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Ex-Post Assessment of Merger Remedies – Contribution from Fiji

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This contribution is submitted by Fiji under Session IV of the Global Forum on Competition to be held on 7-8 December 2023.

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

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Ex-Post Assessment of Merger Remedies

- Contribution from Fiji –

1. What standard does the FCCC follow in developing merger remedies?

1. The FCCC is in the process of developing formal guidelines for the evaluation of possible remedies in merger and acquisition cases under Sections 72 and 73. These guidelines are intended to improve the transparency and comprehensibility to merger parties of the remedies process, and to ensure consistency across merger assessments.
2. Prior to the completion of these guidelines, the FCCC has made use of standards modelled on the practice of peer agencies in other jurisdictions. In particular, the FCCC assesses remedies on the following criteria:
 - Effectiveness – remedies must be effective in addressing the concerns raised by the FCCC;
 - Preservation of any relevant customer benefits – remedies must preserve any relevant customer benefits arising from the transaction; and
 - Proportionality – remedies must be proportionate to the concerns arising from the proposed transaction.
3. The FCCC applies the same standard of assessment both to undertakings provided by merger parties to the FCCC and to remedial measures which are imposed on merger parties by the FCCC.

2. How does the FCCC conduct ex-post evaluation?

4. Typically, the FCCC has conducted ex-post evaluations of merger remedies as part of a broader ex-post evaluation of the merger assessment as a whole. As such, our ex-post evaluations typically involve assessing the following questions:
 - Has the evolution of the structure of the market in the aftermath of the transaction's completion borne out the analysis of the competitive dynamics of the market carried out by the FCCC while assessing the transaction under Sections 72 and 73 of the FCCC Act 2010?
 - Have the remedies successfully corrected adverse effects identified in the course of the merger assessment?
 - Does the subsequent evolution of the market indicate that the remedies were a proportionate approach to ensuring any concerns raised in the original merger assessment were addressed effectively?
 - Does the subsequent evolution of the market indicate that an alternative package of remedies could have remedied the concerns raised more effectively, less intrusively or in such a way as to better preserve relevant customer benefits?
5. The FCCC's ex-post evaluations are carried out in two key forms: firstly, through ongoing monitoring of market outcomes in markets which have been affected by mergers or acquisitions assessed by the FCCC; and, secondly, through follow-up studies of the

markets affected by transactions assessed by the FCCC. Typically, follow-up studies are targeted to markets which are considered systemically important by the FCCC, or in which we deem the risk of consumer harm from successful evasion of the intended effects of the remedies to be particularly high.

6. In many merger cases, the FCCC builds in monitoring and reporting requirements to remedies and undertakings, which allow us to carry out routine monitoring of compliance with the remedies, in addition to ongoing observation of key market outcomes. For instance, parties to a number of recent transactions have provided undertakings to provide us with quarterly bundles of price and volume data for services which had been at the centre of our assessment under Sections 72 and 73 of the FCCC Act 2010. This has allowed us to carry out continued rolling monitoring of key market outcomes in markets affected by transactions reviewed by the FCCC.

7. The FCCC carries out more detailed follow-up studies of markets in which we have completed merger assessments in cases where:

- The remedies introduced were relatively novel or represented an approach not previously used by the FCCC in remedying possible harms;
- The risk of consumer harm from ineffective remedies would be particularly significant; or
- The market is systemically important to the Fijian economy, and therefore the consequences of an ineffective remedies package are more severe.

8. When carrying out follow-up market studies, the FCCC will typically adapt our approach as appropriate to the market in question. However, follow-up studies will routinely incorporate a number of key approaches, including: re-contacting stakeholders who contributed to the original assessment; contacting market entrants, if any; calculating market share and concentration statistics in the aftermath of the transaction; requesting further information submissions from the merger parties, especially in industries which are regulated by the FCCC; and analysing the data collected as part of any disclosure or data-collection facets of the remedies package.

3. How are lessons from ex-post assessments incorporated into future practice?

9. As noted elsewhere in this paper, the FCCC intends to incorporate key learnings from our ex-post assessments of merger remedies and undertakings into our forthcoming guidelines for remedies in Section 72 and 73 cases.

10. The purpose of this is twofold: firstly, a focus on learning lessons from our remedies in past cases will allow the FCCC to ensure the effectiveness of future remedies packages; and secondly, entrench institutional memory of these lessons.

11. This process is essential in ensuring that our approach to remedies in merger cases is well-calibrated to the economic environment in which we operate. While it is important to use international best practice in designing our remedies guidance, in many cases such an approach would entail modelling our approaches on guidance developed in economies which may be very different to the Fijian economy.

12. As such, it is essential that our remedies guidance reflects the context in which we operate, and do not simply imitate the practice of other agencies. We consider that the most effective approach to ensuring that our remedies guidance reflects economic realities is to ensure that our guidance incorporates both lessons learnt through ex-post assessment of

remedies in completed cases and a mechanism for regular review in light of experience in recent merger cases.

4. Challenges of ex-post Assessment

13. While ex-post evaluation of merger remedies is of potentially significant utility to competition agencies, it naturally imposes some costs on competition agencies. Notably, resources and labour time dedicated to the completion of ex-post merger remedy assessments must be diverted away from other activities, such as market studies or other forms of competition enforcement.

14. Ex-post evaluation of merger remedies is valuable in improving the quality of remedies produced in future cases – and thereby potentially averting, for example, abuse of dominance cases in those industries subject to the remedies – but necessarily involves diverting resources away from other activities which might produce more immediate benefits to consumers.

15. In response to this trade-off, the FCCC typically seeks to carry out thorough assessments in cases where the market affected by the transaction is systemically important to the Fijian economy, and where the potential for averting consumer harm is thereby most significant. Assessments in markets which are not systemically important will otherwise be most focused on those markets where we have received feedback from consumers, competitors and other stakeholders.

16. We consider this to be a reasonable approach which maximises the benefits of ex-post assessment of remedies and undertakings while ensuring that resources are directed to the uses which offer the best value-for-money to Fijian consumers.