

Enhancing access to submarine cables for Pacific Island Countries

Session 5: Access to landing station

Suva, Fiji

31st July–3rd August, 2017

Matthew O'Rourke





Session 5: Access to landing station

Agenda

- Types of competition problems and remedies
- How to ensure the principles of open access
 - Focus on ex ante regulation of access and interconnection
- Market analysis process and some common issues

- The control of access to international submarine cables creates potential for competition problems in any downstream retail markets that depend on international connectivity
 - e.g. broadband markets
- Three common types of competition concerns can arise
 - Each problem can arise in each of the three segments of the cable system

**What types of
competition
problems can
result from
dominance over
a CLS?**



Denial of access

- Control of essential infrastructure and the technological advantages that it provides gives the CLS operator the ability and the incentive to strengthen unfairly its position in downstream retail markets by denying access to international submarine cables, or refusing to supply capacity on international submarine cables, to competitors in downstream retail markets.

Excessive pricing

- Prices can be considered excessive if they allow the CLS operator to sustain profits that are higher than it could expect to earn in a competitive market.
- In the absence of potential competition and any significant countervailing buying power, the CLS operator tends to have the ability and the incentive to set its prices at levels that maximise profits at a given level of demand.
- As a consequence of the quantity of capacity/access demanded, consumer surplus, and total welfare would all be less than their potential values under competitive conditions.

Anti-competitive price or quality discrimination

- If the CLS operator is vertically integrated and active in downstream retail markets it tends to have the ability and incentive to attempt to raise unfairly the costs incurred by its rivals in the downstream retail markets and/or restrict their sales, for example, by charging a higher price to downstream competitors than it implicitly charges its own retail arm (i.e. price discrimination between internal and external supply) and/or supplying its downstream competitors services that are of lesser quality (e.g. deprioritised fault restoration) than those supplied to its own downstream arm

The remedy is greater competition...

WET	DRY	BACKHAUL
License more cables	License more CLS	License more network operators
Mandate access to IPLCs		Allow co-location of facilities at the CLS
Allow reselling of capacity		
Authorise foreign consortium members to sell capacity directly		

...or alternatively open access

	WET	DRY	BACKHAUL
Non-discrimination	Right of interconnection; Require access to be offered in smaller capacities	Right to deploy facilities in available space (co-location)	Right of access
Cost orientated pricing	Regulatory oversight of pricing	Regulatory oversight of pricing	Regulatory oversight of pricing
Transparency	RIO	RIO	RIO

**What form of C
regulation wo
likely be justif
in your count**

**How might th
change in th
future?**



Open access

- Federal Communications Commission (FCC) introduced the concept of an Open Network Architecture in 1986
- In 1990s European Union harmonised its telecoms laws around the concept of open network provision
- Reflected in WTO's Fourth Protocol to the General Agreement on Trade in Services (GATS) in 1997
- Today the principles of open access are reflected in various forms in the telecommunications laws of most countries with liberalised telecommunications sectors
 - The question is, how to impose them in the context of CLS?

**In your country
how can you
ensure open
access to
submarine
cables?**



Forms of access regulation

- Essential facilities doctrine
 - United States v Terminal Railroad Ass'n (1912)
 - A particular type of monopolisation claim
 - More a rationale for regulation rather than the means of regulation
- Ex post
 - Countries with numerous CLS often rely on ex post
 - May not be an efficient option for countries with one CLS!
- Ex ante
 - Licence condition
 - Access / interconnection regulation
- Other
 - E.g. Business model, public financing, condition of financing

Open access via ex ante access regulation

- Imposing the principles of open access fits the objectives of, and remedies available in, most access and interconnection regulatory regimes
- Bases the justification for regulatory intervention in the principles of competition law
- Helps ensure that obligations are targeted, proportionate, and relevant.

What is the process of imposing ex ante access regulation in your country?



What is the relevant market?

- Markets are defined in terms of three dimensions:
 - Product or service
 - Customer (e.g. retail or wholesale)
 - Geography (e.g. national)
- Market definition based on the “SSNIP test”
 - Small but significant non-transitory increase in price
 - e.g. a price increase of 5–10% of at least one year’s duration
- Initial boundaries of the market defined by the focal product
 - e.g. wholesale capacity on and access to international submarine cables
 - Boundaries then broadened to incorporate substitutable products

Closely related downstream markets

- Separate markets, but closely related
- Consider whether the national backhaul market needs to be examined in the same process or at a later time (or not at all)



What are the potential substitutes for international connectivity via submarine cable?



Whether a SSNIP is profitable will depend on:

- Supply-side substitution
 - E.g. the entry of alternative suppliers of international capacity
 - Fairly straightforward to foresee within the time period
- Wholesale demand-side substitution
 - E.g. current purchasers switch to an alternative product
 - Technical differences (and pricing) may deter
 - Impact of the latest generation Ka-band satellites?
 - Increased capacity and potentially lower pricing
- Retail demand-side substitution
 - E.g. current retail customers switch to an alternative product
 - Unlikely to pose a credible restraint

Is there significant market power (SMP)?

- SMP: the power that enables a service provider to make decisions and to act independently of its competitors and customers
 - e.g the ability to raise prices or reduce output without being concerned that:
 - competitors will benefit from increased revenue or market share;
 - customers will switch to competitors

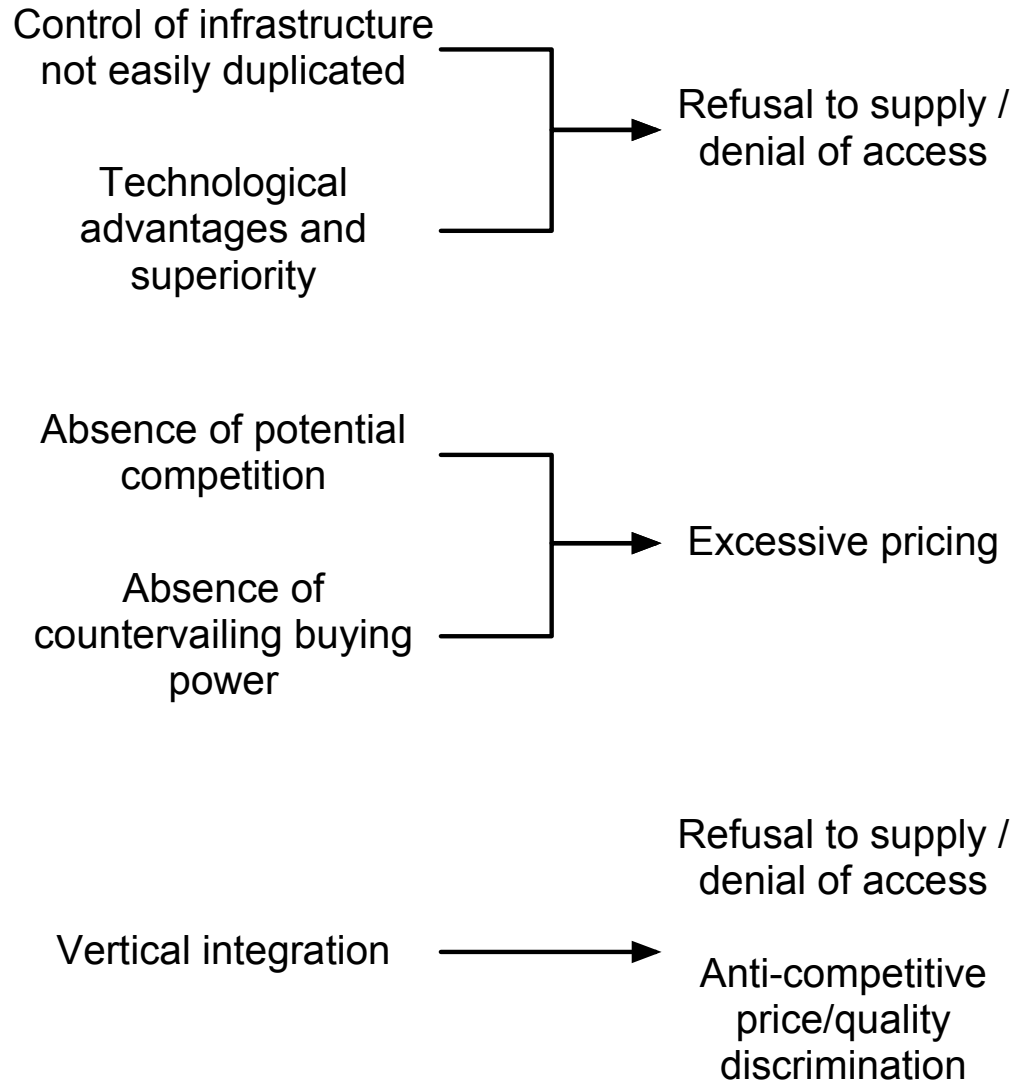
Some of the key considerations

- Control of infrastructure not easily duplicated
- Technological advantages and superiority
- Absence of potential competition
- Absence of or low counter-veiling buying power
- Vertical integration
- Economies of scale
- Ease of market entry

In the future, what factors may change and influence when a CLS operator is found to have SMP?



Sources of SMP and their effects



Typical remedies

	WET	DRY
Non-discrimination	<p>Right of interconnection to the cable</p> <p>Require access to be offered in smaller capacities</p>	<p>Right to deploy facilities in available space (co-lo)</p>
Cost orientated pricing	<p>Regulatory oversight of pricing</p> <p>Price cap</p>	<p>Regulatory oversight of pricing</p>
Transparency	<p>RIO</p>	<p>RIO</p>