



## **Staff Report**

**Investigation into JAMECO Equipment Company Ltd.'s Acquisition of AMECO  
Caribbean Inc.**

**Case no. 8148-20**

**FINAL**

**March 9, 2021**

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## **I. THE PARTIES**

1. AMECO Caribbean, Inc. (“AMECO”) is a company duly incorporated under the laws of the State of California, USA, and registered in Jamaica as an overseas company with local registered offices at Ernest & Young Building, 28 Beechwood Avenue, Kingston 5, St. Andrew, Jamaica. Prior to the acquisition, AMECO was owned by Fluor Inc.
2. JAMECO Equipment Company Limited (“JAMECO”) is a local company incorporated in December 2019, with registered offices at 49 ½ South Camp Road, Kingston 4, in the parish of Saint Andrew. JAMECO’s Principal Director is listed as Stewart Group Holdings (St. Lucia) Inc. located in Castries, St. Lucia. JAMECO is an affiliate company of the Stewart’s Automotive Group (SAG).

## **II. THE CHALLENGED CONDUCT**

3. JAMECO acquired AMECO by way of an asset sales agreement dated April 27, 2020. Further, the agreement includes restraints on trade (non-compete and non-poaching) provisions governing the Seller’s participation in businesses relating to fleet management, sale and lease of commercial equipment and vehicles in Jamaica.

## **III. KEY INVESTIGATION TIMELINES**

4. The Fair Trading Commission (“the FTC/the Commission”) became aware of the acquisition by way of newspaper reports dated August 19, 2020.
5. The FTC subsequently interviewed SAG on October 12, 2020 in relation to the acquisition. Through the interview and research conducted, the FTC was able to ascertain information on the business of AMECO, SAG and its affiliates.
6. On October 14, 2020 the FTC obtained the acquisition documents from SAG, being the Asset Sale Agreement and its Amendments (the “Asset Sale Agreement”) between AMECO Caribbean, Inc. and JAMECO Equipment Company Limited dated April 27, 2020.

## **IV. THEORIES OF ECONOMIC HARM**

7. The conduct is being challenged on the basis that it constitutes a potential breach of section 17 of the Fair Competition Act (FCA) which prohibits agreements which have as their purpose or effect, the

substantially lessening of competition in any relevant market, without any legitimate business objective.

8. If SAG or any of its affiliates currently participate in any market which includes fleet management services or industrial equipment supplies and servicing in Jamaica, or planned to enter this market in the near future, then the acquisition could distort competition in the market which includes fleet management services by excluding a significant rival. This would provide SAG and its affiliates with the opportunity to exercise market power to the detriment of consumers in this market. The harm to consumers would be manifest in higher prices, fewer choices of fleet management service providers, or reduced innovation, relative to the market absent the acquisition.

## V. OVERVIEW

9. Fleet management is the general practice of managing commercial motor vehicles such as cars, vans and trucks to ensure optimal utilization, fuel consumption and maintenance. Fleet management aims to maximize efficiency, increase productivity and improve safety for an organization's vehicles and drivers. Often this is achieved using a combination of vehicle tracking, reporting on fuel consumption, monitoring of driver behavior and management of vehicle maintenance.
10. Industrial equipment supplies and servicing involves the sale, lease or rental of industrial equipment and the commensurate servicing that result from continued usage of the equipment. Industrial equipment includes trucks, forklifts, backhoes and other heavy duty equipment.
11. The purpose of this Report is to (i) identify the factual information considered in the investigation; (ii) explain the legal and economic principles on which the analysis of the competition concerns and competitive effects of the Respondents' challenged conduct are based; (iii) describe the FTC's understanding of the information relevant to the legal and economic analysis of the challenged conduct; and (iv) apply the law and utilize economic skills to analyze the purpose and effect of the challenged conduct.
12. Economists have shown that the circumstances under which suppliers tend to operate efficiently are when they are subjected to competitive market forces. Thus a competitive market gives rise to efficient performance, and consequently, consumers benefit from lower prices, higher quality, increased rate of innovation, and product diversity compared to what would have existed otherwise.
13. In conducting an assessment of the challenged conduct, the FTC identifies reliable information from a variety of sources; these include business documents, the testimony of industry participants, and information concerning the markets at issue. Documents of industry participants created during the

normal course of business are often important and reliable sources of information about patterns of behaviour and specific decisions in the industry. The FTC often uses the information in such documents to test and develop their hypotheses regarding each of the major topic areas involved in evaluating the potential anticompetitive effects of an individual supplier's conduct.

14. This Report continues with Section VI identifies the range of markets that could be affected by the challenged conduct. Section VII assesses competitive effects of the challenged conduct. A summary of the main findings and the overall conclusion of the investigation are provided in Section VIII while the Report closes with the FTC's recommended remedial measure in Section IX.

## **VI. MARKET DEFINITION**

15. The primary objective of defining a relevant market is to identify markets in which the challenged conduct could adversely affect competition. Businesses which participate in the relevant market offer the most immediate and direct competition to those being investigated.
16. Two components of the relevant market are the product market and the geographic market. In essence, the relevant market may be defined as a product (or group of products), a geographic region and time dimension in which the product is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, could profitably raise prices above the competitive level.

### Relevant Product Market

17. At the time of the acquisition, AMECO was a fleet and project manager that assisted its customers to minimize inefficiencies in their fleet operations and projects. AMECO provided the following services:
  - i. Full service fleet management, which includes functions, such as vehicle leasing and financing, vehicle maintenance, licensing and compliance, supply chain management, accident management and subrogation, vehicle tracking and diagnostics, driver management, speed management, fuel management, health and safety management, and vehicle re-marketing;
  - ii. Construction project which manages construction sites from the project development stages to the turn-key stage. The company provides construction managers with mobile equipment, tools, site planning, equipment maintenance and supplies.

- iii. Operation support and solutions – this includes the overall management of the projects by providing customers with plans to improve utilization of equipment, operational performance, and service levels.
18. JAMECO, an affiliate company of the SAG, did not offer any commercial service at the time of the agreement. Prior to the acquisition, SAG was a full service dealership which sold and serviced commercial/industrial and personal vehicles as well as spare parts and accessories. SAG also operated a car rental service that rented automobiles for short periods of time to its customers for a fee. SAG offered the service under a licensing arrangement with international car rental services Budget Car Rental and Enterprise Holdings brand.
  19. For mergers and acquisitions, the relevant product market is built around markets in which parties to the agreement competed with at the time of the acquisition or would likely to have competed with in the future.
  20. Competition is unlikely to be adversely affected in any market currently since AMECO did not compete with JAMECO or any business to which JAMECO was affiliated with. Based on restraints of trade clauses in the agreement, however, Fluor Inc.'s participation in specified markets in the future is restricted and therefore raises concerns that competition in these markets could be potentially adversely affected by the agreement. As such, the relevant markets coincide with the markets restricted by the Agreement: fleet management, sale and lease of commercial equipment and vehicles in Jamaica.

#### Relevant Geographic Market

21. To the extent that the restrictions of trade included in the agreement are limited to Jamaica, the FTC concludes that the relevant geographic market is Jamaica.

#### Conclusion

22. The FTC concludes that the relevant markets for assessing the challenged conduct are the markets for (i) fleet management; and (ii) sale of commercial equipment/vehicles; (iii) lease of commercial equipment/vehicles in Jamaica.

## VII. ASSESSMENT OF SUBSTANTIAL LESSENING OF COMPETITION

### A. Analytic Framework

23. Section 5(1)(a) of the FCA gives the FTC the jurisdiction to investigate matters concerning the conduct of business in Jamaica, whether via complaint or on its initiative. The Privy Council in Fair Trading Commission v. Digicel & Anor<sup>1</sup> held that the FTC is not precluded from investigating and/or intervention in any particular sector of the market.
24. Based on the foregoing, the FTC has the jurisdiction to investigate the challenged conduct and/or any anticompetitive conduct or arrangement in the relevant market to determine whether the same has breached the FCA provisions, subject to any legislation that expressly excludes this particular sector. The Trade Act is applicable to the relevant product. After examining the provisions of the Trade Act, the FTC determined that nothing in these provisions is likely to be construed as having the effect of ousting the jurisdiction of the FTC to investigate anticompetitive conduct.

#### Relevant Section of the FCA

25. The challenged conduct could potentially contravene section 17 of the FCA. Section 17 falls under Part III of the FCA, which deals with the Control of Uncompetitive Practice.
26. 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 a provision(s) that either:
    - has as its purpose the substantial lessening of competition in a market;
    - has the effect of substantially lessening competition in a market; or
    - is likely to have the effect of substantially lessening competition in a market.
27. Generally, agreements containing restraints of trade which are not reasonably necessary to promote a legitimate business objective would be deemed to have as their purpose, the substantial lessening of competition. Further, agreements which lead to, or is likely to lead to, demonstrable harm to rivalry and consumers in any relevant market, are deemed to have the effect of substantially lessening competition.
28. Agreements which have their purpose, the effect or likely effect of substantially lessening of competition would not breach the FCA if the FTC is satisfied that these provisions are ancillary to a

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<sup>1</sup> Fair Trading Commission v. Digicel & Another [2017] UKPC 28 per Lord Sumption at paragraph 22



concentration and therefore necessary. To be considered as necessary, the provisions must satisfy the following:

- i. its duration must not be longer than three years when transferring goodwill and know-how and for two years if only goodwill is transferred;
- ii. its geographic scope should be limited to the area where the vendor had established the products or services before the transfer;
- iii. it must be limited to products and services which form the same economic activity of the undertaking transferred. (Butterworths on Ancillary Restraints)

29. Section 17 is examined in detail below.

*(1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.*

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

*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

*(b) limit or control production, markets, technical development or investment;*

*(c) share markets or sources of supply;*

*(d) affect tenders to be submitted in response to a request for bids;*

*(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts,*

*being provisions which have or are likely to have the effect referred to in subsection (1).*

*(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.*

*(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been -authorized under Part V or which the Commission is satisfied-*

*(a) contributes to-*

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

*(ii) the promotion of technical or economic progress,*

*while allowing consumers a fair share of the resulting benefit;*

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

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

30. The agreement or its provisions must not be one that satisfies the exemptions provided in section 17(4) or be one to which the FTC has granted authorization pursuant to section 29 of Part V of the FCA.
31. 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. Provided that any of these limbs of the test stated above are satisfied, then section 17 would be breached subject to the exemptions provided in subsection 4 of this section.
32. 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.<sup>2</sup> 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.

## **B. Assessment of the Purpose**

33. In this section, the FTC examines the Asset Sale Agreement and the subsequent Amendments thereto, nos. 1 through 4, to determine whether any provision therein contain provisions which have as their purpose, the substantial lessening of competition in any relevant market.
34. Clause 24 which highlights restrictions on the Seller (Fluor Inc.) was the only provision which was identified as being a potential concern and is discussed below.

### *Clause 24- Restrictions on the Seller*

35. In particular clause 24- "Restrictions on Seller" was reviewed to ascertain whether any of the restraints raised any competition concerns.
36. Clause 24.1 and its sub-clauses outline that for two years from the Completion Date, the Seller is prohibited from doing several activities, namely:

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<sup>2</sup> Fair Trading Commission v. Digicel & Another (UKPC 28 per Lord Sumption at paragraph 26).

- i. engaging in, being concerned in or employed in any business supplying services competitive with the Business (defined as the business of the Seller relating to fleet management, sale and lease of commercial equipment and vehicles in Jamaica and includes assets, assumed contracts and material contracts);
- ii. soliciting customers of the Business or the Buyer;
- iii. soliciting or enticing away any Employees of the Business employed in a managerial, supervisory, sales or administrative capacity from the Buyer or any of its subsidiaries for employment with the Seller or a member of the Seller's Group in an enterprise materially competing with the Business;
- iv. carry on a business of trade with a similar or identical name used by the Business or that suggests a connection with the Business or the Buyer

#### Conclusion

37. To the extent that the Agreement contains provisions which restrict the re-entry of Fluor Inc. in the relevant market, the FTC concludes that the Agreement has as its purpose, the substantial lessening of competition in the relevant markets, subject to the evaluation of exemptions outlined later in Part D of this section of the Report.

#### **C. Assessment of the Effect or Likely Effect**

38. In this section, the FTC examines the Asset Sale Agreement and the subsequent Amendments thereto, nos. 1 through 4, to determine whether any provision therein has or is likely to have the effect of substantial lessening of competition in any relevant market.
39. To establish whether the Agreement has the effect of substantially lessening competition, it is necessary to show that the Agreement leads to, or is likely to lead to, demonstrable harm to rivalry and consumers in any relevant market.
40. Harm to rivalry is typically demonstrated by power to raise rivals' cost or exclude rivals from any relevant market. A useful starting point for an assessment of harm to rivalry is, therefore, an evaluation of changes in the competitive constraints faced by businesses arising from the agreement through an examination of market shares and market concentration level. This is the case as market shares and market concentration level are indicators of competitive constraints from current rivals. The greater the market concentration level, the weaker the competitive constraints faced the enterprise with the leading market share, all other things held constant.

41. The Herfindahl-Hirschman Index (HHI) is a common measure of market concentration. The HHI is calculated by squaring the market share of each market participant and then summing the resulting numbers. It ranges between a maximum of 10,000 (where there is only one supplier) and a minimum of zero (where there is a large number of equally sized suppliers). The range of market concentration as measured by the HHI can be classified as follows:
- HHI less than 1,500. Market is considered unconcentrated and transactions resulting in unconcentrated markets are not likely to have adverse competitive effects.
  - HHI between 1,500 and 2,500. Market is considered moderately concentrated.
  - HHI greater than 2,500. Market is considered highly concentrated and transactions that increase the HHI by more than 200 points in highly concentrated markets generally raise competition concerns as they are assumed to enhance market power.<sup>3</sup>
42. Horizontal merger assessment considers both the post-merger concentration and the increase in concentration as a consequence of the transaction. In general, competition concerns do not arise in any merger which increases market concentration levels by fewer than 100 points.
43. Prior to the acquisition, AMECO was the only participant in the relevant market.<sup>4</sup> The acquisition did not increase market concentration levels and thus unlikely to have harmed rivalry at the time the agreement was executed. Consequently, the FTC concludes that the Agreement did not have the effect of substantially lessening competition in any relevant market.
44. To complete the assessment of competitive effects of the market, it is necessary to evaluate the likely competitive effects in any relevant market in the foreseeable future. The restraint of trade provisions contained in the Asset Sales Agreement affects the relevant market in the foreseeable future. In particular, the Agreement includes four sub-clauses (24.1, 24.2, 24.3 and 24.4) which impose restrictions on the Seller's participation in the relevant market in the future. In particular, sub-clauses 24.1, 24.2 and 24.3 impose restraints on trade for a period up to three years. Sub-clause 24.4, however, imposes restrictions on trade for an indefinite period.
45. An evaluation of the likely effect of the restrictions on trade assesses whether and the extent to which the restrictions eliminate a significant competitive constraint on the conduct of the merged entity in the foreseeable future.

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<sup>3</sup> U.S. Department of Justice and the Federal Trade Commission (2010), Horizontal Merger Guidelines.

<sup>4</sup> Interview with SAG on October 12, 2020.

46. At the time of the agreement, the Seller participated in the market without any rival. Further, the FTC notes that the Seller was willing to sell AMECO prior to JAMECO expressing an interest to purchase it. This suggests that that the Seller's anticipated benefits from not participating in the market exceeded its anticipated benefits of participating in the market as the sole participant, all other things held constant.
47. The relative benefits of participating versus not participating may, however, change over time as market conditions change. If the Seller re-entered the market within three years, it would likely face competition from JAMECO. To the extent that the profits generated by the Seller facing no competition would have been significantly greater than the profits which could have been generated by the Seller facing competition, it is unlikely that market conditions would change in a period of three years which would give the Seller adequate incentives to participate (by re-entering) the market. As such, it is reasonable to infer that sub-clauses 24.1, 24.2 and 24.3 impose only non-binding restraints of trade and the FTC concludes, therefore, that these provisions are unlikely to have the effect of substantially lessening competition in any relevant market.
48. A similar argument could not be made for sub-clause 24.4 as it imposes restrictions for an indefinite duration. While it is possible that market conditions could change so that the Seller would have adequate incentives to participate (by re-entering the market) at some point in the distant future, the FTC has insufficient evidence to infer that re-entry is likely.

#### Conclusion

49. The FTC does not have sufficient evidence to conclude that the acquisition is likely to have the effect of substantially lessening competition in any relevant market.

#### **D. Evaluating Exemptions**

50. In part B of this section, the FTC concluded that the Agreement contains provisions (in particular, Clause 24) which have as their purpose, the substantial lessening of competition in the relevant markets. In what follows, the FTC evaluates whether the Agreement qualifies for any exemption stipulated under section 17(4) of the FCA.
51. The restraint of trade clause 24.1 is limited to a period of two years, the geographic scope is within Jamaica and the clause is limited to the products and services of the Seller. The clauses do not go beyond what is necessary to successfully transfer the value of the business to the Buyer and therefore would be considered ancillary and necessary to the acquisition. Accordingly, clause 24.1 qualify for exemption under section 17(4)(a) and 17(4)(b).

52. Clause 24.2 states that each covenant in clause 24.1 shall be construed as a separate covenant and that if one or more of these covenants is held to be unlawful or against the public interest the remainder of the covenants will still be binding on the Seller. Clause 24.3 stipulates that if any covenant contained in clause 24.1 is void, but would be valid if the period of its application was reduced or the covenant modified then the covenant in question will apply with the necessary modifications to make it valid and effective. Both clause 24.2 and 24.3 qualify for exemption under section 17(4)(a) and section 27(4)(b).
53. Finally, clause 24.4 mandates the Seller to refer all enquiries relating to the Business that it may in the future receive in Jamaica to the Buyer. There is no time limit on this clause and therefore this restraint of trade is of indefinite duration. For this reason, the FTC is not satisfied that this clause is necessary to achieve any legitimate business objective and therefore would not qualify for any exemption under section 17(4).

#### Conclusion

54. The FTC concludes that the Asset Sales Agreement contain a restraint of trade provision (Clause 24.4) which has as its purpose, the substantial lessening of competition in the relevant markets and does not qualify for exemptions under the FCA.

### **VIII. SUMMARY AND OVERALL CONCLUSION**

55. The relevant markets for assessing the challenged conduct are the markets for (i) fleet management; and (ii) sale of commercial equipment/vehicles; (iii) lease of commercial equipment/vehicles in Jamaica.
56. The challenged conduct could potentially contravene section 17 of the FCA. For a claim to succeed and liability to be established under section 17, the following must be established:
- (iii) that there is an agreement:
  - (iv) that the agreement contains a provision(s) that either:
    - has as its purpose the substantial lessening of competition in a market;
    - has the effect of substantially lessening competition in a market; or
    - is likely to have the effect of substantially lessening competition in a market.
57. There is insufficient evidence to conclude that the acquisition is likely to have the effect of substantially lessening competition in any relevant market.

58. The FTC concludes that the Asset Sales Agreement contains a restraint of trade provision (24.4) which has as its purpose, the substantial lessening of competition in the relevant markets and does not qualify for any exemption under the FCA.
59. The overall conclusion of the investigation is that JAMECO's acquisition of AMECO breaches section 17 of the Fair Competition Act.

## **IX. RECOMMENDED REMEDIAL MEASURES**

60. In this section, the FTC proposes remedial measures designed to address the concerns described in Section VII.
61. The FTC identified clause 24.4 as the only restraint of trade provision in the Agreement that is not reasonably necessary to support any legitimate business objective because it extends for a period beyond three years.
62. Accordingly, the FTC recommends that this clause be limited to no more than three years to mitigate any potential anticompetitive effects.



## **Addendum to Staff Report dated March 9, 2021**

**Investigation into JAMECO Equipment Company Ltd.'s Acquisition of AMECO Caribbean Inc.**

**Case no. 8148-20**

**FINAL**

**June 3, 2021**

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## **I. CONCLUSION AND RECOMMENDATION OF STAFF REPORT**

1. By Staff Report dated March 9, 2021 the Staff of the Fair Trading Commission (“the Staff”/ “the FTC”) concluded that the Asset Sale Agreement (“Sale Agreement”) dated April 27, 2020 between Ameco Caribbean Inc. (“Ameco”) and Jameco Equipment Company Limited (“Jameco”) contained a restraint of trade provision (clause 24.4 which mandates the Seller to refer all enquiries relating to the Business that it may in the future receive in Jamaica to the Buyer) which had as its purpose, the substantial lessening of competition in the relevant markets and that same did not qualify for any exemption under the Fair Competition Act (“FCA”).
2. As such the Staff found that Jameco’s acquisition of Ameco was in breach of section 17 of the FCA. The FTC therefore recommended that clause 24.4 be limited to a period of no more than three (3) years to mitigate any potential anticompetitive effects.

## **II. SETTLEMENT AGREEMENT AND RELEASE**

3. On May 7, 2021 Ameco and Jameco entered into a Settlement Agreement and Release (“the Release”).
4. By clause 3 of the Release titled “Mutual Release,” the Parties release and discharge each other as well as their predecessors, successors, parent companies, subsidiaries, affiliates and assigns from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights demands, costs, losses, debts, penalties, fees, expenses and punitive damages of any nature whatsoever known or unknown, which the Releasing Parties have, or may have had, against the Released Parties for any acts or omissions related to or arising from the Sale Agreement. Both Parties agree to release each other and shall not take any recourse or seek any remedy against the other for any breach or contravention of the Sale Agreement.
5. However, clause 3 provides that notwithstanding the “Mutual Releases” certain clauses in the Sale Agreement will continue with full force and effect. These clauses include clause 24.1, 24.2 and 24.3 of the Sale Agreement which deal with the Restrictions on the Seller. It is important to note that clause 24.4 is omitted from the list of clauses to which the Mutual Releases do not apply. As such clause 24.4 would fall under the release and the Seller/ Ameco would not be obligated to fulfill the obligations under this clause of the Sale Agreement.

### **III. CONCLUSION**

6. After reviewing the Settlement Agreement and Release the Staff is of the view that said Agreement adequately addresses the concerns of the FTC as laid out in its Staff Report dated March 9, 2021.
7. Accordingly, the FTC's revised conclusion, in light of the Settlement Agreement and Release dated May 7, 2021, is that the Asset Sale Agreement as revised by the Settlement Agreement and Release, does not breach any provisions of the FCA.

### **IV. RECOMMENDATION**

8. The Staff therefore recommends to the Commissioners that the investigation into the acquisition of Jameco be closed without any further action on the part of the Commission.