.1	—	—
Jamozzie	✂✂✂	✂✂✂	✂✂✂	✂✂✂	183,079,282	8.5	18,639,443	1.3	—	—
Total	✂✂✂		✂✂✂		2,162,681,087		1,482,370,457		1,165,051,175	
HHI		4,126.71		4,468.04		3645.5		4904.6		5030.7
Post-Transaction										
BSPs	2018-2019		2017-2018		2016 - 2017		2015 - 2016		2014 - 2015	
	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share
SVL + P2P	✂✂✂	✂✂✂	✂✂✂	✂✂✂	1719654292	79.5	1432336960	96.6	1165051175	100
Island Bet	✂✂✂	✂✂✂	✂✂✂	✂✂✂	259,947,513	12.0	31,394,054	2.1	—	—
Jamozzie	✂✂✂	✂✂✂	✂✂✂	✂✂✂	183,079,282	8.5	18,639,443	1.3	—	—
Total	✂✂✂		✂✂✂		2,162,681,087		1,482,370,457		1,165,051,175	
HHI		7,580.93		8,045.55		6537.6		9340		10000

Horse Racing Sales*										
Pre-Transaction										
BSPs	2018-2019		2017-2018		2016 - 2017		2015 - 2016		2014 - 2015	
	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share
SVRL	✂✂✂	✂✂✂	✂✂✂	✂✂✂	5,109,531,853	64.8	4,735,002,377	64.1	4,358,083,387	61.2
Post to Post	✂✂✂	✂✂✂	✂✂✂	✂✂✂	2,533,660,129	32.1	2,499,225,178	33.8	2,715,172,450	38.1
Capital Betting	✂✂✂	✂✂✂	✂✂✂	✂✂✂	69,264,774	0.9	45,722,726	0.6	50,791,144	0.7
Ideal Betting	✂✂✂	✂✂✂	✂✂✂	✂✂✂	170,124,014	2.2	107,073,138	1.4	—	—
Island Bet	✂✂✂	✂✂✂	✂✂✂	✂✂✂	—	—	—	—	—	—
Jamozzie	✂✂✂	✂✂✂	✂✂✂	✂✂✂	575,266	0.0	358,257	0.0	—	—
Total	✂✂✂		✂✂✂		7,883,156,036		7,387,381,676		7,124,046,981	
HHI		6,260.08		5,911.23		5239.5		4178.4		5195.4
Post-Transaction										
BSPs	2018-2019		2017-2018		2016 - 2017		2015 - 2016		2014 - 2015	
	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share	Sales	Market Share
SVRL + P2P	✂✂✂	✂✂✂	✂✂✂	✂✂✂	7,643,191,982	97	7,234,227,555	98	7,073,255,837	99
Capital Betting	✂✂✂	✂✂✂	✂✂✂	✂✂✂	69,264,774	0.9	45,722,726	0.6	50,791,144	0.7
Ideal Betting	✂✂✂	✂✂✂	✂✂✂	✂✂✂	170,124,014	2.2	107,073,138	1.4	—	—
Island Bet	✂✂✂	✂✂✂	✂✂✂	✂✂✂	—	—	—	—	—	—
Jamozzie	✂✂✂	✂✂✂	✂✂✂	✂✂✂	575,266	0.0	358,257	0.0	—	—
Total	✂✂✂		✂✂✂		7,883,156,036		7,387,381,676		7,124,046,981	
HHI		8,651.59		8,743.37		9405.9		9592.1		9858.4
* Horse racing sales include figures from both local and simulcast horse racing sales (Total Betting Sales-Sports Betting Sales)										