Staff Report on Total Jamaica Limited's Acquisition of Epping Oil Company Limited and Epping Retail Limited

February 18, 2020

Case no. 8101-19

Final

FAIR TRADING COMMISSION
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I. THE PARTIES

1. Acquiring Entity:

   Total Jamaica Limited ("Total") is a company with registered offices at 97 Hope Road, Kingston 6 in the parish of Saint Andrew. Total is engaged in the marketing and retailing of petroleum products.

2. Acquired Entities:

   Epping Oil Company Limited ("EOC") and Epping Retail Limited ("ERL"), (collectively referred to as "Epping") are companies with registered offices at 7 Skibo Avenue, Kingston 10 in the parish of Saint Andrew. Epping is engaged in the marketing and retailing of petroleum products.

II. THE CHALLENGED CONDUCT

3. In February 2019, by way of media reports, the Staff of the Fair Trading Commission ("FTC") became aware of the intention of Total to acquire Epping. By way of Agreement for Sale and Purchase of Shares dated April 5, 2019 ("the Agreement"), Total acquired 100% shares of Epping. This transaction was completed as at May 8, 2019.

4. Section 5(1) of the Fair Competition Act ("FCA") empowers the FTC to carry out investigations and inquiries on its own initiative in relation to the conduct of business to enable it to determine whether any enterprise is engaging/has engaged in practices in contravention of the FCA. The FTC thus initiated an investigation into the transaction.

III. INTRODUCTION & BACKGROUND

5. Crude oil is a crucial natural resource used in the Petroleum sector as it is the main input in the manufacturing of finished products serving the energy needs of the global economies. Finished products delivered by the Petroleum industry cater to, among others, construction workers (asphalt used for road surfaces), homeowners (LPG used for cooking; kerosene used for lighting), owners of vehicles (gasoline, diesel, jet fuel, automotive care products) and power producers.

6. The Petroleum industry generates significant economic activities along the distribution chain which converts the crude oil extracted from the earth to a variety of finished products delivered to final consumers. At the top of this chain, significant effort is made to identify significant reservoirs of crude oil below the surface of the earth. This is known as exploration. Once identified, crude oil is extracted and distributed by various methods (cargo ships, pipelines) to

refineries. The crude oil is refined to produce several petroleum-based finished products which are distributed in bulk quantities to retail distribution outlets (such as dealer locations) where they are made available to final consumers in retail quantities.

7. Crude oil exploration activity is in its nascent stage in Jamaica. In 2018, a 3D Seismic Survey was carried out for the first time in Jamaica's offshore areas. However, Jamaica has not yet detected the presence of oil and gas in commercial quantities in Jamaica's on-shore or off-shore areas.[1]

8. The sole refinery (Petrojam Limited) is owned by the Government of Jamaica.[2] Petrojam imports a mix of crude oil and finished products. The crude oil is refined and used to produce several petroleum-based finished products which are distributed to its customers in bulk quantities. Crude oil imported by Petrojam is purchased mainly from Venezuela and Mexico.[3] The refinery operates as a hydro skimming type plant. The products from the refinery process include: (i) LPG/ Petroleum gas (used for heating and cooking); (ii) Gasoline (motor fuel); (iii) Kerosene (fuel for jet engines); (iv) Gas oil or Diesel distillate (used for diesel fuel and heating oil); (v) Heavy gas or Fuel oil (used for industrial fuel); and (vi) Residuals (such as coke, asphalt, tar and waxes).

9. Petrojam supplies about 54% of the demand for finished petroleum products in Jamaica. Bauxite companies import approximately 35% for their operations whilst the three multinational marketing companies import approximately 11% for exclusive distribution to their respective network of branded dealer locations.

A. The Distribution Chain

10. At the top of the Petroleum industry in Jamaica are two main bulk suppliers: Petrojam Ltd, the only refinery company and West Indies Petroleum Limited ("WIPL"), a bunkering company. Petrojam makes available finished products in bulk quantities primarily to (i) Petroleum marketing companies; (ii) Power Producers; and (iii) Aircraft Refuellers.

11. WIPL makes available finished products to (i) shipping lines, (ii) bauxite companies, (ii) energy companies, (iii) manufacturers[4] and (iv) dealer locations since 2018.[5] Petroleum Marketing Companies act as marketing intermediaries between the bulk suppliers and gasoline dealers who operate dealer locations. They also operate as gasoline dealers by operating their own

[1] http://www.loopjamaica.com/content/no-oil-find-jamaica-says-pcj (accessed: October 23, 2019)
[2] The Petroleum Corporation of Jamaica, a state owned entity of Jamaica, owns 51% of Petrojam. (https://www.petrojam.com/about-us)
[3] https://www.petrojam.com/about/what-we-do (Accessed: October 23, 2019)
[4] The Jamaica Observer; March 31, 2017; http://www.jamaicaobserver.com/business/West-Indies-petroleum-eyes-Caribbean-market_94167
[5] Graham, N. (2018) 'West Indies Petroleum Takes on Petrojam in Gas Supply Market- Price Hook Promises $5 Discount,' **The Gleaner**; 23 February;http://jamaica-gleaner.com/article/business/20180223/west-indies-petroleum-takes-petrojam-gas-supply-market-price-hook-promises

dealer locations. In Jamaica, petroleum marketing companies engage an exclusive network of dealers.

12. Dealer locations operated by gasoline dealers typically bear the brand of the petroleum marketing company which supplies the finished products. There are eight visible marketing companies operating in Jamaica- three of which are multinational companies with the other five being locally owned. The main petroleum marketing companies in Jamaica are Total, Rubis Energy Jamaica Limited, Gulfstream Petroleum SRL ("Texaco"), Petroleum Company of Jamaica, Future Energy Source Company limited, United Petroleum (JA) Limited, Johnson's Petroleum Company Limited and Cool Oasis. The multinational petroleum marketing companies jointly own storage facilities across Jamaica which store finished products imported directly. Accordingly, multinational petroleum marketing companies have the capacity to source finished products directly from the world market as well as through the local refinery. Petroleum marketing companies typically engage independent haulage contractors ('tanker drivers') who use tanker trucks to transport fuel to dealer locations. Tanker drivers then deliver fuel to the approximately 250 dealer locations across Jamaica- most of which are situated in the parishes of Kingston and St. Andrew. Some dealer locations are owned by the petroleum marketing companies while the others are owned by the gasoline dealers.

B. Merger & Acquisition Activity in the Industry

13. There have been a number of Mergers and Acquisitions at the level of petroleum marketing companies since 2014. Total is part of the Total Group, a multinational French-based energy company, and is a key player in the petrochemicals market. Total entered the Jamaican market through an acquisition and expanded its network of gasoline dealers by another acquisition. In particular, Total was incorporated in Jamaica as a registered company on January 12, 2004. It entered the Petroleum sector as a marketing company in April 2004 by acquiring the assets and the supply contracts of 22 dealer locations formerly owned by the local marketing company National Fuels and Lubricants.[6,7] The deal was reportedly worth 9.1 million USD.[8] Accordingly, these locations were re-branded as Total.

14. In March 2008, Total expanded its distribution of dealers by acquiring the service contracts of 37 dealer locations formerly serviced by the multinational marketing company Esso Standard Oil SA

[6] http://www.jamaicaobserver.com/auto/A-Total-overhaul_16364000
[7] Total website and Companies Office website- company search
[8] http://jamaica-gleaner.com/article/business/20190705/national-fuels-sues-total-jamaica-64b

Limited, a subsidiary of ExxonMobile. The sum involved in the acquisition was undisclosed and resulted in boosting Total's network to 62 dealer locations.[9]

15. In 2012, Rubis acquired the assets of Shell Jamaica Ltd, a subsidiary of the multinational marketing company Shell Oil, for an undisclosed amount.[10] The Shell Company entered Jamaica in 1923.[11] By mid 2014, the dealer locations formerly bearing the Shell brand were rebranded as Rubis.

C. FTC's Interest in the Transaction

16. Total and Epping are both petroleum marketing companies. Total sells a full range of petroleum products including fuel (87 & 90 gasoline), diesel oil, aviation (Jet A-1), lubricants for motor vehicles, marine vehicles, industrial equipment and agricultural care. Total supplies an exclusive network of 57 dealer locations across 13 parishes in Jamaica. Total also operates shops within its dealer locations which sell grocery items including snacks, beverages and car care products. Epping also sells petroleum products which include motor oil, diesel oil and lubricants for motor vehicles. Epping supplies an exclusive network of 17 dealer locations across 8 parishes. ERL also operates shops which sell grocery items including snacks, beverages and car care products.

17. The acquisition would result in Total supplying the largest exclusive network of dealer locations in Jamaica (74), surpassing Texaco with a reported network of 70 dealer locations in 2018.[12] Since there are approximately 250 dealer locations in Jamaica, the acquisition would result in Total having a network of approximately 30% of dealer locations.

18. Notwithstanding the above, the size of the islandwide network is not necessarily a reliable measure of the competitiveness of petroleum marketing companies since competition faced at a given dealer location may differ across geographic regions.

D. Merger Analysis Framework

19. A merger should not be permitted if it will create, enhance or entrench market power or facilitate its exercise. The FTC assesses mergers based on their likely impact on consumers and competing entities. If a merger is likely to cause harm to consumers and competing entities then the FTC will seek to block or impose conditionalities in regards to same.

[9] http://old.jamaica-gleaner.com/gleaner/20080312/business/business1.html
[10] The assets of Shell Jamaica were being held by Blue Equity LLC- a member of the Antilles Group Limited.
[11] http://jamaica-gleaner.com/gleaner/20130315/business/business1.html
[12] "Total poised to become Largest Network with Epping Acquisition"; **Jamaica Gleaner**; February 15, 2019

20. A true merger involves two separate undertakings merging into a new entity.[13] However, in the competition law sense where A acquires all, or a majority of, the shares in B, this would also be described as a merger if it results in A being able to control the strategic business decisions of B (the acquisition of a minority shareholding may be sufficient in particular circumstances to be deemed a merger).[14] In the present case, Total acquired 100% of the shares in Epping and this transaction is therefore considered to be a merger.

21. Section IV identifies the range of markets which could potentially be affected by the challenged conduct (relevant market definition). Section V establishes the FTC's jurisdiction to review the transaction and the legal standards required to establish a breach of the relevant section(s) of the Fair Competition Act. Section VI assesses the likely competitive effects in the markets identified while a determination of whether clauses in the Agreement giving effect to the acquisition qualifies for exemption is made in Section VII. The main conclusions arising from the investigations are summarised in Section VIII with the Staff's Recommendation presented in Section IX.

IV. RELEVANT MARKET DEFINITION

A. Analytic Framework

22. In conducting an economic assessment of a merger, the principal question is whether the parties to the transaction are competing and/or will likely compete. To make such a determination, the Staff first defines the relevant market.

23. Market definition helps to identify the products and the regions competition concern may arise. A relevant market for economic analysis can be defined as a product (or group of products) and a geographic region in which the product is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, that was the only present and future producer or seller of those products likely would impose at least a small, but significant and non-transitory increase in price on at least one product in that market, assuming the terms of sale of all other products are held constant.

24. In evaluating mergers, product markets are defined around competing products sold by parties to the merger.

[13] Competition Law 9th Edition by Richard Whish and David Bailey p. 829.
[14] Ibid.

B. Relevant Product Markets

25. Epping sells (i) automotive fuel; and (ii) retail grocery items through shops.[15] Total dealer locations sells (i) automotive fuel; (ii) Jet fuel; and (iii) retail grocery items through shops.[16]

26. As such, the product markets which could be adversely affected by the merger are limited to those in which the following items are: (i) automotive fuel; and (ii) retail products sold through shops.

Automotive Fuels

27. Automotive fuels are petroleum-based products used to power automobiles. Automotive fuel is the sole source of power for almost all automobiles in Jamaica. Hybrid vehicles, which account for only a negligible fraction of the automobiles in Jamaica, are an exception as these vehicles are designed to be also powered by electricity.

28. For virtually all motorists in Jamaica, there are no reasonable means to power their automobiles other than petroleum-based fuels. The next best alternative to petroleum-based products is for final consumers to use an alternative means of transportation such as public transportation (e.g., bus, taxis), pedal cycles, scooters or walking.

29. As such, petroleum-based automotive fuel constitutes a relevant product for assessing the merger.

Retail products outside of regular business hours

30. Dealer locations sell a limited number of grocery items, consumer goods, household items and auto care products ('retail products') through shops located at the dealer locations. These shops cater to emergency purchasing and some of which are opened for extended hours. The closest alternatives to these shops are other retailers such as grocery stores, supermarkets, pharmacies, auto dealers, auto stores, and cafés.[17] While the items available at these shops are available at other retail outlets, these alternatives typically operate within regular business hours and close by 9:00pm while some of the shops operated at gasoline dealer locations operate beyond these business hours.

31. Accordingly, during regular business hours, shops located at dealer locations compete with many other retailers. The narrowest market in which shops located at dealer locations operate

[15] Retail grocery items include automotive care products, packaged consumer goods, over-the-counter medication and personal healthcare products.
[16] Total's response to the Staff Request for Information.
[17] An exception to this general rule is MegaMart Supermarket which is typically open all day.

is retail outlets operating outside of regular business hours, since other retailers are generally closed during this time.[18]

32. The shops at some of Total's dealer locations are open outside of regular business hours. However, none of the shops located at Epping dealer locations are open outside of regular business hours.

33. This means that there is no overlapping by Total and Epping in the retail markets outside of business hours and therefore this market is not relevant for assessing the competitive effects of the acquisition.

C. Relevant Geographic Markets

34. Defining the geographic market is integral in assessing competition since it defines the physical space in which the relevant products are offered for sale. The rest of this section identifies such geographic space in which suppliers of the relevant products are likely to compete in.

35. The competitive constraint faced by any dealer location is dependent on the proximity of the nearest alternative dealer locations; the closer the nearest alternative dealer location, the narrower the geographic region in which a dealer location participates.

36. To illustrate the reasoning behind selecting these factors, consider a motorist travelling along a relatively long route. All dealer locations along this route vie for this motorist. **Figure 1** below gives a simplified example of only two rivals, **Station A** and **Station B**, competing along such route. The motorist's route represents a single geographic market with two dealer locations.

Figure 1: Commuter's route with distinct branded dealer locations representing a single geographic market

37. **Station B** could increase its likelihood of winning that commuter by increasing the number of dealer locations along the route; specifically, it could likely increase its chances by setting up a dealer locations as close as possible to **Station A.** This strategy is also true for **Station A** resulting in an outcome illustrated in **Figure 2** below.

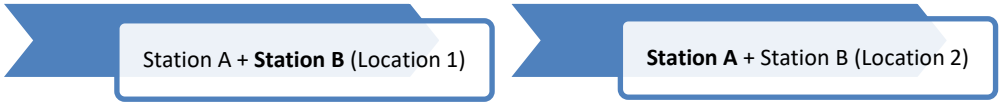

Figure 2: Commuter's Route with Clusters of dealer locations representing multiple geographic markets

[18] Megamart supermarket is a notable exception to this general rule.

38. In **Figure 2** above, **Station B** opens a dealer location at **Location 1** and **Station A** also opens a dealer location at **Location 2**. The addition of these two dealer locations in these particular areas creates two distinct geographic markets along the commuter's route and consequently alters the boundaries of the original market considered previously.

39. Coincidentally, the Staff observes that Total and Epping tend to set up multiple dealer locations along a given "long" route; especially if such a route faces heavy traffic. Specifically, rival dealer locations tend to set up in proximity to each other creating a cluster of dealer locations in a given area.

40. In Kingston & St. Andrew, and to a lesser extent parish capitals, dealer locations tend to operate in clusters. For any given brand of dealer location, there are likely at least one other branded dealer location within a one mile radius. In some areas, dealer locations are adjacent to each other or are located on opposite sides of the road. As one moves from KSA to Towns and then to Rural Areas, the cluster of dealer locations become sparser to the extent that in Rural Areas, dealer locations operate in relative isolation.

41. The transaction under review involves Total's acquisition of 17 dealer locations from Epping. To identify the relevant geographic markets affected by the acquisition, the Staff used each Epping location as the centre point of each geographic market; accordingly, there were 17 candidate geographic markets. The Staff delineated the boundaries of each of these geographic markets based on the regions in which the Epping dealer location is located.

42. The Staff identified the boundaries of the geographic markets as follows:

    i. For Epping dealer locations in Kingston & St. Andrew, Portmore and Spanish Town, the boundary of the geographic market was constructed within a one mile radius;

    ii. For Epping dealer locations in other urban regions, the boundary of the geographic market was constructed within a two-mile radius; and

    iii. For Epping dealer locations in rural areas, the boundary of the geographic market was constructed within a five-mile radius.

43. Based on the geographic markets delineated, the Staff concluded that parties to the transaction were jointly present in only 7 of the 17 candidate markets; accordingly, each of these seven markets represents a relevant geographic market.

44. Section Summary: The relevant product market, and various sub-markets, is identified as the markets for Petroleum based automotive products. Further, the Relevant geographic markets were identified as those being in the vicinity of:

- Half-Way-Tree;
- Maxfield;
- National Heroes Circle;
- Old Hope Road;
- White River;
- Black River; and
- Port Antonio.

V. LEGAL ANALYSIS

45. The Staff seeks to determine whether the Agreement contravenes any provisions of the FCA. The Staff considered the following legal issues:

(i) Whether the Fair Trading Commission can examine anticompetitive practices and agreements in relation to the Petroleum Industry;

(ii) Whether the FTC has the jurisdiction to examine, investigate and/or intervene in mergers; specifically, Total's acquisition of the shares in Epping, and what sections under the FCA empower the FTC with same;

(iii) What are the requirements under the relevant section(s) of the FCA and does the agreement or its provisions fall afoul of said section(s); and

A. Jurisdiction

46. This involves an analysis of issues (i) and (ii) identified above.

Whether the Fair Trading Commission ("FTC") can examine anticompetitive practices and agreements in relation to the Petroleum Industry/Market

47. In the Privy Council ("PC") case of *Fair Trading Commission v. Digicel & Anor*[19], *the Privy Council determined that the FTC has the jurisdiction to examine anticompetitive practices and/or agreements in relation to any sector of the market. In this regard they* stated the following:

"…The Commission is empowered to investigate whether "any enterprise" is engaging in business practices contravening the Act. The contraventions in question include giving

[19] *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28 per Lord Sumption at paragraph 22.

effect to any agreement with an anti-competitive purpose or effect in "a market"…. <u>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</u>…"[20] (Emphasis Ours)

48. Additionally, the subject Agreement is not an Agreement that falls under section 3 of the FCA and is thus not excluded from the remit and jurisdiction of the FTC.

49. Based on the foregoing the FTC would not be precluded from investigating a breach or likely breach of the FCA in the local petroleum sector, unless the statute(s) in relation to this market prevent same.

<u>Relevant Statutes in this Industry</u>

50. The petroleum sector at the retail level is, inter alia, regulated by the Petroleum Act, the Petroleum (Quality Control) Act and Regulations, and the Petroleum and Oil Fuel (Landing and Storage) Act. This sector is also subject to regulations from, among others, the National Environment and Planning Agency (NEPA), the Jamaica Fire Brigade, the National Works Agency, and the Ministry of Health. After examining the provisions of the foregoing pieces of legislation the Staff is of the view that nothing in these provisions are likely to be construed as having the effect of ousting the jurisdiction of the FTC to investigate anticompetitive behaviour including agreements and their provisions in regard to this Industry.

Whether the FTC has the jurisdiction to examine, investigate and/or intervene in mergers; specifically, Total's acquisition of the shares in Epping, and what sections under the FCA empower the FTC with same?

51. The essential question to be resolved is whether these two previously independent companies have come together under common control with the consequence that, in the future, the market will function less competitively than it did prior to the merger.[21]

52. The Privy Council decision in <u>*FTC v Digicel*</u> (supra) is instructive in relation to its examination of the issue of whether the FTC has the power to investigate and intervene in mergers. The PC in delivering its judgment found that section 17 of the FCA was wide enough to encompass agreements such as mergers and that it establishes a regime over a class of transactions which

[20] Ibid. per Lord Sumption at paragraph 12.
[21] Ibid. p. 830.

include mergers.[22] It was stated that section 17 applied to any agreement falling within subsection (1) being **"***any agreement containing provisions having as their purpose or likely effect the substantial lessening of competition in the relevant market*."[23] It was held that "*an agreement by which two competitors merge is an agreement falling within 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*.**"**[24] (Emphasis ours)

53. The Privy Council in this case additionally likens section 17 of the FCA to Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") finding that the provisions have substantially the same purpose. The Privy Council in this case referred to the judgment of *British American Tobacco And RJ Reynolds Industries Inc v. Commission of the European Communities* where the court held that article 101 applied "*where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or defacto control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation.*"[25]

54. Based on the foregoing and the guidance provided by the Privy Council it is clear that section 17 of the FCA empowers the FTC to examine, investigate and, if necessary, intervene in the merger between Total and Epping if same is found to be in contravention of that section.

What are the requirements under the relevant section(s) of the FCA and does the Agreement or any of its provisions fall afoul of said section(s)

55. Section 17 of the Act speaks to agreements which lessen competition and 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 investments;

[22] *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28 per Lord Sumption at paragraph 32.
[23] *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28 per Lord Sumption at paragraph 26.
[24] Ibid.
[25] *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28 per Lord Sumption at paragraph 27.

(c) Share markets of source 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 connections with the subject contracts.*

(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;

(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."

Requirements

56. For a claim to succeed and liability to be established under section 17 the following must be established that:

1. There is an agreement; and

2. The agreement contains a provision(s) that:

i. have as their purpose the substantial lessening of competition in a market;

ii. have the effect of substantially lessening competition in a market; or

iii. are likely to have the effect of substantially lessening competition in a market.

57. It is important to note that the requirements under section 17 are disjunctive, i.e. the provisions of the agreement need to have only one of the following: (i) the purpose; (ii) the effect; or (iii) the likely effect of substantially lessening competition in the relevant market. If it is found that the provisions satisfy any of these three limbs of the test, section 17 would be breached subject to the exemptions provided in subsection 4 of that section.

58. While this section was intended by the legislature to prevent uncompetitive practices, it is important to note that section 17(2) does not provide an exhaustive list of agreements that amount to the substantial lessening of competition.[26] The Commission can therefore find that an agreement that does not fall within those espoused within section 17(2) is in contravention of that section.

59. It is important to note that the word 'purpose' as used in section 17 is not defined in the FCA. Similarly, the FCA does not contain a definition for the term 'substantial lessening of competition'. Section 2(4) of the said Act however, provides some assistance as regards the latter and states that "*References in this Act to the lessening of competition shall, unless the context otherwise requires, include references to hindering or preventing competition*. (Emphasis ours).

60. The FTC has therefore relied on jurisprudence of other commonwealth jurisdictions whose provisions are largely similar to section 17 of the FCA to assist in providing guidance in interpreting these terms. In this regard, the FTC relied on jurisprudence from Australia, New Zealand, Canada and the European Union (the European Commission (**EC**) and European Court of Justice(**ECJ**)).

B. Purpose

61. In determining whether an agreement and/or any of its provisions have an anticompetitive purpose the entire agreement must be examined and also any agreements leading up to the conclusion of the final agreement.

[26] *Fair Trading Commission v Cable & Wireless JA. Ltd. (Lime), Digicel Jamaica Limited and Oceanic Digital Jamaica Limited* [2012] JMCC Comm. 7 per Sinclair-Haynes J at paragraph 32.

62. Purpose in the competition law sense has been defined as the effect, end, goal, objective or aim sought to be achieved or accomplished by the provision.[27]

63. As previously mentioned, as the Privy Council found that Article 101 of the TFEU has substantially the same purpose as section 17 of the FCA, Article 101 was examined to assist in providing some guidance on the application and interpretation of section 17.

64. Article 101 TFEU prohibits any agreement, decision of undertakings or concerted practice 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 or effect 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.[28]

65. The European Court of Justice ("**ECJ**") in *Consten and Grundig v Commission*[29] 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.[30]

66. Section 45 of the Australian Competition and Consumer Act 2010, which is almost identical to our section 17, is considered to be of considerable guidance in relation to the meaning of 'purpose' in this context.

67. Courts in Australia have interpreted the "purpose limb" of the test in section 45 as being a subjective test. The purpose limb was stated to "catch agreements" which the effect and likely effect limb do not; "*by proscribing anticompetitive purposes as well as effects or likely effects, parliament has cast its net widely so as to include provisions which simply have an anticompetitive purpose*."[31]

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[27] The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law by Paul Scott p.173 and citing Seven Networks Limited v News Limited [2009] FCAFC 166 at pgs. 852 and 898.
[28] 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
[29] Cases 56 and 58/64, *Consten and Grundig v Commission,* 1966 ECR 301.
[30] Case 85/45 VDS v Commission, [1987] ECR 405.
[31] Ibid. p. 186.

68. The full Federal Court in *Seven Network Limited v News Limited* [2009] held that the relevant provision must have been included for the purpose of substantially lessening competition in the relevant market and that such purpose must be a substantial purpose for such inclusion.[32] It is opined that as the provisions of both sections are similar and that the Jamaican courts have relied on and endorsed principles from Australia that this approach is likely to have highly persuasive value for courts in this jurisdiction.

69. If the agreement is found to have an anticompetitive purpose then the court need not consider effect and need not engage in an economic analysis.[33] Where it is not possible to ascertain that the purpose or object of an agreement is to substantially lessen competition in the relevant market the FTC must then go on to examine the effect on actual and potential competition and additionally whether any of the efficiency exceptions referred to above (section 17(4) FCA) apply. This agreement is not one to which the Commission has authorized under Part V of the FCA and therefore this will not be explored or discussed further in this report.

Substantial Lessening of Competition

70. As mentioned above the FCA does not contain a definition for the term 'substantial lessening of competition' and therefore the FTC looked to guidance from other jurisdictions, in particular the EU, Australia and Canada, for assistance in interpreting this term and determining whether an agreement has the effect of substantially lessening competition.

71. "In *Global Radio Holdings Ltd. v. Competition Commission*, the Competition Appeal Tribunal held that a 'substantial lessening of competition' did not have to be 'large', considerable' or weighty; a finding that there is a 'significant lessening of competition' is sufficient regardless of whether that lessening is large in absolute terms."[34]

72. The court in *MasterCard v. Commission* observed that for an agreement to have the effect of restricting competition it must be liable to have an appreciable adverse impact on the parameters of competition such as the price, the quantity and quality of the goods or service.[35] The European Commission ("EC") has explained that an agreement can have such an adverse impact '*by appreciably reducing competition between the parties to the agreement or between any one of them and third parties*.'[36]

[32] Ibid.
[33] Ibid. p. 183.
[34] Competition Law 9th Edition by Richard Whish & David Bailey p. 959-960.
[35] Ibid. p. 132.
[36] Ibid.

73. In this case, the EC examined the agreement in the context of Article 101 TFEU, which as stated by our Privy Council has the same purpose as our section 17. However, it must be noted that the wording of the provisions is not identical and thus in Staff Report dated November 23, 2015 in the matter of Radio Jamaica Limited and Gleaner Company Ltd & Anor ("**RJR & Gleaner**") the Staff concluded that the "appreciable effect" test would offer some guidance but was not conclusive/controlling guidance on the interpretation of the phrase "substantially lessening competition" in section 17 of the FCA.[37]

74. In *Stirling Harbour Services Pty Ltd v. Bunbury Port Authority* the Federal Court of Australia 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*."[38]

75. In *Australian Gas Light Company v ACCC (No.3)* (2003) FCA 1525, the Federal Court judge concluded that substantial lessening of competition required that the acquisition have a meaningful or relevant impact on the competitive process over time, not merely a short term effect, which was to be assessed by reference to commercial realities and not hypothetical theories.[39]

76. In the Staff report of RJR & Gleaner it was concluded that s. 79 of the Canadian Competition Act had the most similar provision to our s. 17 and therefore their interpretation of the term would be of most guidance.

77. In this regard the Federal Court of Appeal in *Canada (Commission of Competition) v Canada Pipe Company Limited* held that "*the correct test for establishing substantial lessening of competition is whether but for the impugned conduct the relevant market would have been substantially more competitive*."[40] The Court stated that "*the correct approach in this regard 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*."[41] (Emphasis ours)

78. This is similar to the test enunciated in *Stirling Harbour* (supra). This analysis will include comparing past competitiveness and comparing present competitiveness with the existence of

[37] Fair Trading Commission Staff Report in the matter Radio Jamaica Limited and Gleaner Company Limited and Gleaner Company Media dated November 23, 2015 Case # 7887-15 at p.10.
[38] *Stirling Harbour Services Pty Ltd v. Bunbury Port Authority* [2000] FCA 1381 at paragraph 66.
[39] 20 years in- the substantial lessening of competition test in Australia merger law by Gilbert + Tobin- January 21, 2013.
[40] Fair Trading Commission Staff Report in the matter Radio Jamaica Limited and Gleaner Company Limited and Gleaner Company Media dated November 23, 2015 Case # 7887-15 at p.11 citing *Canada (Commission of Competition) v Canada Pipe Company Ltd.,* 2006 FCA 233
[41] Ibid. at paragraph 38 of *Canada (Commission of Competition).*

the agreement and the likely competitiveness of the market in the absence of the impugned conduct/ agreement (the counterfactual analysis).

79. Some guidelines used by the Competition Merger Assessment Board ("CMA") in determining whether an undertaking's conduct is substantially lessening competition include market definition, measure of concentration, efficiencies, barriers to entry and expansion, and countervailing buyer power.[42]

80. The Staff's assessment of the likely effect of the Agreement is presented in Section VI.

Assessment of the Agreement and Restraint of Trade Clauses

81. In the present case, an examination of the Agreements was conducted to determine whether it or any of its provisions had an anticompetitive purpose. It was observed that the Agreement contains Non-Compete clauses (Clause 6.6.1) in regards to the "Seller," being Epping. The content of the provisions reads as follows:

> 6.6.1.1 During the period beginning on the Completion Date and ending forty-eight (48) months thereafter, none of the Sellers shall without the prior written consent of the Buyer carry on the business of marketing petroleum and petroleum based products anywhere in Jamaica or directly or indirectly own an interest in, manage, operate or control any Person[43] that engages in such business in Jamaica (each, a "Restricted Activity").
>
> 6.6.1.2 Notwithstanding the foregoing, the Parties agree that the operation of one or more dealer locations in Jamaica retailing petroleum and petroleum based products under the "*Epping*" or "Total" brands as a contracted dealer for the Companies or the Buyer shall not constitute a Restricted Activity.

82. Although agreements which contain Restraint of Trade/Non-Competition provisions would not fall within the list of agreements espoused in section 17(2) of the FCA as being an agreement contrary to s.17, as previously stated, this list is not exhaustive. Therefore an agreement may be found to be in breach of section 17 of the FCA that is not one of those enumerated in section 17(2). Additionally, the ruling of the Privy Council in the *Fair Trading Commission v. Digicel and Anor* establishes section 17 of the FCA applies to any agreement that falls within the definition

[42] Competition Law 9th Edition by Richard Whish & David Bailey p. 959.

[43] Person is defined in the Agreement as any individual, entity, general partnership, limited partnership, limited liability partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, foreign trust or foreign business organization.

in subsection (1) being "any agreement containing provisions having as their purpose or likely effect the substantial lessening of competition in the relevant market."

The law on Restraint of Trade/Non-Compete Clauses

83. At common law contracts in restraint of trade, i.e. those imposing a restriction(s) on a person's freedom to engage in trade or employment were regarded as void and unenforceable.[44] Provisions or clauses in restraint of trade are also known as non-compete clauses. However, as times and circumstances have evolved the restraint of trade doctrine has been relaxed such that certain restraints, for example restraints in relation to the sale of a business or employment contracts, are recognized as being necessary and enforceable in certain circumstances.[45]

84. Guidance was thus sought from other jurisdictions such as the EU, UK and Australia in order to ascertain the considerations taken into account when assessing such clauses from a competition law standpoint. In this regard, the Staff examined the Restraint of Trade and Non-Competition provisions in both the AFS and Shareholders' Agreement and assessed the transaction within the parameters of the acquisition of a business and the circumstances under which such provisions may be deemed anticompetitive and in breach of section 17 of the FCA.

85. As regards restraint of trade/non-compete clauses the EU applies the ancillary restraints doctrine. The EU Merger Control Regulation provides that where the EC determines that a concentration is compatible with the common market that that decision would cover any restriction that is considered ancillary and thus necessary or integral to the implementation of the concentration.[46] Restrictions on competition that are not considered to be ancillary to the principal transaction will be assessed separately under Article 101(1) TFEU which prohibits agreements which restrict, prevents or distorts competition.[47]

86. For a restraint or non-compete clause to be considered as an ancillary restraint the restriction must meet two criteria, both being objective in nature, that it must be (1) directly related and (2) necessary to the concentration/transaction.[48] Directly related has been interpreted to mean that it must be closely linked to the transaction and intended to allow a smooth transition to the

[44] Halsbury's Laws of England 4th Edition Reissue, Volume 47 paragraphs 13 and 21.
[45] Ibid. paragraphs 22 and 25.
[46] Butterworths Competition Law Service, Principles of EU and UK Competition Law- Chapter 4- Ancillary Restraints in EU merger Control law.
[47] Butterworths Competition Law Service, Division III Horizontal Agreements Likely to be Permitted- Chapter 2; Ancillary Restraints, paragraph 191.
[48] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), paragraph 11.

changed company structure.[49] Necessary means that in the absence of those agreements, the concentration could not be implemented or it could be implemented only under considerably more uncertain conditions, at substantially higher costs, over an appreciably longer period with considerably greater difficulty.[50] In determining whether a restriction(s) is necessary the nature and scope of the clause, its duration, subject matter, geographical field of application and the persons subject to the restriction are considered to ensure that it does not exceed what the implementation of the transaction reasonably requires.[51]

87. Further guidance is provided by the EC's 2005 Notice in relation to the scope of non-compete clauses in agreements for the acquisition of a business. The EC stipulates that such non-compete clauses must be limited in geographic scope to the area in which the vendor offered or established the relevant products or services before the transfer, since the purchaser does not need to be protected against competition from the vendor in territories not previously penetrated by the vendor.[52] Similarly, the Commission states that as regards product scope the non-compete clauses must be limited to products and services that formed the same economic activity of the undertaking transferred, as providing the purchaser protection from the vendor in markets in which the transferred undertaking was not active before the transfer is not considered necessary.[53]

88. The European Commission in their 2005 Notice approves and adopts the position taken in a number of EU decisions in relation to a reasonable period for a non-compete clause. The Notice states that "non-competition clauses are justified for periods of up to three years when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how. When only the goodwill is included, they are justified for periods of up to two years.[54]

89. Where the restraint of trade/non-compete clause is found to be unreasonable or unenforceable its presence does not necessarily vitiate the contract and the offending clause or part thereof may be severed and effect given to the part(s) which is reasonable whether the restraint is in respect of subject matter, space, time or of persons with whom there may be dealings.[55] An

[49] Case Comp/ 39736 Commission Decision of 18/06/2012 Areva SA/Siemens AG, paragraph 44.
[50] Ibid. at paragraph 13.
[51] Ibid.
[52] Ibid. at paragraph 22.
[53] Ibid. at paragraph 23.
[54] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) at paragraph 20.
[55] Halsbury's Laws of England (4th Edition Reissue, 1994), Vol. 47, paragraph 68.

agreement may be severed where the parts to be severed are independent of one another and are substantially equivalent to a number of separate covenants, severance would not affect the meaning of the remaining part, and the part to be severed is not part of the main purport or substance of the agreement.

90. In Australia, the Competition and Consumer Act 2010 applies to many restraints and thus limits the common law doctrine of restraint of trade. However, section 51(2)(e) of the Competition and Consumer Act 2010 excludes restrictions in contracts for the sale of a business from the scope of the Act and the common law position continues to apply to such restraints and thus applies in the present case.

91. The common law position in regards to restraint of trade/non-compete clauses is that they are prima facie void as being against public policy.[56] However, this presumption can be rebutted and the restraint enforced if the restraint is reasonable in the interest of the parties and the public.[57] Reasonableness is a question of law to be determined by the courts.[58] When assessing whether a restraint is reasonable the courts will consider whether there is a 'legitimate interest' that requires protection and the restraint must not do any more than is necessary to protect the interest. [59] Where the restraint goes beyond what is necessary it will not be considered reasonable.

92. Similar to the approach adopted in the EU, in determining whether the restraint is reasonable the Courts in Australia consider the period of the restraint, its geographic scope, the subject matter of the restraint and the activity to be restrained.[60]

93. Restraint of Trade/Non-compete clauses are standard in most agreements for the purchase/sale of a business in order to guarantee the purchaser the full value of the asset transferred which may include both physical and intangible assets such as the goodwill of the business or the know how developed by the vendor.[61] In the case of the sale of a business it has been held that the purchaser is entitled to protect himself against competition from the vendor in order to realize, for a reasonable time, the full value of what he has purchased.[62] However, it is important to

[56] Competition Law and Policy Cases and Materials 3rd Edition by Philip Clarke, Stephen Corones & Julie Clarke p. 43.
[57] Ibid.
[58] Neville Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (2014) Western Australian Jurist 25, 47.
[59] ACL| Australian Competition Law on Restraint of Trade <https://www.australiancompetitionlaw.org/law/rot/index.html#reources>
[60] Neville Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (2014) Western Australian Jurist 25, 48.
[61] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) at paragraph 18.
[62] Neville Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (2014) Western Australian Jurist 25, 47

ensure that the clause is reasonable and necessary to achieve the goal of implementing the transaction and does not go further than what is required to achieve this objective.

94. The ancillary restraint doctrine was first recognized in the EU case of **Remia BV & Others v Commission** where the court considered whether a non-compete clause in two agreements for sale of businesses provided such restriction as necessary for the successful transfer of the businesses or whether same were unreasonable and anticompetitive. Both agreements included non-compete clauses which prohibited the vendors from competing in the Netherlands with the businesses sold for a period of ten and five years, respectively. [63] It was stated that in order to have a beneficial effect on competition these clauses must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose.[64] The ECJ in their ruling therefore agreed with the European Commission in holding that the clauses restricted competition within the meaning of Article 85(1) as their duration and scope was excessive.[65]

95. A restriction cannot be considered ancillary merely because it made the main agreement more commercially beneficial for the parties.[66] The reasonableness of the restraint in relation to the character of the business is to be judged with reference to the extent of the business sold and not with reference to the business of the purchaser.[67] When assessing whether the restraint clauses exceed what is reasonably necessary, where there are equally effective alternatives available for attaining the aim sought then the business must use the one which is objectively least restrictive of competition.[68]

96. In the EU case of *Areva SA/Siemens AG* the Commission was concerned with post joint venture non-compete obligations (post-JV NCOs) in an agreement between Areva SA (Areva) and Siemens AG (Siemens) whereby Areva would acquire sole control over Areva NP, a joint venture established by Areva and Siemens. [69]

97. In its analysis of the clauses of concern the Commission examined the said clauses to determine whether they were ancillary to the concentration and thus whether they were directly relevant

[63] *Remia BV & Others v Commission* Case 42/84 [1985] ECR 2545 paragraph 20.
[64] Ibid.
[65] Ibid.
[66] Case T-112/99 Metropole television (M6) and Others v Commission, EU:T:2001:101. paragraph 109.
[67] Halsbury's Laws of England 4th Edition Reissue, Volume 47 paragraph 31.
[68] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) at paragraph 13.
[69] Case Comp/ 39736 Commission Decision of 18/06/2012 Areva SA/Siemens AG.

and objectively necessary to its implementation.[70] In considering whether the clauses were objectively necessary the Commission assessed whether the clauses were proportional to the objective sought and whether a less restrictive measure could achieve the same objective. The Commission stated that the main reason a non-compete obligation may be considered ancillary in the acquisition of an undertaking is that the purchaser might need protection from the seller to obtain the full value of the asset transferred.[71] They also noted that protection may be needed to gain customer loyalty and assimilate and exploit know-how and goodwill.[72] The Commission formed the preliminary view that certain post-JV NCOs were not ancillary to the acquisition for their full product scope and duration.[73]

98. The Commission found that the four (4) year post-JV NCO was not objectively necessary or proportionate. They held that a 3 year post-JV NCO was more than adequate protection for Areva NP against any competition from Siemens and for the duration exceeding the three years the post-JV NCO would not be ancillary and would fall within Article 101(1)TFEU.[74]

99. As regards the product scope the Commission found that the post-JV NCO was a restriction of competition by object pursuant to article 101(1) TFEU, restricting competition which would have existed in the absence of the agreement.[75] They found that the post-JV NCO was not objectively necessary or proportionate to the extent that it extended to markets in which Areva was not active with its own products.[76]

Analysis of the Non-Compete Clauses in the Agreement

100. The Non-Compete Clauses in the Agreement were examined and the transaction assessed as a whole in accordance with the guidelines detailed in the preceding paragraphs.

101. The duration of the restraint in relation to the Non-Compete is for a period of 48 months or 4 years commencing on the Completion Date, being May 8, 2019. In keeping with the foregoing guidance, the agreement as a whole was considered to determine whether the duration of the restraint is objectively necessary, proportionate and reasonable for Total to preserve the transferred worth of Epping and to realize for a reasonable time the full value of the undertakings purchased.

[70] Ibid. paragraph 42.
[71] Ibid paragraph 50.
[72] Ibid.
[73] Ibid. paragraphs 3 and 49.
[74] Ibid. paragraph 92.
[75] Ibid. paragraph 80.
[76] Ibid. paragraph 70.

102. The Agreement specifies that Total purchased 100% allotted and issued shares of Epping and includes the assets of Epping. From the documents presented to the FTC, including the Agreement and its schedules, it does not appear as if customer loyalty or know how is important in relation to the present acquisition.

103. It is essential that in keeping with competition objectives that the non-compete clause is only as restrictive as necessary to achieve the goal of successfully implementing the concentration. Using the EC's guidelines as a benchmark, the Staff is of the opinion that the duration of the relevant restraint in the Agreements is considered to be outside the scope of what is necessary to ensure a successful transfer of the businesses to the new entity and allow a smooth transition to the new company structure. The Non-Compete provision in the Agreement, as far as its duration is concerned is considered by the Staff to have the purpose (object, effect, end or aim) of substantially lessening competition by the previous shareholders of Epping with Total (the acquiring entity/buyer) and to prevent them from engaging in any of the conduct prescribed above for a period of 48 months or 4 years. In keeping with the guidelines of the EC, a period of no more than two (2) years should be imposed in relation to the Non-Compete clauses in the Agreement being clause 6.6.1.1.

104. The Restraint of Trade/Non-Competition provision in both Agreements specifies the geographic scope as Jamaica. The acquired entities operated in the parishes of Manchester, St. Elizabeth, Westmoreland, Portland, Kingston and St. Andrew, St. Ann and St. Mary prior to the merger. As the geographic scope is broader than the areas in which the vendors offered their products prior to the acquisition it is opined that the geographic scope in the Non-Compete clauses is not strictly limited to what is necessary for effective transfer of the concentration. It would not need to be protected from competition from Epping in territories not previously penetrated by them and therefore, as regards the geographic scope in the Non-Compete clause extending to the whole island. It is not directly relevant or necessary for the successful implementation of the acquisition; for it to be considered directly relevant, this clause should be no wider than the seven relevant geographic regions identified.

105. The scope of the product market in the Agreement concerns products and activities that the vendor was engaged in prior to the transfer and the restricted activities are deemed to be directly related and objectively necessary for the purposes of the present transaction. To this

extent, the Staff does not find the clause to have the purpose or object of substantially lessening competition.

106. Based on the jurisprudence and guidance emanating from the EU and Australia, the Staff is of the view that a Jamaican court will likely find the foregoing provision in the Agreement to have the purpose of substantially lessen competition as regards to their duration and geographic scope, subject to exemptions provided in section 17(4) of the FCA. The Staff's determination on whether the Agreement qualifies for any exemption is presented in Section VII.

VI. ASSESSMENT OF COMPETITIVE EFFECTS

A. Analytical Framework

107. The first step in assessing the likely competitive effects of the merger is a determination of the extent to which the acquisition increases the concentration levels in the relevant markets identified.

108. 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 participant in a market and then summing the resulting numbers. It ranges between a maximum of 10,000 (where there is only one market participant) and a minimum of zero (where there are a large number of equally sized participants).

109. The range of market concentration as measured by the HHI can be classified as follows[77]: Unconcentrated markets (HHI less than 1,500); Moderately Concentrated (HHI between 1,500 and 2,500); and Highly Concentrated (HHI greater than 2,500).

110. Horizontal merger assessment considers both the post-merger concentration and the increase in concentration as a consequence of the transaction. If the merger significantly increases market concentration levels leading to either a moderately or highly concentrated market, then this would raise concern for the likelihood of unilateral or coordinated effects in the post-merger markets.[78] By unilateral effects, the Staff refers to the exercise of market power by a market participant acting on its own. By coordinated effects, the exercise of market power in the post-merger market arising from the remaining market participants coordinating their conduct.

111. If the increase in market concentration levels suggests an increased likelihood of competitive effects, then a further examination of the market would be warranted to determine whether

[77] The US Horizontal Merger Guidelines (2010).

[78] An increase in the HHI of 200 points or greater is considered significant.

other market conditions confirm, reinforce or counteract the potential harmful effects of the increased market concentration levels.

B. Market Participants, Market Shares and Market Concentration

112. Market shares are typically calculated based on revenue or capacity. The Staff selected capacity as the measure of competitive significance and used the number of dispensers on the premises as a proxy for capacity. A larger number of dispensers would likely signal greater sales and/or rate of sales. Expectations of market participants better estimate future competitive conditions than historical data.

113. Based on the relevant markets defined in section IV above, the market participants and their share in the respective markets are presented in Table 1 below.

Table 1 Market Participants and Market Shares in the Relevant Geogrpahic Markets

Participants	Market Share (in %) by Geographic Market						
	Half-Way-Tree	Maxfield	National Heroes Circle	Old Hope Road	White River	Black River	Port Antonio
Total	24	21	34	23	18	27	20
Epping	17	21	31	14	12	13	30
Texaco	26	18	--	51	18	13	30
Rubis	20	15	--	12	23	--	20
Unipet	13	15	--	--	--	--	--
Michael's	--	--	14	--	--	--	--
Johnson's	--	10	--	--	--	--	--
Petcom	--	--	21	--	--	7	--
Cool Oasis	--	--	--	--	--	27	--
Boot	--	--	--	--	29	--	--
Exxon	--	--	--	--	--	13	--
Sum	**100**	**100**	**100**	**100**	**100**	**100**	**100**

*Market share based on number of dispensers on each premises.

114. Table 1 shows that there were between four and six participants in each market. Generally, no participant controlled more than one third of any market; the only exception to this rule is observed in the 'Old Hope Road' region where Texaco held a market share of 51 per cent.

115. The increase in the HHI across each market is shown in Table 2 below. It shows that the merger significantly increased market concentration levels in all seven relevant geographic markets identified. In four of the seven geographic markets, the merger changed moderately concentrated markets pre-merger to highly concentrated markets post-merger.

116. The significant increase in HHI and the high concentration levels in all geographic market in the post merger period raise significant concerns that, without more, the acquisition increased the market's susceptibility to unilateral and/or coordinated effects. The acquisition therefore warranted further examination of market conditions. In particular, the Staff examined whether and the extent to which Total faced direct head-to-head competition from Epping.

Table 2 The Effect of the Merger on Market Concentration Levels

Geographic Markets	Pre-Merger Market Concentration (HHI)	Change in Concentration level* (points)	Post-Merger Market Concentration (HHI)
Half-Way-Tree	2,018[+]	832	2,940[++]
Maxfield	1,742[+]	842	2,584[++]
National Heroes Circle	2,771[++]	2,140	4,911[++]
Old Hope Road	3,502[++]	653	4,155[++]
White River	2,180[+]	415	2,595[++]
Black River	2,000[+]	711	2,711[++]
Port Antonio	2,600[++]	1,200	3,800[++]

[+] moderately concentrated
[++] highly concentrated
* Changes in concentration levels greater than 200 points are considered significant.

117. In examining this issue, the Staff used data on prices of 90-Octane fuel during the period January 2016 to June 2018.[79] Prices were collected for 23 dealer locations supplied by Total and 32 dealer locations supplied by other petroleum marketing companies. The data comprise end of month fuel prices within the geographic markets in which Total dealer locations participate.

118. Table 3 below reports Total's prices in markets in which Epping was absent. The markets are grouped into two categories: The multinationals category comprise markets in which Total competes with only multinational petroleum marketing companies while the local category comprise markets in which Total competes with at least one local petroleum marketing company.[80]

[79] Price data downloaded from the website of the Consumer Affairs Commission (http://www.cac.gov.jm/dev/SurveyEnquiry/OutletPrices.php)
[80] The multinational companies comprise Total, Texaco and Rubis.

Table 3 Incidence of Low Price Leadership when Epping is Absent

Geographic Markets	Incidence of Total's Low Price Leadership	Marketing Participants
Multinational Markets*		
Marcus Garvey	96%	Total; Rubis
Deanery Road	92%	Total; Rubis
Gilmour Drive	80%	Total; Rubis; Texaco
Shortwood	58%	Total; Rubis; Texaco
West Main Drive	44%	Total; Texaco
Manor Park	30%	Total; Rubis
Red Hills Road	29%	Total; Rubis
Liguanea	19%	Total; Rubis; Texaco
Dunrobin	0%	Total; Rubis; Texaco
Mackville Terrace	0%	Total; Rubis
Group Average	45%	
Local Markets**		
Victoria Avenue	15%	Total; Michael's
Waltham Park	0%	Total; Rubis; Cool Oasis; Texaco
New Kingston	0%	Total; Texaco; Johnson's
Group Average	5%	
Overall Average	36%	

*Markets in which Total competes with only multinational petroleum marketing companies.
** Markets in which Total competes with at least one local petroleum marketing company.

119. Table 3 shows that prior to the acquisition, Total competed more intensely against multinational petroleum marketing companies than it did against local petroleum marketing companies. In particular, in markets where no local petroleum marketing companies were present, there was a 45 per cent chance that Total offered the lowest price.

120. In contrast, in markets where at least one local petroleum marketing company was present, there was only a 5 per cent chance that Total offered the lowest price.

121. Table 4 reports on low price leadership in markets where Epping is also present.

Table 4. Incidence of Low Price Leadership when Epping is Present

Geographic Markets	Incidence of Total and Epping's Low Price Leadership	Marketing Participants
National Heroes Circle	26%	Total; Epping; Michael's; Petcom; Unipet
Half-Way-Tree	0%	Total; Epping; Rubis, Texaco
Old Hope Road	0%	Total; Epping; Rubis, Texaco
Cross Roads	0%	Total; Epping; Petcom; Texaco; Unipet; Johnson's
Group Average	7%	

122. Table 4 shows that in markets where Total and Epping were both present, there was a 7 per cent chance that Total and Epping offered the lowest prices.[81] The National Heroes Circle, in which five petroleum marketing companies participated, was the only market in which both Total and Epping offered the lowest prices. This region was the most competitive geographic market with the price differential across all participants held within a very tight band. For example, 22% of the time all five participants offered the same price; further, in 59% of the time the highest price offered did not exceed the lowest price offered by more than $1.00 per litre.

123. Petcom always offered the lowest price. Unipet matched the lowest price 74% of the time. Epping matched the lowest price 55% of the time while Total matched the lowest price 37% of times.

124. The results of Table 3 and Table 4 are consistent with the hypothesis that, prior to the merger, Total did not face direct head-to-head competition from Epping. This as Total was not more likely to be the low price leader in markets in which Epping was present than it was in markets in which Epping was absent. To this end, Table 3 suggests that multinational petroleum marketing petroleum companies exerted greater competitive constraint on Total than local marketing companies did. These results probably reflect the efforts of multinational petroleum marketing

[81] The lowest and second lowest prices are charged by either Epping or Total.

companies differentiating their products. Multinational petroleum companies differentiate their products by use of petroleum additives.[82]

125. Based on the above, the Staff concludes that Total did not engage in direct head-to-head competition with Epping.

126. Section Summary: The acquisition is unlikely to have had, is having or is unlikely to have the effect of substantially lessening competition in any of the relevant markets identified since, prior to the merger, Epping was not the most significant competitive constraint on Total.

VII. EVALUATION OF EXEMPTIONS OF NON-COMPETE CLAUSES

127. In section VI above, the Staff concluded that dealer locations supplied by Total and Epping were not engaged in direct head-to-head competition prior to the acquisition and so the acquisition is unlikely to eliminate competition in the foreseeable future. Regarding the implementation of the non-compete clause so far as it relates to the duration and geographic scope in the relevant market, the Staff therefore concludes that the clause qualifies for exemptions as set out in section 17(4)(c) as it unlikely to lead to the elimination of competition in respect of a substantial part of the market.

VIII. SUMMARY & OVERALL CONCLUSION

128. The Staff concludes that:

a. The acquisition falls within the Jurisdiction of the Fair Trading Commission and the matter was investigated under Section 17 of the Fair Competition Act.

b. The relevant market comprises the market for petroleum products sold in retail quantities in seven geographic regions within Jamaica.

c. The acquisition significantly increased the concentration levels in the relevant geographic markets.

d. The acquisition is unlikely to have either the purpose or effect of substantially lessening competition since the Staff determined that Total and Epping were not direct head-to-head competitors in any relevant market.

[82] Daley, R. (2019) 'Fuelling The Future,' **Jamaica Observer**, 17 May. Download at http://www.jamaicaobserver.com/auto/fuelling-jamaican-peter-fuentes-afflick-helps-power-texaco_164970?profile=1606.

IX. RECOMMENDATION

129. The Staff recommends that this investigation be closed without any further action on the part of the Commission.