



FTC STAFF REPORT:

ASSESSMENT OF THE PROPOSED AMALGAMATION AGREEMENT BETWEEN

PANJAM INVESTMENT LIMITED

AND

JAMAICA PRODUCERS GROUP LIMITED

Case Number: 8207-22

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FAIR TRADING COMMISSION

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I. PARTIES

PanJam Investment Limited

1. PanJam Investment Limited ('PanJam') is a company existing under the laws of Jamaica with registered offices at 60 Knutsford Boulevard, Kingston 5, in the parish of St. Andrew. PanJam is a holding company with subsidiaries, associated companies, and business interests operating a wide range of commercial activities, including investments, real estate, hotel management, and food manufacture and distribution.

Jamaica Producers Group Limited

2. Jamaica Producers Group Limited ('JP') is a company existing under the laws of Jamaica with registered offices at 4 Fourth Avenue, Newport West, Kingston 13, in the parish of St. Andrew. JP is a holding company with subsidiaries operating in a wide range of commercial activities. Among them are shipping and logistics, food manufacture and distribution, and infrastructure.

3. Both parties have operations in overlapping markets, specifically in shipping and logistics, food manufacture and distribution, and real estate.

II. THE CHALLENGED TRANSACTION¹

4. On November 18, 2022, PanJam and JP executed an agreement to effect a combination of the material businesses of both companies, pursuant to a scheme of amalgamation (the "Amalgamation Agreement"). Subject to the approval of the shareholders of both Companies and the satisfaction of all applicable regulatory and statutory requirements, the proposed amalgamation is intended to entail:

(1) JP transferring substantially all of its operating assets and liabilities to a new wholly owned subsidiary, JP Global Holdings Limited; and

(2) JP transferring the shares in JP Global Holdings Limited to PanJam in exchange for shares in PanJam

5. The anticipated outcome is that JP Global Holdings Limited would become a wholly owned subsidiary of PanJam, and JP would hold 34.5% of the shares in PanJam.

6. The Amalgamation Agreement contains a restraint of trade clause whereby JP, itself or together with any subsidiary or associated company, covenants to PanJam and agrees for a period of three years from the date of

¹ Description of transaction outlined in Letter dated November 21, 2022 from Myers, Fletcher & Gordon to the FTC

the Agreement not to be engaged in the restricted business outlined in the Agreement without the consent of the PanJam Board.

7. The proposed transaction was brought to the FTC's attention by the parties.

III.FTC'S INTEREST IN THE TRANSACTION

8. The matter was reviewed pursuant to section 17 of the Fair Competition Act, 1993 ('FCA') which prohibits an agreement that contains provisions that have as their purpose or effect the substantial lessening of competition in a market.

9. This investigation coincides with Phase 1 of the FTC's merger review process—as described in the FTC (2022), Guideline to Reviewing Mergers, Acquisitions, and Joint Ventures. As part of the information, the FTC reviewed Information submitted by the parties, newspaper articles, and various annual reports.

IV.INTRODUCTION

10. JP and PanJam both operate as holding companies. Holding companies do not produce any good or service themselves - rather, their primary business is to hold shares or business interests in operating companies.

11. PanJam discloses diverse holdings operated by several subsidiaries, associated companies, and business interests. Its subsidiaries span (i) one investment company; (ii) nine Property Development, Management, and Rental companies; (iii) two Hotel Management companies; and (iv) one Food Manufacture and Distribution company. Further, PanJam has shares in two Financial Service providers and a Hotel Management company.

12. JP discloses diverse holdings operated by seventeen subsidiaries and associated companies. Its subsidiaries operate in (i) Shipping and Logistics (nine); (ii) Food Manufacture and Distribution (seven); and (iii) Infrastructure Financing (one).

V.RELEVANT MARKET

A. Analytic Framework

13. A key objective of reviewing a proposed merger is to assess the importance of competition which may be lost if the merger was consummated. Market definition is used by competition authorities to assess the likely competition effects of a proposed merger. For each product sold by one party that competes with one or more products sold by another party (an 'over-lapping product'), competition authorities define a relevant market (necessarily including the over-lapping product) as a product (or group of substitutable 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, could profitably raise prices above the competitive level.

14. A relevant market delineates the boundaries within which competition meaningfully exists and comprises only those products that consumers consider reasonably interchangeable. As such, enterprises participating in a relevant market offer the most immediate and direct competition to those being investigated.

15. In assessing competitive effects, competition authorities also utilize analytic tools which do not rely on market definition. This analysis would include an examination as to whether the parties supply complementary products and the scope and duration of restraint of trade clauses in the Amalgamation Agreement.

B. Discussion

Relevant Product Market

16. For any amalgamation agreement between two holding companies, defining a relevant product market necessarily starts with identifying markets in which subsidiaries, associate companies, and business interests of the parties concurrently participate in or would have likely concurrently participated in, absent the agreement.

17. A review of the portfolios reveals that the parties concurrently participate in three lines of commerce: (i) Shipping and Logistics; (ii) Food Manufacture & Distribution; and (iii) Real Estate (Property Development, Management, Rental and Infrastructure Finance).

Shipping and Logistics

18. PanJam and JP concurrently participate in this line of commercial activity through their ownership of shares in Kingston Wharves Limited.

19. PanJam holds a 30.21% stake in Sagicor Group Jamaica Limited. Pooled Investment Funds Limited is a subsidiary of Sagicor Group Jamaica Limited. Sagicor Pooled Investment Funds Limited holds a 2.30% stake in Kingston Wharves Limited.

20. JP is the majority shareholder of Kingston Wharves Limited with a 42.03% stake.

21. Accordingly, the assessment concludes that the parties do not supply overlapping products in the Shipping and Logistics line of commerce.

Food Manufacture and Distribution

22. PanJam has business interests in two companies that operate in Food Manufacture and Distribution; namely, Busha Browne and Walkerswood. Busha Browne and Walkerswood are both producers of spices and condiments.

23. Food Manufacture and Distribution is a main line of commerce for JP, with two subsidiaries; namely, JP Tropical Foods Limited and Antillean Foods, Inc. Both subsidiaries produce fruits and processed snacks.

24. Accordingly, the assessment concludes that the parties do not supply overlapping products in the Food Manufacture and Distribution line of commerce.

Real Estate

25. PanJam earned approximately 50% of their income from real estate holdings and property services through their subsidiaries: Jamaica Property Company Limited, Baywest Development Limited, Downing Street (Caribbean Place) Limited, Kingchurch Property Holdings Limited, and Knutsford Holdings Limited.²

26. JP has recently entered into a joint venture with Eppley Limited (Eppley), forming Capital Infrastructure Group Limited (CIG). CIG is a Barbadian-registered company that invests in infrastructure projects throughout the Caribbean. CIG is equally owned and managed by JP and Eppley. In addition, CIG has recently formed Rio Cobre Water Limited (RCW) through a joint venture with Vinci Construction Grands Projects, a member of the Vinci Group. RCW has subsequently entered into a public-private partnership agreement with the National Water Commission to design, build, finance, and operate a 15-million gallon per day water treatment plant. This partnership is under a 25-year concession. JP advised the FTC that CIG's mandate is to deploy private capital to address pressing needs for water, power, renewable energy, transportation systems, and telecommunications.

27. Accordingly, the assessment concludes that the parties do not supply overlapping products in the Real Estate line of commerce.

28. To the extent that the merger does not involve overlapping products, no market could be defined for this merger. Other analytic tools which do not require market definition are to determine whether the consummation of the Amalgamation Agreement raises concern for competition (outlined in Section VI of this Report).

Relevant Geographic Market

29. To the extent that the previous section determined that there are no overlapping products relevant for assessing the effect of the Agreement, a definition of the relevant geographic is not warranted.

30. The overall conclusion of this section is that there are no markets in which competition could be harmed as a result of the execution of this Agreement.

VI. ASSESSMENT OF COMPETITIVE HARM

² PanJam Annual Report (2021).

A. Analytic Framework

31. In this section, the report assesses the Amalgamation Agreement to determine whether the consummation of the proposed merger is likely to harm competition, in breach of the FCA. The analysis begins with an assessment of legal harm, including a determination of whether the agreement has, as its purpose, the substantial lessening of competition in a market. The analysis continues with an assessment of economic harm, including a determination of whether the agreement has, or likely to have, the effect of substantially lessening competition in a market.

B. Assessment of Legal Harm

32. Section 17 is found in Part III of the FCA, which speaks to the Control of Uncompetitive Practice and states as follows:

- (1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.*
- (2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that-*
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
 - (b) limit or control production, markets, technical development or investment;*
 - (c) share markets or sources of supply;*
 - (d) affect tenders to be submitted in response to a request for bids;*
 - (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.

33. Accordingly, an examination of an agreement in accordance with section 17 requires the following to be determined:

- a. that there is an agreement:
- b. that the agreement contains a provision(s) that either:
 - (i) has as its purpose, the substantial lessening of competition in a market;
 - (ii) has the effect of substantially lessening competition in a market; or
 - (iii) is likely to have the effect of substantially lessening competition in a market.
- c. that there is an efficiency justification as enunciated in section 17(4).

34. It is of note that the requirements under section 17 are disjunctive specifically, the provisions of the agreement need to have (i) the purpose, or (ii) the effect, or (iii) the likely effect of substantially lessening competition in a market. Provided that any of these limbs of the test stated above are satisfied, then section 17 would be breached subject to the exemptions provided in subsection 4 of this section.

Assessment of Purpose

35. The concept 'purpose' is not defined by the FCA, but it has been defined in competition law as the effect, end, goal, objective, or aim sought to be achieved or accomplished by the provision³. In the New Zealand case of *Union Shipping NZ Limited v Port Nelson Limited*⁴, the High Court examined the meaning of purpose within the context of section 27 of the Commerce Act, which states that it is illegal to "enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market." The Court reasoned that:

"The word is not merely "intention". Intention to do an act, which is known will have anticompetitive consequences, in itself is not enough. "Purpose" implies object or aim. The requirement is that "the

³ The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law by Paul Scott p.173 and citing *Seven Networks Limited v News Limited* [2009] FCAFC 166 at pgs. 852 and 898

⁴ [1990] 2 NZLR 662

conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences.⁵”

36. Section 2(4) of the FCA states that “[r]eferences in this Act to the lessening of competition shall, unless the context otherwise requires, include references to hindering or preventing competition. The FCA, however, does not explicitly define the concept of “substantially lessen competition”. Nonetheless, an examination of Australian decisions assists in providing guidance in regard to this concept. In *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*⁶, the Full Court stated that:

“Conduct has the effect of lessening competition in a market only if it involves a reduction in the level of competition which would have otherwise have existed in that market but for the conduct in question.”⁷”

37. It is noteworthy that an assessment of the substantial lessening of the competition involves an assessment of the ability of the firm to profitably divert price, quality, variety, service, innovation, or any other aspect of the competitive process or its performance outcomes from their competitive levels for a significant period.

38. Where an agreement is found to contravene section 17, it is not enforceable and shall be deemed void. This is so unless it falls within the efficiency justification stipulated in section 17(4) outlined above. Accordingly, in determining whether an agreement substantially lessens competition, an overall competitive assessment is conducted, in which various factors are taken into account, among them the efficiency justifications stated in section 17(4).

39. Competition authorities recognize that certain contractual restrictions may be directly related to and necessary for the successful implementation of the merger or acquisition. However, restrictions that do not satisfy these criteria may be considered to have as its purpose the substantial lessening of competition. In particular, the restraint of trade provision would not be considered by the FTC as being ancillary to the transaction.

40. A restriction is considered necessary where the merger could not be implemented or could be implemented only under considerably more uncertain conditions at a substantially higher cost, over an appreciably longer period, or with considerably greater difficulty⁸. Determining whether a provision is necessary also requires that

⁵ Ibid at 882

⁶ [2000] FCA 1381

⁷ Ibid, para 66

⁸ Notice on ancillary restraints

the duration, subject matter, and geographical field of the application of the restriction in question be contemplated and limited to what is needed to implement the merger or acquisition.

41. Generally, a period of up to three years is justifiable where goodwill and know-how are transferred and two years where only goodwill is included⁹. Regarding the geographical scope, it should be limited to the area where the vendor has offered the relevant products or services before the transfer, and the clause should similarly be limited to the products or services forming the economic activity of the entity transferred.

42. Clause 5A of the Amalgamation Agreement contains a restraint of trade clause, specifically a non-compete restriction whereby JP, itself or together with any subsidiary or associated company, covenants to PanJam and agrees for a period of three years from the date of the Agreement not to be engaged in the restricted business outlined in the Agreement without the consent of the PanJam Board. Clause 5A limits the application of the non-compete to the principal business of JP's subsidiaries or associated companies to the principal territory of their operations at the date of the signing of the agreement.

43. Non-competition obligations imposed on a vendor which facilitates and guarantees the transfer to the purchaser of the full value of the assets transferred, which in general include both physical and intangible assets, such as goodwill accumulated or the know-how developed by the vendor, are considered to be both directly related and necessary for the implementation of the merger. Where the non-competition obligation seeks to provide legitimate protection, the FTC would be satisfied that the non-compete provisions do not have the purpose of substantially lessening competition.

44. Regarding the purpose of the subject Agreement, the parties have indicated that the aim of the non-compete provision is to ensure that the interest and value of the shares of all shareholders are protected. In addition, the parties seek to ensure the success and maximization of the benefits of the combined enterprise, as well as, the realization of efficiency. In the circumstances, the agreement does not have the purpose of substantially lessening competition.

45. An agreement that does not have as its purpose the substantially lessening of competition must be assessed to determine if it has, or is likely to have the effect of substantially lessening competition in a market. It is of significance in determining the effect of an agreement to examine the actual context in which competition would occur in the absence of the agreement.¹⁰

C. Assessment of Economic Harm

⁹ Notice on ancillary restraints

¹⁰ *Société Technique Minière Maschinenbau Ulm* [1996] ECR 235

46. In Section V, the report determined that the Amalgamation Agreement does not involve overlapping products, and therefore the parties do not compete against each other in any market. This means that, without more, there is no concern that the merger would remove competitive constraints in any market.

47. In furthering the analysis, the Staff assessed the extent to which the parties offered goods and services which were strong complements in demand.¹¹ Mergers involving complementary goods and services could raise concerns for competition if one of the parties to the agreement held significant market power for one of the complementary goods. An examination of the goods and services offered by the parties to the agreement determined that the products involved in the Agreement are not strong complements in demand.

D. Determination

48. PanJam and JP have proposed to enter into an Agreement to amalgamate their assets whereby the assets and liabilities of JP were transferred to PanJam in consideration for JP to acquire 34.5% equity in PanJam.

49. The Amalgamation Agreement does not contain any provision which has as its purpose, the substantial lessening of competition in any market.

50. The Amalgamation Agreement does not contain any provision which has the effect of substantially lessening competition in any market.

51. The Amalgamation Agreement does not contain any provision which is likely to have the effect of substantially lessening competition in any market.

52. As such, the Amalgamation Agreement does not breach section 17 of the FCA.

VII. SUMMARY AND OVERALL CONCLUSION

53. The Amalgamation Agreement involves parties that do not compete against each other in any market.

54. The Amalgamation Agreement does not have as its purpose, the substantial lessening of competition in any market. Neither does it have, nor is likely to have, the effect of substantially lessening competition in any market.

55. The conclusion of the investigation is that the Amalgamation Agreement between JP and PanJam does not contain provisions that are likely to breach the FCA.

¹¹ Two goods are said to be complements in demand if consumers typically use one good in conjunction with the other. Examples of complementary goods include coffee and sweeteners.

VIII.RECOMMENDATION

56. Based on the information available, the Staff recommends that the Commission issue a Statement of Non-Objection regarding the consummation of the Agreement.