



Staff Report on Trade Winds Citrus Limited's Acquisition of Jamaica Beverages Limited

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Case no. 8151-20

FINAL

FAIR TRADING COMMISSION

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I. THE PARTIES

Acquiring Entity:

1. Trade Winds Citrus Limited (“Trade Winds”) is a company duly incorporated under the Laws of Jamaica and having its registered office at Bog Walk P.O. in the parish of Saint Catherine.
2. Trade Winds is engaged in the manufacturing and distributing of beverages including fruit juices, vegetable juices, juice drinks, fruit flavoured drinks, fruits (oranges and pineapples), almond milk, nutritional shake and rum punch.
3. The flagship juice brand of Trade Winds is Tru-Juice but it also owns brands such as Freshhh Juice Drinks, Squeezz Drinks, Wakefield Juices and Calico Jack Rum Punch.

Acquired Entity:

4. Jamaica Beverages Limited (“Jamaica Beverages”) is a company duly incorporated under the Laws of Jamaica and having its registered office at 5 Henderson Avenue, Naggo Head Industrial Complex, Naggo Head, Portmore in the parish of Saint Catherine.
5. It has been in operation since June 1998 and is a subsidiary of S.M. Jaleel & Company Limited (SMJ), one of the largest manufacturers of non-alcoholic beverages in the English-speaking Caribbean.¹
6. Generally, Jamaica Beverages is engaged in the processing, packaging and marketing of citrus products and chilled beverages; and the processing, packaging and distributing of milk products. Jamaica Beverages’ products have traditionally included fruit squash, fruit juices, ginger beer, sorrel, cherry malt, egg nog, peanut punch, milk, fruit concentrate and fruit puree. Additionally, it also packages Fruta, Joose, Jamaycus, Dairy Farmers, Pride of Jamaica, and Jus Water brands.² Joose is produced under the Juciful brand and its premium juice product.
7. Additionally, Jamaica Beverages was the exclusive supplier of 100 per cent grapefruit juice to the manufacturers of the Ting brand, which is a grapefruit flavoured carbonated drink.

¹ <https://jis.gov.jm/minister-clarke-hails-jamaica-beverages-acquisition-of-citrus-growers-limited/>

² <http://jamaica-gleaner.com/article/business/20170910/juciful-still-market-says-trustee>

Subsequently, Jamaica Beverages discontinued carrying the Busta and Chubby brand and supplying grapefruit juice.

8. Jamaica Beverages' business and assets were put up for sale in November 2019 to settle a court-awarded judgment amounting to US\$4.5 million.

II. THE CHALLENGED CONDUCT

9. Trade Winds acquired Jamaica Beverages by way of an Agreement for Sale of Assets dated September 29, 2020 ("The Agreement").

Main objectives

10. The primary reason Jamaica Beverages put up its asset for sale was to settle a court-awarded judgment (personal injury claim) amounting to US\$4.5 million.
11. The primary stated objective of Trade Winds purchasing the assets of Jamaica Beverages was to accelerate its entry into the market in which dairy milk is sold.

Consideration

12. By way of The Agreement, Trade Winds acquired Jamaica Beverages' milk brand (*Dairy Farmers*), milk processing equipment, the supply of fresh milk, as well as Jamaica Beverages' institutional knowledge and expertise in the production and distribution of dairy milk. Trade Winds also acquired a trademark licence from Citrus Growers Association Ltd. to manufacture and sell its juice brand (*Juciful*). Under the license, Trade Winds will manufacture and sell the Juciful brand under specific guidelines regarding product quality and minimum performance sales criteria.
13. In consideration of securing the trademark licence, Trade Winds is expected to make royalty payments based on sales performance. The tiered royalties scheduled is presented in the table below:

Table 1: Royalty Payment Schedule

Number of Crates Sold per Month	Royalty (Percentage of sales)
0 – 60,000	2.0%
60,001 – 100,000	0.5%
Greater than 100,000	0.0%

14. As part of the Agreement, Trade Winds also secured real estate located in Bog Walk, St. Catherine within proximity of Trade Winds’ factory compound.

III. KEY INVESTIGATION TIMELINE

15. The Fair Trading Commission (FTC) became aware of the transaction by way of newspaper report dated October 9, 2020 and initiated an investigation on October 13, 2020.
16. In November 2020, the FTC collected information on market participants, prices and products sold in retail outlets in Kingston & St. Andrew and Spanish Town.
17. The FTC subsequently interviewed executive members of Trade Winds, Ojay Coolers and Jamaica Beverages on December 3, 2020, December 9, 2020 and December 15, 2020, respectively.
18. On December 3, 2020, the FTC received the acquisition documents from Trade Winds, being Agreement for Sale of Assets between Jamaica Beverages and Trade Winds dated September 29, 2020.
19. The FTC requested information from twelve market participants but received responses from only six of those market participants.

IV. THEORIES OF HARM

20. The Agreement 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 the substantially lessening of competition in a market or has had, or is likely to have, the effect of substantially lessening competition, without any legitimate business objective.
21. The investigation commenced on the presumption (theory) that the Agreement is likely to adversely affect competition in the market(s) in which drinks, juices and/or dairy

beverages are sold in Jamaica. The Agreement is presumed to distort competition by providing Trade Winds with control over crucial business assets of a current or potential rival, thereby removing a significant competitive constraint. Additionally, The Agreement is presumed to harm consumers by leading to poorer quality products, fewer product varieties, and/or higher prices, relative to what would have prevailed in the market absent the Agreement.

22. Accordingly, the FTC presumes that the Agreement will remove significant competition constraint from at least one relevant market, thereby allowing Trade Winds to exercise market power in the foreseeable future, by itself or in concert with other market participants, to the detriment of consumers.
23. A primary objective of this investigation is to identify, gather and evaluate information sufficient to test (i.e., either confirm or refute) the presumption of harm.

V. OVERVIEW

24. A beverage is any potable liquid other than water. While the primary purpose of beverage is to quench one's thirst, some beverages are sources consumed for their nutritional contents. Examples of beverages include tea, coffee, liquor, beer, milk, juice, or soft drinks. Furthermore, they can be categorized (not exhaustive) as such: (i) Alcoholic/non-alcoholic; (ii) chilled/non-chilled; (iii) carbonated/non-carbonated; (iv) hot/cold; or (v) dairy/non-dairy.
25. Further, beverages are the epicentre of certain social rituals or events. In Jamaica, a cup of hot beverage such as herbal tea, hot chocolate or coffee is the first thing consumed each day while alcoholic beverages are necessities at most social gatherings.

Distribution Channels

26. This investigation spans beverages made from fruits, fruit concentrates or dairy milk. These products made available to consumers through a distribution channel comprising farmers, manufacturers, distributors, and retailers.
27. At the top of the channel are orchards and farms which produce fruits, fruit concentrates, dairy milk and milk powder which are supplied to manufacturers as crucial inputs in the

manufacturing of beverages. Manufacturers process the fruits into juices and drinks. Further, manufacturers pasteurise and process milk to make dairy beverages. Fruit concentrates and milk powder are reconstituted to liquid form. Some manufacturers self-supply from farms they own. The final segment of the channel involves the retailing of beverages to final consumers. Manufacturers supply beverages in bulk quantities to retail distribution outlets such as supermarkets, wholesales, corner shops, restaurants, and schools where they are made available to final consumers in retail quantities.

A. Merger & Acquisition Activity in the Industry

28. Mergers and acquisitions in the beverage industry have been few with the two most recent acquisitions involving Jamaica Beverages' acquisition of Jamaica Citrus Growers Limited in 2012 and Seprod Limited's acquisition of Nestlé milk assets in 2015.
29. In December 2012, Jamaica Beverages acquired assets of Citrus Growers Association Limited while it was in receivership. Specifically, it acquired lands and a factory in Bog Walk, St. Catherine. Jamaica Beverages also received the licence to the Juciful brand for which it paid royalty based on sales. It took over the management of operations of the Bog Walk plant in May 2012 and the final arrangement was completed in December 2012 with a total investment of \$1 billion.
30. In February 2016, the brands associated with the dairy operations of Nestlé Jamaica Limited were acquired by Musson Holdings Limited which is a special purpose vehicle incorporated for that purpose. On the same date, Musson International Dairies Limited acquired the key assets comprising those dairy operations and commenced its principal activity of producing and selling milk-based products from Nestlé's plant located in Bog Walk, St Catherine. Both entities are subsidiaries of the Musson Group of Companies. Seprod which is also a subsidiary of the Musson Group ran the milk operation and in January 2018, Musson Holdings Limited and its subsidiaries were incorporated within Seprod Group. These series of transaction mean that Nestlé ceased manufacturing in Jamaica and is considered a merger between Seprod/Musson and Nestle. The cost of the transactions including the transfer of ownership from Musson to Seprod was \$7 billion.

31. The rest of the Report is organized as follows: Section VI describes the range of markets in which competition could be adversely affected by the challenged conduct. Section VII describes the FTC's assessment of the competitive effects of the challenged conduct in the markets identified in Section VI. In Section VIII, the Report presents a summary of the key findings as well as the overall conclusion of the investigation. The Report concludes in Section IX, in which the FTC describes measures that could be taken to mitigate the potential anticompetitive effects identified in Section VII.

VI. MARKET DEFINITION

A. Analytic Framework

32. In assessing the transaction, a principal issue to determine is whether the parties to The Agreement were rivals or likely to be rivals in the foreseeable future. To make such a determination, the relevant market is defined.
33. Market definition helps to identify the products and the geographic area in which competition concerns may arise. A relevant market for economic analysis can be defined as a product (or group of products) and a geographic region in which the product is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, that was the only present and future producer or seller of those products likely would impose at least a small, but significant and non-transitory increase in price on at least one product in that market, assuming the terms of sale of all other products are held constant.
34. In evaluating the transaction, product markets are defined around competing products sold by parties to The Agreement.

B. Relevant Product Markets

35. In defining the relevant product markets, the FTC identifies products currently sold by the parties to The Agreement, or likely to be sold in the foreseeable future.
36. For each overlapping product identified, the FTC identified reasonable substitutes to delineate the relevant product market.

37. Fruit juice is considered an overlapping product as both parties to the Agreement participated in this market prior to The Agreement.
38. Although Jamaica beverage was the only party to The Agreement which supplied dairy products, dairy products are identified as an overlapping product since Trade Winds had made commitments for participating in this market by June 2021 at the earliest.
39. In summary, the candidate product markets which could be adversely affected by The Agreement are:
 - i. Fruit Juices; and
 - ii. Dairy milk beverages

Fruit Juices

40. Fruit juice, as used in this Report, covers broad range of beverages including premium juice, juice drinks and fruit flavoured drinks. *Premium juice* describes fruit juice as beverages with high juice content and *Juice drinks* refers to fruit juice beverages with low juice content; and fruit-flavoured drinks do not contain any fruit juice content.³
41. Juice drinks and fruit-flavoured drinks ('fruit drinks') are part of a distinct product market from premium juice as manufacturers have successfully sold premium juice at a significantly higher price than drinks. In particular, drinks are available in multiple sizes (content volume) apparently distinguishing between children and adult consumers. Containers targeting children, for example, have labels that are typically more colorful with contents measuring a volume of around 200 milliliters (ml). On the other hand, containers targeting adults have plainer labels and are available in sizes 400ml – 700ml. Regardless of the size of the container in which drinks are sold, however, the unit price (i.e., price per ml) is typically the same across all sizes.
42. Premium juice is sold at a significantly higher price than drinks. In one supermarket, for example, drinks were available at 11-13 cents per ml while premium juices were available at 24-30 cents per ml. Thus, premium juices command twice the price of drinks. This price

³ For purpose of this Report, fruit juice refers to all fruit beverages with at least 80% juice content while juice drinks refer to fruit juice with less than 80% juice content. Fruit flavoured beverages have 0% juice content.

difference is likely attributable to successful efforts by manufacturers to differentiate drink and premium juice. In promoting their brands, manufacturers of premium juices typically draw attention to the higher nutritional value and less artificial flavouring associated with the higher fruit content of premium juices, relative to drinks, therefore catering to consumers who value health and wellness and therefore would be willing to pay an additional price for premium juices. In contrast, drinks are typically promoted as refreshments.

The FTC concludes that two distinct relevant product markets within fruit juices are (i) premium juice and (ii) fruit drinks.

The Market for Dairy Milk Beverages

43. Dairy milk beverages are available in liquid form ('milk') and powdered form ('milk powder'). Consumers typically add water to milk powder to obtain milk.
44. Based on information reviewed by the FTC, milk powder is a close substitute for milk. In particular, in 1992, the Government of Jamaica lifted tariffs on milk powder. This resulted in many dairy farmers (i.e., producers of milk) going out of business as a significant number of consumers switched from the locally produced milk to the cheaper imported milk powdered milk.
45. There does not appear to be a consensus among manufacturers regarding the substitutability of milk and milk powder. One manufacturer of milk powder expressed its view that milk poses little competitive constraint on milk powder. At least two other suppliers of milk advised the FTC, however, of their intention to use their milk products to capture a share of the market in which milk powder is sold.
46. Based on the above, the FTC concludes that dairy milk beverage (in milk or milk powder forms) comprises a relevant product market.

C. Relevant Geographic Markets

47. Defining the geographic market is integral in assessing competition since it defines the space in which the relevant products are offered for sale. The rest of this section identifies

such geographic space in which suppliers of the relevant products are likely to compete in.

48. Most participants in the relevant markets compete for consumers throughout Jamaica with a few small manufacturers supplying in their locality and at very small scale. This is evident by their distribution networks that take products throughout the island and the presence of their brands in retailer outlets across the country.
49. Accordingly, the geographic market is Jamaica.

Conclusion

50. There are three distinct relevant markets for assessing the challenged conduct. The relevant markets are (i) premium juice; (ii) fruit drinks; and (iii) dairy milk beverages, sold in Jamaica.

ASSESSMENT OF SUBSTANTIALLY LESSENING OF COMPETITION

A. Analytical Framework

51. Section 5 (1)(a) of the FCA provides that the Commission can carry out an investigation on its own to determine whether any enterprise is engaging in business practices in contravention of the Act. The aforesaid section of the FCA gives the FTC the jurisdiction to investigate matters concerning the conduct of business in Jamaica.
52. Based on the foregoing the FTC has the jurisdiction to investigate the challenged conduct, subject to being expressly stated in other legislation.
53. The Food and Drug Act (FDA) applies to the beverage industry. After examining the provisions of the FDA, 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 in this industry.
54. The FDA authorizes the regulation of foods, drugs, cosmetics, and medical devices. The scope of authority includes domestically manufactured, as well, as products imported for use. This Act looks at the quality associated with the beverage sector, which nothing in the Act precludes the FTC from investigating mergers/acquisition in the beverage sector.

Relevant Section of the FCA

55. 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.
56. 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 contain provisions that have as their purpose the substantial lessening of competition in a market; or have the effect of substantially lessening competition in a market; or is likely to have the effect of substantially lessening competition in a market.
57. 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.

58. Provided that the agreement or its provision qualifies for exemption under section 17 (4) of the FCA or be one to which the FTC has granted authorization according to section 29 of the FCA then there will be no breach of section 17 of the FCA.
59. The **Australian Gas Light Company v ACCC**⁴ case, examined several previous decisions and articulated 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.”*
60. Section 17 of the FCA is similar in terms with Article 81 of the Treaty establishing the EU which provides as follows:

Article 81

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

⁴ 4(No. 3) [2003] FCA 1525

- (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) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
 - (e) 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.*
2. *Any agreements or decisions prohibited pursuant to this article shall be automatically void.*
3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
- any agreement or category of agreements between undertakings,*
 - any decision or category of decisions by associations of undertakings,*
 - any concerted practice or category of concerted practices,*
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

61. The interpretation of Article 81 of the EC Treaty by the European Court of Justice indicates that if The Agreement has as its purpose the restriction of competition, an economic

analysis on its anti-competitive effect is not necessary.⁵ An agreement that does not have as its purpose the substantial lessening of competition must thereafter be examined to determine if it has had, is having or is likely to have the effect of substantially lessening competition in a market.⁶

62. Effect on competition is determined by an economic analysis of the relevant product and geographic market whereby relevant issues for consideration are whether access to the relevant market is impeded and if so whether the subject agreement has contributed to that foreclosure effect.⁷ Where the answer is in the affirmative to the above questions, the agreement is treated as being in conflict with Article 81 of the EC Treaty.
63. An important consideration in determining the effect of The Agreement is the competition that would occur in the relevant market in the absence of The Agreement.⁸ Thus, in the instant case, The Agreement is considered under section 17 of the FCA generally and specifically with respect to sections 17(2)(b) and or section 17(2)(c) of the FCA.
64. To the extent that Jamaica Beverages is in the hands of a trustee, then one may argue that the said transaction should not be subject to review by the FTC.
65. In the case of the **Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)**⁹, the Court in England and Wales had to decide on whether the buyer of assets of another company, then in liquidation, had acquired merely the bare assets of the company or the enterprise itself, thus triggering the jurisdiction of the Competition and Markets Authority. The Court held that the “*embers of an enterprise*” can survive beyond the extinguishing of its activities and is subject to merger control. The Court stated that the test is one of economic continuity. That is, “*an acquirer acquiring assets acquires an “enterprise” where (i) those*

⁵ VdS v. Commission, Case 45/85 [1987] ECR 405, 4 CMLR 264, para. 39. In as much as section 17 of the FCA is in similar terms as Article 81 of the Treaty Establishing the European Community (EC Treaty), the FTC considers the jurisprudence developed by the European Court of Justice (ECJ) in its interpretation of this provision, if relevant, as guidance in its interpretation and application of section 17 of the FCA.

⁶ Javico v. Yves St. Laurent, Case C-306/96[1998] ECR I-1983, [1998] 5 CMLR 172.

⁷ Delimitis v. Henninger Braüer AG, Case C-234/89[1991] ECR I-935, [1992] 5 CMLR, 210, para. 24-27.

⁸ Société Technique Minière Maschinenbau Ulm [1966] ECR 235, [1966] CMLR 357.

⁹ [2015] UKSC 75.

assets give the Acquirer more than might have otherwise been acquired by going into the market and buying factors of production and (ii) the extra is attributable to the fact that the assets were previously employed in combination in the “activities” of the target enterprise”. The time between cessation of trading and acquisition of control of the assets may be a relevant factor but is not necessarily decisive.

66. Albeit this case is not binding on the Courts in Jamaica, the principles of the case are persuasive in our local jurisdiction and applicable in the matter herein. Accordingly, the FTC investigated the transaction under section 17 of the FCA.

B. Assessment of the Purpose

67. In this section, the FTC examines the Agreement for Sale of Assets between Jamaica Beverages and Trade Winds to determine whether any clauses therein contain provisions that have as their purpose, the substantial lessening of competition in any relevant market.
68. The Australian decisions provide instructive guidance in defining ‘purpose’ in anticompetitive considerations. In **News Limited v South Sydney District Rugby League Football Club Ltd**¹⁰, Glesson CJ defined purpose as the end sought to be accomplished by the conduct. Additionally, in **Seven Network Limited v News Ltd**¹¹ the Full Federal Court observed that: “The purpose will be identified by examining the end sought to be accomplished by the provision”¹². It also noted that: “The purpose must be ascertained by identification of the end sought to be achieved”¹³. Accordingly, the requisite purpose is the goal, objective or end.
69. **Primary Objectives of The Agreement**: Trade Winds advised the FTC that the primary purpose of entering into the Agreement was to reduce the time Trade Winds would take to participate in the dairy milk market by acquiring the assets owned by Jamaica Beverages used to produce dairy milk. The trustees for Jamaica Beverages advised that

¹⁰ (2003) 215 CLR 563

¹¹ [2009] FCAFC 166

¹² Ibid, at 852

¹³ Ibid, at 898

the primary purpose of entering into The Agreement was to maximize the revenue obtained from the disposal of the assets of Jamaica Beverages in settlement of a Court Order.

70. Licensing Restrictions: The Juciful brand is owned by Citrus Growers Association Limited who entered into an exclusive Licence Agreement with Jamaica Beverages to manufacture, sell, and distribute a particular line of juices and beverages that offer products under the brand. In turn, Jamaica Beverages pays monthly royalty per their agreed payment schedule. This Licence Agreement forms part of the Agreement for Sale of Assets between Jamaica Beverages and Trade Winds.
71. Non-compete provisions. In Appendix B, Clause 2 of the Agreement for Sale of Assets provides that neither the Obligors (S.M. Jaleel & Company, Aleem Mohammed and Anna Mohammed) nor any of its affiliates, shareholders or principals should compete with Trade Winds in Jamaica for five years after the Date of Completion.
72. It is a general principle at common law, that contracts that contain restraint of trade clauses were regarded as void and unenforceable.¹⁴ The restraint of trade clauses is also known as non-compete clauses. However, in more recent times, the restraint of trade doctrine has been relaxed such that certain restraints, for example, restraints concerning the sale of a business or employment contracts, are recognized as being necessary and enforceable in certain circumstances.¹⁵
73. It is now generally accepted that a restraint of trade will be contrary to the public policy unless the person imposing the restraint has a legitimate interest meriting protection, the restraint is reasonable as between the parties and the restraint is reasonable in the public interest.¹⁶
74. In essence, for it to be valid, a contract in restraint of trade must, apart from satisfying the test of reasonableness between the parties and in the public interest, also satisfy the following conditions:

¹⁴ Halsbury's Laws of England 4th Edition Reissue, Volume 47 paragraphs 13 and 21.

¹⁵ Ibid. paragraphs 22 and 25.

¹⁶ Ibid. paragraphs 24 and 25.

- a) It must be founded on good consideration¹⁷; and
 - b) Must not be too vague.¹⁸
75. To assess The Agreement, guidance was sought from other jurisdictions namely, the European Union (EU), United Kingdom (UK) and Australia to determine whether provisions may be deemed anticompetitive and in breach of section 17 of the FCA.
76. In the EU case of *Siemens/Areva*, the European Commission (EC) dealt with a joint venture (Areva NP) in the field of construction and maintenance of nuclear power plants. The concentration agreement included a non-compete clause prohibiting Siemens to engage in any activities competing with Areva NP for the lifetime of the joint venture and 8-11 years after Areva obtained full control of Areva NP.¹⁹ As required by the 1990 Ancillary Restraints Notice, the non-compete clause had been notified to the EC and cleared – with an absolute limit for 30 years – at the time of the creation of the joint venture.
77. In the said case, the EC’s assessment was concentrated on the ancillary of the non-compete clause after Siemens’ sale of its shares in the joint venture to Areva, which had not been notified to the EC before the creation of the joint venture. The EC concluded that the clause was directly related and objectively necessary for the implementation of the concentration agreement. However, the duration of the clause was not proportionate. The EC found a three-year non-compete clause after the termination of the joint venture to be appropriate instead.²⁰
78. In recent cases, the EU has created several safe-harbour rules in its Ancillary Restraints Notice.²¹ The duration of non-compete clauses is one of the questions covered by the Notice. It stipulates that when a concentration includes goodwill, non-compete clauses lasting for two years will always be accepted.²² When both goodwill and know-how is included, the safe-harbour period is three years.²³ These safe-harbour rules should make

¹⁷ Ibid. paragraphs 48-51.

¹⁸ Ibid. paragraphs 55.

¹⁹ Commission Decision of 18 June 2012, COMP/39736 Siemens/Areva, para.2.

²⁰ Siemens/Areva, para.76.

²¹ Ancillary Restraints Notice, para 4

²² Provided that the other criteria of ancillary restraints doctrine are fulfilled.

²³ Ancillary Restraints Notice, para.20.

it easier for the companies to come to correct conclusions when they are self-assessing the clauses in their agreements.

79. The EC has been fairly consistent in its application of the Ancillary Restraints Notice.²⁴ In *Kingfisher/Grosslabor*²⁵, the EC found that only goodwill was transferred in the agreement through which Kingfisher acquired Grosslabor. A non-compete clause with a duration period of two years was therefore found to be necessary to secure the transfer.²⁶
80. Since The Agreement contains a non-compete clause for five years, the FTC concludes that the non-compete provision within The Agreement has as its purpose of substantially lessen competition as regards to its duration and scope of the products covered and thereby contravenes section 17 of the FCA, subject to the exemption provided for in section 17(4). The FTC's determination on whether The Agreement qualifies for exemption is presented below in part D of Section VII.
81. Having determined that The Agreement contains provisions which have as their purpose, the substantial lessening of competition in a market, there is no need to assess its actual or potential effects to establish breach of the FCA. Notwithstanding the above, the FTC assessed the competitive effects of The Agreement as it informs the FTC's subsequent analysis as to whether The Agreement qualifies for exemption from section 17 based on the considerations outlined in section 17(4).

C. Assessment of the Effect or Likely Effect

Analytic Framework

68. The FTC now examines whether The Agreement contains provisions which have, or is likely to have, the effect of substantially lessening of competition in any relevant market. The competitive effect of The Agreement is deduced by comparing the competitive dynamics of the relevant market with and without the Agreement.
69. A useful starting point for assessing competitive effects is an assessment of the extent to which The Agreement will increase market concentration level in the relevant markets. Market concentration is an indicator of competitive constraint from current rivals. If The

²⁴ Cook & Kerse, p.72. As mentioned in section 1.3 above, the Commission is generally required to follow its notices.

²⁵ Commission Decision of 2 April 1999, IV/M.1482.

²⁶ Ibid, para 26.

Agreement results in an insignificant increase in market concentration, then the FTC would conclude that The Agreement is unlikely to have adverse competitive effects; otherwise, the FTC presumes that The Agreement is likely to have adverse competitive effects and would assess other market conditions, such as conditions of entry and/or expansion, to confirm or refute the presumption of competitive harm.

Market Concentration

70. Market concentration often offers useful insights into the extent to which an enterprise faces competitive constraints from current rivals. Market concentration is commonly 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 participant) and a minimum of zero (where there are a large number of equally sized participants).
71. The range of market concentration as measured by the HHI can be classified as: (i) Unconcentrated: HHI less than 1,500 points; (ii) Moderately concentrated: HHI between 1,500 and 2,500 points; and (iii) Highly concentrated: HHI greater than 2,500 points.²⁷
72. Assessments of competitive effects consider both the post-transaction concentration and the increase in concentration as a consequence of the transaction. Agreements which do not result in a significant change to market concentration are deemed unlikely to have adverse competitive effects and ordinarily require no further analysis. Transactions which would not require further analysis includes: (i) Agreements resulting in an increase in the HHI of less than 100 points; and (ii) Agreements resulting in unconcentrated markets.
73. Transactions that raise significant competitive concerns and often warrant further scrutiny are: (i) ones resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points; and (ii) ones resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points.

²⁷ The US Horizontal Merger Guidelines (2010)].

74. Transactions resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points are presumed to be likely to enhance market power unless there is persuasive evidence showing otherwise.²⁸

Other Market Conditions

75. If the increase in market concentration arising from the Agreement is not insignificant, then further analysis is required to confirm or refute the presumption of harm to competition in the relevant markets. In particular, the FTC assesses conditions of entry and/or expansion in the relevant markets. Agreements which restrict the opportunities for competitive entry/expansion in the relevant markets are deemed to result in competitive harm.

76. To confirm competitive harm, however, it is sufficient to show that The Agreement led to, or is likely to lead to, demonstrable harm to consumers and rivalry in any relevant market. Harm to consumers is demonstrated by higher prices, fewer product variety, and slower rates of product innovation in the factual market, relative to the market in which The Agreement was not in place. Similarly, harm to rivalry is typically demonstrated by increased opportunity of the combined entity to raise a rival's costs or exclude rivals, relative to the market in which the Agreement was not in place.

Analysis

i. Premium Juice

Change in Market Concentration

77. There are fewer participants in the market for premium juices. There are at least five manufacturers of premium juices, at least eight for juice drinks, and at least fourteen manufacturers of drinks. Premium juice and juice drinks manufacturers typically participate in more than one of the mentioned markets. Further, the market share is distributed unevenly. Trade Winds stated that it has 25-30% market share of the non-

²⁸ The US Horizontal Merger Guidelines (2010)

premium juice market but indicated that it had a significant share in the premium juice market.²⁹

78. Market participants compete by offering a wide assortment of flavours; however, orange is the most popular flavour. An interviewee indicated that orange juice makes up 40% of all juices sold in Jamaica.
79. Based on the above, the FTC concludes that The Agreement will result in a highly concentrated premium juice market. Accordingly, The Agreement is presumed to harm competition in the relevant market. The FTC examines other characteristics of the market to see if there is any evidence that supports or rebut this presumption.

Other Market Conditions

(a) Low Impediments

80. Stakeholders indicated that regulatory restrictions are minimal and is mainly focused on manufacturers delivering products that are safe for consumption. They also indicated that capital requirements depend on the scale of entry, the type of packaging that will be used and access to inputs. For example, small scale entry, and the packaging used for chilled products require relatively small capital investment. Large scale entry and the use of packaging for non-chilled products require large investment. One stakeholder indicated that he has been experiencing difficulties sourcing oranges and/or orange concentrate, a critical input.

(b) Sourcing oranges/concentrates is the most significant bottleneck

81. The most critical bottleneck in this market is sourcing oranges and its concentrates which are used to produce orange juices and other flavoured juices. Belize has recently become a crucial source of oranges and orange concentrate used in the production of juices in Jamaica. Until recently, most producers either owned orchards or sourced oranges from local farmers. The crops on most farms were decimated, however, by diseases such as citrus greening and which restricted the opportunity of local farmers to continue growing

²⁹ Premium juice is advertised as 100% fruit juice while non-premium juices are not advertised as such.

oranges.³⁰ Accordingly, international sources have become a relatively more important source market. Belize is the preferred international market since under the CARICOM External Tariff, manufacturers are able to purchase oranges and orange concentrates originating from CARICOM member states duty free.

82. Trade Winds recently entered into an exclusive agreement with the supplier in Belize. This exclusive supply arrangement between Trade Winds and the supplier in Belize, as well as the demise of many local orange orchards in Jamaica, resulted in the current situation where most producers of fruit juices in Jamaica source orange concentrate through Trade Winds. Jamaica Beverages was a notable exception in that it sourced oranges from the Citrus Growers Association Limited which overcame the plight of the disease. The Citrus Growers Association Limited supplied oranges to Jamaica Beverages exclusively.

83. To the extent that Trade Winds has exclusive access to the cheapest source of input capacity from external markets, The Agreement raises competition concern as it also gives Trade Winds control of additional input capacity from the domestic market. The concern would arise from anticipating that Trade Winds would exercise market power in the future as it would be a significant supplier of the inputs used by its rivals in the markets for juices. This issue is addressed below.

(c) The Agreement is unlikely to remove a significant constraint in the future

84. The importance of Belize as a crucial source of oranges/concentrate is likely to diminish significantly in the future, relative to the present. In particular, The FTC also understands that in 2017, Trade Winds ventured on a fact finding mission in Costa Rica to find new ways to increase revenue. It discovered that Costa Rica's orange crop was resistant to the diseases that plagued the Jamaican crops. Orchards in Costa Rica employed an irrigation management technique used to control citrus diseases; however, Trade Winds indicated that this method would increase the cost of production. Nonetheless, Trade Winds has commenced experimenting with 15 acres of crop. Notably, Costa Rica has successfully

³⁰ <https://jis.gov.jm/government-continues-measures-tackle-citrus-greening-disease/>; last accessed on July 29, 2021

implemented this technique and other countries worldwide are successfully using various horticultural practices such as an integrated management approach³¹ to combat plant diseases and increase crop production. In the near future, therefore, these practices will allow rivals to source orange concentrate directly on the domestic market and therefore avoid sourcing through Trade Winds.

85. The FTC therefore concludes that The Agreement is unlikely to remove any significant competitive constraint in the foreseeable future. The adoption of proven methods to safeguard the domestic production of oranges will likely increase the capacity of rivals to source oranges from domestic sources in the foreseeable future.

ii. Fruit Drinks

86. There are at least 16 participants in the market for fruit drinks. The fruit drinks market is characterized by a high degree of product differentiation with products being differentiated by branding, flavours, packaging, sizing, shelf life, stableness of products, need for refrigeration, and carbonization. Manufacturers cater to the varied tastes of consumers. For instance, manufacturers will target young children with brightly colored labels, shapes, and sizes. Similarly, manufacturers target consumers who are pro-environment by serving their products in cardboard-like packaging instead of plastic.

87. The FTC was unable to gather reliable data on market share in this market. Based on discussions with stakeholders, however, there is little reason for the FTC to suspect that any participant held a disproportionately large share of the market.³² If the market was indeed uniformly distributed among the 16 participants, then The Agreement would not raise any concern for competition as the market would remain unconcentrated.³³

³¹ Thind, SK. 2017. Principles of Disease Management in Fruits. <https://medcraveonline.com/ICPJL/principles-of-disease-management-in-fruit-crops.html>; last accessed July 29, 2021

³² Stakeholders interviewed include Trade Winds Citrus Limited, Nestle Jamaica, Seprod, Ojay Coolers and Trustees of Jamaica Beverages Limited,

³³ If the market share was uniformly distributed among the 16 market participants, then the HHI before The Agreement would be 625 points and the market would be considered unconcentrated. After The Agreement, the HHI would increase by 78 points to 703 points and the market would remain unconcentrated. If this was the case, the FTC would conclude that the Agreement is unlikely to have adverse effect on competition since the increase in HHI was less than 100 points and the market remained unconcentrated.

88. Further, the FTC examined the conditions of entry. Based on stakeholder discussions, the FTC determined that conditions are easy for entering the market for fruit drinks in Jamaica. Based on the insignificant increase in market concentration and the easy conditions of entering the market, the FTC determined that The Agreement is unlikely to cause harm to rivalry in the fruit juice market.
89. Based on the above, the FTC concludes The Agreement is unlikely to have the effect of substantially lessening competition in the market for fruit drinks in Jamaica.

iii. Dairy Milk Products
Change in Market Concentration

90. For liquid milk, the FTC reviewed unconfirmed reports that Seprod Limited has majority share in that segment of the market leading with 70% - 80% share up to the time of the acquisition; while 8-10% of this segment is supplied by Island Dairies, Dairy Farmers and Edwards Dairy.
91. Prior to The Agreement, Jamaica Beverages held a single digit share of the market and Trade Winds did not participate in the market. In the absence of The Agreement, Trade Winds anticipated it would have entered the market by June 2021. Trade Winds were actively taking steps to enter the market as early as three years prior to the Agreement. To the extent that Trade Winds and Jamaica Beverages each would have held only a small share of the market absent The Agreement, the FTC concludes that The Agreement does not remove any significant rival.
92. The FTC concludes that the acquisition is unlikely to results in a significant increase in market concentration. Accordingly, the Agreement is unlikely to substantially lessen competition in the market for dairy milk products.

Summary of Analysis

93. The FTC concludes that The Agreement has not had, is not having and is unlikely to have the effect of substantially lessening competition in the relevant markets identified.
94. The FTC concludes that The Agreement has as its purpose, the substantial lessening of competition in the relevant markets identified.

D. Evaluation of Exemptions

95. In Part B of this Section, the FTC concluded that The Agreement contain a non-compete provision which has as its purpose, the substantially lessening of competition as regard to the duration and product scope in contravention of section 17(1). In what follows, the FTC evaluates whether The Agreement qualifies for exemption based on the three conditions stipulated in section 17(4). Based on section 17(4) Agreements which have been found to contravene 17(1) would be exempt from breach if the FTC is satisfied that The Agreement meets the conditions established in 17(4)(a) and 17(4)(b); or the Agreement meets the conditions established in 17(4)(c).

(a) Promote efficiencies while allowing consumers a fair share of benefits

96. Section 17(4)(a) establishes that one condition for qualifying for exemption is that the FTC must be satisfied that The Agreement contributes to

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

(ii) the promotion of technical or economic process,

while allowing consumers a fair share of the resulting benefits.”

97. The FTC is satisfied that The Agreement meets this condition. The Agreement promotes economic progress by reducing the time taken for Trade Winds to bring innovative milk products to market. Prior to The Agreement, Trade Winds had taken steps to participate in the market for dairy milk products. Based on its plans, Trade Winds had anticipated it would enter the market no earlier than June 2021. This suggests that The Agreement allowed Trade Winds to market dairy milk products at least three months earlier than it would have otherwise been able to.

98. EC guidelines indicate that to demonstrate that consumers get a fair share of benefits, it is sufficient to show that the anticipated consumer benefits of the Agreement (in terms of efficiencies) are greater than the anticipated costs to consumers (in terms of the anti-competitive price and non-price effects). Given that the FTC is satisfied that The Agreement facilitated the accelerated introduction of innovative dairy milk products to market earlier, and to the extent that the FTC concluded that The Agreement had no

anticompetitive effects within the relevant markets identified, nor is it likely to have any such effect in the foreseeable future, the FTC concludes that The Agreement allows consumers a fair share of the resulting benefit.

(b) Indispensible restrictions

99. Section 17(4)(b) establishes that a second condition for qualifying for exemption is that the FTC must be satisfied that The Agreement

“...imposes on the enterprises concerned only restrictions as are indispensable to the attainment of the objective mentioned in [section 17(4)(a)]...”

100. The FTC is not satisfied that The Agreement meets this condition. As described earlier in part B of this section, The Agreement prevents the previous owners of Jamaica Beverages to compete with Trade Winds for a period of five years after the Date of Completion. It is not immediately obvious to the FTC why the purported objectives of The Agreement would be frustrated if the duration of the non-compete provision was reduced to three years.

(c) Does not eliminate competition

101. Section 17(4)(c) establishes that a third condition for qualifying for exemption is that the FTC must be satisfied that The Agreement

“...does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods and services concerned.”

102. The FTC is not satisfied that The Agreement meets this condition. As described earlier in part B of this section, The FTC concluded that The Agreement had no anticompetitive effects within the relevant markets identified, nor is it likely to have any such effect in the foreseeable future. To the extent that the non-compete provision covers products in markets other than the relevant markets identified in this report, however, it is not immediately obvious to the FTC that The Agreement does not allow for the possibility of eliminating competition in respect of those other markets.

103. Based on the above, The FTC concludes that The Agreement has as its purpose, the substantial lessening competition in a market and does not qualify for exemption under the FCA.

VII. SUMMARY & OVERALL CONCLUSION

104. The FTC concludes that:

- a. The Agreement for Sale of Assets between Jamaica Beverages and Trade Winds falls within the jurisdiction of the FTC and therefore, the matter was investigated under section 17 of the Fair Competition Act (FCA).
- b. The relevant market comprises the markets for (i) premium juice, (ii) fruit drinks and (iii) dairy milk products sold in Jamaica.
- c. The Agreement is unlikely to remove any significant competitive constraint in the market for premium juice. The adoption of proven methods to safeguard the domestic production of oranges will likely increase the capacity of rivals to source oranges from domestic sources in the foreseeable future.
- d. The Agreement is unlikely to have the effect of substantially lessening competition in the market for fruit drinks in Jamaica, given the ease of entry and expansion.
- e. The acquisition is unlikely to result in a significant increase in market concentration. Accordingly, the Agreement is unlikely to substantially lessen competition in the market for dairy milk products.
- f. The Agreement contains a provision which has as its purpose, the substantial lessening of competition in the relevant markets, in breach of section 17(1) of the FCA, as it unduly impedes the re-entry of the acquiree in the relevant market as well as impedes the entry of the enquire in other markets. Further, the FTC is not satisfied that The Agreement qualifies for exemption provided for in section 17(4).

VIII. RECOMMENDATION

105. In this section, the FTC proposes remedial measures designed to mitigate the anticompetitive effects described in Section VII.

106. The FTC concludes that Clause 2 of Appendix B in the Agreement for Sale of Assets does not support any legitimate business objective because it extends for a period beyond three years and covers product markets wider than is necessary to achieve the purported objectives of the Agreement.
107. Therefore, the FTC recommends that Trade Winds either:
- a. Justify the identified restrictions of the Agreement to the satisfaction of the FTC;
 - or
 - b. Limit the duration and product scope of the Agreement to address the concerns of the FTC.