Fair Trading Commission

v.

Pure National Limited;

Pure National Ice Company Limited; and

Island Ice & Beverage Company Limited

February 3, 2020

Case Number: 8112-19

FINAL

*****Public Version*****

Contents

I. PARTIES

1. Acquiring Entity:

   Pure National Limited (**PNL**) is a company with registered offices at 109 Old Hope Road, Kingston 6 in the parish of Saint Andrew, was incorporated in September 2018.[1] PNL was not engaged in any line of commerce prior to the challenged transaction.

2. Acquired Entities:

   Pure National Ice Company Limited (**PNICL**) is a company that was incorporated in October 2014 and its registered offices are located at 214 Marcus Garvey Drive, Kingston 13, Saint Andrew.[2] PNICL's sole line of commerce is the manufacturing and distribution of packaged ice; &

   Island Ice & Beverage Company Limited (**IIBC**) was incorporated in July 2008 and is a company with registered offices located at 14 Herb McKenley Drive, Kingston 6, Saint Andrew. IIBC's sole line of commerce is the manufacturing and distribution of packaged ice.

[1] Companies Office of Jamaica company search of Pure National Limited.
[2] Companies Office of Jamaica company search of Pure National Ice Company Limited.

II. THE CHALLENGED TRANSACTION

3. During 2018, PNL acquired the businesses of PNICL and IIBC, by way of an agreement for sale and acquisition of business (AFS). The agreement stipulated that, among other things, PNL would acquire the business of IIBC immediately before or contemporaneously with the acquisition of PNICL.[3]

4. Both acquisitions thus formed part and parcel of one transaction resulting in the merger of PNICL and IIBC; PNL was established for the purpose of facilitating the merger.[4]

III. INTRODUCTION & BACKGROUND

5. Ice is an important commodity in the food and beverage industry where it is used primarily to preserve the useful life of a variety of food items as well as to provide chilled beverages. For example, ice is very useful to fisherfolks particularly due to its portability. In particular, fisherfolks use ice to preserve fish caught on the open seas until their fishing vessels return to shore. Also, patrons of hotels, bars and parties consume alcoholic and non-alcoholic beverages with ice. Ice is also crushed or shaved to make smoothies, snow cones and sky juice. Ice is also important in the sports events sector as it is used to temporarily mitigate the pain and inflammation suffered during contact sports such as football, netball and basketball.

6. Currently, all that is needed to make ice is a freezer or an icemaker, water, electricity and containers. Today, freezers are generally a standard component in refrigerators. In a standard freezer, ice has to be set manually by placing water in trays; however, there are more advanced freezers that have built-in automatic icemakers that dispense ice without the need for trays. Additionally, icemakers that are independent of refrigerators are currently being manufactured and sold for domestic usage as well as for small volume purposes.

7. Commercially, ice is supplied as either block ice or packaged ice. Block ice is made by filling containers such as metal cans, drums and buckets with water and placing them in the freezer at temperatures below the freezing point of water. The water freezes in the cans and the ice blocks are removed from the containers after several hours of freezing. The containers are

[3] The acquisition of IIBC was a condition of the consummation and completion of the AFS.
[4] Based on various documents including the Agreement for Sale and Acquisition of Business between PNICL and PNL dated October 24, 2018 (**the AFS**) and the Shareholders' Agreement amongst PNICL and PNL and Norbrook Ice and Beverage Limited (**NIB**) dated November 23, 2018 (**the Shareholders' Agreement**).

immersed in freshwater to release the ice blocks, which are then stored. Packaged ice comes in two varieties – *cracked ice,* which is block ice that is cracked and packaged and tend not to be uniformly shaped; and *ice cube*s. Ice cubes are small with sides measuring between 1 and 1.5 inch or are tubular in shape. Ice cubes are manufactured using trays that are placed in freezers at home for personal use or by specialized ice makers. Icemakers produce cubed ice by running water over a grid, which freezes the water into the shape dictated by the grid's design. These cubes are then packaged in containers, usually bags with varying weights, the most popular being the 8, 10, and 40 pound bags.

Customers and their Usage of Ice

8. As mentioned earlier, the primary purpose of ice is for chilled beverages and preserving food items. Table 1 below shows some commercial or high volume customers and purposes for which they use ice:

Table 1. Customers

Customers	Use/purpose of Ice
Individuals	Chilled beverages and preserve food products
Hoteliers	Chilled beverages
Nightclubs and Events Promoters	Chilled beverages
Restaurateurs and bar owners	Chilled beverages
Retail outlets (Gas stations, supermarkets, etc.)	Resale to final consumers
Fisherfolks	Preserve catch

Historical Background of Industry

9. Ice manufacturing generally refers to the commercial process of making ice for the purposes of resale. The process allows ice making machines to dispense ice in quantities and at a speed that is commercially viable. Alternatively, there is the less sophisticated process where freezers are used to make blocks of ice in containers, which is then cracked to the required size.

10. The Kingston Ice Making Company Limited (**Kingston Ice**) was incorporated in 1897, making it one of the first registered companies in Jamaica. To put this into context, the first widely used refrigeration system was released by General Electric 30 years later in 1927. May Pen Ice Company Limited is the second oldest ice making company in Jamaica commencing operations in 1964 where it solely produced block ice. It was incorporated in 1965 and is still in the business operating from its location in May Pen, Clarendon with two additional satellite

storage facilities. In about 2008, May Pen Ice Company Limited started to produce and sell cracked ice.

11. IIBC was formed in 2008 by way of the merger of the Happy Ice Ltd ('Happy Ice') and Kingston Ice. Prior to the merger in 2008, Kingston Ice was one of the leading producers of block ice in Jamaica. Happy Ice specialized in the manufacturing of packaged ice. Formed in the 1980's, Happy Ice was one of the first ventures to enter the packaged ice market where its primary customers were small and medium-sized enterprises and organisers of large special events.

12. IIBC manufactured and distributed packaged ice throughout the Caribbean and supplies wholesale and retail customers in Jamaica at over 750 locations.[5] Prior to the merger, IIBC listed some of its customers as hotels, supermarkets, gas stations, pharmacies, agro-processors, night clubs, sporting facilities and the maritime industry.[6]

13. PNICL manufactures and distributes ice to both retail and wholesale customers across Jamaica. It has a factory in Kingston and a storage facility in Montego Bay. PNICL's ice is sold under the brands/trade names of *Pure National Ice* and *Pure Ice*. PNICL's customers include gas stations, supermarkets, hotels, restaurants and event promoters.

14. PNL manufactures and distributes packaged ice that it sells in bags of varying weights. It supplies packaged ice at both the wholesale and retail level island wide with the heaviest concentration of sales in Kingston and St. Andrew.[7] It distributes ice under the brands *Happy Ice* and *Pure National Ice*. PNL does not sell block ice.

The FTC's Interest in the Transaction

15. As a result of the challenged transaction, the Staff estimates that PNL accounts for approximately 65% of sales volume of packaged ice sold in Jamaica.[8]

16. The transaction could result in a more concentrated market and increase the market's vulnerability to anticompetitive effects.

Merger Analysis Framework

17. 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

[5] http://blueequity.com/project/island-ice-beverage-company/
[6] Ibid.
[7] Interview between FTC's Staff and Representatives of Pure National Ice Limited on October 8, 2019.
8 Ibid.

competing entities. If a merger is likely to cause harm to consumers and competing entities then the FTC will seek to block the transaction or impose conditions in regards to same. These conditions are proposed by the Staff to mitigate any anticipated harmful effects of the merger.

18. Section IV of this report identifies the range of markets which potentially could have been affected by the challenged transaction (relevant market definition). Section V establishes the FTC's jurisdiction to review the challenged transaction and the legal standards required to establish a breach of the relevant section(s) of the FCA. Section VI assesses the likely competitive effects in the markets identified; Section VII assesses the conditions of entering the market. Section VIII evaluates exemptions for non-compete clause in the Agreement while the main conclusions arsing from the investigations are summarised in Section IX. Section X contains the Staff's Recommendations.

IV. RELEVANT MARKET

A. Analytic Framework

19. The relevant market is the smallest group of products which compete with one another within a geographic area. Enterprises 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. Market power refers to the ability of suppliers to profitably increase the price of goods and services above the competitive level for a sustained period.

B. Relevant Product Market

20. 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 substitutes by reason of the products' characteristics, their prices and intended use.

21. PNICL and IIBC both supply ice in Jamaica. PNICL manufactures and distributes packaged ice to retail and wholesale customers across Jamaica. IIBC trades as *Happy Ice* and *Kingston Ice* and

also manufactures and sells packaged ice to retail and wholesale customers across Jamaica; neither PNICL nor IIBC manufactures block ice.

22. Since PNICL and IIBC both manufacture and distribute packaged ice, this is the initial product included as part of the relevant product market. In identifying other candidate products to include as part of the relevant market, the Staff considered the closest alternative to packaged ice.

23. As discussed in the *Introduction and Background* section of the Report, ice is an important commodity in the food and beverage sector where it is used primarily to preserve the useful life of a variety of food items as well as to provide cooled beverages.

24. Block ice is the next best alternative to packaged ice since both products are used for the same purpose. Fisherfolks, for example, typically use block ice to preserve their catch while at sea. One important difference between the products, however, is that of convenience.

25. Customers such as hotels, restaurants, bars and events promoters use ice to chill beverages. Packaged ice is a more convenient option than block ice for this purpose since the ice would have to be small enough to fit in drinking glasses. If these customers were to use block ice, they would have to chip the block ice into much smaller pieces to suit their needs.

26. Another difference between block ice and packaged ice is the minimum volume of ice available in each type. Packaged ice is available in 8 lbs, 10 lbs and 40 lbs bags. Each block of ice typically weighs 300 lbs and is sold to intermediaries that divide it into three and a half smaller blocks. This means that block ice would not be a cost-effective option for individuals requiring less than 9 ten-pound bags of packaged ice.

27. Another indication that consumers are unlikely to view block ice and packaged ice as relatively close substitutes is the fact that in 2008, the sole manufacturer of block ice expanded its product offering to include packaged ice.[9]

28. Section Summary: For reasons cited above, the Staff concludes that block ice is unlikely to be considered by consumers as a reasonably close substitute for packaged ice. Accordingly, the relevant product market comprises packaged ice only.

[9] May Pen Ice Company Limited is the sole manufacturer of block ice in Jamaica. It makes packaged ice by cracking block ice into smaller pieces.

C. Relevant Geographic Market

29. Having identified the relevant product market, it is 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 are sufficiently the same for all participants in such market.[10]

30. Consumers are willing to travel over only a limited distance to purchase ice. This is corroborated by market participants who indicated that they strategically established their manufacturing plants and/or storage facilities in proximity to their customers to capitalize on the aforementioned. Further, some suppliers have freezer trucks that allow them to transport ice over greater distances but the quantities needed to make this feasible is significantly hampered by the lack of storage facilities close to the consumers who may themselves not have such facilities. Competitors have therefore established outlets or satellite locations close to the markets using storage facilities to respond to the needs of customers more quickly. Suppliers with the larger capacity and the most extensive distribution network are therefore capable of supplying the entire country while smaller suppliers without the extensive distribution network may serve only a limited region in proximity to their manufacturing facility. Accordingly, the relevant geographic market for assessing the competitive effects of the challenged transaction comprises Jamaica. Further, there are multiple smaller geographic markets within Jamaica comprising sub-markets.

31. Section summary: The relevant market for assessing the challenged transaction is the market for packaged ice sold in Jamaica, as well as packaged ice sold in sub-regions within Jamaica.

[10] Geographic Market Definition in European Commission Merger Control.
http://ec.europa.eu/competition/publications/reports/study_gmd.pdf Retrieved August 8, 2019

V. LEGAL ANALYSIS

32. Prior to determination of whether the FTC should intervene, it considered the following issues:

    i. Whether the FTC could examine anticompetitive practices and agreements in relation to the ice industry.

    ii. Whether the FTC has the jurisdiction to examine, investigate and/or intervene in the merger and acquisition of PNICL; and if so, what sectors under the FCA empowered the FTC.

    iii. What were the requirements under the relevant section(s) of the FCA and did the agreement (s) or any of the provisions fall afoul of said section(s).

33. Determining the jurisdiction of the FTC involved an analysis of issues identified in (i) and (ii) above.

Issue (i): Whether the FTC could examine anticompetitive practices and agreements in relation to the ice industry.

34. Section 5(1) of the FCA empowers the FTC to investigate matters within the remit of the FCA on its own initiative as it is purporting to do in the present case. This view was endorsed in the Privy Council case of Fair Trading Commission v. Digicel & Anor.[11] Where they stated as follows:

35. "…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"… 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…"[12] (Underlining emphasis ours).

36. Based on the foregoing, the FTC is not precluded from investigating a breach or likely breach of the FCA in the ice manufacturing and distribution industry, including any anticompetitive conduct or arrangement within same.

[11] Fair Trading Commission v. Digicel & Another (2017) UK PC 28 per Lord Sumption at paragraph 22.
[12] Ibid. per Lord Sumption at paragraph 12.

Issue (ii): Whether the FTC has the jurisdiction to examine, investigate and/or intervene in the merger and acquisition of PNICL and IIBC by PNL; and if so, what sections under the FCA empower the FTC

37. Before embarking on the analysis of this issue the concept of a merger was defined and examined.

38. 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] A horizontal merger is a combination of two or more companies that compete directly with each other or the merger of one company with another company producing the same product or similar product and selling it in the same geographic market.[15]

39. In the present case, PNL acquired and merged the businesses of PNICL and IIBC both of which operated ice manufacturing and distribution businesses across Jamaica. This is therefore considered a merger as two separate undertakings have come together under common control forming a new entity (PNL). PNICL and IIBC operated in the wholesale and retail sectors of the ice industry and are thus vertically integrated. Additionally, based on the foregoing as both companies sold/sell similar products in Jamaica this merger could be classified as a horizontal merger.[16]

40. The essential question is whether these two previously independent companies having come together under common control with the consequence that, in the future, the market will function less competitively than it would have absent the merger.[17]

41. In general, horizontal mergers pose three basic competitive problems:

    i. the elimination of competition between merging parties;

    ii. the unification of merging parties may create substantial market power and could enable it to raise prices by reducing output unilaterally; and

[13] Richard Whish and David Bailey, *Competition Law*, 9th Edition, (Oxford; Oxford University Press, 2015) p.829.
[14] Ibid.
[15] Black's Law Dictionary 6th Edition p.737.
[16] Vertical integration is when a business operates at different stages of the production and/or distribution chain in the same industry.
[17] Ibid. p.830.

iii. the strengthening of the ability of the remaining market participants to engage in collusive conduct- coordinate prices and output.[18]

42. The Privy Council decision in *FTC v Digicel* (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 Privy Council 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 of control over a class of transactions which include mergers.[19] It was stated that section 17 applied to any agreement falling within the definition stipulated in subsection (1), being "any agreement containing provisions having as their purpose or likely effect the substantial lessening of competition in the relevant market."[20] 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**."[21] (Emphasis ours)

43. Based on the foregoing and the guidance provided by the Privy Council it is clear that section 17 of the FCA empowers the FTC with the power to examine, investigate and if necessary intervene in any merger found to be in contravention of this section.

Issue (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)

Section 17 – Agreements that Substantially Lessening Competition

44. Section 17 of the FCA 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. (emphasis added)

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

i. Directly or indirectly fix purchase or selling prices or any other trading conditions;

ii. Limit or control production, markets, technical development or investments;

[18] Antitrust Law and Economics in a Nutshell, Ernest Gellhorn et al p.409
[19] *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28 per Lord Sumption at paragraph 32.
[20] *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28 per Lord Sumption at paragraph 26.
[21] Ibid.

iii. Share markets of source of supply;

iv. Affect tenders to be submitted in response to a request for bids;

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

vi. Make the conclusion of contracts subject to acceptance by the other parties supplementary obligations which by their nature or according to commercial usage, have no connections with the subject 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 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 process

While allowing consumers a fair share of the economic benefits;

b. Imposes on the enterprise 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

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

i. That there is an agreement.

ii. That the agreement contains 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.

iii. That the agreement or its provisions must not be one that has been authorised by the Commission pursuant to section 29, Part V of the FCA, or one that satisfies the exemptions provided in section 17(4).

46. It is important to note that the requirements under section 17 are disjunctive, i.e. the provisions of the agreement need to have (1) the purpose, (2) the effect, or (3) the likely effect, of substantially lessening competition in the relevant market. If it is found that the provisions satisfy any of these three limits of the test (as set out at a(i), (ii) & (iii) of the paragraph above). Section 17 would be breached subject to the exemptions provided in subsection 4 of this section.

47. While this section was identified by the legislature to prevent uncompetitive practices, it is important to note that section 17(2) does not provide an exhaustive list of provisions which could be contained in agreements and amount to the substantial lessening of competition.[22] The Commission can therefore find that an agreement that does not fall within those espoused within s. 17(2) is in contravention of that section.

48. 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 FCA however, provides some assistance and states that "References in this Act to lessening competition shall, unless the context otherwise requires, include references to hindering or preventing competition." (emphasis added)

49. 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)).

Purpose

50. In the Privy Council case Fair Trading Commission v Digicel Jamaica Limited and Anor, the Privy Council found that Article 101 of the Treaty on the Functioning of the European Union (TFEU) has substantially the same purpose as section 17 of the FCA.[23] Therefore, as the word

[22] Fair Trading Commission v. Digicel & Another (UKPC 28 per Lord Sumption at paragraph 26.
[23] The Fair Trading Commission v. Digicel & Another (2017) UKPC 28.

'purpose' is not defined by the FCA, Article 101 of the TFEU was examined to provide guidance on interpreting and applying the section.

51. Article 101(1) TFEU prohibits any agreement, decision of understandings or concerted practice that has as its objective or effect the prevention, restriction or distortion of competition within the internal market unless same falls within the exceptions espoused in Article 101(3). 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 anticompetitive effect in the marketplace. In other words, for the purpose of applying Article 101(1) TFEU, no actual anticompetitive effects need to be demonstrated where the agreement constitutes a restriction of competition by object.[24]

52. The ECJ in Consten and Grundia v Commission[25] 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 objective 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.[26]

53. The wording of s. 45 of the Australian Competition and Consumer Act 2010 (**ACCA**) is almost identical to section 17 of the FCA and in this regard Australian decisions have also provided instructive guidance in defining 'purpose' in this context. Section 45 of the ACCA provides that corporations must not enter into or give effect to any contract, arrangement or understanding if any provision of same has the purpose or would have or be likely to have the effect of substantially lessening competition.

54. In *News Limited and Others v South Sydney District Rugby League Football Club Ltd*[27], Glesson CJ defined purpose as the end sought to be accomplished by the conduct and the motive was the reason for seeking that end.[28] This definition has been adopted and applied in several cases. In *Seven Network Limited v News Ltd*[29], for example the Full Federal Court observed

[24] Fair Trading Commission v. Digicel & Another (2017) UKPC 28.
[25] Peter Alexadis & Pablo Figueroa, Mixed Messages in "By Object" vs "By Effects" Saga: The Enigma of Lundbeck, February 2018. Eceived from hhpp://www.competitionpolicyinternational.com/mixed-messages-in-in the-by-object-vs-by-effects-saga-the-enigma-of-lundbeck./#_ftn2
[26] Case 56 and 58/64, Consten.
[27] (2003) 215 CLR 563..
[28] Ibid per Glesson CJ at paragraph 18.
[29] [2009] FCAFC 166.

that: "The purpose will be identified by examining the end sought to be accomplished by the provision."[30] The Court in *Seven Network Limited v News Ltd* also 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.[31] (this is a subjective test)

55. In the New Zealand case of *Union Shipping NZ Limited v Port Nelson Limited*, 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 provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market." [32] The Court made the following pronouncement:

56. "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."[33]

57. An agreement that does not have as its purpose the substantial lessening of competition must be examined to determine if its effects are 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 considers whether the access to the relevant market is impeded and, where it is, whether the subject agreement has contributed to that foreclosure effect.[34] 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.[35]

Substantially Lessening Competition

58. 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.[36]

[30] Ibid. at [852].
[31] Ibid. at pgs 852 and 858
[32] [1990] 2 NZLR 662.
[33] Ibid. at [882].
[34] Case C-234/89, Delimitis v Henninger Brauer AG [1991] ECR – I – 935.
[35] *Societé Technique Miniére Maschinenbau Ulm* [1996] ECR 235.
[36] *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA at [41].

59. As mentioned above, the FCA also does not define the term 'substantial lessening of competition' and thus Australian case law assists in providing guidance in regards to its meaning. The Trade Practices Act, 1974 (repealed, now the Competition and Consumer Act 2010) of Australia utilized the term and the jurisprudence involving the statute is instructive. The Federal Court of Australia in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*[37] 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."

60. 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:

61. "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."[38]

62. In the *Australian Gas Light Company v ACCC*[39] which utilized the test of substantially lessening competition, 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."[40] 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.[41]

63. Additionally, section 79 of the Competition Act of Canada and their interpretation of the term substantial lessening of competition is also opined to provide us with assistance.[42]

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[37] [2000] FCA 38.
[38] [2000] FCA 1381 at 66.
[39](No. 3) [2003] FCA 1525.
[40] *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.
[41] 20 years in- the substantial lessening of competition test in Australia merger law by Gilbert + Tobin- January 21, 2013
[42] Section 79 of the Competition Act of Canada provides as follows:
79. (1) Where, on application by the Commissioner, the Tribunal finds that:
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

64. 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."[43] This is known as the counterfactual analysis. 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."[44]

65. 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. In so doing, the anticompetitive effect is analyzed by comparing the level of competition in the market with and without the provision(s) in the agreement.

66. In conducting its assessment of whether the merger of the businesses of PNICL with IIBC substantially lessens competition in the relevant market, the Staff compared the level of competition in the relevant market with and without the Agreements. The Staff additionally considered the impact of the Agreements or any of their provisions on existing competition and determined whether there were any anticompetitive effects.

67. Where an agreement is found to contravene section 17, it is not enforceable, unless the agreement is one which falls within the exemptions set out under section 17(4) or is one that the Commission has authorized under Part V of the FCA.[45] In determining whether an agreement substantially lessens competition, an overall competitive assessment is conducted, in which various factors are taken into account, including the exemptions. The determination whether any of the exemptions under section 17(4) are satisfied involves an economic analysis. Additionally, in the present case as no request for an authorization was received by the FTC from either of the merging entities (PNICL or IIBC) prior to entering into and consummating the transaction, and therefore none granted, the transaction was subject to an assessment/investigation by the FTC at this post merger stage.

[43] 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.
[44] Ibid. at paragraph 38 of Canada (Commission of Competition)
[45] Part V FCA section 29(1) provides that "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 this Act may apply to the Commission for an authorization to do so. Section 30 of the FCA provides that where an authorization is granted and remains in force nothing in the FCA can prevent the person to whom it is granted from giving effect to the agreement.

Assessment of the Agreements and Restraint of Trade Clauses

68. In the present case, an examination of the Agreements was conducted to determine whether any of them or their provisions had an anticompetitive purpose. It was observed that the AFS contains Restraint of Trade clauses (Clause 16) in regards to PNICL, its affiliates, shareholders and principals. It was also noted that the Shareholders' Agreement contains Non-Competition Clauses (Clause 12) with respect to the shareholders, affiliates or directors of Norbrook Ice and Beverage Limited (NIB) and PNICL.

69. 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 section 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 that section 17 of the FCA applies to an agreement that falls within the definition in subsection (1) being "any agreement containing provisions having as their purpose or likely effect the substantial lessening of competition in the relevant market."

70. The content of the Restraint of Trade and Non-Competition provisions of both agreements are identical in substance and provides that:

71. The Vendor and Shareholders respectively undertake that neither of them nor any of their affiliates, shareholders, directors or principals (except as the parties may agree in the case of the AFS) shall for a period of five (5) years after the Final Completion Date in relation to the AFS and in relation to the Shareholders Agreement shall not during their tenure or for a period of five (5) years afterwards:

    i. on its own or in conjunction with others and whether directly or indirectly establish, develop, carry on or assist in carrying on, be engaged or employed in or provide technical, commercial or professional advice to any other business, enterprise or venture engaged in supplying goods and services identical or similar or competitive with the Business in Jamaica...;

    ii. have any proprietorship interest as a shareholder or partner in any business which is identical, or similar to or competitive with the Business in Jamaica except as a shareholder with no more than 5% of the issued shares in a public company;

iii. …disclose any Confidential Information in respect of the Business to any person or use it for any collateral or improper purpose;

iv. Solicit, canvass or entice away (or endeavour to solicit, canvass or entice away) from the Purchaser/Company any of the employees... for the purposes of employment by them in an enterprise or venture materially competing with the Business; and

v. … carry on business or trade under any name, style, logo, get-up or image which is or had been used in respect of the Business or which is calculated to cause confusion with such a name, style, logo, get-up or image or infer a connection with the Business or the Purchases/ Company;

72. Business in the AFS is the company that manufactures and distributes packaged ice to retail and wholesale customers across Jamaica under the trade and business names "Pure National Ice" and "Pure Ice." In the Shareholders' Agreement Business is defined as the business of manufacturing and distributing ice, water and various beverages to customers, as well as, related enterprises including (but not limited to) cold storage, distribution of fast moving consumer products.

73. An additional sub-clause in the respective Agreements state that if any of the above covenants are found to be void due to their duration, but would be valid if the period is reduced or part of the covenant deleted, that the covenant in question shall apply with such modification as will make it valid and effective.

74. Additionally, it should be noted that there are three exemption letters to the Restraint of Trade Clause in the AFS (in particular clause 16.1) with individuals who are shareholders of PNICL being: John Bailey in regards to his company W.E.T. Jamaica Limited t/a Culligan; Mark Myers in regard to the business and operations of Restaurants of Jamaica; and Peter Buckley in relation to his company Cooksmart Equipment & Supplies Limited. The exemptions apply to the extent that the business and operations of the respective companies (or its affiliates) do not operate an ice manufacturing and distribution business that would compete with PNL; and in the case of Cooksmart Equipment and Supplies Limited that it does not knowingly sell ice machines to an entity or person engaged in the business of manufacturing and distributing ice on a retail or wholesale basis.

The Law on Restraint of Trade/Non-Competition Clauses

75. 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.[46] 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.[47]

76. 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.

77. 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.[48] 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.[49]

78. 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.[50] 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 changed company structure.[51] Necessary means that in the absence of those agreements, the concentration could not be implemented or it could be implemented only

[46] Halsbury's Laws of England 4th Edition Reissue, Volume 47 paragraphs 13 and 21.
[47] Ibid. paragraphs 22 and 25.
[48] Butterworths Competition Law Service, Principles of EU and UK Competition Law- Chapter 4- Ancillary Restraints in EU merger control law.
[49] Butterworths Competition Law Service, Division III Horizontal Agreements Likely to be Permitted- Chapter 2; Ancillary Restraints, paragraph 191.
[50] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), paragraph 11.
[51] Case Comp/ 39736 Commission Decision of 18/06/2012 Areva SA/Siemens AG, paragraph 44.

under considerably more uncertain conditions, at substantially higher costs, over an appreciably longer period with considerably greater difficulty.[52] 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.[53]

79. 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.[54] 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.[55]

80. 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.[56]

81. Where the restraint/ 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.[57] An 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

[52] Ibid. at paragraph 13.
[53] Ibid.
[54] Ibid. at paragraph 22.
[55] Ibid. at paragraph 23.
[56] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) at paragraph 20.
[57] Halsbury's Laws of England (4th Edition Reissue, 1994), vol 47, paragraph 68.

the meaning of the remaining part, and the part to be severed is not part of the main purport or substance of the agreement.

82. 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 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.

83. 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.[58] However, this presumption can be rebutted and the restraint enforced if the restraint is reasonable in the interest of the parties and the public.[59] Reasonableness is a question of law to be determined by the courts.[60] 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. [61] Where the restraint goes beyond what is necessary it will not be considered reasonable.

84. 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.[62]

85. Restraint of trade/non-compete provisions 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.[63] 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.[64] However, it is important to 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.

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[58] Competition Law and Policy Cases and Materials 3rd Edition by Philip Clarke, Stephen Corones & Julie Clarke p. 43.
[59] Ibid.
[60] Neville Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (The Western Australian Jurist Vol 5 p 47)
[61] ACL| Australian Competition Law on Restraint of Trade <https://www.australiancompetitionlaw.org/law/rot/index.html#reources>
[62] Neville Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (The Western Australian Jurist Vol 5 p 48)
[63] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) at paragraph 18.
[64] Neville Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (The Western Australian Jurist Vol 5 p 48) citing Bleby J in *Hydron Pty Ltd v Harous*(2005) 240 LSJS 33.

86. 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. [65] 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.[66] 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.[67]

87. A restriction cannot be considered ancillary merely because it made the main agreement more commercially beneficial for the parties.[68] 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.[69] 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.[70]

88. In the recent 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. [71]

89. 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 and objectively necessary to its implementation.[72] 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

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

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.[73] They also noted that protection may be needed to gain customer loyalty and assimilate and exploit know-how and goodwill.[74] The Commission formed the preliminary view that certain post-JV NCOs were not ancillary to the acquisition for their full product scope and duration.[75]

90. The Commission found that the four (4) year post-JV NCO was not objectively necessary or proportionate. They held that a three-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.[76]

91. 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.[77] 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.[78] Due to the fact that the parties offered commitments to the Commission which reduced the duration of the post-JV NCO to three years and also reduced the product scope, the Commission did not consider it necessary to take action and ceased proceedings against the parties.

Analysis of the Restraint of Trade and Non-Competition Clauses

92. The Restraint of Trade and Non-Competition clauses in both agreements (clauses 16 and 12 of the AFS and Shareholders' Agreements respectively) were examined and the transaction was assessed in accordance with the guidelines detailed in the foregoing paragraphs. Additionally, the exemptions to the Restraint of Trade clauses in particular that in regard to Peter Buckley and his company were noted and the Staff assessed whether the limitation as to the sale of ice machines has or is likely to have anticompetitive effects.

93. The duration of the restraint in relation to the AFS is for five (5) years and in the case of the Shareholders' Agreement five (5) years from the end of the tenure of the Shareholder. The purpose or object of these provisions is to prevent competition with PNL and to prevent any of

[73] Ibid. paragraph 50.
[74] Ibid.
[75] Ibid. paragraph 3 and 49.
[76] Ibid. paragraph 92.
[77] Ibid. paragraph 80.
[78] Ibid. paragraph 70.

the directors, shareholders, or any of the affiliates of the acquired entities as well as the Shareholders' of NIBL and PNICL from engaging in any of the conduct prescribed above for a period of 5 years in the case of the AFS and 5 years post tenure in respect of the Shareholders' Agreement. 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 in order for PNL to realize for a reasonable time the full value of the undertakings purchased.

94. The AFS specifies the transfer of the assets of the business of PNICL, however, the AFS and the Restraint of Trade clauses therein as well as the Non-Competition Clauses in the Shareholders' Agreement and the various exemption letters also makes it clear that the goodwill as well as customer loyalty are also of utmost importance to PNL. It is essential that in keeping with competition objectives, the non-compete clauses are only as restrictive as necessary to achieve the goal of successfully implementing the concentration. As such the duration of the relevant restraints in both 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.

95. The Restraint of Trade/Non-Competition provision in both Agreements specifies the geographic scope as Jamaica. The acquired entities as well as the Shareholders operated in and throughout the island of Jamaica prior to the acquisition. As the geographic scope is limited to the areas in which the vendors offered their products prior to the acquisition it is opined that the geographic scope in the Restraint of Trade and Non-Competition clauses is consistent with the purpose of the effective transfer of the Business and does not have the purpose of substantially lessening competition in the relevant market.

96. The scope of the product market in the Shareholder's Agreement extends to water, beverages, related enterprises including cold storage and distribution of fast moving consumer products. These are not product markets within which the acquired businesses were active prior to the merger. As such the sole purpose or object of the inclusion of these markets is to prevent the shareholders (including John Bailey, Mark Myers and Peter Buckley) and their affiliates from competing with PNL in these markets and the clauses in the Shareholders' Agreement would thus restrict competition which would have otherwise existed in the absence of this agreement in those markets.

97. Based on the jurisprudence and guidance emanating from the EU and Australia, the FTC is of the view that a Jamaican court will likely find the foregoing provisions in the AFS and Shareholders' Agreement to have as their purpose, the substantial lessening of competition as regards their duration and in relation to the product scope in the Shareholders' Agreement, subject to the provisions satisfying the exemptions under section 17(4) of the FCA. The Staff's assessment as to whether the provisions of concern satisfy the exemptions is presented in Section VIII.

VI. ASSESSMENT OF COMPETITIVE EFFECTS

A. Analytic Framework

98. Having defined the relevant market, the Staff now seeks to identify the enterprises supplying this market (market participants) and the share of the markets supplied by each participant (market share).

99. The extent to which a market participant 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 are a large number of equally sized firms).

100. The range of market concentration as measured by the HHI can be classified as follows: (i) *Unconcentrated markets* (HHI less than 1,500). Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects; (ii) *Moderately Concentrated* (HHI between 1,500 and 2,500). Mergers resulting in moderately concentrated that increases HHI by more than 100 points potentially may harm competition and therefore often warrant further evaluation; and (iii)*Highly Concentrated*:(HHI greater than 2,500). Mergers resulting in highly concentrated and involve an increase in the HHI by more than 200 points is presumed to adversely affect competition. Further examination would be needed to rebut the presumption.[79]

101. Horizontal merger assessment considers both the post-merger concentration and the increase in concentration as a consequence of the transaction.

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

B. Market Participants

102. Based on the above, the relevant market is defined as the market for packaged ice sold in Jamaica; there are also multiple sub-markets comprising smaller regions within Jamaica.

103. The relevant market can be separated into two levels: wholesale and retail suppliers. The Staff identified four registered enterprises which supplied packaged iced in wholesale quantities, prior to the merger: IIBC; PNICL; May Pen Ice Company Limited; and Eezy Ice Company Limited.[80] The annual production capacity of these enterprises is indicated in Table 2 below.

Table 2 Market Share Distribution (based on annual production capacity)

Market Participant	Production Capacity (in millions of pounds)	Market Share
Eezy Ice Company Limited	[redacted]	[redacted]
May Pen Ice Company Limited*		
Pure National Ice Company Limited**		
Island Ice & Beverage Company Limited**	[redacted]	[redacted]
Total	[redacted]	[redacted]
Pre-merger HHI=2,822 points; Post-Merger HHI=3,394 points; Increase in HHI=572 points.		

*Only [redacted]% ([redacted] million pounds) of May Pen Ice's capacity is currently utilized for the production of packaged ice. The other [redacted]% is dedicated to block ice.
** Companies acquired by PNL.

104. In addition to the registered enterprises, the Staff was made aware that several informal or unregistered ice manufacturers actively participate in the market.[81] Additionally, there are large customers of packaged ice such as hotels and restaurant chains that self-supply, and at times sell excess production.

C. Market Share and Market Concentration

105. Consumers typically perceive no difference in the packaged ice available from the various suppliers. To the extent that the relevant market is a market for homogenous products, the capacity of market participants is the best measure of participants' competitive significance.

[80] The Companies Office of Jamaica lists five companies registered to manufacture ice in Jamaica but only four are presented in the Table. The other registered ice company, Sun Ice Company Limited, does not appear in the Table as the Staff was unable to gather any information about its operations.
[81] [redacted]

106. Prior to the merger, Eezy Ice held [redacted]% of the production capacity of the market segment with the capacity to produce approximately [redacted] million pounds of packaged ice annually. May Pen Ice Company Limited held the second largest capacity accounting for [redacted]% of the segment-although this capacity was split between block ice and packaged ice. PNICL and IIBC accounted for [redacted]% and [redacted]% respectively.

107. Accordingly, the pre-merger market was highly concentrated with a HHI of 2,822 points. The merger increased market concentration by 572 points to 3,394 points.

108. Although the market was highly concentrated prior to the merger, the significant increase in concentration levels raises concerns for competition. Further examination of the market is therefore warranted to determine whether other market conditions confirm, reinforce or counteract the potentially harmful effects of the increased concentration level.

109. In assessing a merger, the competition authority identifies the competitive effects, if any, that the merger may have in the relevant market(s). A merger may substantially lessen competition, thereby harming consumers, by creating the opportunity for the merged entity to either raise prices profitably on its own (*unilateral effect*) or create or enhance the ability of the market participants to act in a coordinated way on some competitive dimension (*coordinated effect*). In either case, consumers may face higher prices, lower quality, reduced service, or fewer choices as a result of the merger.

110. Section Summary: The challenged transaction was consummated in a highly concentrated market. The increase in concentration resulting from the merger along with the relative size of the participants in the market for ice manufacturing and distribution raises concerns relating to unilateral conduct. It is necessary therefore to assess the ability of PNL to exercise market power.

D. Unilateral Effects

111. Unilateral effects refer to the exercise of market power by a market participant acting on its own, which may arise as a result of the elimination of competition between merging parties. The exercise of market power through unilateral conduct includes increased prices above the pre-transaction level, reduced output, quality or capacity, diminished innovation, or the exclusion of competitors from the market.

112. In general, participants will have fewer incentives to unilaterally exercise market power in markets where consumers have at least one alternative supplier with comparable capacity, quality and scope of operations. Since products in the relevant market are homogenous, differences in production capacities would drive competition in the wholesale segment of the market.

113. Table 2 shows that the merging parties hold the 3rd and 4th largest production capacities. The merger resulted in the merged entity holding the largest production capacity (million pounds annually), but only marginally greater than the enterprise with the 2nd largest capacity (million pounds annually). The other market participant has a capacity of million pounds annually.

114. Further, two other participants in the post-merger period report operating with excess capacity. May Pen Ice Company reports operating with an excess capacity of % of its production capacity whereas Eezy Ice reports operating with an excess capacity "just under %" of its production capacity.

115. The excess capacity currently in the market suggests that rivals could satisfy a significant increase in quantity demanded from large customers seeking to avoid a unilateral price increase on the part of the merged entity; thus making such an increase unprofitable to the merged entity and therefore unlikely to be sustained if implemented. To this point, the Staff is aware of at least one failed attempt at a unilateral price by the merged entity during the post merger period. The price increase was successfully resisted by the large buyer as it was able to negotiate lower prices with another supplier with adequate excess capacity.

116. Section Summary: The merged entity is unlikely to have adequate incentives to unilaterally exercise market power because of the excess capacity currently in the market.

E. Coordinated Effects

117. Coordinated effects refer to the exercise of market power which may arise as a result of the merger encouraging or enabling post-merger interaction among market participants.

118. The exercise of market power through coordinated conduct covers a range of conduct including collusion (which is strictly prohibited by competition law) and parallel behaviour which harms competition but is not prohibited by competition law.

119. Coordinated effects are more likely when (i) the merger significantly increases market concentration and leads to a moderately or highly concentrated market; (ii) the market shows signs of vulnerability to coordinated conduct; and (iii) there is credible basis for the Staff to conclude that the merger may enhance that vulnerability.

120. The merger significantly increased market concentration level in a market which was already highly concentrated. As discussed above, the merger involved participants with the 3rd and 4th largest production capacity in a market for homogenous products. The merger increased market concentration level by 572 points from its pre-merger highly concentrated level of 2,822 points.

121. The market shows signs of vulnerability to coordinated conduct for at least two reasons:

    i. Firstly, coordination is more likely the more participants stand to gain from such efforts. Coordination is more profitable in markets with a lower market elasticity of demand. To the extent that the market elasticity is lower for products with fewer substitutes, the market elasticity for packaged ice is likely to be relatively low since it has no close substitute and therefore likely to be vulnerable to coordinated conduct.

    ii. Secondly, the market is transparent in terms of which participant is supplying a particular customer. The nature of the market is such that rivals can observe when customers (especially large buyers) switch suppliers. To the extent that packaged ice is homogenous, whenever switching takes place it may be confidently inferred by rivals to be due to better prices. This transparency with respect to identity of customers is likely to make the market vulnerable to coordinated conduct involving market/customer segmentation.

122. Section Summary: The merger significantly increased market concentration level in a market which was previously highly concentrated. The Staff concludes that although the merger is unlikely to lead to unilateral effects, the merger increased the market's vulnerability to coordinated effects.

VII. ENTRY

A. Analytic Framework

123. When assessing whether potential rivals pose a competitive constraint to the merged entity, consideration is given to the ease with which new entry can occur and the capacity of incumbents to expand. Impediments to entry are to be considered when assessing competitive constraints. Impediments refer 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.

124. 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."

B. Timeliness

125. Entry is considered timely if it is likely to occur within two years. It is understood that the average time period taken to set up an ice manufacturing business equal in size to the merged entity is nine months.[82] Entrants that are entering the market with a smaller capacity can do so in significantly less time.[83]

126. The requirements to set up an ice manufacturing and distribution business are as follows:

[82] While no data is available on the setting up of IIBC, the setting up of PNICL was done in nine months.
[83] Entry on a small scale could occur within a month, as persons would need to acquire only a freezer and some containers to set the ice.

i. Licensing with the Bureau of Standards of Jamaica (BSJ) and the Ministry of Health[84]

ii. Possession of the necessary property, plant and equipment

iii. Requisite knowledge/ expertise to start up and operate business

iv. Capacity to produce and store ice

v. Trucks for distribution (can be outsourced)

127. For reputational purposes some market participants obtain certification from the National Water Commission that indicates that the water meets the minimum standard for consumption.[85]

128. Over the past five years two manufacturers and distributors, entered the market for ice production and distribution: Iceman in 2019 and PNICL in 2016.[86] Over the same period, one entity, MoBay Ice closed its operations. The reason(s) for closure has not been ascertained by the Staff.

129. Even if the prospect of entry does not deter the merged entity from behaving in a way that injures competition, post-merger entry could lessen the impact of any attempts to do so. Given the ease of setting up an ice manufacturing and distribution operation, the potential of rapid entry by ice manufacturers could also constrain the behaviour of the merged parties. The extent of this constraint is dependent on whether or not the potential entrants would have a sufficiently large enough impact on the operations of the merged party such that its attempt to injure competition is unprofitable post entry of the new player. Even if this is not the case, new entrants could still limit the harm to competition by the parties to the transaction by mitigating, if not averting, anticompetitive effects.

130. Based on the aforementioned, entry is considered to be timely given that setting up of operations is likely to be done within a two-year period. There is also the fact that large consumers of ice such as hotels and restaurants manufacture ice and have significant capacities that could enable them to enter the ice market in the future in a relatively short time period.

[84] The industry is not regulated but the quality of ice is tested by the BSJ to ensure that market participants are selling ice that meets a minimum quality and the Ministry of Health checks to ensure that companies adhere to the sanitary standards.
[85] Interview with Bryan Linton, Eezy Ice Company Limited, November 26, 2019.
[86] Iceman is a subsidiary of Restaurants of Jamaica that supplies packaged ice at Burger King's retail outlets using ice boxes.

C. Likelihood

131. Entry is considered to be likely if it would be profitable at current prices. Some market participants indicate that the business can be asset-intensive, given the high cost of infrastructure such as plant and equipment, operational overheads, etc. A market participant indicates that a high scale operation could cost upwards of One Million United States Dollars (USD 1,000,000) to set up. However, other participants mentioned that this cost is purely dependent on the scale of operations. All market participants interviewed reiterated that at a low scale, the business is relatively simple to set up.

132. The merged entity advised the Staff that the long-term viability of market participants is not profitable at current prices; it cited a series of failed attempts which included that of Kingston Ice Making Company Limited.

133. Another market participant indicated, however, that the market going forward is profitable at current prices. It advised the Staff that its profits increased between 2017 through 2019. The participant's positive outlook for the future is underscored by its projections indicating that it would be able to satisfy the anticipated demand of its consumers only through acquisition of additional plant and equipment. The recent entry of other participants such as Iceman is evidence that other participants have a positive outlook for the market.

D. Sufficiency

134. Even if entry is likely, it will not be sufficient to discourage anticompetitive conduct if market conditions do not allow participants to adequately respond to consumers seeking to avoid price increases.

135. Based on information received, the crucial inputs required to supply the market are readily available to any market participant on the open market. Further, the Staff did not identify any evidence of consumer inertia in this market. Further, to the extent that significant excess capacity exists in the market, the Staff concludes that market conditions are such that rivals would be able to attract and satisfy additional demand from consumers seeking to avoid any unilateral increase in prices.

136. Section summary: Competitive entry is likely to mitigate, if not avert, the harmful effects of the merger in the relevant market.

VIII. EVALUATION OF EXEMPTIONS OF NON-COMPETE CLAUSES

137. Regarding the implementation of the Restraint of Trade/Non-competition clauses so far as it relates to duration in the relevant market, the Staff concludes that these clauses satisfies exemptions set out in section 17(4)(c). Furthermore, these clauses are unlikely to lead to the elimination of competition in respect of a substantial part of the market for packaged ice as the market is conducive to new entry.

138. Regarding the implementation of the Restraint of Trade/Non-competition clauses so far as it relates to duration in markets other than packaged ice, the Staff concludes that these provisions are broader in scope than is necessary to effect the merger as it relates to products outside of the relevant market.

IX. OVERALL SUMMARY

139. The relevant market for assessing the merger is the market for packaged ice sold in Jamaica.

140. The merger was investigated under section 17 of the Fair Competition Act which prohibits agreements that contains provisions which 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, subject to stipulated exemptions.

141. All other things constant, the merger increased the relevant market's vulnerability to anticompetitive effects as it made it easier for enterprises to coordinate their activities to the detriment of consumers in the foreseeable future. The easy conditions of entry, however, decrease the incentives for market participants to engage in anticompetitive conduct.

142. The Staff identified provisions in the Agreements governing non-compete clauses giving effect to restraints in markets which are broader in product scope than is necessary to effect the merger as the products are outside of the relevant product market. A review of the likely effect of these transactions on markets other than the relevant market is outside the scope of this investigation; accordingly, enforcement of these provisions is subject to review by the Commission.

143. The overall conclusion is that the provisions in the Agreement giving effect to the merger do not breach any section of the Fair Competition Act.

X. RECOMMENDATION

144. The Staff recommends to the Commissioners that the investigation into the merger be closed without any further action on the part of the Commission.