INVESTIGATION INTO THE ACQUISITION OF CHAMPION GAMING LIMITED (CGL) BY SUPREME VENTURES LTD (SVL)

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Case Number: 8134-20

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I. PARTIES

Acquiring Entity

1. Supreme Ventures Limited (SVL) is a company with registered address at 28-48 Barbados Avenue, Kingston 5 in the parish of Saint Andrew. SVL entered the slot-machine gaming (SMG) market in 2004.

Acquired Entity

2. Champion Gaming Limited (CGL) is a company registered under the laws of Jamaica and its registered offices is located at 9-11 Barbican Road, Unit #6, Kingston 6 in the parish of St Andrew. CGL was established in 1997 and offers betting services as a bookmaker, as well as slot machine gaming services.

II. THE CHALLENGED TRANSACTION

3. During 2019, SVL acquired the business of CGL, by way of an agreement for sale and acquisition of business (AFS). The agreement stipulated that, among other things, SVL would acquire CGL by way of the following agreements: Agreement for Sale of Assets, Shareholder's Agreement relating to the company known as Bingo Investments Limited; and a Share Issue Agreement.

4. The parties have entered into three agreements. They are as follows:

- Agreement for Sale of Assets;
- Shareholder's Agreement relating to the company known as Bingo Investments Limited; and
- Share Issue Agreement.

III. INTRODUCTION

5. Several studies show that gamers have different motivations for playing games of chance be it lottery, sports betting, slot machine gaming or otherwise. There are those that are habitual gamers that play games of chances for the very same reason why others follow sports teams religiously - the thrill of "the hunt", there are those that occasionally play these games out of either influence of other persons playing or for leisure purposes such as releasing anxiety or stress etc. Then there are persons who play with the sole thought that this is going to be their big break to finance whatever ambition they set for themselves. Further to this, one could break down the motivation behind why gamers play games to the following five reasons[1]:

[1] Chen, S., Shoemaker, S. & Zemke, D.M. (2013). Segmenting slot machine players: A factor-cluster analysis. International Journal of Contemporary Hospitality Management.

- Ego-driven - self defined aspirations for playing games
- Learning/evaluating - the need to experience something new or to assess one's own ability in playing a game
- Relaxation - the need to "escape" from present reality
- Financial rewards - a source of earning
- Excitement - the need to increase adrenaline flow

6. A study conducted by the University of Nevada indicated that 21.8 per cent of players surveyed played slot machines once or more weekly, 44.7 per cent played once or twice a month and 33.5 per cent played four to six times for the year.

7. Individuals who play machines primarily do so to win. The frequency of winning is pre-determined by Return to Player (RTP) to which each machine is conditioned. The RTP is the factor that decides the returns or how much the slot pays out. If the slot is conditioned with RTP of 95 per cent, then 95 per cent of the total amount gambled is returned as winnings and the machine owner receives 5 per cent. The RTP is regulated by the Betting Gaming and Lotteries Commission (BGLC) which requires slots to be conditioned with a RTP of at least 75 per cent.[2] The BGLC independently tests slots to ensure that operators honor their commitment to pay the agreed RTP rate.

Games of chance and other games

8. Slot machines are said to be the most popular games in any casino. This when compared to horseracing and table games such as roulette. Slots usually have three reels but sometimes also have five reels. The reel is the image that spins in the front of the machine. It has multiple symbols on it, and if certain combinations of symbols are lined up in a particular order, a return or money is paid to the player. The less likely it is to line up a particular set of symbols, the higher the payout on that particular combination.

9. Both parties to the agreement operate in the market for slot machine gaming services. Included in the assets SVL will be acquiring are 1,346 slot machines, operated by CGL across 208 locations island wide. SVL owns 179 slot machines across 29 locations island wide. Should the acquisition be finalized, it would strengthen SVL's position as a significant market player in the slot machine gaming market.

[2] The BGLC is required by the Betting, Gaming and Lotteries Act to perform several functions. Among them are to regulate and control the operation of betting and gaming and the conduct of lotteries in Jamaica. Currently, the BGLC supervises the conduct of bookmaking operations, the betting activities of the Racing Promoter and the conduct of lotteries by the Lottery Operator. The BGLC also examines problems relating to the operation of betting and gaming and the conduct of lotteries in the Jamaica.

10. In its 2016-2017 report, the Betting Gaming and Lotteries Commission (BGLC) reported that there are 352 locations island wide that operate as a non-gaming lounge (i.e., areas which house fewer than twenty slot machines) and 2,003 locations that operate as a gaming lounge (areas which house twenty or more slot machines). The acquisition will significantly increase SVL's share of slot machine island wide.

IV. THE FTC'S INTEREST IN THE TRANSACTION

11. The FTC has taken an interest in the transaction as the coming together of the two entities sees the largest market player in the SMG market, CGL, being acquired by SVL. The FTC is investigating the acquisition to determine if it will have an adverse effect on competition in the market for gaming services to the detriment of consumers. The merger may raise concerns under section 17 of the Fair Competition Act (FCA).

12. The investigation relied on information from the parties, rivals and the regulator. Interviews were also conducted with various stakeholder groups. Newspaper articles and various annual reports were consulted as a part of the investigation.

V. RELEVANT MARKET

A. Analytic Framework

13. The relevant market is the smallest group of products which compete with one another within a geographic area. Firms in the relevant market offer the most immediate and direct competition to those being investigated. Market definition sets the stage on which competition takes place and is important because only after the scope of the market has been defined can market shares, of each market participant, be calculated and market power assessed.

14. Two components of the relevant market are the product market and the geographic market. In essence, the relevant market for economic analysis is defined as a product (or group of products), a geographic region and time dimension in which the product is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, could profitably raise prices above the competitive level.

B. Discussion

<u>Relevant Product Market</u>

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

The definition of the relevant product market necessarily starts with the overlapping products offered by parties to the transaction.

16. The players that make up this market includes Technical Service Providers (TSPs) who manufacture and repair locally made slot machines, bars and lounges, license holders and technical service operators.

17. SVL is a gaming licenses holder and currently provides services gaming services to the public along with betting and lottery services. CGL provides gaming services.

18. Since both parties offer slot machine gaming services, this service will be the focus of this assessment to determine the relevant product market(s).

Slot machine gaming service

19. Slot machine gaming generally speaks to gaming using machines found in lounges, bars, hotels, and other similar locations. There are two typologies of slot machines in Jamaica: locally-made machines (LMM) or imported gaming machines (IGM).[3] Furthermore, the categorization of operators is dependent on the number of slot machines they operate and the types of slot machines operated.

20. Gaming lounges operate only IGMs and can operate from 20 to 225 machines. Non-gaming lounges operate a mixture of IGMs and LMMs but can operate a maximum of 18 machines in total. Under-19 operators operate only LMMs and as the name suggests can operate a maximum of 18 machines.

21. SVL currently operates one gaming lounge and thirty two non-gaming lounges, while CGL operates only LMMs at its 212 Under-19 locations. The primary difference between the two types of machines is the fees charged by the government. For LMMs, operators pay a flat annual licensing fee of JMD10,000 per machine, while IGM operators pay a Gross Profit Tax (GPT) monthly to the government.

22. Technical Service Providers (TSPs) are authorized by the BGLC to make and repair LMMs. TSPs have also being observed to either lease and/or sell LMMs (Type 1) or lease IGMs (Type 2). TSPs that make LMMs are licensed to make as many machines as they require with one condition: all the machines made have to be licensed by the BGLC. The machines are assembled using imported parts (motherboard), a monitor and a casing to house the system. Assembly is done by a carpenter.

23. The two options available to TSPs to earn from LMMs and IGMs are: 1) lease the machines to premises operators, thereby establishing a partnership or 2) to sell the machines to these premises owners. The most common occurrence is option 1. With this option, premises owners are not responsible for repairs and/or any

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

other servicing of the machines. The main disadvantage with option 1 however is that the earnings from the machines will have to be split (usually 60/40 for Type 1 TSPs and 5% for Type 2 TSPs) between the premises operator and the TSP (premises operator gets the lion's share). Option 2 sees the premises operator benefiting from 100% of proceeds from the machine. The two major drawbacks are the initial capital outlay to purchase the machines and the cost of repairs and/or other servicing of the machines.

24. By comparison IGM operators are also licensed by the BGLC and each machine imported by these operators is required to be licensed. Unlike the Type 1 TSPs, there is no assembling of parts as machines come pre-assembled. Despite the difference in the process of procuring the machines, consumers do not differentiate between the two machines. In fact, on occasions, consumers have been known to demand particular games (for example Pot of Gold) that are only available on LMMs. Another major difference between the two types of machines is the time taken to acquire the machines. For LMMs it can take as little as two weeks to have a LMM operating, while for IGMs the average time is six weeks.

25. TSPs also vary in their modes of operation. The majority of TSPs, particularly those that operate LMMs only, are very intimate with their operations, i.e. they frequently visit these operations and in some instances have additional business relationships. Other TSPs operate remotely. This remote operation is facilitated by the internet. TSPs that operate remotely are better able to keep track of their machine's operations but they are limited to areas and premises that have internet connectivity. In contrast to type 1 TSPs, type 2 TSPs are less intimate with operators and their relationship is limited to the businesses directly related to the machines.

26. Slot machines have varying payout percentages, which range from 75 per cent to approximately 98 per cent. Payout percentages vary depending on the slot machine game and the owner/operator. The minimum required percentage payout (RTP) set by the BGLC is 75 per cent. It is likely that punters, generally, would see slot machine games provided by SVL and CGL to be substitutable, given that the games provided are the same and they have the guarantee of the minimum payout percentage.

27. Given that consumers would find betting services with respect to slot machines of SVL and CGL to be substitutes, betting services on slot machines form a relevant product market.

Relevant Geographic Market

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

product are sufficiently the same for all participants in such market.[4] For each relevant product markets in which the parties to the transaction participate, the geographic market must be defined.

29. Regarding slot machine gaming service, both SVL and CGL operate in several parishes across the island. The service is offered primarily in gaming lounges and bars.

30. The Staff observed that consumers of gaming operations generally limit their playing slot machines to a specified geographic area. This primarily hinges on the fact that travelling to an area that is, say 30 miles away, will come at a significantly higher cost than going to a slot machine which is within closer proximity. The Staff therefore assessed the geographic markets to be those located within the same postal code.

31. Table 1 below denotes the distribution of slot machine operators across the 285 distinct geographic markets in Jamaica. The table shows that there are 114 geographic markets with a single slot machine operator and there are 43 geographic markets with 10 or more slot machine operators.

Table 1. Distribution of Slot Machine Operators across Geographic Markets

Number of Geographic Markets	Total Number of Slot Machine Operators	Number of Geographic Markets (continued)	Total Number of Slot Machine Operators (continued)
114	1	3	20
49	2	2	21
24	3	3	23
15	4	4	25
7	5	1	27
10	6	2	29
10	7	2	30
4	8	1	32
9	9	1	33
2	10	1	35
2	11	1	40
3	12	1	43
2	13	1	47
2	14	1	50
1	15	1	75
1	16	1	76
1	17	1	79
1	19	1	86

Total number of Geographic markets: 285

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

32. The FTC deduced that no more than 33 of these 285 geographic could be affected by the acquisition. In particular, the FTC determined that prior to the acquisition, SVL was present in 33 geographic markets whereas CGL was present in 212 geographic markets. To the extent that only overlapping geographic markets could be affected by the acquisition, then the FTC concludes that there are no more than 33 relevant geographic markets. The data received by the FTC, however, do not allow for the identification of the specific geographic markets in which the parties participated in.

33. Based on the foregoing it is concluded that the relevant market for SMG services in multiple geographic markets coinciding with the regions in which SVL and CGL were both present prior to the acquisition.

VI. LEGAL ANALYSIS

Jurisdiction to examine industry

34. Section 3 of the Fair Competition Act (FCA) speaks to the application of the Act and based on an examination of section 3, the provision does not exempt the FTC from investigating this business transaction to ascertain whether there is or is likely to be any anticompetitive effects on the relevant market.

35. The Privy Council in the **Fair Trading Commission v. Digicel & Anor** clearly enunciated that the FTC has the authority to examine all markets.[5] Additionally, the Betting, Gaming and Lotteries Act, which governs the gaming industry, does not contain any provision that precludes the FTC from investigating the conduct of players within the industry. In this regard, unless there is an expressed legislative exclusion or exemption, the FTC can examine whether the business practices of parties result in any anticompetitive conduct or arrangement that breach or is likely to breach the FCA.

Jurisdiction to examine Agreements

36. The business transaction between the parties, who are competitors, consist of three agreements. In competition law, these agreements are classified as horizontal agreements which is defined as agreement(s) between actual or potential competitors who operate at the same level of production or distribution in the market. It is understood that not all horizontal agreements harm competition. Many are beneficial as they foster efficiencies, reduce risk, create new and improved products or methods of distribution, among other advantageous capabilities.

37. By contrast, there are horizontal agreements that may eliminate competition, raise prices as well as restrict competition. Accordingly, it is implicit that the objective of a competition agency is to distinguish

[5] [2017] UKPC 28

between agreements that have procompetitive effects and those that are anticompetitive. Accordingly, the FTC will investigate, and intervene where agreements are determined to be anticompetitive.

38. The prevailing section of the FCA that empowers the FTC to examine agreements is section 17 and applies to agreements that have the effect of lessening competition. The section states as follows:

> *17.-(1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.*
>
> *(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that –*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development or investment;*
>
> *(c) share markets or sources of supply;*
>
> *(d) affect tenders to be submitted in response to a request for bids;*
>
> *(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(f) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts,*
>
> *being provisions which have or are likely to have the effect referred to in subsection (1).*
>
> *(3) Subject to the 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 by the Commission is satisfied –*
>
> *(a) contributes to –*
>
> *(i) the improvement of production or distribution of goods or 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 indispensible 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.

39. The FTC, therefore, in conducting its investigation will examine whether the following requirements of section 17 have been established:

i. The parties have an agreement(s);

ii. The agreement(s) contains provisions that:

- Have has their purpose the substantially lessening of competition in a market; or
- Have the effect of substantially lessening competition in a market; or
- Have the likely effect of substantially lessening competition in a market.

40. In addition, in the absence of authorization under section 29, the FTC will examine whether any of the efficiency justification promulgated in section 17(4) are applicable should the agreement be found to be anticompetitive.

41. The requirements stated in section 17 are disjunctive and as a result, an examination of an agreement involves assessing whether the agreement has either (a) the purpose; (b) the effect or (c) the likely effect of substantially lessening competition in the relevant market. Where it is determined that the agreement's provision satisfies any of these three limbs, it will be deemed unenforceable.

42. Additionally, the FTC is not limited to anticompetitive practices detailed in section 17(2) as the subsection does not provide an exhaustive list. In this regard, the FTC can determine that a practice contravenes section 17, even where it is not specially stated.

43. The FCA does not satisfactorily define the essential concepts that underpin the operations of section 17, particularly the word "purpose" and the term "substantially lessening of competition." Section 2(4) of the FCA does provide some guidance regarding the meaning of substantially lessening of competition as it states "References in this Act to the lessening of competition shall, unless the context otherwise requires, include references to hindering or preventing competition." Accordingly, the jurisprudence of other commonwealth jurisdictions, whose competition legislations have similar provisions as the FCA, is examined to assist in interpreting section 17. Additionally, the Privy Council in **Fair Trading Commission v. Digicel & Anor** observed that the structure of the FCA was derived from the system of competition control operated under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and as result,

guidance can be attained from decisions from the European Commission ("EC") and the European Court of Justice ("ECJ").

44. Jurisprudence has established that the determination of whether an agreement has anticompetitive purpose involves examination of the entire agreement to ascertain whether there are any provisions that would affect competition in the relevant market. However, where it is determined that an agreement does not have as its purpose the substantially lessening of competition, the competition agency will examine whether the effect of the agreement is likely to substantially lessen competition in a market. This examination involves an economic analysis of the relevant product and geographic market and whether access to the relevant market is hindered and where it is, the agreement is assessed to determine whether it has contributed to a foreclosure effect. The guidance obtained from case law indicates the importance of accessing the actual context in which competition would occur in absence of the agreement to determine its effect on competition.

45. Additionally, the assessment of whether an agreement has the effect or likely effect of substantially lessening competition involves an assessment of its pro and anticompetitive effects. This assessment involves comparing the level of competition in the market with or without the provision(s) of the Agreement. The Staff, therefore, would seek to determine the impact on competition and ascertain whether anticompetitive effects can be discerned in the market. Economic evidence plays a vital role as the substantial lessening of competition is equated with the prospect that customers would face significantly higher prices or significantly less choice over a significant period in the relevant market. See Appendix.

Non-compete provisions

46. The Staff examined provisions that may be considered as being non-compete provisions. It was observed that two of the Agreements between the parties contained non-compete provisions, that is the Shareholders' Agreement and Share Issue Agreement. The Shareholders' Agreement states as follows:

"Champion covenants…that while it holds shares in the company and for a period of 24 months thereafter….:

a. directly or indirectly carry on or be engaged in any activity or business in Jamaica which shall be in competition to the restrained business;

b. at any time after the completion date disclose confidential information (as defined in clause 10) to any person or use it for any purpose;

c. directly or indirectly into any commercial arrangement with any customers, agents suppliers, or advisers in respect of a business similar to, or competitive with, the restrained business;

d. directly or indirectly cause or encourage any suppliers or advisers of the restrained business to cease or restrict or reduce their suppliers, services or advice;

e. at any time after completion carry on business or trade under any name, style, logo, get-up or image which is or had been used in respect of the restrained business or which is calculated to cause confusion with such name, style, logo, get up or image or infer a connection with the restrained business; and/or

f. directly or indirectly solicit, canvass or entice away (or endeavour to solicit, canvass or entice away) any employee from the restrained business.

47. The non-competition clause in the Share Issue Agreement provides that:

"….[the parties] covenants on behalf of itself and its own shareholders for the benefit of the Company that during the continuance of this Agreement and the conduct by the Company of the business sold to it, it shall not carry on or be engaged in any activity or business which shall be in competition, PROVIDED ALWAYS THAT nothing in this clause shall prohibit any shareholder party from owning less than 5% of the ordinary issued shares of business that conducts activities that are similar."

48. It is observed that while the purpose of the non-compete provisions may be similar, that is to protect the purchaser from unfair competition, each agreement expresses this intention differently. Arguably, it is commonplace in business transfer transactions to have the agreement, not only speak to the subject matter of the transaction but also include additional covenants such as non-competition covenants. However, the validity of these non-competition covenants is dependent upon the satisfaction of certain conditions.

49. In **Remia BV and others v. Commission of the European Communities,** the Court of Justice indicated the conditions that permitted the admissibility of non-competition covenants. The Court distinguished two conditions: 1) necessity for an appropriate transfer of the enterprise; and 2) proportionality that involves a strict limitation of the covenant's duration and scope regarding its purpose. Accordingly, a noncompetition covenant is permissible in circumstances, where the restriction is objectively necessary for the implementation of the concentration and secondly, it is proportional and as a result, its duration, subject matter, geographical field of application and the persons subject to them do not exceed what is reasonably necessary to the implementation of the concentration.[6]

Necessary

50. For a non-competition covenant to be considered necessary, it must have a legitimate purpose, that is, the covenant must be designed to protect only the legitimate interests of the parties. Legitimate

[6] T-112/99 Metropole television (M6) and others v Commission of the European Communities.

interest has been construed by the Courts to include, goodwill, maintenance of a stable system of distribution, the preservation of secure outlets, the protection of the buyer's trade, customer and supplier relationship and confidential information, among others.[7]

51. Non-competition covenants are a measure designed to ensure that legitimate business interest of the buyer to receive the whole value of the subject matter of the transaction. Often the most substantial part of the value of the acquired business consists of the intangible, immeasurable worth, as goodwill and the protection of goodwill is the leading legitimate interest of a business buyer recognized by the Courts.

52. The FTC notes that in discussions with SVL, they indicated that the basis for the transaction was due to CGL having the best run route manufacturing business in Jamaica and as such, SVL seeks to purchase not only the physical assets of CGL but also their know-how. Accordingly, the non-competition provision is deemed to have a legitimate purpose to protect goodwill, as SVL seeks to enter a new market and wishes to earn time to establish themselves in the relevant market. Additionally, it is deduced that the purpose of the non-competition provision of the Share Issue Agreement is to protect the goodwill and ensure the protection of the new initiative formulated by the parties.

Proportionality

53. For a noncompetition clause to be recognized as acceptable and enforceable, it must have not only a legitimate purpose, but it must be proportional. There must be a balance between the public interest in allowing businesses to compete and the protection of the buyer's legitimate commercial interests. It is therefore a question of what is reasonable in the circumstances.

54. Non-competition covenants can only be regarded as proportional, when it addresses a subject whose competition should necessarily be restricted in order to achieve a legitimate aim. The reasonableness of the covenant is questioned where it is imposed too broadly, for example, it includes others who do not have any specific knowledge or relations to the transferred business and cannot therefore, influence the value of the acquired business.

55. In addition, the subject matter of noncompetition covenants must be proportional to the legitimate aim pursued. This is determined on a case-by-case basis. However, the primary content of these agreements includes the economic-commercial activities relevant to the business sold, specifically, it is limited to products and services forming the economic activity of the enterprise transferred.

[7] Virginijus Bite, Non-Competition Covenants in case of Business Transfers, 2011.

56. The geographical scope of the non-competition clause must be limited, so that it only covers the markets where the products concerned were manufactured or sold at the time of the agreements or markets where the enterprise may be regarded as a potential competitor.

57. The duration of the non-competition covenant is also significant in determining its proportionality. In **Reuter/BASF**, the European Commission indicated that the protection of the buyer's legitimate interests must be limited to the period required by an active competitive buyer for him to take over undiminished the enterprise's market position such as it was at the time of transfer.[8]

58. While it is not possible to set a duration that is universally suitable, in principle a prohibition of competition may not exceed the period of time which the buyer requires to take steps to withstand challenges by the seller's competition without suffering serious effects. Guidance from case law indicates that the appropriate duration for noncompetition covenants are as followed:

a. Two year period when the business transfer includes only the goodwill;

b. A period of up to three years when the transfer includes the transfer of both goodwill and knowhow.

59. In **KNP BT/Bunzil/Wilhelm Seiler**, the Commission stated that: "Contractual prohibitions on competition which are imposed on the vendor in the context of a concentration achieved by the transfer of an undertaking are acceptable if they do not exceed the period of two years in the case of a transfer of goodwill, are limited in their scope to the area where the vendor had established the products and services before the transfer and to the products and services which form the economic activity of the undertaking concerned." [9]

60. Similarly, in **Kingfisher/Grosslabor**, the Commission observed that the noncompetition clause in the sale and purchase agreement did not exceed two years and this was in line with normal practice as the purchase resulted in only the acquiring of goodwill.[10]

61. Based on the foregoing, it is contended that the non-compete provisions in the Shareholders' Agreement are proportional in respect of its subject, as the prohibition of covenant is directed against those who have knowledge, management and control of CGL, such as the directors. Additionally, the non-compete provision focuses solely on the gaming, as it is the restrained business that is the subject of the parties' interest.

62. The duration of the non-compete provisions in the Shareholders' Agreement is 24 months and is limited geographically to Jamaica. Based on the guidance of case law, 24 months is an appropriately limited

[8] Case IV/28.996.
[9] Case No. IV/M.884.
[10] Case No. IV/M.1482.

duration, particularly where goodwill is being transferred. In this regard, the Shareholders' Agreements non-compete provisions are found to be proportionate to its legitimate purpose of implementing the transfer of assets and establishment of a new company. On that basis, the Staff does not find any competitive purpose in the provisions.

63. In contrast, the non-competition provisions of the Share Issue Agreement do not appear proportional in respect of its subject and content. Additionally, there is an absence of limits on the duration and geographical scope of the provisions. Arguably, this could result in the restriction of competition that would have existed in the absence of the Agreement. The question that therefore arises is whether the provisions satisfy the exemption stated in section 17(4) of the FCA. Section 17(4) primarily examines whether the transaction would result in efficiency gains and this can only be determined by economic examination of the relevant market. Consequently, this will be examined in the following section.

VII. ASSESSMENT OF COMPETITIVE EFFECTS

A. Market Overview

64. The slot machine gaming market comprises technical service providers (TSPs), premises owners and customers. TSPs manufacture or import the machines that are then sold or leased to premises owners after which customers then play the games. It is important to note that some TSPs are premises owners.

65. Locally made machines are made of a monitor, a CPU and a casing for the unit. These components are either locally sourced or imported. The key component used in the CPU that determines the games that are on each machines is the motherboard. These motherboards are imported from overseas markets such as China, Taiwan and Hong Kong.

66. The BGLC reports that, as at March 2018, there were 16 non-gaming lounge operators that operate a total of 464 slot machines in Jamaica; as well as 12 gaming lounge operators that operate a total of 1,999 slot machines.

67. For the Financial Years 2014/2015 and 2015/2016 payout rates for non-gaming lounges has been consistently above 90 per cent, ranging from 91 to 94 per cent of total odds. TSPs have maintained that the payout ratio that currently prevails is at least 90 per cent. It is important to note however that the required minimum payout rate set by the BGLC is 75 per cent.

B. Market Share and Concentration

68. The extent to which a firm may face competitive constraints from current rivals is indicated by market concentration. The Herfindahl-Hirschman Index (HHI) is a common measure of market concentration which is based on the distribution of market shares. HHI is calculated by squaring the market share of each firm in a market and then summing the resulting numbers. It ranges between a maximum of 10,000 (where there is only one firm) and a minimum of zero (where there is a large number of equally sized firms). The range of market concentration as measured by the HHI can be classified as follows:

- HHI less than 1,500. Market is considered unconcentrated and transactions resulting in unconcentrated markets are not likely to have adverse competitive effects.
- HHI between 1,500 and 2,500. Market is considered moderately concentrated.
- HHI greater than 2,500. Market is considered highly concentrated and transactions that increase the HHI by more than 200 points in highly concentrated markets generally raise competition concerns as they are assumed to enhance market power.[11]

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

The markets for slot machine gaming service consist of 1,835 operators, operating 8,131 machines in 285 distinct geographic markets.

Table 2. SMG providers, location and slot machines

TSPs	Number of Locations		Number of Slot Machines		Number of TSPs	
	2017/2018	2018/2019	2017/2018	2018/2019	2017/2018	2018/2019
SVL	32	33	356	366		
CGL	194	212	1,222	1,599		
Others	716	1,590	3,377	6,166		
Total	942*	1,835*	4,955	8,131	4	14

* Only SVL's gaming lounge was included and data does not include the other gaming lounges and hotels (10 of which had >19 machines and 13 had 19 and under)

[11] US Department of Justice and Federal Trade Commission (2010), Horizontal Merger Guidelines.

69. The information which the FTC reviewed was insufficient to establish market concentration for each of the 285 geographic markets identified.

70. To the extent that the data available to the FTC do not allow for a determination of changes in market concentration in each relevant geographic market, the FTC proceeded to assess other market conditions which would affect competition in the relevant market going forward.

C. Coordinated Effects

71. A merger may diminish competition by enhancing the likelihood of the firms selling in the relevant market to engage in coordinated interaction that harms consumers. Coordinated interaction consists of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself.

72. One of the tenets for successful coordinated interaction is agreeing to terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine the coordinated interaction.

73. As pointed out earlier in this report, the data reviewed by the FTC does not allow for identification of the overlapping geographic markets which could be affected by the transaction. Accordingly, the FTC is unable to make ay determination regarding the likelihood of coordinated effects arising from the acquisition.

D. Unilateral Effects

74. A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because the merged entity may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output. The issue to be determined therefore is whether there exists the opportunity and incentives for SVL, by virtue of its acquisition of CGL, to unilaterally cause competitive harm.

75. Again, the FTC is unable to make ay determination regarding the likelihood of unilateral effects arising from the acquisition. The data reviewed by the FTC did not allow for identification of the overlapping geographic markets which could be affected by the transaction.

VIII. ENTRY ANALYSIS

A. Analytic Framework

76. 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.

77. 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. DISCUSSION

Entry must be timely

78. To deter or counteract the competitive effects of concern, entrants must be able to quickly impact the price in the relevant market significantly. The competition authority generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.

79. The following are the requirements to enter the market for SMG:

- Licensing with the BGLC
- Machines to lease or sell (TSP)
- Machines to operate on premises (Premises owner)
- Requisite knowledge/expertise to start up and operate the business

80. Prior to granting the license, a due diligence phase of the exercise is conducted by the BGLC to verify the applicant's integrity, technical competence, financial ability, standard operating procedures, the premises being "fit for purpose", among other stipulations. The process of obtaining a license from the BGLC is usually completed within six months. If there are extraordinary circumstances that require further assessment the due diligence process continues, which includes verification that all associated parties are "fit and proper" based on the guidelines of the BGLA. TSPs have stated that there have not been any undue delays in renewing licenses or acquiring the licenses.

81. Slot machines can either be imported or assembled locally. It takes approximately six to eight weeks for a machine to be imported and cleared through Customs when it is imported via sea and three days via air freight. Locally made machines generally take on average two to three days to be assembled. Prior to assembly it takes approximately two months to import the parts via sea or three days via air. Some TSPs import parts from Taiwan, Hong Kong and China, while others source parts locally and retrofit and modernize old machines.

82. Over the two-year period 2017/2018 and 2018/2019, ten TSPs entered the market (250 per cent increase), 893 additional locations (64 per cent increase) and 3,176 new machines (95 per cent increase).

83. In December 2014, SVL shuttered a number of its SMG locations, citing the need to curb losses amid falling revenues as the reason. SVL scaled back on its projections of the number of slot machines operated. In 2015, the company projected adding at least 2,000 new machines to its operations. Of this amount it added only 250 machines. Currently the company has 366 machines in operations.

84. Contrastingly, the sector itself has grown in both the number of locations that have opened and the number of machines in operations. In 2014, the BGLC reported that overall, the SMG sector recorded a significant increase in gross profits.

85. Given the ease of setting up a slot machine gaming operation, the potential of rapid entry by gaming machine operators could also act as a constraint on 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.

86. 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 gaming lounges and hotels can enter the slot machine gaming market in the future in a relatively short time period.

Entry must be likely

87. Entry is considered likely if it would be profitable. Factors that reduce the opportunities for entrants to make a profit include: (a) a decline in market demand; and (b) a reduction in the total number of customers that are available to purchase from the entrant. An example of the market being profitable is evidenced by customers entering into contracts to purchase from rivals.

88. The BGLC Annual Reports for 2014-2019 all indicated year on year increases in the gross profit declared by participants in the SMG services sector, except for 2016 when a gaming lounge operator (Vault Gaming Lounge) exited the market. These profits are likely the major contributing factor that led to the rapid increase in the number of entrants coming into the market in the years 2018 and 2019. The common thread regarding slot machines reported by the BGLC in its annual reports was "Slot machine sales increased by double-digit %. Growth continued to be fuelled by the rollout of new slot machines/seats and promotional offerings."

89. The amalgamation of CGL with Markham Betting Company Limited and Track Price Plus Limited in 2014 further strengthened CGL's position in the slot machine gaming market. The resulting entity, Post-to-Post betting, now had an increase in its number of locations, increase in the number of machines, a wider customer base and added managerial experience and expertise to rely on. The company also boasted of increased revenues in the gaming market and its intentions to increase its footprint in said market.

90. The sheer size of the increase in the number of SMG locations and slot machines in 2019 is an indicator that competitors see the market as being profitable.

91. The average cost of making a LMM machine is approximately JMD200,000 which includes the sourcing of the parts and the assembling of the machine. These machines are then sold at an average mark-up of 50 per cent to 100 per cent.

92. Another factor that contributes to the market's profitability is that the BGLC charges a fixed gross profit tax (GPT) on each machine. This is beneficial to SMG operators whose profit is dependent upon sales volume given the high payout percentage ratio (90 per cent) and the commensurate low percentage of sales retained (10 per cent). Currently each unit attracts a flat JMD10,000 annual tax. Alternatively, gaming lounges that use IGMs attract tax as a percentage of sales and pay considerably more per machine.

<u>Revenue Generation Models:</u>

93. Option 1: Bar owner purchases machines outright: cost of machine ranges from JMD350,000 to JMD400,000. Bar owner receives 100 per cent of profit.

Option 2a: Bar owner leases machines from TSPs and gets 40 per cent of profits. TSP gets 60 per cent of profits. Profits are generally 10 per cent of total sales generated i.e. a 90 per cent payout.

Option 2b: Bar owner leases the machines and gets 5 per cent of sales generated.

94. One of the most significant threats to the profitability of SMG was that of misappropriation of funds by intermediaries. This threat has been curtailed by some TSPs who have ensured that cash is inserted into the machines is not paid through intermediaries. This however has increased the need for security for the machines as with this method, there exist the threat of larceny.

95. Given the continued growth in the market and the relatively low costs of entering and operating in the market (relatively low capital outlay, high profit margins on resale or lease, relatively low taxes) entry into the SMG market is considered to be likely.

Entry must be Sufficient

96. Entry is considered sufficient if the threat of entry or actual entry is likely to counteract the harmful effects of the merger, effectively constraining the actions of the incumbent(s), preventing them from harming competition. Inasmuch as multiple entry generally is possible and individual entrants may flexibly choose their scale, committed entry generally will be sufficient to deter or counteract the competitive effects of concern whenever entry is likely. However, entry, although likely, will not be sufficient if, as a result of incumbent control, the tangible and intangible assets required for entry are not adequately available for entrants to respond fully to their sales opportunities.

97. Entry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, make it impossible for entry profitably to achieve the necessary level of sales. The critical inputs into a successful SMG operation are slot machines and premises from which to operate them. On the matter of slot machines, we concluded that the acquisition of slot machines is relatively easy.

98. TSPs maintain that the market is large enough for all existing players and one TSP mentioned that present market participants have not exhausted their capacity or potential. The market has constantly evolved over the years to tackle the challenges that threaten its existence. For example, the threat of intermediaries misappropriating funds is being curtailed by manufacturing machines that are independent of said intermediaries. That is, machines are being manufactured that can pay out cash to punters. With this technology punters insert cash directly into the machines and receive winnings in cash from the machine. With the previous technology machines were of a “button press” nature with a cash collection option through intermediaries or persons who monitor machines.

99. Jamaica has a significant number of bars per square mile. These act as the primary premises used by SMG operators as punters tend to visit bars periodically for various reasons including slot machine gaming. The ease of establishing a bar and the number of existing bars increases the likelihood of entrants having access to this critical input.

100. No single SMG operator has significant control of premises from which SMG is done. However, if there is a requirement that existing operators use only machines from a certain TSP, this could limit entry and also expansion of incumbents. Barring any of these limitations, access to premises is relatively easy.

IX. SUMMARY AND OVERALL CONCLUSION

101. The relevant markets comprise slot machine gaming services in no more than 33 geographic locations in Jamaica.

102. The data available to the FTC did not allow for an assessment of the change in market concentration level in the various relevant markets arising from the acquisition. The absence of such data also prevented the FTC from assessing the prospects for unilateral and coordinated effects arising from the transaction. As such, further analysis of market conditions was conducted to assess the likely effect of the acquisition on competition in the various relevant markets.

103. The FTC determined that even if the acquisition increased the likelihood for unilateral and/or coordinated effects, the easy conditions of entry in the various geographic markets would limit the incentives to engage in anticompetitive conduct. Accordingly, competitive entry is likely to mitigate, if not avert, such adverse effects on competition.

104. As such, FTC concludes that the transaction is unlikely to have as the effect of substantially lessening competition in the relevant markets and therefore unlikely to breach section 17 of the FCA.

X. RECOMMENDATION

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

APPENDIX

Analysis of Purpose

B1. Section 17 has substantially the same objective as Article 101 of the TFEU. Article 101 prohibits all agreements, decisions of undertakings and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition within the internal market. It has become settled law that an assessment of anticompetitive conduct under Article 101 involves examining object and effect alternatively rather than cumulatively. In this regard, where an agreement has demonstrated that it has an anticompetitive object, it becomes unnecessary to consider the effects of the agreement. This is so as that is presumed that the agreement will have negative effects and thus, prohibited. In contrast, where no anti-competitive object is established, an assessment of the agreement's effects must be investigated by the competition authority.

B2. The landmark case of Consten and Grundig provided the analytical groundwork for examining agreements that has their object to harm competition.[12] The ECJ reasoned that as it was determined that the agreement had as its object the restricting of competition, this negated the need to assess concrete market effects as it was inconsequential. Essentially, the proof of adverse effects on competition is unnecessary as it is enough to show that the agreement can prevent, restrict, or distort competition within the internal market.

B3. In Article 101, the distinction between "restrictions by object" and "restrictions by effect" demonstrates that certain forms of conduct between enterprises by their very nature can be regarded as being injurious to the proper functioning of normal competition.[13] Accordingly, restrictions of competition "by object" are those that by their very nature have the potential to restrict competition and as a result, have the high potential for negative effects on competition. It is on this basis, where restriction by object is established, it obviates the requirement to demonstrate any actual or likely anticompetitive effects on the market.

B4. In order to definitively conclude that an agreement is restrictive by object involves an assessment of several factors. In P. GlaxoSmithKline, the ECJ indicated these factors include the content of the agreement's provisions, its objectives, and the economic and legal context of which it forms a part.[14] The reasoning of the Court is consistent with previous cases as the court held that a finding of restriction by "object" does not require that final consumers be deprived of advantages of effective

[12] Case 56/64 and 58/64.
[13] Case C-226/11 Expedia, para 50, delivered on 6 September 2012.
[14] [2009] ECR I-9291 para 58.

competition. On the contrary, only if a restrictive agreement does not have as its object the distortion of competition, is an "effects-based" analysis required. In an "effects-based" analysis, it would be necessary to prove that the agreement produces anticompetitive effects in the market given the surrounding factual and legal context.

B5. Further an examination of whether an agreement has anticompetitive effects involves an economic analysis of the relevant product and geographic markets as well as, other factors relevant to the economic and legal contract. These factors are examined to determine whether cumulatively, entrants are denied access to the market. Where entrants are not denied access to the market, it will be concluded that the agreement does not restrict competition. However, where it is found that barriers to entry are high, an analysis of whether the cumulative effect of the agreement significantly contributes to market foreclosure.[15]

B6. Section 45 of Australia's Competition and Consumer Act has a provision similarly worded to section 17 of the FCA which prohibits contracts, arrangements, understandings or concerted practices that have as their purpose, effect or likely effect of substantially lessening competition in a market. Australian jurisprudence has analyzed the concept of "purpose" and the weight of Australian authority has leaned towards a subjective test. In Seven Network Ltd v. News Ltd, the Full Federal Court observed that: "The purpose will be identified by examining the end sought to be accomplished by the provision."[16]

B7. This subjective stance was also taken in News Ltd v. South Sidney District Rugby League Football Club Ltd where the Court reasoned that ascertaining the purpose of an agreement is to examine the intention of the parties.[17] Glesson CJ stated that: "Purpose is to be distinguished from motive. The purpose of conduct is the end sought to be accomplished by the conduct. The motive for conduct is the reason for seeking that end."[18] Accordingly, the concept of the "purpose of a provision" refers to the subjective purpose of the parties responsible for including the provision in the relevant agreement.

B8. In New Zealand, section 27 of their Commerce Act speaks to the concept of purpose and the substantial lessening of competition. The meaning of purpose was considered in the case of Union Shipping NZ Limited v Port Nelson Limited where the High Court observed that: "Like so many mental concepts, the reference to "purpose" has its difficulties.[19] The word is not merely "intention." Intention to do an act, which is known will have anticompetitive consequences, in itself is not enough. "Purpose" implies object or aim. The requirement is that "the conduct producing the consequences

[15] Stergios Delimitis v Henninger Brau AG, C-234/89; [1991] ECR I-935.
[16] [2007] FCA 1062.
[17] (2003) 215 CLR 563.
[18] Ibid., para 18. Additionally, the FTC is not limited to anticompetitive practices detailed in section 17(2) as the subsection does not provide an exhaustive list. In this regard, the FTC can determine that a practice contravenes section 17, even where it is not specifically stated.
[19] [1990] 2 NZLR 662, para 707.

was motivated or inspired by a wish for the consequences were motivated or inspired by a wish for the occurrence of the consequences."

B9. Accordingly, the Staff has examined the Agreements in their entirety and have assessed their effect on competition in relevant market by conducting a detailed economic analysis.

Substantially Lessening of Competition

B10. The substantial lessening of competition is an essential term that triggers the anticompetitive provision of section 17 of the FCA. The determination of whether a conduct substantially lessens competition focuses on changes to the state of competition in the relevant market and involves well established economic concepts that are considered in assessing whether competition, would be or is likely to be substantial lessened.

B11. In Dandy Power Equipment Pty Ltd v. Mercury Marine Pty Ltd [1982] FCA 178, Justice Smithers stated that: "To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening." Accordingly when examining conduct that has already occurred and determining whether it could be said 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 or without the proposed acquisition.

B12. The Canadian Competition Act also uses the concept of substantial lessening of competition. In the Commissioner of Competition v. Canada Pipe Limited, the courts discussed the appropriate standard for lessening of competition and stated that "...the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial". This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. Only through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned practice "has had, is having or is likely to have the effect of preventing or lessening competition substantially."[20]

B13. The Canada Pipe decision established in the Canadian jurisdiction the "but for" test to determine the substantial lessening of competition. The essence of the test is to compare the state of the market in the presence of the impugned practice with the same market without such practice.

[20] 2006 FCA 233, para 37.

B14. Accordingly, the Staff assessed the pro and anticompetitive effects to determine whether the transaction had the effect or likely effect of substantially lessening competition within the relevant market.