

# BNTCL Merger Application Decision

## PRESS RELEASE

### BNTCL MERGER APPLICATION DECISION

The Fair Trading Commission, pursuant to Section 20(5) of the Fair Competition Act CAP.326C (FCA), has completed its analysis of the merger application submitted by BNTCL Holdings Limited (SOL) and the Barbados National Oil Company Limited (BNOCL), referred to hereinafter as the Applicants.

The Commission has considered all of the information submitted to it in order to determine the likely impact of the transaction on competition in the relevant markets, namely the markets for the storage and distribution of auto fuels, JetA1 fuel and HFO. In so doing, and in accordance with Section 20 (7) (a) to (e) of the FCA, the Commission considered the structure of the markets likely to be affected by the proposed transaction, the degree of control exercised by the enterprises, the likely effect of the proposed merger on consumers and the economy, the actual and potential competition from other enterprises and the likelihood of detriment to competition.

In assessing the likely impact of the proposed merger on consumers and the economy in accordance with Section 20 (7) (d) of the FCA, the Commission also considered the compelling arguments advanced by SOL regarding the suggested financial benefits which they posited would be occasioned to the Barbados economy on realisation of the proceeds of sale.

Subsequently, the Commission made the following determinations on four (4) major issues identified with the proposed transaction:

Issue 1: The Vertical Alignment of the Upstream and Downstream Markets &mdash; The Commission is of the view that this transaction in the upstream market for the storage and distribution of auto fuels, JetA1 fuel and HFO would significantly lessen competition in the relevant downstream markets of the retail of auto fuels and distribution of JetA1 fuel. The Commission believes that there could be foreclosure post-merger which would allow the Applicants to increase the cost to rivals, thereby leading to upward pressure on their sales prices. SOL could restrict or refuse access to current and potential Marketers at the Terminal, or offer access only on discriminatory terms. In addition, the possibility of SOL having access to sensitive information related to its competitors would be increased.

Issue 2: Increase in Throughput Fees [Clause 11(xv)] &mdash; The Commission is of the view that the ownership of the bottleneck facility, along with the proposed higher throughput fees charged post-merger, may provide a sufficient cushion for SOL to engage in anticompetitive tactics in any of its downstream operations, which could potentially have a negative impact on consumers.

Issue 3: The Fifteen Year Moratorium [Clause 11 (xvi)] &mdash; The Commission is of the view that the inclusion of Clause 11 (xvi) on the moratorium is inherently anti-competitive, restricts competition or potential competition, and is therefore contrary to the Fair Trading Commission Act CAP. 326B (FTCA) and FCA.

Issue 4: Absence of Real Efficiencies &mdash; The Commission, having determined that the transaction is likely to substantially lessen competition, also considered whether they were real efficiencies which would be great enough to offset the potential anti-competitive effects. In the Commission's view, the efficiencies put forward by the Applicants were not real but pecuniary and are neither greater nor more than what is required to offset the effects of any limitation on competition that is likely to result from the proposed transaction.

Further, the Commission was of the view that the arguments advanced by SOL regarding the suggested positive impact of the proposed merger on the financial position of the Barbados economy, though compelling, did not sufficiently outweigh the competitive concerns raised.

In light of the foregoing, the Commission has determined that the merger as currently structured and presented to it, does not qualify to be permitted under Section 20 of the FCA. The Commission is of the view that there are no available behavioural remedies which would adequately address the anticompetitive concerns in the transaction as currently structured. As such, the Commission cannot but decide against this proposed merger transaction. The Commission will assess any substantially altered transaction which may be placed before it.

## THE DECISION

The policy pursued by the Government of Barbados to have the BNOCL divest its interest in the BNTCL is not being challenged by the Commission.

However, the Commission is of the view that the proposed transaction, if it were to be consummated, is likely to cause anticompetitive effects because it is probable that the Purchaser could utilise its vertical alignment in the upstream and downstream segments of the market to the detriment of competition in the relevant product markets. The Commission is also of the view that the granting of exclusive importation rights to the Purchaser, which has been proposed, is likely to

bolster their position in the market.

Additionally, the Commission in its determinations, finds that the substance of the sale as it stands cannot be completed because the moratorium clause and the increase in throughput fees, which are conditions precedent in the Sale and Purchase Agreement (SPA), are inherently anticompetitive.

The Commission notes that despite the submissions that additional anticompetitive effects are likely to result from the proposed transaction, the Applicants have not made a showing of evidence that rebuts the presumption of anticompetitive effects. Neither have the Applicants demonstrated a willingness to address the offending clauses in the SPA.

The Board of the Commission, on November 23, 2017, determined that it would be prepared to approve the completion of the merger ONLY IF:

a. The vertical alignment issues in the current transaction are addressed;

b. The following clauses are removed from the Agreement and transaction:

(i) A moratorium on the construction of any new terminal facilities or new import depots in Barbados for a period of fifteen (15) years from the transaction's completion date.

(ii) A moratorium on the issuing of licenses for the storage of gasoline, diesel, fuel oil, and aviation or jet fuels used for industrial and commercial purposes in Barbados other than those that currently exist for a period of fifteen (15) years from the transaction's completion date.

(iii) A 32% increase in throughput fees; and

c. BNTCL Holdings Limited or any of its affiliates do not acquire an exclusive right of importation of oil products into Barbados.

As such, the Commission cannot but decide against this proposed merger transaction in its present form.

The Commission will assess any substantially altered transaction, including a relevant amended agreement, which may be placed before it.

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