STAFF REPORT

INVESTIGATION OF THE PURCHASE AND SALE AGREEMENT

by and among

MASSY GAS PRODUCTS HOLDINGS LTD,

CARIBBEAN PETROLEUM MARKETING LIMITED

AND

I.G.L. (ST. LUCIA) IBC LIMITED

April 2023

Case Number: 8199-22

FAIR TRADING COMMISSION
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TABLE OF CONTENTS

I. PARTIES

Massy Gas Products Holdings Limited

1. Massy Gas Products Holdings Ltd is registered under the laws of Trinidad and Tobago with registered offices at North Sea Drive, Point Lisas Industrial Estate, Savonetta, Couva, Trinidad and Tobago.

2. Massy Gas Products Holdings Ltd, which has oversight for the Gas Products portfolio regionally, is an investment holding company for the Massy Group of Companies and is owned by Massy Holdings Ltd. Massy Holdings Ltd is registered under the laws of Trinidad and Tobago with registered offices at 63 Park Street, Port of Spain Trinidad.

3. Massy Gas Products (Jamaica) Limited ("Massy") is a subsidiary of Massy Gas Products Holdings Ltd and is registered under the laws of Jamaica with its registered offices at 236 Windward Road, Rockfort, Kingston 2, in the parish of St. Andrew.

I.G.L (St, Lucia) IBC Limited

4. I.G.L. (St. Lucia) IBC Limited ("IGL St. Lucia") is registered under the laws of St. Lucia with registered offices at Meridian Place, Choc Estate, Castries St. Lucia.

5. IGL St. Lucia is a holding company and the target of the transaction. Is the owner of al the shares in I.G.L Limited ("IGL"), which is registered under the laws of Jamaica with its registered offices at 593 Spanish Town Road, Kingston 11, in the parish of St. Andrew. IGL is a nationwide distributor of Liquefied Petroleum Gas (LPG), Liquefied Natural Gas (LNG), and Welding and Medical Gas Accessories.

Caribbean Petroleum Marketing Limited

6. A St. Lucia International Business Company, duly registered under the laws of St. Lucia and having its registered office at Meridian Place, Choc Estate, Castries, St. Lucia.

II. THE CHALLENGED TRANSACTION

7. On December 19, 2022, a Purchase and Sale Agreement ("Agreement") was entered into by and among Massy Gas Products Holdings Ltd, Caribbean Petroleum Marketing Limited, and IGL St. Lucia. Through this Agreement, Caribbean Petroleum Marketing Limited, being the sole owner of IGL St. Lucia, sold all of its interests in IGL to Massy Gas Products Holdings Ltd.

8. Massy Gas Products Holdings Ltd was selected as the preferred bidder following a competitive bidding process initiated by the owners of Caribbean Petroleum Marketing Limited exploring ways to monetize their investment in IGL.

III. THE FTC'S INTEREST IN THE CHALLENGED TRANSACTION

9. The FTC investigated The Agreement to determine if it is likely to breach the Fair Competition Act ("FCA"). The combination of the assets of Massy and IGL being facilitated by this Agreement raises concerns under section 17 of the FCA that prohibits 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.

10. In undertaking investigations of this nature, the FTC typically seeks information from the parties to the transaction, other market participants, suppliers, customers, regulators, and industry observers.

IV. INTRODUCTION

11. LPG describes any of several liquid mixtures of volatile hydrocarbons, propene, propane, butene, and butane. It was used as early as 1860 as a portable fuel source, and its production and consumption for both residential and industrial use have expanded ever since. A typical commercial mixture may also contain ethane and ethylene, as well as a volatile mercaptan, an odorant added as a safety precaution.[1] LPG is transported to the Caribbean by specially built seagoing tankers. Locally, the product is canned and sold in varying sizes from 20 lbs (9 kg) to 500 lbs (227 kg) containers.

12. Based on end-user application, the LPG industry is classified into several segments: residential (or domestic), commercial, industrial, agricultural, transport and chemicals.[2] End-users in Jamaica's residential segment ("households") use LPG primarily for cooking.[3] In 2019, 85.8% of households in Jamaica reported using LPG for cooking.[4] Common end users in the commercial segment include restaurants, hotels, and hospitals. Industrial uses include powering forklift trucks in warehouses, aluminum die-casting, and food processing and glass production. In the agricultural segment, LPG is used to crop drying, poultry breeding, thermal desiccation, sanitation, and incineration. In the transport segment, LPG (Autogas) is used as an alternative fuel to gasoline and diesel. Unlike diesel oil, LPG can be stored nearly indefinitely without degradation. LPG is used as feedstock in the chemical segment to manufacture plastics and synthesize olefins.

13. The derived demand for LPG, as measured by imports, contracted by 8% during the period 2019 to 2022. In 2019, Jamaica imported 1,156,590 barrels (183,883,077 litres) of LPG.[5] This was followed by an 11% decline to

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[1] Petruzzello, M 2023, 'Liquefied Petroleum Gas," *Britannica*, available at https://www.britannica.com/science/liquefied-petroleum-gas . Accessed March 23, 2023.

[2] Fortune Business Insights, LPG (Liquefied Petroleum Gas) Market. Available at https://www.fortunebusinessinsights.com/lpg-liquefied-petroleum-gas-market-106373 (accessed: March 9, 2023)

[3] Alternative uses include heating water and homes.

[4] Voluntary National Review (2022), "Goal 7: Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for all" available at https://www.pioj.gov.jm/wp-content/uploads/2022/10/VNR_Goal_7.pdf (accessed February 14, 2023)

[5] Jamaica does not product LPG.

1,053,856 barrels during 2022- due in part to restrictions arising from the onset of COVID-19 in Jamaica in March 2020. There was a moderate recovery in 2021, with imports increasing to 1,118,557 barrels but nonetheless 4% below the 2019 level. By 2022, annual LPG imports decline to 1,062,250 barrels which was 8% below the 2019 level.

14. PetroJam Limited ("PetroJam"), licensed petroleum bulk distributors ("marketing companies") and intermediaries ("dealers") are the major players in the supply chain. All marketing companies source LPG domestically from PetroJam, the sole oil refinery in Jamaica. PetroJam imports and supplies commercial LPG in two grades, Butane and Propane. In the residential segment, portable cylinders filled with LPG ("packed LPG cylinders") are retailed to end users in the residential segment ("households"). Marketing companies distribute packed LPG cylinders to households directly, or supply households indirectly through dealers. Marketing companies engage dealers on either exclusive or non-exclusive terms in the residential segment. Exclusive dealers retail LPG for only one marketing company, while non-exclusive dealers retail LPG for multiple marketing companies. The majority of dealers operate non-exclusively.

15. Marketing companies strategically locate LPG filling plants within proximity of end users. Cylinders are typically made of steel, but plastic composite cylinders have been recently introduced in Jamaica. Cylinders vary in size from 20 lbs (7 kg) to 105 lbs (47.5 kg). For end users in the commercial segment ("bulk customers"), LPG is supplied in containers called tanks. The sizes of the tanks vary with the operations of the bulk customer and the requirements of the management. In most instances, marketing companies own the tanks, but there are a few bulk customers who own storage tanks. Unlike the residential segment, marketing companies do not engage intermediaries in the bulk segment.

16. The portability of cylinders in the residential segment poses a significant commercial risk for current and prospective marketing companies. Cylinders are critical to the prospects for increasing sales in the residential segment. A rule of thumb in this industry suggests that marketing companies need to have three or four cylinders for every residential customer they serve. The cylinder rotation rate measures the number of times marketing companies fill/sell packed LPG with one cylinder each year. The cylinder rotation rate is an important market dynamic impacting the expected rate of return on investments. A low cylinder rotation rate would necessitate investment in a greater number of cylinders to serve a given customer base. The movement of cylinders from filling stations to end users is fairly well monitored. During the return trip from end users back to filling plants, however, marketing companies are exposed to significant commercial risks arising from losing cylinders (through, for example, illegal cross-filling and household abandonment) or slower than anticipated cylinder rotation rate (through, for example, the failure of rival marketing companies to surrender cylinders in a timely manner).

17. Marketing companies have devised multiple private mechanisms to mitigate the commercial risks to investment in their cylinder inventory. One such strategy is the pricing structure. It is common for marketing companies to charge residential customers a lower price for packed LPG if the household also surrenders an empty LPG cylinder owned by that marketing company.[6] Another private mechanism is an informal arrangement among the three earliest entrants whereby dealers were authorized to collect from households, empty cylinders belonging to any party to the arrangement. Each empty cylinder retrieved from households would then be surrendered to its owner.[7] While the arrangement has the potential to improve cylinder rotation rate (by facilitating the timely retrieval of empty cylinders from end-user premises back to their respective owners), it also exposes marketing companies to commercial risk as it would invariably result in one marketing company gaining custody of cylinders belonging to its rivals and therefore exposes parties to the arrangement to lower cylinder rotation rates.

18. Massy and IGL are the top two suppliers of LPG in Jamaica. In 2022, approximately [redacted]% of LPG purchased by marketing companies was sourced directly from the international markets, with the other [redacted]% sourced indirectly through PetroJam.[8] Massy and IGL are the only marketing companies that source LPG directly from the international market.

19. IGL is reported to be the sole manufacturer/distributor of medical gases in Jamaica. Medical Gases include oxygen, carbon dioxide, nitrogen, nitrous oxide, and compressed air. These gases are primarily used by hospitals and clinics and, to a lesser extent, in care homes and private homes. Industrial gases distributed include liquid nitrogen, ammonia, ethylene, helium, argon, and hydrogen. Industrial gases are used in various applications, including welding, flash freezing and water treatment. Massy reports that it imported and distributed IMG (specifically oxygen) in Jamaica to alleviate the supply chain bottleneck which arose during COVID-19, thereafter, Massy commissioned an oxygen vaporization plant and will be a minor player in the IMG market going forward.

20. Section V reports on the scope of economic activity which is likely to be affected by the challenged conduct while section VI presents an assessment of the likely competition effects. Section VII contains a summary of the conclusion arising from the analyses. Section VIII describes measures proposed to mitigate the concern for adverse competitive effects identified and Section IX outlines the Staff's recommendation to the Commissioners of the FTC.

[6] Yaadman Gas, which entered in 2018, does not charge a higher price to households which do not surrender an empty cylinder.
[7] The arrangement commenced when these three marketing companies were the only participants in the market.
[8] Source: FTC's calculation based on data from PetroJam, Massy and IGL.

21. The Annex provides a copy of the Transfer and Storage Agreement between Massy Gas Products (Jamaica) Limited and IGL Limited.[9]

V. RELEVANT MARKET

A. Analytic Framework

22. A relevant market for competition assessment comprises the smallest group of products that compete within a geographic area. Participants in a relevant market offer the most immediate and direct competition to those being investigated.

23. Two components of the relevant market are the product market and the geographic market. In essence, a relevant market for assessing competition effects is 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, could profitably raise prices above the competitive level.

B. Analysis

Relevant Product Markets

24. A relevant product market defines the product boundaries within which competition meaningfully exists and includes only those products which consumers consider reasonably interchangeable. A product market is therefore taken to comprise only goods and services which consumers regard as reasonable substitutes by reason of the products" characteristics, their prices, and intended use. For transactions involving mergers and acquisitions, the definition of the relevant product market necessarily starts with the products which are related in demand and offered by at least two parties to the transaction.

25. One relevant product market is defined as the distribution of LPG since Massy and IGL participated in this market immediately prior to the transaction.

26. Within the LPG product market, two sub-markets exist based on industry segmentation: (i) residential segment and (ii) commercial segment. Two of the more obvious differences between these segments are that (i) bulk customers purchase LPG in greater volumes; and (ii) LPG is a final product for the residential segment but an intermediate product for the commercial segment. Further, there are subtle differences in the interaction between marketing companies and end users in these segments. These include (i) the distribution channel (packed LPG is distributed to residential end users through dealers or through marketing companies,

[9] A copy of The Transfer and Storage Agreement was sent as an attachment in letter to FTC dated April 26, 2023 from Massy (Avyann Ferguson-Awai, Chief Counsel).

while bulk LPG is distributed to bulk end users exclusively by marketing companies); and (ii) the scope for negotiations (prices and the duration of supply, for example, are negotiated with commercial customers but no comparable negotiation takes places with residential customers).

i. Residential Segment

27. Households in Jamaica use LPG primarily for cooking. The next best alternatives to LPG in the residential segment include electricity, charcoal, wood, and kerosene. Each fuel alternative requires different cooking apparatus.

28. The use of clean fuel (LPG and electricity) in Jamaica is increasing annually, with less utilization of wood and charcoal reported. In 2019, 85.8% of households reported using LPG for cooking, and 1.5% reported using electricity. Approximately 6.2% of households reported using charcoal, and 5.0% reported using wood.[10]

29. To the extent that switching to these alternative fuel sources requires households to secure different cooking apparatus at a significant cost, the FTC concludes that households would unlikely switch to other fuel sources in response to a small but significant non-transitory increase in the price of LPG. Accordingly, LPG comprises a relevant product market for the residential segment.

ii. Commercial Segment

30. The next best alternative to LPG in the commercial segment is liquefied natural gas (LNG). In its assessment, Massy has identified New Fortress Energy (suppliers of LNG in Jamaica) as posing a competitive threat to large commercial industrial companies in the commercial segment.[13] The FTC notes, however, that by 2030, LNG may become a reasonable alternative to LPG given the Government of Jamaica's stated commitment to have 50% of Jamaica's energy needs supplied by renewable energy sources. [New Energy (2018), "Jamaica Announces Goal for 50% renewable energy by 2030." Available at https://newenergyevents.com/jamaica-announces-goal-for-50-renewable-energy-by-2030/].

31. LNG is a relatively new renewable fuel option for bulk customers but is not considered a close substitute for the non-renewable LPG option as it is currently not available at a scale that would make a small but significant non-transitory increase in the price of LPG unprofitable.

iii. Transport Segment

32. Both Massy and IGL offer LPG AutoGas which is used as fuel in internal combustion engines in vehicles as well as generators. The next best alternatives to AutoGas are gasoline and diesel. Most gasoline-powered or diesel-

[10] Voluntary National Review (2022), "Goal 7: Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for all" p. 148. Available at https://www.pioj.gov.jm/wp-content/uploads/2022/10/VNR_Goal_7.pdf (accessed February 14, 2023)

powered automobiles can be converted to use AutoGas. To the extent that gasoline and diesel are close substitutes for AutoGas and these substitutes are the primary choice of automotive fuels in Jamaica, the FTC concludes that this transaction is unlikely to adversely affect competition in the supply of automotive fuels in Jamaica.

iv. Industrial Segment

33. Massy and IGL also offer LPG for use as fuel in forklifts. The next best alternative to LPG forklifts is diesel and electricity. Most diesel-powered forklifts can be converted to use LPG. To the extent that diesel is a close substitute for LPG in forklifts and is the primary choice of fuel for forklifts in Jamaica, the FTC concludes that this transaction is unlikely to adversely affect competition in the supply of fuel for forklifts in Jamaica.

34. Accordingly, the relevant product market comprises the distribution of LPG. Sub-markets for the (i) residential segment; and (ii) commercial segment are also useful in assessing the competition effects of the challenged conduct.

Relevant Geographic Markets

35. Having identified the relevant product market and sub-markets, the next step is to define at least one relevant geographic market, which comprises an area in which both parties are involved in the supply of any relevant product and in which the conditions of competition are sufficiently similar. This area is a geographical territory that can be distinguished from neighbouring areas, in which competition conditions in a relevant market of a product are sufficiently the same for all participants in such a market.[11] For each relevant product market identified, a geographic market is defined.

36. Massy and IGL each distributes LPG in all parishes in Jamaica. Accordingly, the relevant geographic market comprises Jamaica. It is also true that competition exists in smaller geographic regions within Jamaica. This is the case as marketing companies typically serve end users within proximity of a given filling plant because, all other things held constant, the cost of supplying LPG is typically higher for end user premises located further away from filling plants.[12]

[11] Geographic Market Definition in European Commission Merger Control http://ec.europa.eu/competition/publications/reports/study_gmd.pdf Retrieved August 8, 2019.

[12] The customer base from a filling plant could be extended marginally through the use of depots.

37. In reviewing the distribution of filling plants across Jamaica, the FTC determined the following seven relevant geographic markets for LPG sold in Jamaica:

- Region I (Kingston, St. Andrew, St. Thomas);
- Region II (Portland, St. Mary);
- Region III (St Catherine)
- Region IV (Clarendon, Manchester)
- Region V (St. Ann, Trelawny)
- Region VI (St James, Hanover, Westmoreland)
- Region VII (St. James, St. Elizabeth, Westmoreland)

38. Accordingly, the relevant geographic markets coincide with seven geographic regions within Jamaica in which filling plants for Massy and IGL are both located.

39. The FTC concludes that the relevant markets for assessing The Agreement are the markets for LPG sold in seven geographic regions in Jamaica. Sub-markets exist based on end-user application: (i) residential segment and (ii) commercial segment.

VI. ASSESSMENT OF COMPETITIVE EFFECTS

A. Analytic Legal Framework

40. Any determination as to whether the challenged conduct has as its purpose the substantial lessening of competition, would necessarily involve scrutiny of the Purchase and Sales Agreement ("The Agreement"), which would give effect to the challenged conduct.

41. 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 is likely to have, the effect of substantially lessening competition in a market.

Assessment of Legal Harm

42. 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.

43. For a claim to succeed and liability to be established under section 17 of the FCA, the following must be established:

(i) There is an agreement:

(ii) The agreement contains provisions that:

a. have as their purpose the substantial lessening of competition in a market;

b. have the effect of substantially lessening competition in a market; or

c. are likely to have the effect of substantially lessening competition in a market.

(iii) The Agreement does not fall within the exemptions listed in section 17(4) of the FCA.

44. The requirements to establish a breach under section 17 of the FCA 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.

B. Assessment of Purpose

45. The concept of "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 provision[13]. Australian cases provide instructive guidance in defining "purpose" in anticompetitive considerations. In ***News Limited v South Sidney District Rugby League Football Club Ltd***[14], Glesson CJ defined purpose as the end sought to be accomplished by the conduct. Additionally, in **Seven Network Limited v News Ltd**[15] the Full Federal Court observed that: "The purpose will be identified by examining the end sought to be accomplished by the provision"[16]. It also noted

[13] 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

[14] (2003) 215 CLR 563

[15] [2009] FCAFC 166

[16] Ibid, at 852

that: “The purpose must be ascertained by identification of the end sought to be achieved”[17]. Accordingly, the requisite purpose is the goal, objective, or end.

46. 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 notion of “substantially lessen competition”. Nonetheless, an examination of Australian decisions assists in providing guidance regarding this concept. In *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*[18], 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 existed in that market but for the conduct in question.[19]”

47. 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.

48. Where an agreement is found to contravene section 17 of the FCA, 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 exemptions stated in section 17(4) of the FCA.

49. Competition authorities recognize that certain contractual restrictions may be directly related to and be 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.

50. 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 difficulty[20]. Determining whether a provision is necessary also requires that 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.

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[17] Ibid, at 898
[18] [2000] FCA 1381
[19] Ibid, para 66
[20] Notice on ancillary restraints

51. Generally, a period of up to three years is justifiable where goodwill and know-how are transferred and two years where only goodwill is included.[21] 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.

52. Article X of The Agreement contains a restraint of trade clause, specifically a non-compete restriction whereby IGL, itself or together with any subsidiary or associated company, covenants to Massy and agrees for a period of five years from the date of The Agreement not to ***"own, directly or indirectly, solely as an investment, securities of any Person traded on any national securities exchange if ………..not a controlling Person of, or a member of a group which controls, such Person and does not, directly or indirectly, own as a passive investor, 10% or more of any class of securities of such Person"***. Article X of The Agreement limits the Seller or its subsidiary or associated company to own directly or indirectly no more than 10% in any investments or securities.

53. Non-compete obligations imposed on a vendor which facilitate and guarantee 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 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.

54. In the circumstances, 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.

55. Since The Agreement contains a non-compete clause for five years, the FTC concludes that the non-compete provision within The Agreement may have the purpose of substantially lessen competition as regards to its duration covered and thereby may contravene section 17 of the FCA, subject to the exemption provided for in section 17(4) of the FCA. The FTC's determination on whether The Agreement qualifies for exemption is presented below in part D of Section VI of this Report.

C. Assessment of Competition Effects

56. The FTC assessed whether the challenged transaction has or is likely to have the effect of substantially lessening competition in any of the relevant markets identified.

[21] Notice on ancillary restraints

57. The extent to which an enterprise may face competitive constraints from current rivals is indicated by market concentration. The Herfindahl-Hirschman Index (HHI) of market concentration is a common measure based on the distribution of market shares within each relevant market. HHI is calculated by squaring the market share of each market participant and then summing the resulting numbers. The HHI ranges between a maximum of 10,000 (where there is only one firm) and a minimum of zero (where there is a large number of equally sized firms). The range of market concentration as measured by the HHI can be classified as follows:

- HHI less than 1,500. The market is considered unconcentrated, and transactions resulting in unconcentrated markets are not likely to have adverse competitive effects.
- HHI between 1,500 and 2,500. The market is considered moderately concentrated.
- HHI greater than 2,500. The market is considered highly concentrated, and transactions that increase the HHI by more than 200 points in highly concentrated markets generally raise competition concerns as they are assumed to enhance market power.[22]

58. Horizontal merger assessment considers both the post-merger market concentration and the increase in concentration as a consequence of the transaction.

<u>Market Concentration</u>

59. There are twelve marketing companies actively operating in at least one relevant market: JAMGAS Limited, Yaad Man Haulage Jamaica Limited ("Yaadman"), IGL, Petroleum Company of Jamaica ("Petcom"), Regency Petroleum Limited ("Regency"), Blaize Service Centre Company Limited ("Blaize"), C&J Petroleum Limited ("C & J Gas"), Coastal Gases Limited, Wilson Beck LPG Limited ("WB"), Future Energy Source Company Limited ("FESCo"), Sunshine Gas Limited ("Sunshine") and Massy.[23]

60. Table 1 below identifies the marketing companies participating in the seven geographic markets in which LPG is marketing and distributed in Jamaica. While there are a total of twelve active marketing companies, only IGL, Massy, and Petcom participate in each relevant geographic market. For at least twenty years leading up to 2018, Massy, IGL, and Petcom were the sole active market participants in each market. The table shows at least five active marketing companies in each geographic market, with Region I (Kingston, St. Andrew, and St. Thomas) being the only geographic market in which all twelve marketing companies participate. The table also identifies the main participants in each geographic market, where the main active participants refer to market participants with filling plants and or depots as well as cylinders in the geographic market. The other active participants are identified as market participants which do not have filling plants in the geographic market. The

[22] US Department of Justice and Federal Trade Commission (2010), <u>Horizontal Merger Guidelines</u>.
[23] Source: Ministry of Science, Energy and Technology.

number of main active participants across Jamaica ranges between three (in Region IV comprising Clarendon and Manchester) to seven (in Region III comprising St. Catherine).

Table 1 Active Participants by Geographic Market

Geographic Market	**Areas Covered**	**Main Active Participants** (Cylinders, Filling Plants and/or Depots)	**Other Active Participants** (only cylinders)
Region I (12 active participants)	Kingston, St Andrew and St Thomas	Massy, IGL, Petcom and Yaadman	WB, Tex Gas, C&J, Regency, Sunshine, Blaize, Jus Gas and FESCo
Region II (6 active participants)	Portland and St Mary	Massy, IGL, Petcom, and C&J	Tex Gas and Regency
Region III (10 active participants)	St Catherine	Massy, IGL, Petcom, WB, C&J, Jus Gas and FESCo	Regency, Sunshine and Blaize
Region IV (8 active participants)	Clarendon and Manchester	Massy, IGL and Petcom	Yaadman, WB, C&J, Sunshine and Blaize
Region V (5 active participants)	St Ann and Trelawny	Massy, IGL, Petcom and Tex Gas	Yaadman
Region VI (5 active participants)	St James, Hanover and Westmoreland	Massy, IGL, Petcom and Yaadman	Regency
Region VII (5 active participants)	St James, St. Elizabeth and Westmoreland	Massy, IGL, Petcom, Yaadman and Regency	---

Sources:

(i) Massy (2021), Massy Gas Products (Jamaica) Limited 2021-2023 Business Focus Summary.
(ii) Letter dated February 15, 2023 from Massy to FTC.

61. Massy distributes LPG from seven plants located across Jamaica.[24]

- Massy's plant in Rockfort, Kingston serves the parishes of Kingston, St. Andrew, and St. Thomas. (Region I)
- The satellite plant in Port Maria, St. Mary, serves the parishes of Portland and St. Mary. (Region II)
- The satellite plant in Portmore, St. Catherine, serves the parish of St. Catherine. (Region III)
- The satellite plant in May Pen, Clarendon, serves the parishes of Clarendon and Manchester. (Region IV)
- The satellite plant in Runaway Bay, St. Ann, serves the parishes of St. Ann and Trelawny. (Region V)
- Massy's plant in Freeport, St James, serves the parishes of St James, Hanover, and Westmoreland. (Region VI)
- The satellite plant in Anchovy, St. James, serves the parishes of St. James, St. Elizabeth, and Westmoreland. (Region VII)

62. For purposes of assessing market concentration, product market/geographic market combination is a proper unit of analysis. That is, market shares should be calculated for each relevant geographic market serving each relevant product. Further, market share should be based on a measure that best captures the competitive dynamics within the relevant market in the foreseeable future. Potential candidates for measuring market share include (i) historical data (on sales revenue or units); (ii) production capacity; and (iii) forecasted data (on future sales revenue or units).

i. Market Share Based on Historical Data on Volumes

63. Data were unavailable to determine market shares based on LPG volumes distributed within each geographic market. As such, the analysis uses nationwide market share data as a proxy for the market share in the various geographic markets.

64. In the commercial segment, Massy and IGL are the top two marketing companies– accounting for approximately [redacted]% of the volume of LPG distributed in 2021.[25] Massy indicated it had approximately [redacted]%, while IGL had [redacted]%. Petcom, TexGas, Yaadman, and Regency are the other main participants in this segment.

[24] Two of the plants are owned and operated by Massy while the other five are satellite plants owned by third party operators which partner with Massy to distribute the LPG on behalf of Massy.

[25] Source: FTC Meeting with Massy

the acquisition would result in highly concentrated markets (HHHI exceeding 8,100 points) and would increase market concentration by 3,712 points—significantly above the 200-point threshold that would typically raise concerns for adverse competitive effects in the market post-acquisition.

65. Similarly, Massy and IGL are the top two suppliers in the residential segment, accounting for [redacted]% of the volumes distributed, with IGL supplying [redacted]% and Massy supplying [redacted]%. Petcom is the third largest supplier, with approximately [redacted]%. Based on these data, the markets in the residential segment would be highly concentrated following the acquisition. The acquisition would result in a market concentration of at least 5,184 points and would increase market concentration by 2,560 points—significantly above the 200-point threshold that would typically raise concerns for adverse competitive effects in the market post-acquisition.

ii. Market Share Based on Production Capacity

66. Production capacity of marketing companies, however, is likely to be more reliable than historical sales data for measuring the economic strength of the combined entity in the future. To the extent that nine of the twelve market participants entered between 2018 and 2022, historical data on volumes distributed may overstate the competitive significance of the acquiring party (Massy) in the post-acquisition period. Similarly, historical data on volumes distributed may understate the future competitive significance of recent entrants. A more reliable measure of Massy's competitive significance in the post-acquisition period would be the production capacity that rivals may use to mitigate the effects of anticompetitive conduct in the foreseeable future. Rivals with spare production capacity could mitigate, if not avert, the undue exercise of market power by rapidly scaling production to accommodate customers seeking to avoid any undue exercise of market power (through, say, higher prices or reduced product quality and variety) in the post-acquisition period.

67. The analysis used the number of filling plants as a proxy for production capacity. Access to filling plants within a given geographic market is crucial to scaling up production. Marketing companies collectively utilize approximately 36 filling plants across the island. Massy and IGL each account for 7 of these filling plants; Petcom accounts for 14 filling plants; while the other 8 filling plants are used by the recent entrants. At least one filling plant currently serves multiple marketing companies. Table 2 below shows data on market concentration based on the distribution of filling plants in each geographic market.

Table 2 Distribution of Filling Plants, by Geographic Market

Geographic Market	Areas Covered	Filling Plants	Resulting Market Concentration level	Increase in Concentration (HHI points)
Region I (7 Plants)	Kingston, St Andrew and St Thomas	Massy (1); IGL (2); Petcom (3); FESCo (1)	Highly concentrated	881
Region II (4 Plants)	Portland and St Mary	Massy (1); IGL (1); Petcom (1); Tex Gas (1)	Highly concentrated	1,250
Region III (6 Plants)	St Catherine	Massy (1); IGL (1); Petcom (1); Wilson Beck (1); C&J (1); Jus Gas (1)	Highly concentrated	555
Region IV (4 Plants)	Clarendon and Manchester	Massy (1); IGL (1); Petcom (2)	Highly concentrated	1,250
Region V (5 Plants)	St Ann and Trelawny	Massy (1); IGL (1); Petcom (2); Tex Gas (1)	Highly concentrated	800
Region VI (7 plants)	St James, Hanover and Westmoreland	Massy (1); IGL (2); Petcom (2); Yaadman (1); Regency (1)	Highly concentrated	816
Region VII (13 Plants)	St James, St. Elizabeth and Westmoreland	Massy (1); IGL (3); Petcom (5); Yaadman (2); Regency (2)	Highly concentrated	355

Source: Massy (2021), Massy Gas Products (Jamaica) Limited 2021-2023 Business Focus Summary

68. Using filling plants as a proxy for production capacity, the FTC concludes that, post-acquisition, each relevant geographic market would be highly concentrated. Also, the acquisition would increase market concentration in the various regions by an amount ranging from a low of 355 points (Region VII) to a high of 1,250 points (Region II and Region IV).

69. To the extent the challenged transaction would significantly increase market concentration and result in a highly concentrated market, the FTC presumes that the acquisition poses a significant risk to competition. Consequently, further analysis is required to determine whether other market conditions would confirm or assuage the FTC's concern about the potential adverse competitive effects of the acquisition.

Potential Anti-Competitive Effects

70. In this section, the Report discusses market conditions which could confirm or counter the presumption of adverse competitive effects.

71. Anticompetitive effects arising from the acquisition may be classified into unilateral effects and coordinated effects. Unilateral effects describe adverse competitive effects arising because the challenged transaction enhanced the market power of the combined entity, without requiring any change in the behavior of other market participants. Adverse competitive effects could also arise if the challenged conduct enhanced market power by increasing the risk of non-independent behavior among market participants. Such effects are referred to as coordinated effects.[26]

72. An examination of the market dynamics supporting the observed features in the residential and commercial segments is instructive in assessing the scope for adverse competitive effects arising from the acquisition.

The Dynamic Nature of Competitive Interaction (Residential Segment)

73. In the residential segment, the FTC observed the following features in the residential segment.

74. **Premium brands command the highest shares**. LPG is sold at a relatively wide range of prices with the higher-priced brands ("premium brands") having the lion's share ([redacted]%) of the residential segment despite charging a premium of up to 17% above the more affordable brands ("discount brands").[27]

75. There are multiple arguments that could potentially explain the observed high market share of premium brands. One supply-side argument is that the productive assets installed by the discount brands are inadequate to accommodate (regarding location and/or spare capacity) residential customers who would otherwise seek to avoid the premium prices. There is evidence, however, that rival companies do not face capacity constraints in the residential segment. Petcom, with productive assets located in each geographic market, has spare production capacity estimated to cover a significant proportion of the current sales volume of the premium

[26] Department of Justice and Federal Trade Commission (2010, Horizontal Merger Guidelines.

[27] In November 2022, the price for a 25 lb packed LPG cylinder ranged between $3,600 and $4,200 (Neville Graham, "New Player Wilson Beck enters LPG Market" Sunday Gleaner, November 6, 2022.)

brands. Table 3 below shows the proportion of the combined volume of packed LPG sold by Massy and IGL, which could be covered by the spare production capacity of Petcom.

Table 3. The proportion of Joint Sales of Premium Brands that are covered by the Spare Production Capacity of Petcom

	If Petcom's Current Capacity Utilization Rate is…					
	21.7%	*25%*	*30%*	*35%*	*40%*	*50%*
Then the proportion of customers from Massy and IGL which could be served by Petcom's spare capacity is…	100%	83%	65%	52%	42%	28%

Source: FTC Staff calculations

76. FTC did not receive data on the capacity utilization rate of Petcom. As such, the proportion of joint sales covered by Petcom's spare capacity is presented for a range of values that the FTC is fairly confident includes Petcom's actual capacity utilization rate. Table 3 shows that if Petcom currently utilises no more than 21.7% of its production capacity, then its spare production capacity could accommodate all the customers served by the premium brands.[28] If the capacity utilization rate is as high as 50%, however, Petcom's spare capacity could accommodate no more than 28% of the customers served by premium brands. Based on the data on capacity utilization for the premium brands, the FTC estimates that Petcom's current production activity utilises between 25%-30% of its maximum production capacity. Over this range of values, the spare production capacity of Petcom could accommodate between 65% and 83% of the households served by the premium brands.

77. Accordingly, capacity constraint is unlikely to be a plausible explanation for the observed high market share of premium brands. In the absence of evidence supporting supply-side explanations for the observed high share of premium brands, the investigation explored potential demand-side explanations.

78. **Product Differentiation.** A marketing company that is about to enter the LPG market expressed the view that the earlier entrants (IGL, Massy, and Petcom) benefit from participating in the market significantly longer than

[28] For this analysis, maximum production capacity is determined by a 1 production shift per day comprising 8 hours.

the other market participants. The marketing company argues that this allowed the earlier entrants to distinguish themselves from the more recent entrants. The marketing company stated that residential customers perceive IGL to be the “safer” brand, Massy to be the “most ubiquitous” brand, and Petcom to be the “affordable” brand.[29] The FTC identified anecdotal evidence supporting this view of product differentiation. In February 2023, Massy hosted a survey on its Facebook page. While respondents to the survey are unlikely to be representative of the wider group of residential customers, the views expressed are consistent with the view that premium brands are able to attract customers along more than one dimension-not just prices.[30] The survey results indicate that 45 (51%) respondents would describe Massy’s GasPro as being a “reliable” brand, approximately 25 (29 %) respondents would describe GasPro as being an “affordable” brand, while another 18 (20%) respondents would describe GasPro as being a “convenient” brand. To the extent that households place significant value on characteristics such as “safety,” “reliability” and “ubiquity,” one would expect that at least some households, who are able to, would be willing to pay a higher price (i.e., a premium) to acquire brands perceived to have the characteristics they value the most.

79. The expressed perspective of the marketing company regarding the competitive advantage of the early entrants is consistent with market structures in which products are vertically differentiated, and consumers have heterogeneous preferences regarding product characteristics. Based on the observed features of the market, the premium brands are differentiated from the other brands based on characteristics such as “safety,” “reliability” and “convenience.” It is reasonable to assume that there is consensus among households that, all other things equal, brands embodying these characteristics are preferred to brands which do not. If all brands were available at identical prices, then all households would select, say, the “safest” brand or the “most reliable” brand or the “most convenient” brand.[31] As such, the FTC determined that the residential segment comprises vertically differentiated products. Further, to the extent that even brands which are not vertically differentiated brands command a positive market share, it is inferred that households differ either in their preference for vertical product characteristics or their ability to pay for these characteristics. In this sense, prices would be more important to the assessment of households with less-intense preference for vertical product characteristics (or households with less disposable income), compared to the assessment of households with more intense preference (or households with more disposable income). As a result of this vertical product differentiation and heterogeneous consumer preference/income, therefore, brands that are

[29] FTC’s interview with [redacted] on February 6, 2023.

[30] The survey was posted on the GasPro’s facebook page (https://www.facebook.com/GasProJamaica/) on February 16, 2023. The survey invited users to “Choose one word to describe GASPRO: “Reliable”; “Convenient” or “affordable.” As at March 3, 2023 there were 111 comments on the post with 88 comments directly responding to the survey.

[31] This is to be distinguished from horizontal products differentiation such that if all the horizontally differentiated products were available at the same price, then each brand would command a market share comparable to the distribution of consumer preferences for the horizontal product characteristics.

not differentiated would have to offer discounted prices to participate in the market, and these discount brands would cater to the more price-sensitive households.

80. **Multiple dimensions of competition.** The observed nature of competition corroborates the perspective that products are vertically differentiated in the residential segment. The market is consistent with one that involves competition among vertically differentiated products for consumers with heterogeneous preferences. In particular, the impact of entry on the market share of the early entrants suggests that Petcom competes more intensely with the recent entrants than IGL and Massy do. In 2016, Phoenix Fuels (a privately-owned company) acquired Petcom from PetroJam (a publicly-owned entity). At that time, only IGL, Massy and Petcom participated in the market with Massy accounting for 42% of the market, IGL had 40% and Petcom commanded 18%.[32] In 2018, Yaadman and Regency entered the residential segment– the first *de novo* entry in over 29 years. By the end of 2022, the combined share of the nine most recent entrants was 3.4%. In particular, Massy's share marginally increased by 0.1 percentage point, while IGL's share declined by 1.1 percentage points. The recent entry had the relatively greatest impact on Petcom as its market share declined by 3.1 percentage points. The disproportionate change in market share is consistent with the view that the recent entry had a relatively greater impact on Petcom than it did on IGL and Massy.

81. A review of internal business documents of Massy establishes a stronger causal relationship between the recent multiple entries and the market share of incumbent marketing companies. Business documents offer insights as to the extent and nature of competitive constraints faced by Massy. There is evidence that in 2021, Massy took note of the impact of IGL, Petcom and recent entrants on the competitive market and threats to Massy's potential growth market. In particular, [redacted] Massy distinguished the perceived threat posed by Petcom, Yaadman, and Regency from the perceived threat posed by IGL.

82. The Strategic Plan indicated that the threat from Petcom, Yaadman, and Regency was based on the low price offerings of these marketing companies. [redacted]

[32] Neville Graham "Phoenix Issues Bond to Pay for Petcom, Taps Howard Hamilton as Chairman," **The Daily Gleaner**, Friday, July 8, 2016. Download at https://jamaica-gleaner.com/article/business/20160715/phoenix-issues-bond-pay-petcom-taps-howard-hamilton-chairman (accessed March 14, 2023).

[33] Massy (2021), Massy Gas Products (Jamaica) Limited 2021-2023 Business Focus Summary, page 2.

[redacted]

83. In its Strategic Plan, Massy did not express any concern for price competition from IGL. [redacted].

84. The measures proposed by Massy to mitigate the perceived threats provide a useful indication of the competitive interaction between Massy and its rivals. Massy has expressed the view that it operates in a market in which discount brands predominantly attract price-sensitive consumers and therefore premium brands would have to offer lower price options to compete with discount brands. In particular, to mitigate the risk to its growth objectives, Massy recommended an extension to its product line by introducing a "fighter brand," a cheaper packed LPG cylinder product. This proposal was subsequently implemented with the introduction of Massy's *ValuPro* brand.[38] Accordingly, discount brands serve as a binding constraint on the price of premium brands.

85. Massy acknowledges that it operates in a market in which the customers of premium brands are predominantly less price-sensitive and competition between the premium brands takes place along non-price dimensions. In particular, to mitigate the competition against IGL, [redacted] Massy increased direct-to-customer sales efforts as well as introduced its GasPro Plus composite cylinder brand which is marketed with a five-point value proposition encompassing non-price considerations such as safety and convenience. Accordingly, Massy perceived that repositioning its unique selling proposition (through vertical product differentiation) would be an effective means of competing against IGL.

86. **Consumer Inertia**. The observed tendency for residential consumers to remain with premium brands, despite the availability of more affordable options, is also consistent with a market structure with vertically differentiated products and heterogeneous consumer preferences.

87. There is anecdotal evidence of consumer inertia in the residential segment. In February 2023, for example, IGL invited its "loyal customers" visiting its Facebook page to indicate how long they have been customers of

[34] Massy (2021), Massy Gas Products (Jamaica) Limited 2021-2023 Business Focus Summary, page 1.
[35] Massy (2021), Massy Gas Products (Jamaica) Limited 2021-2023 Business Focus Summary, page 2.

IGL.[36] The fourteen responses to the question ranged from a maximum of 56 years to a minimum of 12 years with a median response of 31.5 years. Further, anecdotal evidence of consumer inertia is observed in comments to a newspaper article posted in November 2022 on the Facebook page of the Jamaica Gleaner.[37] The article referenced the entry of Wilson Beck LPG Limited supplying packed LPG at the lowest price point in the market. Of the 25 comments published about the article, 12 comments revealed a range of consumer attitudes toward the new entry of another low-price option for households. A total of 6 persons welcomed the entry of a low-priced option, 4 persons indicated they would stay with their current brand (2 responses for GasPro, 1 response for IGL and 1 response for Petcom), while 2 persons indicated they would need further information to assess the new brand. While this was not a scientific survey, and these results could not be generalized to the wider residential consumer population, it does indicate that some households are prepared to switch to lower-priced brands, while other households would remain loyal to the premium brands despite being aware of lower price alternatives. In this sense, information asymmetries could not account entirely for the consumer inertia observed in the residential segment.

88. In summary, the salient features empirically observed in the residential segment are: (i) price is directly correlated with the timing of entry—with the early entrants commanding higher prices; (ii) market share is directly correlated with the timing of entry—with the early entrants commanding the greater market share; (iii) Consumer inertia—the tendency for households to remain with a premium brand for a protracted duration of time despite the availability of more affordable options; (iv) multiple bases of competition among market participants—premium brands (IGL and Massy) compete against each other along non-price dimensions but compete against discount brands (Petcom and recent entrants) along the price dimension. The Report next examines the nature of competition in the commercial segment.

The Nature of Competition (Commercial Segment)

89. There are a few key differences in the structure of the commercial and residential segments, which ultimately drive differences in the nature of competitive interaction in these sub-markets. Firstly, marketing companies engage bulk customers directly only, whereas they often indirectly engage households through dealers. This means that marketing companies have greater control over the price of LPG paid by bulk customers, relative to the price paid by households. Secondly, bulk customers typically demand a significantly greater volume of LPG than households demand. Even among bulk customers, there exists a significant variation in the quantity

[36] The Facebook post was published on February 24, 2023 under the caption "If you're a dedicated IGL customer☺, let us know in the comments how many years you have been purchasing from us!" (https://www.facebook.com/iglblue/photos/a.435215666497348/6314177981934391: Accessed March 17, 2023). As at March 17, 2013 there were 38 comments with 14 direct responses to the question posed.

[37] Facebook post on November 6, 2022. (see https://www.facebook.com/story.php?story_fbid=2488432651311825&id=116087685213012&p=2 : accessed March 17, 2023)

demanded. This suggests that at least some bulk customers could exert countervailing buyer power in a way that households could not.

90. Massy and IGL collectively distribute approximately [redacted]% of the bulk LPG supplied in the commercial segment, with Massy accounting for approximately [redacted]%. The commercial segment is more amenable to negotiated interactions between marketing companies and end users than the residential segment is. This situation arises because (i) marketing companies interact directly with bulk customers; and (ii) there is significant variation in volume demanded by bulk customers. The terms which are negotiated with the bulk customers may include (i) price; (ii) volume; (iii) the duration of the arrangement; and (iv) which party provides and/or maintains the storage tank. The formality of the arrangements in the commercial segment varies. Massy, for example, indicates that approximately [redacted]% of its sales to bulk customers are not negotiated with formal contracts but rather, informally on a month-to-month basis. The remaining [redacted]% of sales are negotiated under formal short-term and long-term contracts lasting for up to [redacted].

91. There is evidence that IGL and Massy compete against each other more intensely in prices in the commercial segment than they compete in the residential segment. [redacted] a large bulk customer, informed the FTC that "…pricing is paramount…" and that it would "…utilize other LPG suppliers if the rates are more favourable for business…"[38] [redacted] another large bulk customer, informed the FTC that it is not engaged in any formal supply contract with marketing companies and purchases LPG from either of the suppliers (IGL and Massy) that provide it with the most competitive terms and conditions at the point of negotiating.[39] [redacted], a large bulk customer which sources LPG from both Massy and IGL, informed the FTC that it would be prepared to switch suppliers contingent on "…price, service, and overall reliability."[40]

92. In summary, marketing companies compete on prices more intensely in the commercial segment than they do in the residential segment. Further, product differentiation takes on lesser significance in the commercial segment, relative to the residential segment. The Report next examines the scope for unilateral effects in the domestic segment, given the FTC's understanding of the competitive dynamics at play.

[38] Letter dated January 25, 2023 to FTC from [redacted]
[39] Letter dated January 27, 2023 to FTC from [redacted]
[40] Letter dated January 24, 2023 to FTC from [redacted]

Unilateral Effects (domestic segment)

93. Based on the market dynamics highlighted in the residential segment, the FTC deduced the following regarding the scope for unilateral effects arising from the acquisition.

94. The FTC deduced that the acquisition, without more, is unlikely to lead to a unilateral price increase in the residential segment since the acquisition would not eliminate the primary source of price competition for Massy. In particular, the acquisition would not increase Massy's incentives to increase price, relative to Massy's incentive to increase price in the absence of the acquisition. To the extent that the discount brands were primarily responsible for disciplining the price of Massy's GasPro, and the acquisition would not eliminate price competition from discount brands, the FTC concludes that the acquisition is unlikely to place any significant upward pressure on the price of packed LPG, without more.

95. The FTC also deduced that the acquisition, without more, is likely to reduce the pace of introduction of product innovations and therefore harm those households which value vertical product characteristics over lower prices. Since Massy competes against IGL primarily along non-price dimensions, the elimination of direct competition between Massy and IGL would reduce Massy's incentive to improve its product offerings (through vertical product differentiation), relative to the incentives Massy would have had if the direct competition between the parties had not been eliminated by the acquisition. A high diversion ratio between Massy and IGL would likely lead to adverse competitive effects since it means that even if Massy could not have exercised market power before the acquisition, it could profitably do so after the acquisition as some of those sales which would have been lost before the acquisition, could be recovered from the households which would have switched from Massy to IGL. While the FTC does not have quantitative data on the number of households that would be diverted from Massy to IGL, diversion is likely to be significant between the two premium brands as the evidence of direct competition suggest that Massy and IGL are the top two choices for a significant number of the less price-sensitive households.

96. Direct competition between IGL and Massy is inferred from internal business documents, indicating that IGL and Massy directly targeted each other's customers through non-price strategies. [redacted].

97. The FTC concludes that the acquisition is likely to harm the less price-sensitive consumers. While it is expected that Massy would continue its efforts in the future to provide the market with safer and more

convenient options, it is also likely that the elimination of competition against IGL would, at the very least, reduce the pace of introduction of these innovations. To the extent that there are customers who value vertical product characteristics more than they value low prices, then the acquisition would expose these customers to harm. The Report next examines the scope for unilateral effects in the commercial segment, given the FTC's understanding of the competitive dynamics at play.

Unilateral Effects (Commercial Segment)

98. Based on market dynamics highlighted for the commercial segment, the FTC deduced the following regarding the nature of unilateral effects arising from the acquisition.

99. Massy supplies approximately [redacted]% of the commercial segment, IGL supplies approximately [redacted]% and Petcom supplies the majority of the remaining [redacted]%. While non-price factors (such as service standards and reliability) play a role, price is the primary means of competition in the commercial segment.[41] In the past, customers were able to secure LPG at more favourable terms and conditions by playing off IGL and Massy against each other. This indicates that a significant portion of bulk customers who switched away from Massy in search of more favourable terms may have entered supply arrangements with IGL.

100. The acquisition, without more, is likely to lead to a price increase in the commercial segment. This, as the elimination of IGL as a competitor, would reduce the opportunities for bulk customers to continue to playoff IGL and Massy against each other. This, in turn would reduce the incentives for Massy to set or maintain lower prices and therefore, without more, exert an upward pressure on prices.

101. There are two channels through which the market could serve to mitigate, if not deter, the undue unilateral exercise of market power post-acquisition. The first channel is PetroJam. PetroJam is an option available to large bulk customers who own storage tanks and are not restricted by long-term supply arrangements with marketing companies. Such bulk customers would be able to resist significant price increases from Massy, post-acquisition, by purchasing bulk LPG from PetroJam. In fact, one large bulk buyer advised the FTC that they would be willing to contract the services of PetroJam if marketing companies were unable to supply bulk LPG under more favourable terms than PetroJam was able to offer.[42] The second channel is rival marketing companies with spare production capacity to accommodate a critical amount of bulk orders above current production levels. As demonstrated earlier in Table 3, at least one marketing company (Petcom) has spare production capacity that is likely to be sufficient to accommodate a significant portion of the combined customers of IGL and Massy. The FTC estimates that Petcom has spare production capacity to cover 65%-85%

[41] See Letter dated January 24, 2023 to FTC from [redacted]

[42] Letter dated January 18, 2023 to FTC from [redacted]

of the combined sales of IGL and Massy.[43] To the extent that Petcom has adequate spare production capacity, the incremental cost of increasing production to meet the needs of bulk customers which own storage tanks would be the cost of purchasing additional LPG. For bulk customers who do not own tanks, the incremental cost would also include the cost of acquiring additional tanks.

102. It would also be likely that marketing companies operating only in the residential segment could discipline price increases in the bulk segment. This is the case since it may be feasible for a bulk supplier using a 500 lb tank could switch to using five 100 lb cylinders to avoid any undue price increase in the bulk segment. A customer in the bulk segment, [redacted] indicates that

> "…we do note that PetroJam Limited is an alternative supplier that would also be able to supply us with our bulk LPG needs and we are confident that we can obtain LPG cylinders from other suppliers…"[44]

103. Since PetroJam's sole loading terminal is located in Kingston, Massy has a competitive advantage (in terms of lower transportation cost) in geographic markets located furthest away from Kingston. This is because Massy owns and operates a storage facility in Montego Bay in which it stores LPG imported directly from international markets. No other LPG marketing company owns such a facility. Further, IGL is the only marketing company that has an agreement with Massy which permits access to this facility. From this storage facility, Massy distributes to markets located in at least Region V, Region VI, and Region VII and therefore has a distinct cost advantage over PetroJam and rival marketing companies, which do not have access to comparable facilities and therefore, must serve these markets with LPG transported from PetroJam's terminal in Kingston.

104. To the extent that (i) price is the primary basis of competition in the commercial segment; (ii) Petcom's spare production capacity is likely to accommodate a significant proportion of bulk customers served by Massy and IGL in geographic markets other than those located in the western end of Jamaica; and (iii) marketing companies serving the residential segment could accommodate the smaller bulk customers, the FTC concludes that the acquisition is likely to enhance Massy's ability to exercise market power in the western end of Jamaica (covering at least Region V, Region VI, and Region VII), relative to the extent to which it would have been able to do so absent the acquisition. The Report next examines the scope for coordinated effects predicated on the FTC's understanding of the competitive dynamics at play.

[43] Inference made under the assumption that Petcom's capacity utilization rate is between 25% and 30%.
[44] Letter dated January 18, 2023 to FTC from [redacted]

Coordinated Effects (Residential and Commercial Segments)

105. The earlier assessment of unilateral effects was undertaken under the presumption that the acquisition would increase neither the incentives nor opportunities for non-competitive behavior among the brands participating in the market post-acquisition. This presumption is now relaxed to make way for an assessment of the likelihood for greater risk of coordinated effects arising from the acquisition.

106. It is generally accepted that for coordinated behaviour to be sustained over time, market conditions must be such that (i) the entities participating in coordinated conduct must be able to establish the terms of the coordination; (ii) participating entities must be able to monitor each other's adherence to the established terms; and (iii) an effective punishment mechanism must exist to deter deviation from the established terms.[45] The issue at hand is not to assess whether coordination is likely in the post-acquisition period. Rather, the issue is to determine whether the acquisition increases the risk of coordination in any relevant market, relative to the risks of coordination which would have prevailed in the absence of the acquisition.

107. There is insufficient evidence to support the view that the acquisition is likely to increase the risk of coordinated effects in either the residential or commercial segment of the LPG market. While there is evidence of coordination among the top three players regarding the retrieval and surrender of empty LPG cylinders, there is no corresponding evidence of coordinated effort regarding the marketing and distribution of packed cylinders. To the extent that GasPro is the only differentiated brand, as well as the significant difference in market share and cost structure between Massy and the discount brands, The Agreement is unlikely to increase the risk of coordinated conduct involving Massy and the discount brands.

108. The Report next examines the scope for competitive entry to discipline the unilateral effects posed by the acquisition.

<u>Analysis of Entry and Expansion</u>

109. Having concluded that the acquisition is likely to have unilateral effects in at least one relevant market, the analysis examines whether such effects are likely to be mitigated, if not averted, by competitive entry. When assessing whether potential rivals would pose a competitive constraint to Massy post-acquisition, consideration is given to the ease with which new entry can occur and the ability of incumbents to expand to deter anticompetitive conduct. Impediments refer to factors that would make (i) new entry difficult, or (ii) expansion by incumbents difficult. Even if a market participant is determined to have a persistently large market share, it may be subject to competitive pressure from outside of the market if entry is easy; that is, if

[45] The Merger Working Group, 2013, "The Role of Economists and Economic Evidence in Merger Analysis", *12th Annual Conference of the ICN*, Warsaw, Poland, April 24-26, 2013: p.34.

impediments are low. Impediments are considered low if entry is effective in constraining anticompetitive conduct. Entry is effective in constraining anticompetitive conduct if it is likely, timely and sufficient.

110. Entry is likely when it is profitable to enter, based on pre-entry prices. Entry is timely when it occurs within two years, while entry is sufficient when critical inputs are not controlled by existing market participants, and entrants have the capacity to accommodate additional demand from customers seeking to avoid the harm caused by the undue exercise of market power. The relevant markets were assessed to determine the scope for competitive entry. The results are presented below.

i. Entry is timely

111. To deter or counteract the competitive effects of concern, it is necessary for entrants to be able to quickly impact the price in the relevant market significantly. Competition authorities generally consider being timely, only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.

112. The following are the primary assets to facilitate the entry and timely expansion:

- Filling plant and filling equipment
- Delivery vehicles (trucks and or bobtails)
- Storage containers (cylinders and/or tanks)

113. The assets listed above are readily accessible on the open market.[46] Suppliers of cylinders include (i) Shangdong Huanri Cylinder International Trading (located in China); (ii) Sahatmitr Pressure Container Co. (located in Thailand); (iii) Linh Gas (located in Thailand); and Sefic (located in China). Suppliers of storage tanks include (i) Arcosa (located in Mexico); and (ii) Trinity. Suppliers of Bobtails/Trailers include (i) Mississippi; and (ii) White River. Additionally, items required to build a filling plant & equipment are accessible on the open market.

114. Prospective entrants are also required to secure licenses and approvals from regulators. The required licenses and regulatory approvals from the Ministry of Science Energy & Technology (MSET), Bureau of Standards Jamaica (BSJ), and the National Environmental Protection Agency (NEPA) are readily accessible to prospective entrants within six months.

115. The FTC concludes that entry would be timely.

[46] Source: Massy

ii. Entry is likely

116. Entry is considered likely if it would be profitable at 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 number of customers accessible to the entrant.

117. To assess the likelihood of entry, it is useful to review the history of entry. There have been multiple entries in the relevant market since 2018. Between 2018 and 2020, three enterprises were issued a license to operate as LPG distributors— thereby joining IGL, Massy, and Petcom as participants in the market. Between 2020 and 2022, licenses were issued to an additional six enterprises resulting in a market comprising twelve marketing companies. There is no record of any failed attempt to enter.

118. Entry is expected to occur in markets where the expected benefits exceed the expected costs. As such, expected revenue is a key consideration for respective entrants. In 2021, the FTC concluded its investigation into alleged anticompetitive conduct in this market.[47] In interviews with one of the recent entrants, the high profit margins earned by the earlier participants (IGL and Massy) motivated its entry into the market at a lower price point.

119. Similarly, entry cost is another significant consideration when assessing the likelihood of entry. The cost of entry represents the total direct and indirect costs a prospective entrant would incur to participate in the market. Significant costs faced by the prospective entrant but not faced by incumbents could deter entry. The decision to enter the market would be based on the unrecoverable fixed costs of entry ("sunk costs"). A sufficiently large sunk cost would deter entry.

120. There is evidence that entry costs are likely to be lower in the future than they have been in the recent past. The main impetus driving the more favourable conditions of entry is a reduction in the sunk cost of entry. Sunk cost is properly measured capturing both explicit and implicit components. Explicit sunk costs represent those sunk costs that require a monetary outlay. In the LPG market, the unrecoverable explicit fixed cost would include the cost of acquiring cylinders, tanks, filling plant licenses and regulatory approvals as these assets would not have significant commercial value outside of the LPG market. Implicit sunk costs, however, represent the value of market information that could be gathered by delaying entry. As such, implicit sunk costs are likely to be more significant in markets in which there is greater uncertainty about future market conditions. [48]

[47] FTC (2021). Staff Report: An Investigation into Alleged Anti-Competitive Agreement among IGL Limited, Petroleum Company of Jamaica Limited and Massy Gas Products (Jamaica) Limited, Case # 8136-20. ("FTC Staff Report (2021)")

[48] For a discussion on this option value theory interpretation of sunk costs as a forgone option value see Robert S. Pindyck, "Sunk Costs and Real Options in Antitrust Analysis," in 1 *Issues in Competition Law and Policy* 619 (ABA Section of Antitrust Law 2008), p. 619-640.

121. In the LPG market, current and prospective participants have identified market conditions that create uncertainty regarding the return on investment in cylinders.[49] Market participants have identified two longstanding issues giving rise to great uncertainty about the return on their investments in cylinders: (i) reduced active cylinder stock (through, for example, cylinder piracy); and (ii) delayed cylinder rotation.

122. Cylinder piracy (or pirate cross-filling) is a term used in the industry in reference to the illegal, unauthorised filling and distribution of cylinders owned by marketing companies. Delayed cylinder rotation arises as a result of protracted delays in the retrieval and surrender of empty cylinders to their owners. These issues represent a commercial risk (i.e., reduces the expected rate of return on investment in cylinders) for market participants and prospective entrants alike but are likely to be a more significant issue for prospective entrants contemplating entry. [50] One option which is available to prospective entrants is to delay entry until they have discerned adequate information from the recent experience of recent entrants about the size of the risk to investments. The value of that information is properly to be considered as an unrecoverable implicit fixed cost of entry since, by entering now, the entrant foregoes the value of the information which could have been gained by delaying entry; the historic pattern of entry observed in the LPG market is consistent with this option value theory of sunk costs.

123. In particular, the theory predicts that in a market with great uncertainty about future market conditions, there will be a period in which no entry occurs (as prospective entrants delay entry to learn from the experience of others), then if a single entry occurs, it would be followed by multiple entries (as prospective entrants learn from the most recent entrant). As described below, this theory reasonably organizes the observed pattern of entry in the LPG market.

124. Up until 1989, when Petcom entered the market, no more than two marketing companies had ever served the market simultaneously.[51] There was no *de novo* entry for the next 29 years until Yaadman and Regency entered a month apart in 2018 to become the fourth and fifth entrants, respectively, participating in the LPG market. In the subsequent four-year period, there were eight *de novo* entry events. This sharp increase in the entry is not explained by demand-side factors as market demand did not expand over the period; in fact, market demand contracted by 8% during the period 2019-2022. Further, it should also be noted that the explicit sunk costs required to enter had not reduced over the period either. The option value theory, however, offers a plausible explanation for this pattern of entry–the observed drastic increase resulted from a reduction in the implicit sunk costs of entry.

[49] See (i) "LPG Market Information- Situation" attachment to email dated February 10, 2023 to FTC from Rubis Energy Jamaica Limited; and (ii) Massy (2021), Massy Gas Products (Jamaica) Limited 2021-2023 Business Focus Summary.

[50] These issues also raised a major public safety risk to customers.

[51] Steven Jackson, "PCJ weighing re-entry into retail gas market" The Daily Gleaner, Tuesday, December 12, 2017. View at https://jamaica-gleaner.com/article/business/20171213/pcj-weighing-re-entry-retail-gas-market accessed: March 24, 2023.

125. The privatisation of Petcom in 2016 offers evidence in support of the claim that there was a reduction in implicit sunk costs of entry since then. Up until this acquisition of Petcom by Phoenix Fuels (a domestic investor), uncertainty regarding the risks of investments in cylinders (due to cylinder piracy and delayed cylinder rotation) may have served to deter the entry of other prospective domestic investors. Having observed the experience of Petcom since it was privatized in 2016, prospective domestic investors would have gathered valuable information about market conditions and therefore have fewer incentives to further delay entry. Hence the implicit sunk costs (as measured by the value of the information which could be obtained by delaying entry) would have progressively decreased every year since 2016 because of the information gathered by domestic investors subsequent to privatisation of Petcom.

126. The intervention of the main regulator may have also served to lower market uncertainty regarding investment in cylinders. MSET is leading discussions among a Working Group comprising marketing companies established to develop a Code of Conduct facilitating an obligatory cylinder retrieval and surrender arrangement to mitigate the concern for delayed cylinder rotation.[52] When implemented, such an arrangement would mitigate the risks of entry and therefore lower the costs of entry.

127. In summary, entry is likely in the LPG market due to reduced entry costs. Further, the entry cost is likely to be further reduced in the foreseeable future with the planned development and implementation of the cylinder retrieval and surrender arrangements being contemplated with the intervention of the MSET. To this point, a local newspaper reports that FESCo has acquired the assets of Wilson Beck.[53]

iii. Entry is Insufficient

128. Entry would be considered to be sufficient if the threat of entry, or actual entry, is likely to counteract the harmful effects of the challenged transaction, effectively constraining the actions of the incumbents, and preventing them from harming competition. Inasmuch as multiple entries generally are possible and individual entrants may flexibly choose their scale, committed entry generally will be sufficient to deter or counteract the competitive effects of concern whenever entry is likely. However, entry, although likely, will not be sufficient if, as a result of incumbent control, the tangible and intangible assets required for entry are not adequately available for entrants to respond fully to opportunities to increase sales.

129. The first issue affects only the western end of Jamaica. One critical issue for marketing companies in the western end of Jamaica (covering at least Region V, Region VI, and Region VII) would be access to storage facilities. Massy owns and operates a terminal facility and pipeline in Freeport, Montego Bay, on the western end of Jamaica. The ability to offload imported LPG at the western end of Jamaica confers a competitive

[52] Letter dated April 17, 2023 from MSET to FTC. MSET expects that the Code of Conduct will be completed by May 1, 2023.
[53] Business Reporter. “Fesco Acquires Wilson Beck’s LPG Assets,” *Jamaica Observer*, April 9, 2023.

advantage to marketing companies operating in the western regions because PetroJam makes LPG available to marketing companies only from its terminal in Kingston, which is located on the eastern end of Jamaica. Massy, therefore, has the ability to transport LPG from its facility to the western regions at a significant cost advantage over marketing companies trucking LPG from Kingston to the western regions.

130. To this point, there is a Pipeline Transport and Storage Agreement in place between Massy and IGL which allows LPG imported by IGL to be offloaded from ships to Massy's storage tanks located at its terminal facility in Montego Bay through the pipeline owned by Massy. For this service, Massy charges IGL a tolling fee. It is highly unlikely that a new entrant could replicate the terminal facility in St James. The acquisition removed the only rival which had access to such a facility. Accordingly, unless new entrants had access comparable to the terms under which IGL had access, the competitive constraint faced by Massy post-acquisition in at least Region V, Region VI, and Region VII is likely to be not as strong as the competition it would have faced in the absence of the acquisition as new entrants would be limited in their ability to expand in response to the undue exercise of market power by Massy post-acquisition.

131. Accordingly, the FTC concludes that entry would be insufficient to discourage anticompetitive conduct in at least three geographic markets (Region V, Region VI, and Region VII) since rival marketing companies would not have reasonable access to a storage facility comparable to the one owned by Massy. The Report next examines other issues affecting all the geographic markets.

i. Commercial Segment (access to bulk customers)

132. One of the critical inputs would be access to the end users. Through the use of long-term supply contracts, for example, market participants may frustrate new entry. Supply contracts are used only in the commercial segment. Based on information submitted by Massy, the FTC investigations concluded that long-term supply contracts were not common practice among marketing companies for engaging bulk customers. Most of the LPG supplied by Massy to bulk customers is based on month-to-month arrangements. Massy indicates that approximately [redacted]% of its bulk supplies are delivered outside of formal supply agreements, approximately [redacted]% of bulk supplies are delivered via formal short-term supply contracts—renewable within two years; while [redacted]% of bulk supply contracts are delivered via longer-term supply contracts— renewable within 3-5 years.

133. As such, new entrants would have reasonable access to bulk customers. The Report next examines other issues affecting the sufficiency of entry in the residential segment.

ii. Residential Segment (access to dealer network)

134. Another critical input (for the residential segment) is access to the dealer network. The dealer network plays an important role in taking a given brand closer to residential premises. Dealers are also valuable to the

expansion of a given marketing company even if the dealers do not retail its brand. In particular, dealers facilitate the efficient recovery of empty cylinders from the premises of households (therefore speeding up cylinder rotation). Access to the dealer network is therefore important to distribute packed LPG to households as well as for the timely retrieval of empty cylinders from households. The frustrated attempt of recent entrants to access the dealer network was the subject of a recently concluded FTC investigation.[54]

135. The FTC investigation was conducted based on the complaint of a recent entrant alleging that it was being unfairly excluded from an informal arrangement for the retrieval and surrender of empty cylinders among three market participants (IGL, GasPro, and Petcom). The marketing companies argued that they had to take measures to ensure that marketing companies that operate without integrity do not get custody of their productive assets (cylinders). While the FTC recognized the need for marketing companies to protect their investment in cylinders, it was also evident that the seemingly arbitrary exclusion of recent entrants from the independent dealer network would unduly impede timely expansion and therefore discourage competition in the residential segment. Accordingly, that investigation concluded that market expansion, without access to the independent dealer network, would be insufficient in scale to discourage anticompetitive conduct. Since completing the investigation in 2021, the FTC has been continuously engaging key stakeholders, including MSET, and market participants, to establish a formal cylinder retrieval and surrender arrangement that would address the concerns of all current and prospective market participants, once implemented.

136. As mentioned earlier in this Report, MSET is seeking to address the difficulties being experienced by recent entrants in accessing the dealer network to facilitate a speedy cylinder rotation. In July 2022, MSET held a meeting with marketing companies and regulators to discuss the establishment of such an arrangement. As a result, MSET has given an undertaking to continue to engage the industry while private bilateral arrangements for the surrender of cylinders among market participants continue.

137. Until any such arrangement for the retrieval and surrender of empty cylinders is implemented, however, the FTC would remain concerned about the sufficiency of entry to mitigate anticompetitive conduct.

138. Accordingly, the FTC concludes that although entry is likely and would be timely in the relevant markets, expansion is unlikely to take place at a scale which would mitigate, if not deter, anticompetitive conduct. Therefore entry is unlikely to mitigate the adverse effects of anticompetitive conduct.

139. The FTC concludes that The Agreement contains provisions which have or are likely to have the effect of substantially lessening competition in at least one relevant market.

[54] See FTC (2021), Staff Report: Case No. 8136-20, for a summary of the main findings of the investigation.

D. Evaluation of Exemption Status

140. Having determined that The Agreement contains provisions which may have as their purpose the substantial lessening of competition in at least one relevant market, and contains provisions which have or are likely to have the effect of substantially lessening competition in at least one relevant market, the FTC assessed whether The Agreement qualifies for exemption outlined in section 17(4) of the FCA.

i. Covenant Not to Compete (scope of the product and geographic markets covered)

141. The FTC concluded that the scope of the product and geographic markets implicated by Article X of The Agreement is broader than necessary to achieve the stated objectives of The Agreement. As such, the scope of The Agreement makes it possible to eliminate competition in products and/or geographic markets in which neither party currently participates. It is not obvious to the FTC how the elimination of competition between the parties in markets in which neither party currently participates would contribute to technical or economic progress or is even indispensable to achieving the stated purpose of The Agreement.

142. Accordingly, the FTC is not satisfied that the broad scope of the markets covered by the covenant qualifies for exemption under section 17(4).

ii. Covenant Not to Compete (duration)

143. The duration of the covenant not to compete, as implicated by Article X of The Agreement, extends beyond the three-year period which is generally acceptable for non-compete clauses. The stated purpose of this provision is to ensure the success and maximization of the benefits of the combined enterprise, as well as the realization of efficiency.

144. The FTC is satisfied, however, that the five-year duration of the covenant qualifies for exemption under section 17(4).

iii. Inaccessibility of Storage Facilities (Western Jamaica)

145. The FTC concluded that The Agreement is likely to have the effect of substantially lessening competition in at least Region V, Region VI, and Region VII. The Agreement would eliminate competition from the only marketing company which Massy allowed to access its storage facilities located in Montego Bay. This conclusion followed the FTC's assessment that competitive entry in these regions was unlikely unless rival marketing companies had access to storage facilities located in these regions that were comparable to the storage facilities owned and operated by Massy in Montego Bay. It is not obvious to the FTC how the elimination of the only marketing company which was allowed access to the storage facilities in Montego Bay would contribute to technical or economic progress or is even indispensable to achieving the stated purpose of The Agreement.

146. Accordingly, the FTC is not satisfied that the inability of competing marketing companies to access the LPG storage facility located in Montego Bay qualifies for exemption under section 17(4).

iv. Absence of a Cylinder Retrieval and Surrender Arrangement (access to dealer network)

147. The FTC concluded that the absence of an arrangement for the retrieval and surrender of empty LPG cylinders would preclude competitive entry. It is not obvious to the FTC how not engaging in such an arrangement with other marketing companies, without more, would contribute to technical or economic progress or is even indispensable to achieving the stated purpose of The Agreement.

148. Accordingly, the FTC is not satisfied that Massy's non-participation in arrangements for the retrieval and surrender of empty cylinders qualifies for exemption under section 17(4).

149. Accordingly, the FTC concluded that The Agreement contains provisions that are likely to have as their purpose, the substantial lessening of competition, and are likely to have the effect of substantially lessening competition in at least one relevant market.

VII. SUMMARY AND OVERALL CONCLUSION

150. The Agreement involves entities that compete in Jamaica in the distribution of LPG in the (i) residential, (ii) commercial, (iii) transport and (iv) industrial segments.

151. It was investigated under section 17 of the Fair Competition Act, which prohibits any Agreement containing provisions that may have as their purpose the substantial lessening of competition in at least one relevant market, and contains provisions that have or are likely to have the effect of substantially lessening competition in at least one relevant market.

152. The relevant market for assessing the effect of The Agreement comprises the distribution of LPG in seven geographic areas in Jamaica in two end-user segments: (i) the residential segment; and (ii) the commercial segment. There are at least five marketing companies actively participating in each geographic market with Region I (comprising Kingston, St. Andrew, and St. Thomas) being the only geographic market in which all twelve marketing companies participate. Massy, IGL, and Petcom are the only brands that participate in all seven geographic markets.

153. Regarding its purpose, The Agreement was determined to contain provisions that were broader than necessary to achieve the stated objectives of The Agreement. As such, the unduly broad scope of The Agreement makes it possible to eliminate competition in products and/or geographic markets in which neither party currently participates.

154. Regarding its effect, The Agreement was determined to have unilateral effects in the residential and commercial segments. The challenged transaction will result in a highly concentrated market and increase market concentration levels significantly beyond the levels that would normally trigger the presumption of adverse competition effects. Further assessment was done to confirm or refute the presumption.

155. The residential segment was found to be consistent with an oligopolistic market in which differentiated brands compete for households with heterogeneous preferences for brand characteristics. In the residential segment, Massy and IGL are the top two suppliers, with a reported lion's share ([redacted]%) of the market, despite marketing brands that sell at premium prices. It was determined that the most likely reason for this is that premium brands offered by IGL and Massy were vertically differentiated from other brands. It was also determined that the premium brands engaged each other on non-price dimensions of competition but engaged the other brands primarily along prices. There was also evidence of consumer inertia based on households' relatively strong preference for vertical product characteristics such as safety, convenience, and ubiquity of the respective brands. In this residential segment, the transaction is likely to have unilateral competitive effects and harm the less price sensitive households by reducing the pace at which Massy introduced product innovations going forward.

156. The commercial segment was found to be one which is consistent with an oligopolistic market with price as the primary basis of competition. In the commercial segment, Massy and IGL are the top two suppliers with a reported [redacted]% of the market with Petcom serving a majority of the other [redacted]%. The FTC determined the transaction will have unilateral effects in the commercial segment as medium-sized bulk customers are unlikely to have sufficient alternatives to resist the exercise of market power in the western end of Jamaica where Massy's storage facility in Montego Bay confers a significant competitive advantage over rivals in the region.

157. The FTC also determined that The Agreement contains provisions that are likely to have the effect of substantially lessening competition in the residential segment since the non-implementation of a cylinder retrieval and surrender arrangement among marketing companies through the dealer network is likely to frustrate competitive entry and expansion in the residential segment.

158. The FTC also determined that entry in at least three geographic markets is unlikely to mitigate adverse competitive effects as rival marketing companies are unlikely to have reasonable access to a storage facility comparable to the one owned by Massy.

159. The overall conclusion is that The Agreement contains provisions which are likely to breach section 17 of the FCA.

VIII. PROPOSED REMEDIAL MEASURES

160. The FTC concluded in Section VI of this Report that The Agreement contains provisions which have as their purpose, the substantial lessening of competition, or have or are likely to have the effect of substantially lessening of competition in at least one relevant market–in contravention of section 17 of the FCA.

161. The FTC concluded that, in the absence of remedial measures, The Agreement would likely harm the less price sensitive consumers in the residential segment of the LPG market by reducing the pace of product innovations. Further, the FTC concluded that, in the absence of remedial measures, The Agreement would likely harm bulk customers in the commercial segment of the LPG market by exerting an upward pressure on prices. The FTC raised these concerns with Massy.

i. Limit The Scope of Covenant Not to Compete

162. In a letter dated February 16, 2023, from Alberto Rozo, Director, Massy Gas Products Holdings Ltd, to the Executive Director of the Fair Trading Commission, Massy gave an undertaking to amend Article X of The Agreement to limit the scope of markets covered by the restriction.

163. The proposed amendments, if implemented, would address the FTC's concerns in this regard.

ii. Offer Access to LPG Storage Facilities in Montego Bay

164. Further, in an attachment to the letter, Massy expressed a willingness to make its storage facility in Freeport, Montego Bay, accessible to other marketing companies. The terms under which IGL accessed the facility owned by Massy are disclosed in a copy of the *Transfer And Storage Agreement* included in the Annex to this Report.

165. If access to the storage facilities were offered under terms comparable to those under which IGL accessed the facility, subject to Massy's capacity and negotiated terms then the FTC's concern in this regard would be addressed.

iii. Continue to Engage in Private Arrangements for the Retrieval and Surrender of Empty LPG Cylinders

166. Regarding arrangements for the retrieval and surrender of empty cylinders, Massy informed the FTC that it held discussions with recent entrants and, based on those discussions, confirmed that they are willing to enter into cylinder retrieval and surrender arrangements. Massy pointed out also that it has already executed retrieval and surrender arrangements with recent entrants.[55]

167. If Massy undertakes to continue engaging other marketing companies through private arrangements until a public arrangement has been implemented, then the FTC's concern would be addressed in this regard as it

[55] Letter dated September 26, 2022 to FTC from Rohan Ambersley (CEO, Massy).

relates to the sufficiency of entry to mitigate the adverse effects of anticompetitive conduct in the residential segment.

168. As such, the implementation of these proposed measures would fully address the FTC's concerns regarding the likely harm to consumers (in terms of higher prices and reduced pace of product innovation) and likely harm to rivalry in the relevant markets. In particular, the FTC is satisfied that the implementation of the measures would mitigate, if not avert, the anticipated adverse effects of The Agreement outlined in Section VI of the Report.

IX. RECOMMENDATION

169. Based on the foregoing, the Staff recommends that the Commissioners issue a Statement of Non-Objection to parties to The Agreement, subject to Massy Gas Products Holdings Ltd's verifiable implementation of the proposed remedial measures.

ANNEX: TRANSFER AND STORAGE AGREEMENT (AUGUST 9, 2022)

CONFIDENTIAL