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**INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS –
Contribution from Fiji**

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This contribution is submitted by Fiji under Session III of the Global Forum on Competition to be held on 1-2 December 2022.

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

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Interactions between Competition Authorities and Sector Regulators

– Contribution from Fiji–

1. The FCCC's Regulatory Remit

1. The FCCC has a broad mandate to regulate markets in Fiji where competition is not effective, and efficient outcomes can be achieved without imposing excessive administrative or compliance costs. This regulatory regime is multi-faceted and includes substantial price-control powers.
2. The FCCC's regulatory remit is wide-ranging and includes the regulation of prices of consumer goods as well as responsibility for regulating telecommunications, pharmacies, electricity tariffs and a number of public services. The FCCC has responsibility for setting the prices of a wide range of consumer goods at wholesale and retail levels, ranging from basic foodstuffs to hardware. In addition, it monitors compliance with the freeze on rents in the residential property rental market. The FCCC's rental market activity is closely related to its consumer goods price control activity.
3. To set the prices of controlled consumer goods, the FCCC adds a wholesale and retail margin to the landed cost of goods. This margin reflects the distribution costs of the goods as well as a fair profit for the wholesaler and retailer. The FCCC believes that it is appropriate to investigate possible changes to the process of setting the prices of consumer goods to reduce the cost for all parties, aid compliance, and protect consumers.
4. The methodology used by the FCCC to determine the prices of services provided by regulated industries also takes a cost-plus-margin approach. It is challenging to identify the correct costs of a regulated entity. If the costs accepted by FCCC are too low, the entity faces no incentive to invest and consumers will not receive the right amount and quality of the service; if costs are too high, the entity earns a monopoly profit, which again harms consumers. In order to identify economically efficient costs, FCCC will investigate the use of alternative regulatory models for setting regulated prices.
5. The FCCC's objectives for the pricing of consumer goods, rents and regulated industries are that:
 - Where effective competition is unable to be sustained, the price of consumer goods reflects the costs of the goods including distribution costs and a fair margin.
 - Residential rents are fair for the tenant and the landlord.
 - Regulatory decisions set prices and quality standards that reflect efficient costs, remove monopoly prices and provide an incentive to invest.
 - Regulated businesses should have regulatory certainty and smooth price paths.

2. Optimal Regulation in Fiji

6. The FCCC's approach to regulation is driven by a number of considerations, which mean that optimal regulatory design requires a different relationship between competition regulators and other regulatory agencies than is desirable in other jurisdictions. In

particular, the nature of many Fijian markets means that the benefits of integrating competition and sectoral regulation into a single, dynamic multi-sector regulator are very significant, and this fundamentally changes the balance of costs and benefits in regulatory design.

7. The features of the Fijian regulatory landscape which increase the social return to using a multi-sector regulator with a competition focus as opposed to more sector specific regulatory designs are as follows: firstly, the relatively small size of Fijian markets which increases the importance of competition regulation because of the reduced scope for intense competition in the absence of robust regulatory action; secondly, the relative weakness of competition absent robust competition oversight and the increased risks of regulatory capture if powerful market players are able to exploit weaknesses in regulatory design; thirdly, the increased ability of a multi-sector regulator – relative to sector specific regulators with narrower mandates – to benefit from cross-sectoral knowledge spill overs within the regulator itself when dealing with small markets. These are addressed in turn in the forthcoming paragraphs.

8. Firstly, the importance of specialised competition oversight is magnified in Fijian markets because of the relatively small size of many markets in Fiji – especially with regard to geographically isolated markets. Fiji’s relatively small population and archipelagic geography increase the frequency with which the minimum efficient operating scale of businesses exceeds the size of local markets, which in turn means that many markets in Fiji are monopolistic which would be unlikely to be so in other jurisdictions. This serves to increase the scope for consumer harms related to weak competition relative to other forms of consumer harm and in turn elevates the importance of a robust competition-enforcement approach across these markets.

9. Secondly, as illustrated by the case study set out below, bringing regulatory responsibility for specific sectors under the purview of the FCCC can address possible regulatory capture concerns. As a multi-sector regulator, the FCCC is able to act as a highly-professional and well-staffed regulatory agency which obviates the need for using self-regulatory mechanisms which create unacceptable risks of damaging regulatory capture. This has been a focus of much recent FCCC regulatory work.

10. Finally, the structure of the FCCC creates opportunities for cross-sectoral regulatory knowledge spillovers which would be less accessible in a regulatory structure based around many sector-specific regulators. By pooling the regulation of several markets under the purview of a single regulator, it is possible for staff in the FCCC’s Economic Regulation team to build up a base of experience and expertise in regulation which could not be achieved in single-sector regulators. The same staff members are able to gain expertise in regulating prices in markets for basic food items and in telecommunications – this allows FCCC officers to develop proficiencies through their experience of regulating one market in implementing regulation in other markets, allowing the FCCC to carry out much more sophisticated analysis than would be possible otherwise.

11. In effect, the use of a dynamic multi-sector regulator such as the FCCC allows Fiji to solve the dilemma facing designers of regulatory systems in small-island economies. Many markets in Fiji and economies of similar size are too small to sustain large highly-professional regulatory organisations. As such policy-makers are faced with a choice in many of these markets with a choice between using small regulators which may struggle to develop the professional capacity to effectively implement the country’s regulator regime, or instead making use of the expertise that exists within players in the market to be regulated by introducing a form of self-regulation – with the concomitantly increased risk of regulatory capture. By delegating the regulation of several industries to the FCCC, it is

possible to avoid the undesirable trade-off between regulatory expertise and regulatory capture risk.

3. Case Study of Regulatory Change: Pharmacy Regulation in Fiji

12. One particularly significant example of the changing nature of the relationship between the FCCC and other regulatory agencies in Fiji can be seen in the recent overhaul of the regulatory regime for pharmacies in Fiji. These regulatory changes have combined liberalising legislative changes designed to promote competition and the creation of new pharmacy businesses with a new regulatory structure which brings the regulation of the pharmacy market directly under the supervision of the FCCC.

13. By creating this increased emphasis on competition, the new regulatory regime has addressed concerns about regulatory capture in this market in Fiji and has substantially improved access to pharmacy services in Fiji. We have already received applications for new pharmacy businesses which promise to serve as many as 100,000 people – or about 10% of Fiji’s population – who previously had extremely limited access to pharmacy services.

4. Pharmacy Regulation in Fiji prior to 2022

14. Prior to the reforms which came into force this year, pharmacies in Fiji were regulated by the Pharmacy Professions Board, which had been established under the Pharmacy Professions Act 2011. The Board had the power to register pharmacists, pharmaceutical chemists and pharmacy technicians, and was charged with enforcing the Pharmacy Professions Act 2011.

15. The composition of the Board was set out in the Act, and the board was largely composed of representatives of the pharmacy profession – for example, two of the nine members of the Board were appointed by Fiji Pharmaceutical Society, the professional body for pharmacists in Fiji. While the powers of the Board were extensive, the Board appeared to be relatively ineffective in enforcing them, and the composition of the Board meant that there was a significant risk of regulatory capture.

16. The Pharmacy Professions Board had the power under Section 45 of the old Act to authorise, or refuse to authorise, the establishment of new pharmacy businesses in Fiji. Without authorisation from the Board, it was illegal to operate a pharmacy business anywhere in Fiji. This effectively meant that the Board’s composition could give veto power over the establishment of new pharmacy businesses to rivals of the pharmacy business seeking to establish a new pharmacy.

17. This regulatory structure combined with some features of the law to create powerful barriers to procompetitive entry and expansion. Notably, the law restricted pharmacists to the ownership of a maximum of two pharmacies only. Although the Board did have some leeway to authorise pharmacists to own more than two pharmacies under certain circumstances, this power appears to have been effectively unused.

18. In order to acquire a proprietary interest in an additional pharmacy when they already owned 2 pharmacies, a pharmacist could apply under Section 45 of the Act and could be granted authorisations to exceed the “two pharmacy rule” if there was no other pharmacist who owned less than two pharmacies who was willing and able to operate a pharmacy in the location in question.

19. Given the structure of the previous regulatory regime, it is perhaps unsurprising that the power to authorise additional pharmacies under Section 45 was rarely used. In particular, the power of the Board to require applicants under this section to share their financial data and other business details with the Board – that is, with potential competitors – may have acted as a significant deterrent to new applications.

20. We also became aware, in the course of the market investigation which led to our advocacy of the regulatory reforms in question, of a number of allegations that the pre-2022 regulatory regime was being abused to frustrate competitors.¹ For example, the FCCC became aware, in the course of our investigation, of allegations that applications had been made under Section 45 for new pharmacy licenses in remote areas of Fiji by pharmacists who already operated two pharmacies, but that these had been declined on the basis that another pharmacist had been found to operate in the location in question – only for this apparent alternative applicant to fail to open a pharmacy business. This conduct, the complainant business alleged, represented a misuse of the regulatory regime to impede competitors.

21. The FCCC’s market investigation in this sector revealed a number of similar allegations, and this paper is not intended to comment on any individual such complaint. However, the nature of these complaints is such that we can reasonably infer that substantial numbers of stakeholders were concerned that the previous regulatory regime had suffered from regulatory capture by their competitors, and that these concerns related to features of the regulatory regime – notably the Board’s composition and its information gathering and veto powers – that may be reasonably expected to inhibit the procompetitive entry and expansion of players in this market.

5. Consequences of the Previous Regulatory Regime

22. The combination of the previous legal regime and regulatory structure had significant effects on the nature of the pharmacy market in Fiji. In particular, the FCCC concluded that the regulatory regime as it operated prior to reform led to the extreme geographic concentration of pharmacies in a small number of urban centres, and left large areas of Fiji without access to private pharmacy services.

23. In particular, we noted that pharmacies in Fiji were extremely highly geographically concentrated in three conurbations: Lautoka, Nadi and Suva-Nausori. These three settlements contained around 80% of the pharmacy businesses in Fiji at the time of our market investigation.

24. The FCCC market investigation concluded that the combination of the “two-pharmacy rule” and concerns about regulatory capture could potentially explain this geographic concentration and the reluctance of pharmacists to establish businesses outside these conurbations. Given that applications to exceed the two-pharmacy rule would have required extensive investigations to be carried out by a regulatory regime which could have required the sharing of sensitive business information with potential competitors, and that applications to exceed this limit appear to have been unsuccessful under the old system, in essence the two-pharmacy rule functioned as a hard ceiling on the number of pharmacies

¹ It should be noted that these are based on complaints we had received from stakeholders within this market, and some of these complaints relate to conduct that had allegedly happened a number of years earlier. We have not prioritised detailed investigations of specific alleged abuses of the regulatory regime in the past. The cases cited in this section relate to credible submissions we had received to this effect from stakeholders in the course of our market investigation.

which could be operated by a single owner. Under such circumstances, pharmacists may have been deterred from establishing pharmacy businesses in smaller settlements, given that doing so would have meant foregoing one of only two opportunities the pharmacist would have to operate in a potentially more lucrative major market by setting up operations in one of the larger conurbations.

6. Legislative and Regulatory Reforms in 2022

25. As a result of FCCC advocacy work, the Government of Fiji introduced reforms to the regulatory regime for pharmacies in Fiji by passing the Pharmacy Profession (Budget Amendment) Act 2022. This Act introduced a number of changes to the regulatory regime in this market, which we consider likely to promote competition and facilitate pro-competitive entry and expansion of pharmacy businesses within this market.

26. Firstly, the amended Act increased the number of pharmacies which can be owned by a single proprietor from two to five. This directly removed one barrier to entry and expansion in this market, and – in combination with the new regulatory regime – removes a significant obstacle to the establishment of pharmacies in rural areas.

27. Secondly, by transferring regulatory responsibility to the FCCC, the reforms powerfully mitigate concerns about regulatory capture. The FCCC, unlike the Board, has no financial interest in the pharmacy market. Applicants have nothing to lose by providing us with the information required to make the regulatory regime work effectively. We believe that this is likely to encourage a substantial increase in the number of applications for additional pharmacies in areas currently unserved by a private pharmacy business.

28. Thirdly, by transferring regulatory authority to the FCCC, the reforms have delegated responsibility for this market to an agency with an explicit competition mandate. This has allowed the FCCC to introduce explicit competition provisions into the authorisation regime for new pharmacies: the FCCC's practice statement requires new applications to undergo a competition assessment when the proposed new pharmacy is within 25km of a competitor. These competition assessments are intended to address concerns about potential vertical foreclosure strategies by competitor with links to firms in vertically related markets, such as pharmaceutical producers or distributors. Outwith a 25km radius, no competition assessment is required – this is intended to promote the establishment of pharmacy businesses in rural areas by offering an expedited approval process.

29. Finally, by bringing the pharmacy regulation regime under the purview of the FCCC, the reforms transfer responsibility to a relatively large multi-sector regulator with extensive experience of regulating other sectors within Fiji. The FCCC can make use of full-time staff who are experienced in regulating complex and technically sophisticated markets. Many markets in Fiji are relatively small, and the cost of sector-specific regulators is concomitantly higher, relative to the size of the market. By using the FCCC as a multi-sector regulator, it is possible to maintain a regulatory regime with more substantial resources – in terms both of labour and of expertise – than would be possible with single-sector regulators in these relatively small markets.