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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Fiji

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More documentation related to this discussion can be found at: oe.cd/eac.

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Economic analysis and evidence in abuse cases

– Contribution from Fiji* –

1. The FCCC – in common with most other competition authorities – has faced a rapidly changing environment over the course of the last 2 years. In our enforcement of competition and consumer protection legislation in Fiji, we have been required to adapt, after a lengthy period in which there were no cases outside quarantine facilities, to a significant Sars-CoV-2 outbreak, and then subsequently to a successful vaccination campaign and the return of normal life.
2. While these have naturally been exceptional circumstances, we nonetheless believe that there are lessons to be learnt from our experience of the Sars-CoV-2 pandemic which can be carried forwards into the future, and inform our approach to tackling abuse of dominance cases in “normal” times. The exceptional circumstances we have faced have affected every aspect of competition enforcement.
3. As with many of the competition authorities we have been faced with circumstances have forced us to switch between enforcement priorities at speed, and to adapt aspects of our analysis in real time as investigations progress.
4. In particular, we have been faced with rapidly changing geographic market definitions when assessing abuse of dominance cases, as a result of the intermittent imposition and subsequent relaxation of travel restrictions in response to the Sars-CoV-2 outbreak.
5. Much of the public health response to the Sars-CoV-2 within Fiji centred around the imposition of internal borders within Fiji, in particular with the imposition of “containment zones” within Viti Levu, and of travel restrictions between islands. In addition to these legal restrictions on travel, there was also a robust emphasis in government communications on the importance of staying at home and refraining from international travel.
6. This meant that the FCCC faced a situation in which many markets for which we previously would have used fairly wide geographic market definitions, based on regional or even nationwide market definitions, were suddenly splintered into hundreds of much smaller markets. This left many businesses which we would not have previously considered as serious candidates for a market-dominant position holding newly immense amounts of market power for some goods.
7. Similarly, the changing conditions experienced throughout mid-2021 manifested themselves in dramatic increases in seller bargaining power in some markets, as the sudden outbreak of the disease in April 2021 led to many consumers being faced with an urgent and unexpected need to acquire some Covid-related products, such as face coverings and hand sanitiser, at short notice.
8. In addition, many businesses may have found themselves in a temporarily dominant position having never been in a comparably powerful position before. Relatively modestly sized businesses may have found themselves transformed temporarily into powerful market actors by the effects of the Covid outbreak. This created new challenges for our enforcement of the anti-abuse provisions of the FCCC Act 2010, because it was bringing businesses into conflict with the Act which would not have been dominant absent the pandemic.

* Contribution from the Fijian Competition & Consumer Commission (FCCC).

9. This landscape has naturally affected the approach which the FCCC takes in abuse of dominance cases as we have adapted to the rapidly changing circumstances in which we are enforcing the FCCC Act 2010. While the circumstances we have faced are particular to the Sars-CoV-2 pandemic, there are general lessons which we believe can and should be applied in the general course of anti-abuse enforcement practice.

10. In particular, we consider that the recent history of anti-abuse enforcement in Fiji shows three clear lessons:

1. The need for a clear, comprehensible analytical framework that can be applied across a range of similar cases;
2. The need for effective, on-the-ground information gathering so that abuse can be tackled at speed as it occurs; and
3. The need for economic analysis which can be clearly communicated to stakeholders including businesses, consumers and government.

1. Our legal framework

11. The FCCC enforces the Fijian Competition and Consumer Act 2010, which sets out a range of offences which deal with abuse of dominant positions. In particular, many of the abuse offences we deal with are prohibited under one of three sections:

- Section 66 – Misuse of Market Power
- Section 67 – Anticompetitive Conduct
- Section 76 – Unconscionable Conduct

12. The last of these three provisions, Unconscionable Conduct, is an extremely broad provision which covers many offences which are not related to abuse of a dominant position. However, it is a useful provision for the purposes of preventing abuses of dominant positions which are not intended to entrench a dominant competitive position but instead harm consumers directly.

13. In particular, this provision has allowed us to move swiftly against sellers of Covid-relevant products who we deemed to be price-gouging in order to take advantage of a temporary increase in their market power.

2. Economic analysis

14. The approach we have taken to adapting our economic analysis to the rapidly-changing enforcement terrain is twofold: firstly, an emphasis on providing a strong central analysis of the likely kinds of consumer harm that might arise from the abuse of dominant positions on the part of businesses, which can be adapted easily to different circumstances; secondly, an active monitoring policy to take action against anti-consumer abuse as it happens.

15. We were especially able to take this approach for two reasons: firstly, another part of our recent work has been the active monitoring of supply chains as we worked collaboratively with major importers to avert shortages, which gave us a much more extensive oversight of business costs than would normally have been the case; and secondly, we broadly took a cooperative approach with businesses where possible, promoting the view that we were helping the businesses to comply with competition law in

Fiji, rather than always acting punitively against breaches where we considered it likely they had not been made in bad faith.

16. This allowed us to focus our efforts on producing economic analyses which focused on the core of the conduct about which we were concerned, without diverting unnecessary labour hours into granular analysis of businesses' dealings except where we thought the consumer protection payoff of so doing would be greatest.

17. As a result, we were able to take action against more than 30 traders for price-gouging in relation to products such as masks and hand sanitiser. As such, we were able to address these problems rapidly and stamp these harmful practices out as they occurred – issuing 22 warning letters for price-gouging and bringing charges against 9 businesses in key areas at a crucial time in the progress of the outbreak.

18. Our focus in our economic analysis also shifted towards greater emphasis on geography and information, rather than nationwide market share, for example – largely to reflect two considerations. Firstly, the dramatic reduction in consumers ability and willingness to shop around in a situation in which they were being asked to remain at home. Secondly, the dramatic shift in the nature of the negotiation between businesses and consumers when faced with a situation in which there was widespread anxiety about the spread of the disease and an urgent demand by consumers for related products.

3. Implementation

19. Our core focus was on rapid, proactive implementation of our anti-abuse strategy. To this end, we hired a large number of temporary extra staff to assist our enforcement and monitoring teams, mainly for the purpose of tackling price-gouging behaviours. In 2020, the FCCC hired an additional 45 monitoring staff to strengthen our capacity to tackle abusive behaviours – an expansion of around 50% in our total workforce.

20. As part of our focus on flexibility in implementation, we temporarily merged two previously separate departments, creating a single unit aimed at protecting consumers from exploitative practices and, in addition to the extra 45 monitoring staff we recruited, used this unit to protect consumers from abuse at a crucial moment. This has been a feature of our response to each outbreak of Sars-CoV-2, as well as to other natural disasters. For example, in the first wave of the disease, between the 22nd of April and 27th July 2020, we carried out 8,351 inspections. This led to 345 businesses being charged, predominantly under price-gouging offences.

4. Other recent developments in our economic analysis

4.1. Common shareholdings

21. The FCCC is increasingly taking an innovative view in abuse of dominance and merger cases regarding the extent to which we should be concerned about the scale of common shareholding by major investors, even in the absence of complete acquisition by those investors in the businesses in question.

22. Increasingly, competition authorities everywhere are becoming more concerned about the existence of a relatively small number of investment firms which have substantial shareholdings in the same businesses as one another – even if none of these investors has direct control over the business.

23. We are increasingly making moves to incorporate this analysis into our assessment of dominance cases, although the focus of our recent abuse cases has been such that there has been more opportunity to apply this analytical framework in merger assessments. Nonetheless, given the potential for commonality of shareholdings among big investors to weaken competition between players who would otherwise seem to be distinct competitors, we are aiming to incorporate these considerations more closely into our analysis in future cases.

4.2. Regulatory capture

24. We are increasingly turning our attention to the impact of regulatory structures on the incentives of businesses and regulators who could be in a position to use regulatory powers to entrench dominant positions in their markets.

25. The analysis of this specific channel for abuse of a dominant position is different from a purely market-driven approach. It focuses far more on mechanism-design aspects of the regulatory bodies themselves, and the extent to which these can be used to control information flows in the event that powerful market players also gain undue influence over the regulatory body. Our particular focus in this area has been on those regulatory bodies which are designed to promote industry self-regulation.

26. The need for a more robust approach in tackling regulatory capture concerns in industries where a more “business only” approach, which did not focus on the relationship between businesses and industry self-regulation bodies, has become increasingly clear to us in light of a number of recent cases, and will be a key focus of our advocacy and enforcement work in the near future.

4.3. Price control orders

27. The FCCC has a somewhat different policy toolkit relative to many other competition authorities and this is reflected in a slightly different policy emphasis in dealing with problems arising from weak competition in markets of concern. In particular, the FCCC is empowered to recommend the imposition of price-control orders under Section 44 of the FCCC Act 2010 if we are satisfied that competition in that market is lessened or limited.

28. The economic analysis we carry out when using price control orders to pre-empt consumer harm is, naturally, different to that which we would carry out in addressing abuse cases *post facto*. In particular, the analysis required for these purposes makes much more reference to the interests of the businesses affected, as well as those of consumers, because of the need to ensure that the businesses enjoy sufficient returns to guarantee future supply (as well as making reference to the need to be both procedurally fair to the business and to refrain from making unnecessary interventions in these markets).

4.4. Information gathering

29. One key part of our approach to consumer protection was to implement a programme of supply-chain monitoring in order to actively pre-empt supply chain disruptions – especially with the aim of monitoring the transport of groceries into and around Fiji.

30. We implemented specialised supply-chain monitoring studies, focused on essential foodstuffs and medical supplies markets. This programme included daily monitoring inspections in supermarkets to ensure that there were no shortages of essential goods. We also introduced a programme of regular meetings major players in these markets – both

wholesalers and retailers – which we used to monitor stockpile levels and supply chains. We also arranged monitoring visits to wholesalers’ and major supermarkets’ distribution centres and warehouses make this monitoring regime more effective.

31. While the purpose of this programme was principally to guarantee free-flowing supply chains while preventing collusive conduct between wholesalers and major retailers, it was also useful to give us wide oversight of supply chains, and thereby to have a clear idea of the landed costs and availability of various goods, before receiving any complaints about the products in question. This in turn allowed our enforcement and monitoring teams to detect much more rapidly which instances of potential price-gouging behaviour were abusive and which were genuinely reflective of cost pressures and supply chain- or transport-disruptions. This was central to our overall approach of prioritising speed and breadth of implementation and enforcement in a crisis scenario.

5. Conclusions

32. While the circumstances of the Sars-CoV-2 pandemic are naturally unique, we nonetheless believe that there are clear, implementable lessons for the application of economic analysis in abuse of dominance cases.

33. Firstly, economic analysis should be couple with a flexible, adaptable and dynamic framework for implementation, enforcement and information gathering. This is especially true in crisis scenarios, but is true even in normal times. By having the ability to track down even low-level abusive practices quickly and efficiently, consumers can be protected before serious harm has been allowed to occur.

34. Secondly, economic analyses should be based around flexible frameworks which can be adapted repeatedly to similar cases. While every market is unique, there are categories of problem which are likely to repeatedly occur across many markets. Having broad frameworks that can be adopted easily by implementation and enforcement teams, and which are readily understood by these teams, can allow consumer protection bodies to cast a much wider net, and detect consumer harms that might otherwise have gone undetected.

35. Thirdly, competition authorities should be willing to use various enforcement tools as complements to one another, and the manner in which this is done should be informed by careful economic assessments of the effects of these tools, with the primary objective of averting the worst abuses while refraining from the creation of unintended harms by unduly aggressive use of these tools.

36. Finally, we must recognise the trade-off between deep-dive economic analyses, implementation speeds, and the need to have staff working always on the most useful tasks for them to be working on. A dynamic approach can allow us to retain staff capacity to work on the highest-public-return assignments, while still allowing for rapid implementation across the board.