



Fair Trading Commission v. Desnoes & Geddes Limited

Case No. 8185-21

August 18, 2022

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PUBLIC VERSION

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I. The Respondent

1. Desnoes and Geddes Limited ("D&G") is a limited company duly incorporated on July 31, 1928, under the laws of Jamaica. D&G produces, manufactures, distributes, and markets a range of alcoholic and non-alcoholic beverages, including Red Strip, Heineken, Guinness, and Dragon.
2. D&G has registered offices at 214 Spanish Town Road, Kingston 11, Jamaica.

II. Nature of the Case

3. Beverages are potable liquids other than water. While beverages are consumed primarily to quench one's thirst, some beverages are also consumed for their nutritional content. 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.
4. Beverages are made available to consumers in multiple types of containers. D&G, for instance, offers its beverages in glass bottles, aluminum cans, and stainless steel or aluminum kegs. Some glass bottles can be reused to fill new products when the beverages they contain have been consumed.¹ These bottles are referred to as returnable glass bottles ('empties'). Empties are sanitized and reused for the bottling of new products. It is generally more cost-effective for beverage companies to use empties to package new products than it would be to use other containers such as new glass bottles and plastic (disposable) bottles. Notwithstanding, new glass bottles could not be eliminated by any beverage company since not all returnable bottles are retrieved from consumers, and there is a limit on the number of occasions any glass bottle could be reused.
5. D&G indicates that 93% of its alcoholic and non-alcoholic beverages distributed and sold in Jamaica are supplied in returnable glass bottles. D&G sources its new returnable glass bottles exclusively from overseas. Disruptions in the global supply chain, occasioned by the COVID-19 pandemic in 2020, led to D&G becoming increasingly reliant on empties to supply glass-bottled beverages as new glass bottles from its overseas suppliers were not available in adequate supply.²
6. In a complaint, the Informant alleges that Red Stripe implemented a Full-for-Empties policy in September 2021, requiring the return of empty bottles to supply their product to a particular retailer. The Informant advises that the policy limits the quantity of beverages supplied to channels such as "supermarket independents" by the quantity of empty bottles returned by such channels. The Informant alleges that this

¹ Letter from D&G to FTC, dated November 18, 2021.

² Letter from D&G to FTC, dated November 18, 2021.

creates a fetter on competition and results in an unfair competitive advantage to already dominant players such as chain stores, to which the policy does not apply.

7. D&G stated that the sole aim of the policy was to increase the rate of glass bottle returns to sustain the production and distribution of its glass-bottled beverages. Under the policy, distribution channels would be sold quantities of bottled products equivalent to the quantities of empties returned to D&G. Some distributional channels, however, were exempted from the policy.
8. Based on the complaint, the Commission commenced an investigation to determine whether the implementation of the policy breached any section of the Fair Competition Act (FCA).
9. The investigation commenced on the premise that by virtue of D&G's dominance in the manufacturing of beverages sold in Jamaica, implementing the Full-For-Empties policy is likely to impede the maintenance of competition in retailing D&G's bottled beverages. Competition is likely to be impeded because not all distribution channels for D&G products would face the restrictions (imposed by the policy) when replenishing the inventory of D&G bottled products. In addition, in the retail market in which D&G beverages are sold, D&G created an unfair competitive advantage in favour of distribution channels that are exempted from the policy and which compete against distribution channels that are not exempted from the policy. Consequently, the policy is likely to divert revenue from the rivals of distribution channels exempted from the policy. Consumers are likely to be deprived of potential benefits of competition in the long run in terms of lower prices and more convenient retail locations.

III. Background

A. Beverages

10. Beverage companies typically give consumers access to their products indirectly through various independently owned retail locations across numerous distribution channels.
11. Beverages are made available to consumers in multiple types of containers, with glass bottles accounting for the majority of the beverages sold in Jamaica. D&G points out that empties are the most cost-effective means of manufacturing bottled beverages sold in Jamaica, as returned empties are only sanitized before being refilled with new products.
12. Additionally, new glass bottles, plastic bottles, and one-way glass packaging are used to bottle new products. D&G sources new returnable glass bottles exclusively from international markets.

B. Disruption in the Supply of New Glass Bottles, March 2020

13. Returned empties are more cost-effective than new glass bottles for packaging bottled beverages. However, the supply of new glass bottles has historically been more reliable than the supply of returned

empties. This changed with the COVID-19 pandemic, which disrupted global supply chains and severely restricted D&G's procurement of glass bottles from its overseas suppliers.³

14. Accordingly, D&G became increasingly dependent on returned empties to fulfill the demand for its glass bottled beverages, as empties would have to be used to make up for the reduction in new glass bottles from overseas suppliers.

C. The Need for Improving the Retrieval of Empties, August 2021

15. The pandemic also adversely affected the return of empties domestically. D&G maintains that by August 15, 2021, the customer bottle return rate of empties was “extremely low” in 2021, making it difficult for D&G to meet the anticipated demand for its glass bottled products, given the unavailability of new glass bottles. D&G reduced its production and distribution of glass bottled products in response to the shortage of glass bottles.
16. By August 29, 2021, D&G maintains that the bottle return rate became “critically low” following a series of no movement days implemented by the Government of Jamaica pursuant to the Disaster Management (Enforcement Measure) (No. 9), 2021 which was promulgated on August 20, 2021.
17. To avert further reductions in the production of glass-bottled products, on September 3, 2021, D&G implemented its Full-for-Empties policy with the stated aim of “...finding a fair and non-discriminatory way to improve the rate of bottle returns to the Company.”⁴

D. The “Full-for-Empties” Policy, September 2021

18. D&G implemented its Full-for-Empties policy on September 3, 2021. Under the policy, retailers in select distribution channels would be sold D&G products in quantities equivalent to the number of empties returned. The policy was binding initially on the following distribution channels only:
- Community Bars
 - On Premises
 - Quick service restaurants
 - Supermarket independents
 - Grocery Shops
 - Mini-marts
 - Wholesales
 - Distributors

³ Letter from D&G to FTC, dated November 18, 2021.

⁴ Letter dated November 18, 2021, from D&G to the FTC.

19. D&G informed the FTC that the distribution channels selected under the policy accounted for in excess of 95% of the returnable bottles sold by D&G in Jamaica. Exempted from the policy were distribution channels such as supermarket chains, educational institutions, hotels, gas stations, and convenience stores.

IV. Market Definition

20. A relevant market is the smallest group of products that compete with one another within a geographic area. Enterprises participating in the relevant market offer the most immediate and direct competition to one another. Defining the relevant market is important to assess whether and the extent to which enterprises exercise market power to the detriment of consumers, competitors, and potential competitors.
21. Two dimensions of the relevant market are the product market and the geographic market. In essence, the relevant market for economic analysis is defined as a product (or group of products), a geographic region in which the product is produced or sold such that a hypothetical profit-maximizing supplier not subject to price regulation could profitably raise prices above the competitive level.

A. Relevant Product Market

22. A relevant product market defines the product boundaries within which competition meaningfully exists and includes only those products that are reasonably interchangeable by consumers for the same purpose. A given product market is therefore taken to comprise all those products which consumers regard as reasonable substitutes by reason of the product's intended use.
23. The process of defining a relevant product often starts with the product(s) offered by the Respondent with reference to the challenged conduct.
24. The Respondent offers beverages with distinct features contained in bottles. In general, there are several narrower groups of bottled beverages catering to distinct preferences of consumers. For example, there are alcoholic and non-alcoholic lines of beverages. Within the line of alcoholic beverages, there are low-alcoholic and strong alcoholic beverages. Within the line of non-alcoholic beverages, there are flavoured and non-flavoured beverages. Within the line of flavoured beverages, there are carbonated and non-carbonated beverages.
25. To the extent that the challenged conduct involves the Respondent's conduct in bottled beverages, the FTC includes the entire line of bottled beverages as a relevant product market. Other markets relevant to assessing the effects of the challenged conduct coincide with various narrower groups of bottled beverages. The next issue was determining the product consumers perceived as the closest substitute(s) for bottled beverages.

Next Best Alternative to bottled beverages

26. Beverages are offered to consumers in different types of containers. It is reasonable to deduce that the next best alternative to a beverage sold in glass bottles would be the same beverage sold in other containers. The containers used by D&G, for example, include glass bottles (returnable and non-returnable), aluminum cans, and stainless steel or aluminum kegs.
27. Evidence supports the claim that there is a strong consumer preference for beverages sold in glass bottles. D&G points out that the type of container used to package a given beverage is driven by a combination of consumer preference and D&G's production capabilities. A significant share (93%) of D&G's beverages is supplied in returnable glass bottles.
28. The FTC concludes that bottled beverages comprise a relevant product market as consumers are unlikely to switch to the beverage in other containers in response to a small but significant non-transitory increase in prices. Accordingly, the relevant product market comprises bottled beverages as well as its various narrower submarkets (e.g., low-alcoholic bottled beverages, strong alcoholic bottled beverages, flavoured beverages, carbonated beverages, etc.).

B. Relevant Geographic Market

29. Having identified the relevant product markets, it is now important to define the relevant geographic market, which comprises the area in which the enterprises concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently similar. This area is a geographical territory which can be distinguished from neighboring areas, in which competition conditions in a relevant market for a product are sufficiently the same for all participants in such market. For each relevant product market in which the Respondent participates, the geographic market must be defined.
30. Beverages are available throughout Jamaica. Consumers typically purchase the product within regions proximate to where they work, live, or places along the route they may be travelling.
31. The FTC, therefore, concludes that the relevant geographic market comprises multiple geographic areas throughout Jamaica.

Section Conclusion

32. Based on the above, the FTC concludes that the relevant market comprises bottled beverages sold in multiple geographic regions across Jamaica. In addition, there are also multiple narrower sub-markets.

V. Assessment of Substantially Lessening of Competition

33. Having identified in Section IV the boundaries of commerce that the challenged conduct could harm, the FTC next assessed the likely competitive effects of the challenged conduct within the boundaries identified.

A. Analytic Framework

34. Section 5 (1)(a) of the FCA provides that the Commission can investigate 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.
35. The Food and Drug Act (FDA) applies to the beverage industry. 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.
36. After examining the provisions of the FDA, the FTC determined that nothing in the FDA is likely to be construed as having the effect of ousting the jurisdiction of the FTC to investigate anticompetitive conduct in this industry.

Relevant Sections of the FCA

37. The challenged conduct may contravene sections 19-21 of the FCA. In the following section, we consider whether the Respondent's policy of introducing a "Full-for Empties" policy in relation to certain retail outlets breaches any provision of the FCA.

Dominance and Assessment of Dominance - Section 19

38. Dominance is defined by section 19 of the FCA, which states:

"An enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors".

39. The definition of the relevant market is of utmost significance, as it provides an understanding of the scope of competition and the competitive constraints that limit a firm's ability to exercise market power.⁵ Dominance has to be determined by identifying the relevant market, as an enterprise can only be dominant in a market.

⁵ International Competition Network, Unilateral Conduct Workbook, Chapter 3: Assessment of Dominance, May 2011

40. The case of *Re Continental Can Company Inc.*⁶ has been relied on by Commonwealth countries such as New Zealand and Australia for the test of dominance. That case established that whereas a result of market share, market share combined with technical knowledge, raw materials, or capital; an enterprise has the power to control production or distribution for a significant part of the relevant product(s), it is dominant. Accordingly, the minimum indicator is that the enterprise is strong enough to ensure overall independence of behaviour.
41. The later cases of *United Brands*⁷ and *Hoffman-La Roche* also laid out a test for dominance.⁹ The European Court of Justice (ECJ), in these cases, reasoned that a dominant position is a position of economic strength that enables a firm to prevent effective competition in the relevant market; a firm with a dominant position has the power “to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.”¹⁰ In economic terms, one would say that a dominant position is one in which the firm has a “reasonably large” degree of market power.
42. In assessing dominance, it is imperative to consider whether the enterprise faces constraints on its ability to behave independently. Several factors lead to a determination of dominance, including but not limited to the market position of the enterprise and its competitors, barriers to entry and barriers to expansion as well as countervailing buyer power, commercial advantages, which could include vertical integration¹¹, and the strength and number of competitors in the market¹². Notably, as the court in *Hoffmann-La Roche*¹³ stated, “the existence of a dominant position may derive from several factors which taken separately are not necessarily determinative, but among these factors, a highly important one is the existence of very large market shares”.
43. The ECJ has stated that dominance can be presumed, in the absence of evidence to the contrary, if a business has a market share persistently above 50 percent. If the firm's market share is not overwhelming, other factors indicative of market power may be examined; for example, relative market share; relations of the market leader with competitors, suppliers, and customers; time scale over which the leading position has been enjoyed; the possession of material technology; and barriers to entry. These factors are rooted in economics, and as such, the determination of whether an enterprise holds a dominant position requires economic analysis.

⁶ [1972] CMLR D11 at pg. D27

⁷ Case 27/76, *United Brands Co. and United Brands Continental BV v. Commission* [1978] ECR 207, [1978] 1 CMLR 429.

⁹ Case 35/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, [1979] ECR 461, 3 CMLR 211.

¹⁰ Case 27/76, *United Brands Co. and United Brands Continental BV v. Commission* [1978] ECR 207, [1978] 1 CMLR 429, para 65.

¹¹ *Ibid* at paragraphs 70-81

¹² *United Brands Co v Commission* Case C-27/76 at para 110.

¹³ Case 35/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211.

Assessment of Abuse

44. Where dominance is established, the conduct of the enterprise is assessed to determine if the conduct constitutes an abuse of its dominant position. Section 20 states that an enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market. Section 20(1) details the practices and arrangements that are categorized as an abuse of a dominant position. The list is a non-exhaustive list of abusive activities and includes the following:

- Restricting the entry of any person into that or any other market;
- Preventing or deterring any person from engaging in competitive conduct in that or any other market.
- Eliminating or removing any person from that or any other market;
- Directly or indirectly imposing unfair purchase or selling prices or other uncompetitive practices;
- Limiting the production of goods or services to the prejudice of consumers;
- Make the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

45. The question of what constitutes abuse can be garnered from Hoffmann-LaRoche¹⁴. The ECJ, in paragraph 91, states that:

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market, whereas a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

46. Elements that are considered to determine abuse of dominant position according to the literature include, but is not limited to, the following:

- (i) Inferred largely based on a large market share;
- (ii) Consideration of entry conditions and other factors which may influence the ability of firms with large market shares to exercise market power;
- (iii) Charging of high prices or the carrying out of other exploitative acts;

¹⁴ Case 35/76, Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, [1979] ECR 461, 3 CMLR 211.

- (iv) Exclusionary conduct by firms harms the competitive process (that is, conduct preventing competing firms from entering the market.
- (v) Examining the case law reveals that abusive behaviour consists mainly of exclusionary practices such as predatory pricing¹⁵, exclusive dealing, refusal to supply¹⁶, and tying¹⁷.

47. Section 20(2) provides that an enterprise shall not be treated as abusing a dominant position where:

- a. If it is shown that-
 - i. Its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and
 - ii. Consumers were allowed a fair share of the resulting benefit;
- b. By reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design, or trademark.

Standard of Proof: Lessening Competition Substantially

48. It is important to emphasize that an enterprise having a dominant position does not contravene the FCA. Competition law recognizes that the presence of a dominant enterprise may have procompetitive effects as they are generally suitable for consumers, create many jobs, innovate, and exploit economies of scale. However, the abuse of a dominant position may prevent or deter actual or potential competitors from competing on their merits, resulting in the competitive process being harmed. In circumstances where the dominant enterprise is eligible to be treated as abusing a dominant position, the FTC conducts an economic assessment of whether the conduct harms competition. The applicable legal standard in determining breach is laid down in section 21 of the FCA. The section states that to establish a breach, it is necessary that the abuse must have had, is having, or is likely to have the effect of lessening competition substantially in the market.
49. The FCA does not define the term “lessening competition substantially”. However, section 2(4) of the FCA indicates that “References in this Act to the lessening of the competition shall unless the context otherwise requires, include references to hindering or preventing competition.” Additionally, an examination of Australian decisions provides a guide concerning this term. The Trade Practices Act, 1974 (repealed, now the Competition and Consumer Act 2010) of Australia utilized the term, and the case law involving the

¹⁵ Case C62/86, AKZO v Commission, and Tetra Pak v Commission [1997] 4 CLMR 662.

¹⁶ Cases 6/74, Commercial Solvents v Commission [1974] ECR, 223, [1974] 1 CMLR 309.

¹⁷ Case C-333/94P Tetra Pak International SA v Commission [1996] ECR I-5951, [1997] 4 CMLR 662.

statute is instructive. The Federal Court of Australia in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*¹⁸, 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.”

50. On appeal to the Full Court, Justices Burchett and Hely agreed that Justice French applied the correct test to determine whether there was a substantial lessening of competition. The Court reasoned 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.”*¹⁹

51. In the *Australian Gas Light Company v ACCC*²⁰, which utilized the test of substantially lessening competition, the Court examined several 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.”*²¹

52. The courts have, therefore, found that a lessening of competition means a reduction or a loss of competition as a result of the conduct, that is meaningful or relevant to the competitive process and that it involves considering the future state of competition with and without the impugned conduct.²²

53. Accordingly, an evaluation of whether the challenged conduct will have the effect or likely effect of lessening competition substantially involves an analysis to determine the pro and anticompetitive effects, with the particular facts of the case being assessed to determine the effect of the conduct on competition. Additionally, section 21(2) of the FTC provides that in determining whether the conduct of an enterprise has had or is likely to have the effect of lessening competition substantially in the market, the FTC examined whether the challenged conduct is a result of superior competitive performance.

54. Consequently, to establish a breach of sections 19-21, the FCA requires an assessment of:

- (i) Whether the enterprise is dominant in a market;
- (ii) Where the enterprise is dominant, whether its conduct is eligible to be treated as an abuse of that dominant position;
- (iii) Whether such abuse has had, or is having, or is likely to have the effect of lessening competition substantially; and

¹⁸ [2000] FCA 38.

¹⁹[2000] FCA 1381 at 66.

²⁰(No. 3) [2003] FCA 1525.

²¹ *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.

²² Glibert+Tobin, *In brief: abuse of dominance in Australia*, Lexology. Accessed July 13, 2021, <https://www.lexology.com/library/detail.aspx?g=116e8cab-19fc-4acf-8b19-2eca5c4fa03a>

(iv) Whether any procompetitive benefits arise from the conduct of the dominant enterprise.

B. Analysis

55. Retail outlets are the primary access points for final consumers of bottled beverages in Jamaica. Competition among retail outlets is likely to be harmed when rivals are restricted from expanding in the markets. The Full-For-Empties policy effectively restricts the ease with which retail outlets subject to the policy can replenish their inventory of bottled beverages manufactured by D&G.
56. In examining whether competition is likely to be harmed, therefore, it is essential to assess whether and the extent to which retail outlets which are bounded by the policy compete against retail outlets which are exempted from the policy and the importance of D&G bottled beverages to competition among retail outlets.

Existence of Dominant Position

57. The FCA maintains that an enterprise holds a dominant position in a market if, by itself or with an affiliated company, it occupies such a position of economic strength as will enable it to operate in the market without effective competition.
58. The ability of an enterprise to effect a substantial lessening of competition largely depends on the degree of market power it holds. An enterprise with market power can, inter alia, charge a price above the competitive level for a sustained period. A dominant enterprise exercises a significant degree of market power.
59. Market power is usually assessed by examining the market shares (to measure the extent of competitive constraints from competitors) and impediments to entry (to measure the extent of competitive constraints from potential competitors).

Restraints on Competition from Competitors

60. Market concentration relies on the distribution of market shares and is a useful proxy for the intensity of competition among competitors. For market concentration to reflect the extent of competitive constraints from competitors, the base unit for calculating the market share must reflect the basis on which market participants compete.
61. 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 individual market participants and then summing the resulting numbers. The index 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).

62. The range of market concentration as measured by the HHI can be classified as Unconcentrated (for HHI less than 1,500), Moderately Concentrated (for HHI between 1,500 and 2,500), and Highly Concentrated (for HHI greater than 2,500).

63. D&G participates in multiple relevant product markets in Jamaica- including the beer sub-market. It first entered the market by producing Red Stripe Beer, a bottled, low-alcoholic beverage. Based on information published in multiple public reports, D&G offers the most popular brand of beer in Jamaica and competes against four foreign brands and two other local brands.²³ Although the FTC did not seek to obtain quantitative data on sales of the various brands operating in Jamaica, the qualitative data reviewed was sufficient for the FTC to conclude that the market is highly concentrated.

64. To fully characterize the dominance of D&G in the beer sub-market, the FTC examined the extent to which potential competitors are able to enter and expand in the market to mitigate the effects of anticompetitive conduct.

- Competitive Restraints from Potential Competitors

65. Competition authorities consider entry into the relevant market critical to its competitiveness. The Horizontal Merger Guidelines (2010) state that

“The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern ...”²⁴

66. Even if an enterprise has a high market share, the incentives and opportunity to engage in anticompetitive conduct may be constrained by potential competitors (future entrants). If entry conditions are easy, new entry could mitigate, if not avert, the exercise of market power. On the other hand, if entry conditions are difficult, entry is unlikely to constrain the exercise of market power.

67. When assessing whether potential competitors pose a competitive constraint for incumbents, consideration is given to identifying market impediments. An impediment refers to factors that would make:

- a. entry by new competitors difficult; and/or
- b. expansion by recent entrants is difficult.

²³ See articles by: (i) Steven Jackson entitled “Two Craft Beer Operations emerging in Jamaica” appearing in the August 8, 2021 edition of **The Gleaner**. Available at <https://jamaica-gleaner.com/article/business/20210808/two-craft-beer-operations-emerging-jamaica> (accessed December 12, 2021); and (ii) Sabrina Gordon entitled “Beer Retreat” appearing in the August 20, 2010 edition of **The Gleaner**. Available at <https://jamaica-gleaner.com/gleaner/20100820/business/business1.html> (accessed December 12, 2021)

²⁴ See page 28 in US Department of Justice and Federal Trade Commission (2010), *Horizontal Merger Guidelines*. Available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> (Last accessed: February 2, 2022)

68. Impediments are considered to be low if entry is effective in constraining anticompetitive conduct. Entry is described as being effective if it is timely, likely, and sufficient. Entry is timely when it occurs within two years. Entry is likely when it is profitable to enter, based on pre-entry prices, while entry is sufficient when critical inputs are not controlled by market participants, and new entrants have the capacity to accommodate additional demand from consumers seeking to avoid the anticompetitive effects of market participants. Finally, competitive entry occurs when potential entrants are considered a binding competitive constraint.
69. Impediments to entry and expansion were assessed by examining the conditions of entering the relevant market.

History of Entry

70. The history of entry may indicate the possibility of timely entry in the future. This is particularly true if there have been little or no changes in the market that would likely alter the speed at which new entrants can enter the market when compared to previous entries.
71. In 2018, two breweries in Jamaica produced about thirteen beers locally.²⁵ Red Stripe beer was first brewed in Jamaica in 1934. Since then, D&G products have been a staple in Jamaican, and no other brand has successfully challenged D&G as the leading brand in Jamaica.
72. *Real Rock* and *Kingston 62* are two recent examples of failed attempts by Jamaican-made brews to enter and challenge D&G's position in the relevant market comprising beer; Kingston 62 exited the market comprising beer in 2010 after being unable to penetrate it in a four-year period despite being sold at a lower price than Red Stripe.²⁶ Similarly, Real Rock has since exited the beer market.²⁷ The brand Kingston 62 re-entered the market in 2020 but not in the beer sub-market. Instead, the brand entered the rum sub-market; replacing the established *Appleton Special* brand of strong alcoholic content bottled beverage.
73. In August 2021, there were reports of the recent establishment of two local-based micro-breweries in the market: Montego Bay Brewing Company Limited and Craft Beer Company of Jamaica Limited. Craft beer is the only one of the two breweries already generating sales and distributes its products in small quantities only through trendy lounges and eateries in Kingston and sells for double the price of standard retail beers.²⁸

²⁵ Daniel J. Leonard "A Guide to the Jamaican Beer Scene" *Beer Syndicate Blog*, January 31, 2018. (accessed September 17, 2021).

²⁶ Sabrina Gordon entitled "Beer Retreat" appearing in the August 20, 2010 edition of *The Gleaner*. Available at <https://jamaica-gleaner.com/gleaner/20100820/business/business1.html> (accessed December 12, 2021)

²⁷ <https://www.jamaicaobserver.com/business/kingston-62-to-replace-appleton-special-brand/> (access July 17, 2022)

²⁸ Article by Steven Jackson entitled "Two Craft Beer Operations emerging in Jamaica" appearing in the August 8, 2021 edition of *The Gleaner*. Available at <https://jamaica-gleaner.com/article/business/20210808/two-craft-beer-operations-emerging-jamaica> (accessed December 12, 2021).

Entry is timely

- 74. To deter or counteract the competitive effects of concern, potential competitors must be able to quickly impact the price in the relevant market significantly. Accordingly, the competition authority generally will consider timely only those committed entry alternatives that can be achieved within two years.
- 75. The FDA governs the establishment of a brewery. However, the strictures imposed by the FDA are minimal and unlikely to delay the entry beyond two years.
- 76. Accordingly, entry is considered to be timely, given that the setting up of a brewery is likely to be completed within two years.

Entry is likely

- 77. Entry is considered likely if it would be profitable for entry to take place at the current prices. Factors that reduce the opportunities for entrants to make a profit include: (a) a decline in market demand; and (b) a reduction in the total number of available customers willing to purchase from the entrant(s).
- 78. Entrants are likely to be able to profitably offer products at the current price. D&G, for instance, generated profits for the ten years ending 2016, with profit after taxation reported at JMD 3,350 million in 2016.²⁹ Indeed, Kingston 62 participated in the market between 2006 and 2010 at a lower price point than Red Stripe. Further, there are reports of the incorporation of Montego Bay Brewing Company Limited in September 2019 and the incorporation of Craft Beer Company of Jamaica Limited in August 2020 that suggests that these companies anticipated that they would be likely to profitably participate in the market at the current price.
- 79. Accordingly, the FTC concludes that entry is likely.

Entry is not Sufficient

- 80. Entry is considered sufficient to deter anticompetitive conduct if entrants are able to accommodate consumers seeking to avoid the exercise of market power by incumbents. Since entry may occur within a relatively short period and entrants may flexibly choose their scale, committed entry generally will be sufficient to deter anticompetitive conduct whenever an entry is likely. Entry could be likely but not sufficient to deter anticompetitive conduct, however, if, as a result of an incumbent's control over the tangible and intangible assets required for competing, prevent entrants from accommodating consumers seeking to avoid anticompetitive effects.

²⁹ Desnoes and Geddes Limited, Annual Report 2016. Available at <http://www.redstripecompany.com/wp-content/uploads/2017/09/2016-annual-report.pdf> (accessed: November 17, 2021).

81. There is evidence of strong consumer inertia in favour of D&G. This is likely due to a strong brand loyalty nurtured by D&G since the brand entered the market in 1934. Strong brand loyalty to Red Stripe would explain why a brand such as Kingston 62 could not generate sufficient sales despite participating in the market at a lower price point for four years (2006-2010). Strong brand loyalty to Red Stripe would also explain the failed attempts of other brands to penetrate the market. This strong brand loyalty means that D&G could profitably raise prices above competitive levels. Accordingly, given the strong brand loyalty, D&G is unlikely to face constraints from potential competitors since competitive entry is unlikely.
82. The conclusion in this section is that D&G is dominant in at least one of the relevant markets (in particular, the beer sub-market) as it faces insufficient constraints from its competitors and potential competitors.

Challenged Conduct

83. D&G has been engaged in conduct with the objective and/or effect of impeding the maintenance of competition in the retail segment of the relevant market by deterring certain retail outlets from engaging in competitive conduct.
84. In particular, D&G has implemented its Full-for-Empties policy, making the supply of full bottles of beverages to its distribution channels conditional on the number of empties returned by the distribution channels. To the extent that some distribution channels are exempted from the policy, however, the implementation of the policy is being challenged based on the premise that the policy places distribution channels that are bound by the policy at a competitive disadvantage against competing distribution channels which are exempted from the policy.

Assessment of Abuse of Dominant Position

85. In this section, the FTC describes the events leading to the implementation of the policy.

- Before March 2020

86. D&G uses multiple packages to distribute its beverages. It uses a variety of containers, including glass bottles, aluminum cans, and stainless steel or aluminum kegs. The selected packaging used over the years was based primarily on production capacity as well as consumer preference.
87. The returnable glass bottle is the preferred packaging container for D&G. The returnable glass bottle is preferred as it is a cheaper and more environmentally friendly container to package beverages compared to other containers. D&G has two sources for returnable glass bottles: (i) New returnable glass bottles sourced overseas; and (ii) re-called returnable glass bottles sourced from consumers post beverage

consumption. Approximately 93% of D&G beverages sold in Jamaica are supplied in returnable glass bottles.

88. Prior to COVID-19, retrieved returnable glass bottles were used to package only a small proportion of bottled beverages. This was because D&G retrieved a “low” proportion of returnable glass bottles, which meant that D&G had to use new returnable glass bottles to continue to meet the demand for its beverages. Glass bottles used to contain beverages are sourced only on international markets.

- March 2020 to September 3, 2021

89. The international and domestic responses to the global pandemic significantly impacted D&G’s local operations. Regarding the international responses, the disruptions to the global supply chains led to restrictions in D&G’s supply of new returnable glass bottles on the international market. Consequently, D&G would have to become increasingly reliant on post-consumption returnable glass bottles “empties” in the packaging process if it were to mitigate the shortfall in production that would arise from the restricted access to new returnable glass bottles. Regarding the domestic responses, measures implemented by the Government to address the pandemic served to further restrict the supply of returnable glass bottles available to D&G to package its beverages.³⁰ In addition, on August 20, 2021, the Government’s promulgation of the Disaster Risk Management (Enforcement Measures) (No.9), 2021 adversely affected the rate at which “empties” were retrieved by D&G as a result of designated days which limited the movement of non-essential personnel across the country. The combined effect of the interruption of the supply of new returnable glass bottles and the slowdown in the retrieval of empties induced D&G to reduce production and therefore compromised D&G’s ability to meet the anticipated demand for bottled beverages.

90. Faced with the prospects of further reductions in production, D&G implemented the Full-For-Empties policy on September 3, 2021. The stated aim of the policy was to find “... fair and non-discriminatory way to improve the rate of bottle returns to the Company.”³¹ The policy maintained that for certain products sold in some distribution channels, D&G would sell quantities of full bottles of beverages equivalent to the number of empties returned to D&G. The distribution channels subjected to the policy were:

- a. Community bars
- b. On Premises

³⁰ Crisis24 “Jamaica: Government confirms First COVID-19 Case March 10,” available at <https://crisis24.garda.com/alerts/2020/03/jamaica-government-confirms-first-covid-19-case-march-10-update-2> (accessed October 26, 2021)

³¹ Paragraph 14 of letter from D&G to FTC, dated November 18, 2021.

- c. Quick service restaurants
- d. Supermarket independents
- e. Grocery shops
- f. Mini-marts
- g. Wholesalers
- h. Distributors

91. D&G maintains that the channels were selected to be included in the policy based on the rate of bottle return as well as the volume of sales through the respective channels.
92. An important point is that distribution channels such as supermarket chains, educational institutions, hotels, gas stations, and convenience stores were exempted from the policy. The policy, therefore, creates a market in which one group of retailers (i.e., the included distribution channels) would find it more difficult to expand its sales relative to the other group of retailers (i.e., the included distribution channels).
93. The ability of an enterprise to expand sales to accommodate consumers seeking to avoid the anticompetitive conduct of its rivals is an important means of maintaining competition in a market. To the extent that any distribution channel which is included in the policy is a binding competitive constraint for any distribution channel which is exempted by the policy, then the effect of the policy would be to deter competitive conduct in the retail segment of the relevant market.
94. The FTC concludes that D&G is in a dominant position in the wholesale supply of beer in Jamaica, and its conduct is impeding the maintenance or development of effective competition in the retail supply of beer in Jamaica. However, further analysis is required to establish that D&G could be properly treated as abusing its dominant position.

Eligibility for Not Being Treated as Abusing a Dominant Position

95. Section 20(2) of the FCA identifies two conditions under which an enterprise shall not be treated as abusing a dominant position. Section 20(2)(a) affords that an enterprise shall not be treated as abusing a dominant position if it is shown to improve production or distribution or promote efficiencies and allows a fair share of the benefits to be appropriated by consumers. Similarly, section 20(2)(b) affords an enterprise shall not be treated as abusing a dominant position if the enterprise was seeking only to enforce any right under or existing by virtue of any copyright, patent, registered design, or trademark.
96. The FTC is satisfied that D&G is eligible not to be treated as abusing its dominant position based on section 20(2)(a) since its conduct improved production and distribution, and consumers shared in the resulting benefits.

97. The policy increased production. It allowed D&G to better meet projected consumer demand by maintaining production at a higher level than it otherwise would have been had the policy not been implemented. In the week commencing August 22, 2021 (one week before the implementation of the Full-For-Empties policy), approximately 62,000 cases of glass bottles were returned to D&G. In the week commencing September 5, 2021, approximately 105,000 cases of glass bottles were returned. This means that the production level facilitated immediately after the policy was implemented was 69 percent greater than the production level immediately prior to the implementation of its policy on September 3, 2021.
98. The policy helped D&G to avoid the costly measures associated with temporarily shutting down its brewery. Immediately before the policy, the empty bottles in the custody of D&G supported only five days of production.³² There was a danger, therefore, that D&G would have to shut down its brewery if the production level fell below the minimum level that would allow D&G to produce bottled beverages at a competitive price. The policy allowed D&G to increase its stock of empty bottles to three weeks of production and avoid shutting down.
99. Secondly, the FTC is satisfied that consumers received a fair share of the benefits. Consumer benefits typically include lower prices, better quality, and a wider choice of new or improved goods and services.³³ In this case, consumers shared in the benefits of the policy as the policy helped D&G to avoid shutting down its brewery and therefore allowed consumers to maintain access to its bottled beverages.
100. Accordingly, the FTC concludes that D&G is not abusing its dominant position.

Section Conclusion

101. Based on the above, the FTC concludes that D&G, being dominant in the sub-market for bottled beer in Jamaica, is not engaged in abusive conduct as it relates to the implementation of the Full-For-Empties policy.

VI. Summary and Overall Conclusion

102. The Fair Trading Commission (FTC) investigated D&G's Full-for-Empties policy under sections 19-21 of the Fair Competition Act (FCA), which prohibit any action of an enterprise occupying a dominant position in a market from abusing its dominance to the detriment of effective competition.
103. Based on the investigation, the FTC concludes that:

³² D&G's meeting with FTC held on September 9, 2022.

³³ See Svend Albaek (2013) "Consumer Welfare in EU Competition Policy," https://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf (accessed June 16, 2022).

- (i) The relevant markets for identifying the competitive effects of the challenged conduct are the market for bottled beverages as well as its various submarkets (including the sub-market for beer) sold within multiple regions in Jamaica.
- (ii) D&G occupied a dominant position in at least one of the relevant markets (in particular, the sub-market for beer).
- (iii) D&G is not abusing its dominant position since its Full-For-Empties policy improves the production of its bottled beverages, with consumers benefitting by being able to continue accessing these beverages.

Overall Conclusion

104. The overall conclusion of the investigation is that the implementation of its Full-For-Empties policy is unlikely to breach sections 19-21 of the FCA.