



Competition issues in the provision of network access

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1. Introduction

- 1.1 The theme of this forum has been how to expand Internet access to as many consumers as possible. In order to provide Internet access an ISP needs to have a transmission network. This network uses two types of complementary infrastructure that we can call non-competitive inputs (or bottle neck inputs) and competitive inputs. The non-competitive inputs are transmission infrastructure such as dedicated circuits (switched and non-switched) and telephone lines and require access to a public switched telephone network (PSTN).

In most countries, due to the legal monopolies that existed before liberalization of the telecommunications sector, these transmission facilities have to be leased from a single network operator. Problems of a competitive nature may arise when the incumbent who controls and owns the non-competitive input, also competes in the downstream competitive market. The basic allegation that is usually levied against a monopolist facilities provider is that its dominant position in the basic telecommunications market would allow it to compete unfairly by extending its market power in the upstream market into the downstream Internet access market.

- 1.2 In Europe the central tool for ensuring open access conditions for ISP's is the Open Network Provision Directive issued by the European Commission. It has efficiently opened the networks of the incumbents, all of which continue to hold significant market power. In Jamaica however, there is no similar sector-specific access provisions for ISP's. The current Telecommunications Act addresses the obligations of a dominant carrier with respect to the interconnection of public voice networks of different carriers but fails to address the obligations of a network operator in its provision of facilities essential for downstream telecommunications services (e.g. leased circuits). We therefore have to apply the provisions of the Fair Competition Act (FCA) whenever anti-competitive behaviour in the Internet market becomes obvious.

2. Application of the FCA to Access Issues

- 2.1 Anti-competitive behaviour in this market is likely to take one of two forms under the FCA: the making of anti-competitive agreements which falls under Section 17; or the abuse of a dominant position which falls under Section 20. In fact, in some cases the behaviour in question may take both forms. The major focus of Internet access cases currently being dealt with under Competition Law however, has been the incumbent's abuse of a dominant position and these are the issues which this presentation will address.
- 2.2 It is important to note here that whether a company is dominant does not depend only on the legal rights granted to that company. The mere ending of legal monopolies does not put an end to dominance. Under Section 19 of the FCA an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors. Notwithstanding the full liberalization of the Jamaican telecommunications industry set for March 1, 2003, the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time.
- 2.3 The cases of abuse of dominance prevalent in the Internet market can be placed into three main categories:
- Refusal to supply access to facilities
 - Unreasonable delay in the supply of access
 - Pricing Issues (excessive and discriminatory)

Refusal to supply access to facilities

- 2.4 Service markets in the telecommunications sector will initially have few players and refusals to supply access will therefore affect competition in these markets. There is no absolute rule however, that a dominant operator's refusal to supply access would in all cases be found to be abusive. A refusal will not be held abusive if an objective justification for the refusal can be demonstrated, provided that the conduct was indispensable to achieving its objectives.
- 2.5 Broadly speaking, there are two relevant refusal to supply scenarios:
- (a) a refusal to supply access for the purposes of a service where another operator (usually an affiliate of the dominant operator) has been given access by the access provider to operate in that service market.
 - (b) a refusal to supply access for the purposes of a service where no other operator has been given access.

Scenario A

- 2.6 With respect to the first scenario, a refusal to supply access in these circumstances would constitute discriminatory treatment, and if it restricts competition in the

relevant market, it would be an abuse. In the absence of objective justification, a dominant operator should provide access in such a way that the facilities offered to the downstream company is available on terms no less favourable than those given to other parties, including its own corresponding downstream operations.

Scenario B

- 2.7 As to the second scenario, the issue is whether the network operator should be obliged to allow the service provider access to the network. Any analysis by the FTC of this refusal, would have to take into consideration the existence of any capacity or technical constraints. Where these constraints are not an issue however, and the facilities are proven to be essential then the operator should be obligated to provide access.
- 2.8 The key issue is therefore what constitutes an essential facility. In the determination of what is essential it is not sufficient that access to the relevant facility would place the access seeker in a more advantageous position. A facility will be deemed essential if in the absence of access, the access seeker would not be able to participate in the relevant service market due to a lack of feasible alternatives.

Unreasonable delay in supply of access

- 2.9 Outright refusal to supply is probably the most obvious form of anti-competitive behaviour relating to the supply of access. Another way however, in which an access provider can frustrate the competitive process is the time taken to provide access. Dominant network operators have a duty to deal with requests for access efficiently and unreasonable or unjustified delays may constitute a breach of the FCA. It is difficult however, to establish a rule of thumb as to what constitutes an unreasonable delay and the FTC takes a case by case approach when dealing with such cases. In making its determination, the Commission will consider, among other things:
- the usual time frame and conditions applicable when the access provider grants access to its own subsidiary; and
 - the explanations given for any delay.

Pricing Issues

- 2.10 In examining whether there is a pricing problem under competition rules, it will be necessary to demonstrate that costs and revenue are allocated in an appropriate way. The telecommunication industry is characterised by economies of scale, arising from substantial fixed costs and economies of scope, which gives rise to common costs. As a result of these characteristics, telecommunications firms tend to be multi-product firms and their pricing policies therefore need to take into account the recovery of these fixed and common costs.
- 2.11 It is also necessary to make a distinction between wholesale and retail pricing. The prices levied in the wholesale market can significantly affect competition, because by increasing the wholesale charges for facilities required by its

competitors a vertically integrated firm may be able to raise rivals' costs anti-competitively. For example, an integrated firm might increase its wholesale charges and seek to use the increased revenues to allow it to reduce its retail prices. An increase in wholesale charges together with a reduction in retail prices could mean that rival firms no less efficient than the integrated firm were subject to a price "squeeze" rendering them unprofitable.

Excessive Prices

- 2.12 Often times pricing problems that have to do with provision of access to service providers by a dominant operator will revolve around excessively high prices. This is of particular relevance in the wholesale market where in the absence of another feasible alternative to the facility to which access is being sought, the dominant operator may be inclined to charge excessive prices. The European Court of Justice has defined excessive prices as being "excessive in relation to the economic value of the product.
- 2.13 There is no easy way to determine when a price is sufficiently high to constitute a breach of the FCA. In making its decision however, the Commission will consider the cost characteristics and the pattern of prices (both over time and across products which have same cost base). Appropriate cost allocation is therefore essential in determining whether the price is excessive. For instance where a company is engaged in more than one type of activity, it will be necessary allocate the relevant costs to the various activities, together with an appropriate allocation to common costs.
- 2.14 The Commission may also use international benchmarking to determine excessive pricing.

Price Discrimination

- 2.15 Price discrimination can be defined in economic terms as a situation in which a firm charges different prices to different buyers for the same product and where the difference in prices does not correspond to the difference in the cost of supplying the product. In the telecommunications industry, such discrimination could likely restrict competition in the downstream market in which the access seeker wishes to operate, in that it might limit the possibility for that service provider to enter the market or expand its operations in that market.
- 2.16 Under the FCA, a dominant access provider may not price discriminate between the parties of different access agreements, where such discrimination may lead to the substantial lessening of competition in the relevant market.

Conclusion

- 2.17 The FTC believes that development of a competitive and innovative Internet market in Jamaica depends on the establishment of an effective and unbundled access regime. It is our opinion that non-discriminatory access will ensure that consumers have a choice of suppliers of Internet service by ensuring that competing ISP's have the same opportunity to access the PSTN.

2.18 The ability of firms to enter the Internet market will be the requisite stimulus for current ISPs to continuously assess and adjust the way they operate. The ability of a firm to adjust and the speed at which such adjustment is carried out, are measures of the firm's competitiveness. This is why we in the Caribbean should embrace competition as a key driver of competitiveness. ISP's should therefore be allowed to succeed or fail in the market place based on their merits as service providers and not based on their preferential access or lack of access to a proprietary, essential input.

Thank you.