



## **STAFF REPORT**

**Acquisition of Cornwall Medical & Dental Supplies Limited by Medical  
Disposables & Supplies Limited**

**Case no. 8172-21**

**December 14, 2021**

**FINAL**

**FAIR TRADING COMMISSION**

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## I. THE PARTIES

### Medical Disposables and Supplies Limited

1. Medical Disposables & Supplies Limited (“Medical Disposables”) is registered under the laws of Jamaica with registered offices at 83 Hagley Park Road, Kingston 10.
2. Medical Disposables is a publicly-traded company with three divisions: pharmaceutical, medical and consumer goods.<sup>1</sup> The pharmaceutical division supplies pharmaceuticals to pharmacies; the medical division supplies medical disposable items to hospitals and medical centers; and the consumer goods division supplies general items such as cleaning, household and beauty supplies to supermarkets, wholesales, and other enterprises.<sup>2</sup>

### Cornwall Medical and Dental Supplies Limited

3. Cornwall Medical & Dental Supplies Limited (“Cornwall Medical”) is registered under the laws of Jamaica with registered offices at 38 Barnett Street, Montego Bay, St. James.
4. Cornwall Medical is an island-wide distributor of medical equipment, medical disposable items, and dental supplies. Cornwall Medical also supplies pharmaceuticals through its three pharmacies operating under the brand name Corn-Med Pharmacy. Two pharmacies are located in Montego Bay and the third in Savannah-La-Mar.<sup>3</sup>

## II. THE CHALLENGED CONDUCT

5. On March 30, 2021, Medical Disposables and Cornwall Medical consummated an Agreement to consolidate their operations by transferring the assets and liabilities of both parties to Cornwall Enterprise Limited- an entity formed to give effect to the consolidation. The Agreement resulted in Medical Disposables holding a 60 percent share of Cornwall Enterprises Limited, with Cornwall Medical holding 40 percent.

## III. KEY INVESTIGATION TIMELINE

6. The FTC became aware of the transaction on June 30, 2021, through articles in the Jamaica Gleaner and the Jamaica Observer describing the acquisition.<sup>4</sup>

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<sup>1</sup> Medical Disposables and Supplies Limited, “2014 Annual Report,” accessed September 24, 2021. <https://www.jamstockex.com/attachments/2014-08/mds-2014-annual-report-doc-20930.pdf>

<sup>2</sup> Ibid.

<sup>3</sup> HG Helps, “Medical Disposables & Supplies Acquire Cornwall Medical & Dental,” *Jamaica Observer*, June 30, 2021.

<sup>4</sup> HG Helps, “Medical Disposables & Supplies Acquire Cornwall Medical & Dental,” *Jamaica Observer*, June 30, 2021.

7. The FTC subsequently interviewed Medical Disposables on September 22, 2021, and Cornwall Medical on October 28, 2021, in gathering information pursuant to the investigation.
8. The FTC also interviewed several rivals in the medical disposables industry between October 27, 2021, and November 4, 2021.

#### **IV. NATURE OF THE INVESTIGATION**

9. The FTC challenged the agreement, which consolidated the operations of Medical Disposables and Cornwall Medical because it eliminated significant competition between the parties.
10. Medical disposable items comprise a range of goods used in the health care industry and which are disposed of after a single-use. The more popular medical disposable goods include gloves, masks, gowns, syringes, wipes, and needles.
11. The Agreement reduces the number of independent market participants supplying medical disposable items. Prior to the Agreement, Medical Disposables participated in the health care industry supplying pharmaceuticals, medical disposable items, and consumer goods. Cornwall Medical also participated in the health care industry supplying medical equipment, pharmaceuticals, medical disposable items, and dental supplies.
12. The FTC challenged the Agreement on the premise that by consolidating their operations, Medical Disposables and Cornwall Medical would eliminate the binding significant competitive constraint which existed between both entities, thereby allowing the consolidated entity, Cornwall Enterprise Limited, to exercise market power in the foreseeable future. Accordingly, consumers of health care services ('patients') would be harmed by the Agreement as they would face higher prices as a result of the reduced competition in the relevant market(s).

#### **V. BACKGROUND**

13. The health of a country's citizens is critical to its growth and development. Such is the importance of a country's healthcare system that the Pan American Health Organization (PAHO) recommends that each country invest at least 6% of its GDP into its healthcare system.<sup>5</sup> The World Bank estimated Jamaica's GDP in 2020 at USD13.81 billion. This recommended investment by PAHO

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<sup>5</sup> Pan American Health Organization, "Health Financing," <https://www.paho.org/en/topics/health-financing> Retrieved December 13, 2021

would value the healthcare sector at USD829 million. The health component of Jamaica's first long-term strategic development plan, Vision 2030, acknowledges this benchmark by PAHO.<sup>6</sup>

14. Strategic Goal #1 of the health component of Vision 2030 is geared at "Safeguarding access to equitable, comprehensive and quality health care." Three requirements for quality health care are patients' safety while being treated, timeliness of treatment, and affordability/accessibility of treatment. To fulfill these requirements, medical practitioners must have clean devices and equipment in readily available supplies. This requirement has led to the increased popularity of medical disposables.
15. Medical disposables/single-use devices are intended to be used temporarily or only once. There are several types of disposable devices that are used in the medical profession. These include: hypodermic needles, syringes, applicators, bandages and wraps, drug tests, exam gowns, face masks, gloves, suction catheters, and surgical sponges. Medical disposables are, in general, simple to operate as they do not require maintenance and sterilization. Medical officers use a new device every time and discard it after use. The primary reason for creating disposable devices is infection control. When an item is used only once, it cannot transmit infectious agents to subsequent patients.
16. There are three primary benefits of using medical disposables versus reusable medical devices: safety, time, and cost.

*Safety:* Arguably, the most significant benefit to using single-use medical devices is that disposing of the device immediately after use improves patient safety. Single-use medical devices reduce the risk of surgical site infections and cross-contamination. If only one person is using the device, and the device is used correctly, the possibility of spreading germs and diseases among patients and medical personnel is virtually eliminated.<sup>7</sup>

*Time.* To ensure that reusable medical devices are safe to use with other patients, they must be cleaned after every use. Taking the time to clean reusable devices means less time spent with patients. Most single-use medical devices are ready to use upon opening, saving medical professionals a significant amount of time. Single-use devices also eliminate the need for medical

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<sup>6</sup> Vision for Health 2030, <https://www.moh.gov.jm/wp-content/uploads/2019/05/MOHV-Vision-for-Health-2030-Final.pdf>  
Retrieved December 14, 2021

<sup>7</sup> The Benefits of Switching to Single-use devices <https://www.medicalindicators.com/post/the-benefits-of-switching-to-single-use-medical-devices/> Retrieved December 14, 2021

staff to clean, disinfect, and sterilize reusable devices. With minimal preparation and effort, single-use medical devices can significantly increase a facility's efficiency.<sup>8</sup>

*Cost.* Although single-use medical devices may seem like a more expensive option, it's usually a more cost-effective one in the long run. Many reusable devices require the purchase of additional accessories in order to ensure the device is safe for use among multiple patients. However, disposable products do not require the purchase of additional accessories, and there are no additional costs associated with cleaning, calibrating, or repairing disposable devices. Reusable devices require the re-purchasing of decontamination supplies on a regular basis, and there is also the additional cost of machine maintenance, utility use, and employee time, which can greatly increase costs. Single-use supplies can provide the same quality as reusable devices without the additional cost of ongoing maintenance and upkeep. In the end, providers will see continued savings after making the switch to single-use medical supplies.<sup>9</sup>

17. There is no available information on the exact value of the medical disposables market; however, a search of the directory reveals that at least 14 participants serve the market. Of the participants in this market, only one is listed on the Jamaica Stock Exchange, Medical Disposables and Supplies. Information from the company's 2020 annual report values the company's annual revenues at JMD2.48 billion for the year ending March 31, 2020. This represents a fraction of the overall market, which is estimated to be multiples of this, given the number of other participants.

## **VI. RELEVANT MARKET**

### Relevant Product Market

18. The relevant product market defines the product boundaries within which competition exists between the parties to the challenged conduct and includes only those products that are reasonably interchangeable by consumers for the same purpose. Therefore, the product market is taken to comprise all those products supplied by Medical Disposables which competed against products supplied by Cornwall Medical.
19. The initial candidates for identifying the potential markets which could be affected by the Agreement, the FTC identified competing products supplied by both Medical Disposables and Cornwall Medical. Medical Disposables participated in the health care industry supplying pharmaceuticals, medical disposable items, and consumer goods. Cornwall Medical also

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

participated in the health care industry supplying pharmaceuticals, medical equipment, medical disposable items, and dental supplies.

20. Accordingly, the two initial candidate products to include in the relevant market(s) are (i) medical disposables and (ii) pharmaceuticals as these were the only two range of products supplied by both Medical Disposables and Cornwall Medical. However, pharmaceutical supplies were subsequently excluded from the relevant market because Medical Disposables and Cornwall Medical operated at different segments of the distribution chain. Medical Disposables supplied pharmaceuticals in wholesale quantities as a distributor, while Cornwall Medical supplied pharmaceuticals in retail quantities to patients through its pharmacy outlets.
21. Accordingly, the FTC concludes that the relevant product market comprises medical disposable items.

#### Relevant Geographic Market

22. The relevant geographic market comprises the area that the parties concerned are involved in the supply of the relevant products 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 the same for all participants in such market.<sup>10</sup>
23. Medical Disposables and Cornwall Medical supply medical disposable items island-wide. The FTC noted that although Cornwall Medical scaled down its operations in recent years, it continued to supply medical disposables through the entire island.
24. Accordingly, the relevant geographic market comprises the entire Jamaica.

#### Conclusion

25. Accordingly, the FTC concludes that the relevant market for assessing the competitive effects of the Agreement comprises the medical disposable items sold in Jamaica.

## **VII. ASSESSMENT OF SUBSTANTIAL LESSENING OF COMPETITION**

### **A. Analytic Framework**

26. The FTC's jurisdiction to investigate matters concerning the conduct of business in Jamaica is grounded in section 5(1)(a) of the Fair Competition Act ("FCA"). In *Fair Trading Commission v.*

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<sup>10</sup> Geographic Market Definition in European Commission Merger Control  
[http://ec.europa.eu/competition/publications/reports/study\\_gmd.pdf](http://ec.europa.eu/competition/publications/reports/study_gmd.pdf) Retrieved August 8, 2019



Digicel & Anor,<sup>11</sup> the Privy Council confirmed this jurisdiction and stated additionally that the FTC is not precluded from investigating and/or intervention in any particular sector of the market, subject to any legislation that expressly excludes that particular sector.

27. Based on the foregoing, the FTC has the jurisdiction to investigate the challenged conduct to determine whether the same has breached the provisions of the FCA.
28. The Privy Council also confirmed that section 17 of the FCA applied to mergers and acquisitions.

#### Relevant Section of the FCA

29. 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.
30. For a claim to succeed and liability to be established under section 17, the following must be established that:
  - (i) There is an agreement:
  - (ii) The agreement contains a provision that:
    - a. has as its purpose the substantial lessening of competition in a market;
    - b. has the effect of substantially lessening competition in a market; or
    - c. is likely to have the effect of substantially lessening competition in a market.
31. Section 17 is examined in detail below and provides as follows:
  - (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;*

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<sup>11</sup> Fair Trading Commission v. Digicel & Another [2017] UKPC 28 per Lord Sumption at paragraph 22

*(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.*

32. 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 the FCA.

33. 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 in order for same to be in contravention of this section. 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.

#### Evaluating the Purpose of Substantially Lessening Competition

34. It is important to note that the word ‘purpose’ as used in section 17 is not defined in the FCA. Similarly, the FCA does not contain a definition for the term ‘substantial lessening of competition’. Section 2(4) of the FCA, however, provides some assistance and states that “References in this Act to lessening competition shall, unless the context otherwise requires, include references to hindering or preventing competition.” (emphasis added)
35. Therefore, the FTC has relied on the jurisprudence of other commonwealth jurisdictions whose provisions are largely similar to section 17 of the FCA to assist in providing guidance in interpreting these terms. In this regard, the FTC relied on jurisprudence from Australia, New Zealand, Canada, and the European Union (The European Commission (EC) and European Court of Justice (ECJ)).
36. In the Privy Council case *Fair Trading Commission v Digicel Jamaica Limited and Anor*, the Privy Council found that Article 101 of the Treaty on the Functioning of the European Union (TFEU) has substantially the same purpose as section 17 of the FCA.<sup>12</sup> Therefore, as the word ‘purpose’ is not defined by the FCA, Article 101 of the TFEU was examined to provide guidance on interpreting and applying the section.
37. Article 101(1) TFEU prohibits any agreement, decision of understandings, or concerted practice that has as its objective or effect the prevention, restriction, or distortion of competition within the internal market unless same falls within the exceptions espoused in Article 101(3). Once it has been established that the object or effect of an agreement is to restrict competition, it is irrelevant to determine whether an infringement of Article 101 has occurred, whether the agreement in question actually had an anticompetitive effect in the marketplace. In other words, for the purpose of applying Article 101(1) TFEU, no actual anticompetitive effects need to be demonstrated where the agreement constitutes a restriction of competition by object.<sup>13</sup>

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<sup>12</sup> *The Fair Trading Commission v. Digicel & Another* (2017) UKPC 28.

<sup>13</sup> *Fair Trading Commission v. Digicel & Another* (2017) UKPC 28.

38. The ECJ in Consten and Grundia v Commission<sup>14</sup> ruled that for the purpose of the application of article 85(1) (now Article 101), there is no need to take account of the concrete effects of an agreement when it has as its objective the prevention, restriction or distortion of competition. Accordingly, where it is determined that an agreement by its very nature is anticompetitive and it is apparent that the object is to prevent, restrict or distort competition, it would be unnecessary to consider the actual effects of the Agreement.<sup>15</sup>
39. The wording of s. 45 of the Australian Competition and Consumer Act 2010 (**ACCA**) is almost identical to section 17 of the FCA, and in this regard, Australian decisions have also provided instructive guidance in defining ‘purpose’ in this context. For example, section 45 of the ACCA provides that corporations must not enter into or give effect to any contract, arrangement, or understanding if any provision of same has the purpose or would have or be likely to have the effect of substantially lessening competition.
40. In News Limited and Others v South Sydney District Rugby League Football Club Ltd<sup>16</sup>, Glesson CJ defined purpose as the end sought to be accomplished by the conduct, and the motive was the reason for seeking that end.<sup>17</sup> This definition has been adopted and applied in several cases. In Seven Network Limited v News Ltd<sup>18</sup>, for example, the Full Federal Court observed that: “The purpose will be identified by examining the end sought to be accomplished by the provision.”<sup>19</sup> The Court in Seven Network Limited v News Ltd also held that the relevant provision must have been included for the purpose of substantially lessening competition in the relevant market and that such purpose must be a substantial purpose for such inclusion.<sup>20</sup> (this is a subjective test)
41. In the New Zealand case of Union Shipping NZ Limited v Port Nelson Limited, the High Court examined the meaning of purpose within the context of section 27 of the Commerce Act, which states that it is illegal to “enter into a contract or arrangement, or arrive at an understanding,

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<sup>14</sup> Peter Alexadis & Pablo Figueroa, Mixed Messages in “By Object” vs “By Effects” Saga: The Enigma of Lundbeck, February 2018. Eceived from [http://www.competitionpolicyinternational.com/mixed-messages-in-in-the-by-object-vs-by-effects-saga-the-enigma-of-lundbeck/#\\_ftn2](http://www.competitionpolicyinternational.com/mixed-messages-in-in-the-by-object-vs-by-effects-saga-the-enigma-of-lundbeck/#_ftn2)

<sup>15</sup> Case 56 and 58/64, Consten.

<sup>16</sup> (2003) 215 CLR 563..

<sup>17</sup> Ibid per Glesson CJ at paragraph 18.

<sup>18</sup> [2009] FCAFC 166.

<sup>19</sup> Ibid. at [852].

<sup>20</sup> Ibid. at pgs 852 and 858

containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.”<sup>21</sup> Accordingly, the Court made the following pronouncement: “Intention to do an act, which is known will have anticompetitive consequences, in itself is not enough. “Purpose” implies object or aim. The requirement is that “the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences.”<sup>22</sup>

#### Evaluating the Effect of Substantially Lessening Competition

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

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<sup>21</sup> [1990] 2 NZLR 662.

<sup>22</sup> Ibid. at [882].

<sup>23</sup> Case C-234/89, *Delimitis v Henninger Brauer AG* [1991] ECR – I – 935.

<sup>24</sup> *Société Technique Minière Maschinenbau Ulm* [1996] ECR 235.

<sup>25</sup> *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA at [41].

<sup>26</sup> [2000] FCA 38.

45. On appeal to the Full Court, Justices Burchett and Hely agreed that Justice French applied the correct test in his determination of whether there was a substantial lessening of competition.

The Court stated that:

“Conduct has the effect of lessening competition in a market only if it involves a reduction in the level of competition which would have otherwise have existed in that market but for the conduct in question.”<sup>27</sup>

46. In the *Australian Gas Light Company v ACCC*<sup>28</sup> which utilized the test of substantially lessening competition, the Court examined a number of previous decisions and agreed that “in determining whether it could be said that there is likely to be a substantial lessening of competition in a market, it is necessary to consider the future state of the relevant market with and without the proposed acquisition.”<sup>29</sup> The Federal Court judge concluded that substantial lessening of competition required that the acquisition have a meaningful or relevant impact on the competitive process over time, not merely a short-term effect, which was to be assessed by reference to commercial realities and not hypothetical theories.<sup>30</sup>

47. Additionally, section 79 of the Competition Act of Canada and their interpretation of the term substantial lessening of competition is also opined to provide us with assistance.<sup>31</sup>

48. In this regard, the Federal Court of Appeal in *Canada (Commission of Competition) v Canada Pipe Company Limited* held that “the correct test for establishing substantial lessening of competition is whether but for the impugned conduct the relevant market would have been substantially more competitive.”<sup>32</sup> This is known as the counterfactual analysis. The Court stated that “the correct approach in this regard is to compare the level of competition in the presence of the exclusive

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<sup>27</sup> [2000] FCA 1381 at 66.

<sup>28</sup>(No. 3) [2003] FCA 1525.

<sup>29</sup> *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259; *Outboard Marine Australia Pty Ltd v Hecar Investments* (No 6) Pty Ltd (1982) 44 ALR 667 at 669-70.

<sup>30</sup> 20 years in- the substantial lessening of competition test in Australia merger law by Gilbert + Tobin- January 21, 2013

<sup>31</sup> Section 79 of the Competition Act of Canada provides as follows:

79. (1) Where, on application by the Commissioner, the Tribunal finds that:

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

<sup>32</sup> Fair Trading Commission Staff Report in the matter Radio Jamaica Limited and Gleaner Company Limited and Gleaner Company Media dated November 23, 2015 Case # 7887-15 at p.11 citing *Canada (Commission of Competition) v Canada Pipe Company Ltd.*, 2006 FCA 233.

arrangement with what it would have been in the absence of the arrangement, and not to exclusively focus on entry by new firms and switching by incumbent firms”<sup>33</sup>

49. Accordingly, an evaluation of whether an agreement has the effect or likely effect of substantially lessening competition involves an analysis of the pro and anticompetitive effects. In so doing, the anticompetitive effect is analyzed by comparing the level of competition in the market with and without the provision(s) in the agreement.
50. In conducting its assessment of whether the Agreement between Cornwall Medical by Medical Disposables substantially lessens competition in the relevant market, the FTC compared the level of competition in the relevant market with and without the acquisition (this will be discussed in the following sections).
51. Where an agreement is found to contravene section 17(3), it is not enforceable unless the agreement is one that falls within the exemptions set out under section 17(4) or is one that the Commission has authorized under Part V of the FCA.<sup>34</sup> In the present case, no request for authorization was received by the FTC from either Cornwall Medical or Medical Disposables.
52. In determining whether an agreement substantially lessens competition, an overall competitive assessment is conducted, in which various factors are taken into account, including the exemptions. The determination of whether any of the exemptions under section 17(4) are satisfied involves an economic analysis.

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

53. Medical Disposables entered the Agreement pursuant to a wider objective to expand its operations into new markets within the health care industry.<sup>35</sup> Prior to the Agreement, Medical Disposables had increased its warehousing space to accommodate larger inventories of the products it sells.<sup>36</sup> Over the period 2019-2020, Medical Disposables made significant investments to improve its internal infrastructure to facilitate the expansion.<sup>37</sup> Market expansion, without

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<sup>33</sup> Ibid. at paragraph 38 of Canada (Commission of Competition)

<sup>34</sup> Part V FCA section 29(1) provides that “any person who proposes to enter into or carry out an agreement or to engage in a business practice which in the opinion of that person, is an agreement or practice affected or prohibited by this Act may apply to the Commission for an authorization to do so. Section 30 of the FCA provides that where an authorization is granted and remains in force nothing in the FCA can prevent the person to whom it is granted from giving effect to the agreement.

<sup>35</sup> Meeting with Kurt Boothe, CEO, Medical Disposables (September 22, 2021)

<sup>36</sup> [https://www.jamaicaobserver.com/business/medical-disposables-eyes-expansion-of-pharmaceutical-product-line\\_19231323](https://www.jamaicaobserver.com/business/medical-disposables-eyes-expansion-of-pharmaceutical-product-line_19231323)

<sup>37</sup> [https://www.jamaicaobserver.com/business-observer/medical-disposables-supplies-acquires-cornwall-medical-dental-new-subsidiary-to-operate-as-part-of-cornwall-enterprises-ltd\\_224842](https://www.jamaicaobserver.com/business-observer/medical-disposables-supplies-acquires-cornwall-medical-dental-new-subsidiary-to-operate-as-part-of-cornwall-enterprises-ltd_224842)

more, raises no concern for competition since it could not reduce competition in the market in which the expansion is taking place.

54. Cornwall Medical entered into the Agreement for the purpose of accessing financial relief. Cornwall Medical indicated that it had been facing financial difficulties and advised the FTC that it likely would have either exited the market or sought to partner with another entity had it not been for this Agreement. Financial relief to an otherwise viable business entity, without more, raises no concern for competition. On the contrary, the financial support of a going concern is likely to promote competition by allowing the competitive assets of the entity to remain in the market.
55. To the extent that:
  - a. Medical Disposables entered the Agreement for the purpose of expanding to markets in which it had not previously participated in; and
  - b. Cornwall Medical entered into the agreement to access liquidity support for its otherwise viable business operations,

The FTC concludes that the Agreement does not have the purpose of substantially lessening competition.

### **C. Analysis of Effect**

56. In this section, the FTC further examines the Agreement to determine whether it has, is having, or is likely to have the effect of substantially lessening of competition in any market.
57. In analyzing the effect of the Agreement, it is sufficient to show that the transaction leads to, or is likely to lead to, demonstrable harm to rivals and consumers in any relevant market.
58. Harm to rivals is typically demonstrated by power to raise a rival's costs or exclude rivals from any relevant market. Therefore, a useful starting point for an assessment of harm to rivals is an examination of market shares and market concentration levels to evaluate changes in the competitive constraints arising from the Agreement.
59. This is the case as the distribution of market shares and changes in the market concentration level are useful indicators of competitive constraints from current rivals. The greater the market concentration level, the weaker the competitive constraints faced by the enterprise with the leading market share, all other things held constant.



### Market Share and Concentration

60. The extent to which an enterprise faces competitive constraints from current rivals is indicated by market concentration. Market concentration level is measured by the Herfindahl-Hirschman Index (HHI), which is based on the distribution of market shares. HHI is calculated by squaring the market share of each firm in a market and then summing the resulting numbers. It ranges between a maximum of 10,000 (where there is only one supplier) and a minimum of zero (where there are a large number of equally sized suppliers). The range of market concentration as measured by the HHI can be classified as follows<sup>38</sup>:
  61. HHI less than 1,500. Market is considered unconcentrated, and transactions resulting in unconcentrated markets are not likely to have adverse competitive effects.
  62. HHI between 1,500 and 2,500. Market is considered moderately concentrated.
  63. 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.
64. In general, horizontal merger assessment considers both the post-merger concentration and the increase in concentration as a consequence of the transaction. Typically, competition concerns do not arise in mergers which increase market concentration by less than 100 points.
65. Information gathered indicates that there are many players in the relevant market. The telephone directory indicated that at least 14 enterprises participated in the market. The FTC interviewed 10 of the 14 companies listed in the directory to gather qualitative data on the relative size of Medical Disposables and Cornwall Medical in the relevant market.<sup>39</sup> Based on the interviews with some market participants, the market is served by between 25 and 50 participants.
66. Cornwall Medical is likely to have a relatively low market share since none of the participants interviewed identified it as being among the leading five (5) suppliers of medical disposable items. This suggests that Cornwall Medical held no more than 17% of the relevant market.
67. The FTC did not gather sufficient data to determine a point estimate of the market share, but it was likely to be significantly less than 17%. Cornwall Medical advised the FTC that business was waning and, therefore, it had scaled back on its inventories which further minimized its island-wide footprint. Several rivals corroborated this statement indicating that Cornwall Medical was no longer in the position of strength that it was in prior to the Agreement. Given that (i) the bulk

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<sup>38</sup> The US Horizontal Merger Guidelines (2010)].

<sup>39</sup> The FTC contacted 11 of the 14 companies listed in the Directory. One participant declined to participate in the interview.

of Cornwall Medical's business was focussed on the distribution of dental supplies and (ii) Cornwall Medical significantly scaled down its operations due to experiencing a protracted period of financial difficulties, Cornwall Medical likely held a low market share in the market for medical disposable items.

68. Medical Disposables held a larger market share than Cornwall Medical. Three rivals indicated that Medical Disposables was among the leading five market participants, while three rivals stated that Medical Disposables was not among the largest five players. Four rivals were non-responsive regarding the relative size of Medical Disposables.
69. Based on the information described above, the FTC determined that only one of the parties to the Agreement was among the leading five enterprises in the relevant market. This suggests that the Agreement is unlikely to lead to a substantial increase in market concentration and therefore could not raise any significant competition concerns. However, to the extent that this determination relied on subjective data which was not independently corroborated, the FTC tentatively concluded that the Agreement was unlikely to have the effect of substantially lessening competition in the relevant market.
70. To make a robust conclusion regarding the likely competitive effects of the Agreement, the FTC examined other characteristics of the market to confirm or refute the tentative conclusion that the Agreement is unlikely to adversely affect competition.

#### **D. Assessment of Conditions for Competitive Entry**

##### Analytical Framework

71. Competition authorities routinely assess the extent to which the top supplier in a given market is likely to face competitive constraints from potential suppliers. Such assessment relies on conditions of entry, expansion, and exit. Suppliers in markets with negligible impediments to entry, expansion, and exit are unlikely to exercise market power for a sustained period, even in a highly concentrated market.
72. Entry must be likely, timely, and sufficient to mitigate effectively and/or to avert anticompetitive conduct. To be likely, there must be an expectation that entry is profitable at prices prior to the conduct; to be timely, the entry must take place within two years; and to be sufficient, incumbent suppliers should not have exclusive control over critical inputs and the entrant should have the capacity to accommodate consumers who may seek to avoid the high prices associated with anticompetitive conduct on the part of incumbent suppliers. (US Horizontal Merger Guidelines).

### Assessment

73. A review of the history of entry informs the FTC's assessment of the prospects for competitive entry in the future, subject to there being no technical or other changes that would alter the speed of new entry relative to the speed of past entry. Accordingly, the FTC is satisfied that the conditions of entry, expansion, and exit are unlikely to be any less favourable to competitive entry in the foreseeable future than they have been in the recent past. An important consideration in arriving at this conclusion is the anticipated lingering impact of the COVID-19 pandemic, which is expected to continue generating a high demand for medical disposable items.
74. Rivals indicated that more than one enterprise had entered the market in the preceding five years. They have credited the rise in entry into the market to the increased demand for medical disposables due to the COVID-19 pandemic.
75. Market participants informed the FTC that multiple entries have been observed in the preceding five years. For example, AVAL Medical Supplies and Disposables and Medical Warehouse were notable recent entrants.
76. None of the rivals interviewed recalled any notable exits from the market. The reason that was given for companies continued existence is that the medical disposables market consists of a vast number of products matched by a wide cross-section of customers. Entrants are therefore able to carve out their niche market by specializing in one product or a group of products.
77. Entry into the market takes place relatively quickly. A timely entry would be more likely to mitigate and/or reverse adverse competitive effects which may arise from the challenged conduct when compared to a market where entry is prolonged. All rivals interviewed indicated that entry into the market is likely to be done within a year. The capital requirement outlined was estimated to be between JMD 10 million to JMD 75 million. There were no regulatory requirements for specific products in the medical disposables market such as gloves and gauze; other products such as needles, liquids, things with expiration dates, and catheters require permits. There is no restriction or prohibition on imports for the products that do not require a permit. Permits often take between one to two weeks for processing but will vary depending on the product and other factors, which could see them take up to six months, particularly if they have to go through the Pharmacy Council of Jamaica. Entrants into the market need only to register with the Companies Office of Jamaica to get started. This process is usually completed within five business days. The

other aspects of setting up are at the entrant's discretion, which includes having a storage facility, equipment, and staffing. Accordingly, the FTC concludes that entry into this market is timely.

78. The likelihood and sufficiency of effective entry are dependent on (i) demand conditions in the relevant market, and (ii) the ability to build out an extensive network in the medical disposables distribution markets. As stated above, historically, the entry we observe is on a large scale and is likely sufficient to combat or reverse any adverse effect from the transaction. The entry and expansion of a notable entrant, AVAL Medical Supplies and Disposables, among numerous other entrants who have not exited, is consistent with the position that entry is likely and sufficient.
79. Since entry is likely, timely, and sufficient, the FTC concludes that competitive entry is likely to mitigate, if not avert, the exercise of market power in the relevant market.

#### Views of Rivals

80. Rivals had mixed reviews on the anticipated effect of the Agreement on competition. Six of the ten rivals interviewed by the FTC indicated that they did not anticipate any competitive harm arising from the Agreement; one of the rivals stated they believed that the transaction would prove to be beneficial to competition. Three rivals shared some concern that their business would be impacted by the strengthening of a rival that increased their market shares or from the vertical integration in relation to the pharmacies' acquisition. One rival did not have any opinion.
81. Further, the rivals indicated that the market for medical disposables was saturated, but new entrants were able to find a niche set of customers or a product. They indicated that this had been the case particularly since the March 2020 onset of the COVID-19 pandemic in Jamaica. Rivals cited examples of new companies entering the market at various levels and competing for the same customers because they typically sourced products from the same distributors overseas.
82. Based on the above, the FTC concludes that the Agreement is unlikely to have removed significant competitive constraints in the relevant market since both Medical Disposables and Cornwall Medical continue to face significant competitive constraints from other market participants.

#### Conclusion:

83. Based on the results of the analyses described above, the FTC concludes that the Agreement does not breach section 17 of the Fair Competition Act.

## **SUMMARY AND OVERALL CONCLUSION**

84. The FTC investigated the Agreement, which amalgamated the businesses of Medical Disposables & Supplies and Cornwall Medical & Dental Supplies to form Cornwall Enterprises Limited.
85. The challenged conduct was investigated under section 17 of the Fair Competitive Act, which prohibits agreements containing provisions that have as their purpose the substantial lessening of competition, or have or are likely to have, the effect of substantially lessening of competition in a market.
86. The relevant market for assessing the effect of the Agreement was the market for medical disposables in Jamaica.
87. The Agreement does not significantly increase market concentration because Cornwall Medical & Dental Supplies held a relatively small market share.
88. Competitive entry is likely in the relevant market.
89. The Agreement does not have the effect or likely effect of substantially lessening competition in the relevant market because (i) it involved an enterprise which relatively small market share; and (ii) competitive entry is likely to mitigate, if not avert, anticompetitive conduct due to the easy conditions of entry.
90. The Agreement does not have the purpose of substantially lessening competition in the market. Its purpose was to facilitate the expansion of Medical Disposables in a new market and facilitate financial relief for Cornwall Medical.
91. The overall conclusion is that the Agreement does not contain any provision which breaches the Fair Competition Act.

## **RECOMMENDATION**

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