Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2024)5

Unclassified

English - Or. English

5 November 2024

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

Cross-border Mergers – Contribution from Fiji

- Session II -

2-3 December 2024

This contribution is submitted by Fiji under Session II of the Global Forum on Competition to be held on 2-3 December 2024.

More documentation related to this discussion can be found at: oe.cd/gfc24.

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JT03554710

Cross-border Mergers

- Contribution from Fiji -

1. The Fijian Competition and Consumer Commission (FCCC) is responsible for Fiji's merger and acquisition control regime, under Sections 72 and 73 of the FCCC Act 2010. The overwhelming majority of mergers reviewed by the FCCC fall under Section 72, which relates to transactions entailing the transfer of shares or assets within Fiji itself. Section 73 is used less frequently, and relates to transactions outside Fiji but which could give rise to a dominant position in a market within Fiji.[1]

2. Cross-border mergers are an extremely important feature of the FCCC's work for a number of reasons, including both the relatively small size of some markets in Fiji and the geographic situation of Fiji on trade routes between the major economies of the Asia-Pacific region.

3. These fundamental features of the Fijian economy mean that most mergers assessed by the FCCC in the last five years have had at least some cross-border component. A number of these transactions have related to the flow of goods, services or people between Fiji and other countries, and the cross-border elements of these transactions have consequently been essential to the FCCC's analysis.

4. Consequently, the FCCC is frequently faced with assessing merger activity which spans multiple countries, where the merger parties have typically filed a number of separate applications in different jurisdictions.

5. Typically, the FCCC will engage with other agencies in jurisdictions affected by the transaction at the very beginning of the process, especially in cases where there is a clear cross-border component of the transaction. In a number of important cases, this has developed into a broad process of analysis-sharing between the FCCC and peer agencies, especially where the transaction is either of some concern in both jurisdictions or relates to cross-border trade.

6. In other cases, the FCCC has engaged in ex-post peer review of our merger reviews in some cases with a cross-border component, where the peer agencies engaged in the review were already familiar with the case in question as a consequence of at least some components of the transaction falling under their jurisdiction.

7. While the FCCC does not insist on merging parties subject to assessment under Sections 72 or 73 of the FCCC Act 2010 notifying other affected peer agencies, we will typically engage with the parties to the transaction to establish whether the transaction is subject to approval in other jurisdictions. The FCCC encourages parties to engage with competition agencies in other jurisdictions affected by the transaction.

8. The FCCC's statutory timetables are not affected by the progress of assessments in other jurisdictions, and our statutory clock-stopping provisions apply only to the provision of information to the FCCC by the merger parties and not to their engagement with other agencies or FCCC information gathering in jurisdictions outwith Fiji.

[1] Section 73 empowers the FCCC to recommend that the use of a ministerial "declaration", under which the party to which the declaration relates must cease trading in the market specified in the declaration.

9. This may produce some challenges in information gathering where there is a significant component of the transaction in another jurisdiction. While the parties themselves may be required to provide such information as required by the FCCC for the purpose of our assessment, third parties in other jurisdictions cannot be so compelled. This may pose informational constraints on the FCCC where third parties in other jurisdictions are reluctant to provide information in a timely fashion, and highlights the need for regional regulatory coordination to allow competition authorities to make use of the information gathering capacity of other competition agencies.[2]

10. Given Fiji's geographic situation and openness to international trade, many transactions which affect Fiji have a clear international dimension, and the FCCC frequently applies regional and supranational market definitions in assessing mergers. Such definitions are typically only one facet of the merger assessment, and are used in conjunction with national or sub-national market definitions in most cases.

11. Typically, the FCCC will not take into account the competitive effects of transactions under assessment in jurisdictions outside Fiji unless those competitive effects will adversely affect competition in a market in Fiji.

1. Challenges of Cross-Border Merger Control

12. Fiji's status as a relatively small economy which is deeply engaged with trade and global markets means there is some correlation between the likelihood of the merger or acquisition featuring substantial cross-border components and the systemic importance of the affected market to the economy of Fiji.[3]

13. Applicants in such transactions, and the target firms in the relevant acquisitions, are often headquartered in jurisdictions other than Fiji, or are substantially under the control of businesses headquartered elsewhere. This reduces the visibility of the FCCC with regard to the business activities of the parties to the transaction, and may in some cases impose constraints on the credibility of remedy options when the economic rationale for the transaction is substantively driven by business activities outwith Fiji.

14. As such, for competition agencies operating in relatively open economies, the transactions for which the potential consequences of anticompetitive mergers for consumer welfare are most severe are also those for which the informational and enforcement challenges are greatest.

15. A common feature of cross-border mergers is that there may frequently be substantial heterogeneity in the importance of the transaction in question in each of the different jurisdictions in which the merger activity occurs.

16. This is especially likely to be the case when there are substantial differences in the size of the affected markets in the countries affected by the merger activity, or their centrality on global trade networks. For example, the FCCC assessed a merger in the freight shipping and shipping agency markets in 2019, where the transaction represented a

[2] One recent example of this difficulty occurred in a merger case in early 2024, in which the applicant made submissions to the FCCC regarding the competitive effects of a similar transaction in another Pacific Island jurisdiction. The FCCC was able to gather the required information, although it lay outside the remit of our compulsory information gathering powers.

[3] Notable examples from the last five years include freight shipping, LPG, and banking.

relatively modest consolidation at the regional level, but a much more substantial consolidation on the route between Fiji and New Zealand.

17. This route represented a much greater share of aggregate freight capacity for Fiji than for the other country on the route, because a large share of freight shipped to and from Fiji is trans-shipped via this route.

18. This highlights one possible complicating factor for cross-border merger cases: merger cases of potentially major systemic importance to one affected country may not be of major concern to the competition authorities of other affected economies. If one of the affected authorities operates a revenue or market share threshold for investigating merger activity – especially if this threshold is at the typically higher levels used in mandatory notification regimes – this asymmetry is likely to be exaggerated.

19. One important feature of such asymmetries is that the economic drivers of the transaction are likely to relate more strongly to the larger of the markets affected by the transaction, which are generally more likely to be situated in the larger economy. When there is sufficient heterogeneity between the size affected economies, therefore, there is likely to be simultaneous misalignment of the incentives of merger parties to engage with competition agencies, the potential for the transaction to affect consumer welfare, and the ability of competition agencies to develop remedies packages which effectively and comprehensively address any adverse effects of the transaction.

20. This illustrates the importance of cross-border regulatory alignment and cooperation. Increasingly, smaller economies and developing countries may be faced with mergers and acquisitions in concentrated cross-border markets where there is significant misalignment between the importance of the transaction to national markets and the ability of the competition agency to enforce the relevant provisions of national competition legislation.

21. Competition agencies should consider the possibility that the increasing globalization and digitalization of many important markets necessitates greater cooperation in the enforcement of the decisions of competition agencies, as well as the assessment of mergers and acquisitions under competition legislation.

22. A further challenge specific to cross border mergers is the informational constraint imposed on competition authorities by the existence of a cross-border facet of the transaction. Share transfers which happen overseas are naturally less visible to the FCCC than those which occur within Fiji, for a number of reasons: while the FCCC and the South Pacific Stock Exchange engage in information exchange, no competition authority is able to enjoy such an arrangement with every stock exchange in the world; local news sources are less likely to report transactions occurring overseas; and businesses are less likely to voluntarily notify competition agencies in jurisdictions other than that of the centre of the transaction.

23. This challenge is becoming increasingly significant as competition authorities are becoming increasingly aware of the possibility that the existence of common shareholders across businesses may weaken incentives to compete even when the degree of direct control exercised by those shareholders over those businesses is limited.

24. While domestic reporting requirements for changes in control over businesses may be used as a tool of mergers intelligence when the share transfers I'm question are domestic, this option may not exist when the transfer of shares occurs overseas, creating the risk that the incentives of businesses to compete, and indeed the structure of the market as a whole, may be subject to substantial changes which are not easily visible to competition agencies operating in jurisdictions other than that in which the parties are headquartered.

25. The FCCC has, in recent years, taken some steps to mitigate this difficulty. In particular, in a number of merger cases the FCCC has required undertakings from the acquiring party that they will notify the FCCC in the event that they acquire further shares in other businesses or themselves undergo a significant change in the composition of their own shareholders.

26. Naturally, this approach is, while useful in the cases in which it has been applied, subject to some significant limitations in its application. In particular, it can only be used to gather information relating to businesses for which the FCCC has already assessed an application pursuant to Section 72 or 73 of the FCCC Act 2010, by whom such an undertaking could consequently be given. In cases where an anticompetitive change occurs as a result of conduct relating to a party which has not previously made such an application, the utility of this approach is more limited.

27. It is worth noting, moreover, that the difficulties of cross border mergers control do not create social welfare costs solely through making enforcement more difficult and less effective. Indirectly, these difficulties also impose costs on businesses, who must deal with several separate applications processes simultaneously, with all the complications entailed in managing multiple separate legal frameworks and assessment timelines.

28. This complexity has been a frequent subject of comment by applicants to the FCCC for merger authorisation, who have frequently been dealing with numerous competition authorities - sometimes in combination with other regulators - across several jurisdictions at once. Naturally, it is often the case that the competition agencies in question have operated according to different statutory timeframes and legal standards.[4]

29. This heterogeneity may create a degree of uncertainty among businesses, which in turn may impede essentially harmless or even pro-competitive activity, in so far as it deters merger activity in relatively small markets.

1.1. Benefits of Regulatory Cooperation

30. As noted above, the FCCC considers that competition agencies should consider the possibility that the increasing globalization and digitalization of many important markets necessitates greater cooperation in the enforcement of the decisions of competition agencies.

31. This need for greater cooperation applies to the assessment and remedial phases of merger assessments, and to pre-assessment merger intelligence regimes. Merger parties may not notify competition authorities in every jurisdiction affected by the transaction, and some transactions may be less easily detected by mergers intelligence programmes in some jurisdictions relative to partner agencies.

32. Competition authorities should consider pooling merger intelligence reports at the regional level, or otherwise developing systems to ensure that mergers intelligence is shared between all competition authorities affected by the transaction in question.

33. The increasing digitalization and globalization of many markets greatly strengthens the case for greater regulatory cooperation at the regional level, especially given the misalignment of the incentives of merger parties to engage with competition agencies, potential adverse consequences for consumer welfare, and the ability of competition agencies to develop remedies packages.

[4] Notably, for example, the FCCC operates a dominance standard, while most authorities in neighbouring jurisdictions use an SLC test.

34. In recent years, the FCCC has assessed mergers and acquisitions in which at least one of the parties, or the parent company thereof, enjoyed annual revenues many times greater than Fiji's national GDP. While we have been able to successfully remedy any of the concerns raised in each of these mergers, this naturally raises some concerns about the credibility of remedies packages and ministerial declarations in future cases.

35. In such cases, the FCCC has been able to develop, where appropriate, credible and effective undertakings packages which have successfully remedied any competition concerns arising from the transaction. However, the successful development and implementation of such packages would be much more difficult in cases where either of the parties operated through digital platforms or where the central market definition used in our analysis was supranational.

36. The FCCC has noted a number of successful competition enforcement decisions taken in recent years by bodies acting at the regional level, such as the European Commission. Such an approach to competition enforcement allows competition agencies to enjoy greater scope for imposing remedies on large transnational entities and businesses operating across borders using digital media.

37. National competition authorities should consider whether such recent competition decisions could be replicated successfully at the national level, or whether a greater degree of inter-agency cooperation would be required to enforce competition decisions against large transnational players, especially where those businesses are active in digital markets.

38. Traditional approaches to competition enforcement have allowed competition agencies to impose penalties based on global turnover, which may be large relative to the scale of business operations in the jurisdiction of the competition agency in question.

39. Increasingly, the growing size of some digital businesses is likely to reduce the credibility of remedial and enforcement action by competition agencies, even in relatively large economies. The possibility that merger parties will choose to relocate or scale down their operations rather than comply with competition enforcement and remedy packages has been a persistent – albeit as of 2024 non-binding – consideration for the FCCC in past, and is likely to become more important in the future.

40. As such, the FCCC believes that competition agencies should consider developing tools for joint assessment and enforcement in competition cases with significant cross-border dimensions, especially in cases where regulatory and legal frameworks are similar.

2. Summary

41. In summary, the Fijian experience provides a number of key insights which should inform future approaches to competition enforcement:

42. Cross border mergers impose a number of significant practical and informational constraints on competition authorities.

43. While competition authorities can coordinate bilaterally or multilaterally to address such constraints, the nature of the informational constraint in cross border mergers cases means that ad hoc cooperation may be less effective than formalized regular cooperation.

44. These constraints become more important as economies become more heterogeneous, especially in cases where the "centre" of the merger is in the jurisdiction in which the competitive effects of the transaction are weakest. Such a dynamic is common when one of the affected economies is a small developing country.

45. These challenges are likely to remain difficult to address – and indeed are likely to become increasingly widespread and acute in the era of digital markets – in the absence of deeper regulatory cooperation among regional competition authorities.

46. The impact of the increasing role of cross-border mergers, especially in digital markets, is likely to affect different jurisdictions asymmetrically. While competition authorities overseeing the largest economies may be able to carry out their responsibilities as effectively as before, competition agencies in smaller or developing economies are likely to find that optimal enforcement is increasingly inhibited by cross-border dimensions to mergers and acquisitions falling under their purview.

47. This is likely, moreover, to raise the costs of compliance for businesses faced increasingly with a requirement to submit numerous applications for clearance simultaneously across a range of different jurisdictions with different legal tests and application requirements.

48. As such, the Fijian experience illustrates the need for strengthening both regulatory cooperation and for harmonization of the approach taken to competition enforcement in the mergers space by competition agencies.