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Adapting Telecommunications Regulation to Competition: A Selection of Key Issues for Reform in the Philippines

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Abstract

Despite gains from liberalisation and deregulation in the 1990s, the Philippines telecommunications industry continues to be hampered by poor quality of service, high prices, with high barriers to entry and lack of meaningful alternatives for citizens. This article argues that liberalisation of the telecommunications industry is insufficient in facilitating economic growth and improving consumer welfare. Competition is a necessary precondition for this to occur, and to this end, an environment that will allow competition to flourish is indispensable. Hence, telecommunications regulation must be infused with competition law principles to ensure a robust, competitive sector that improves consumer welfare.

Introduction

Telecommunications or the transmission of information and data over distance, is an essential basic service for all citizens – in education, business, health, entertainment, the provision of government services and the maintenance of personal relationships. Now more than ever, reinforced by the pandemic, a country's connectivity infrastructure is a key enabler for economic activities in a growing number of sectors.

Almost half of the global population lacked internet connectivity in 2019, not only due to lack of infrastructure,¹ but also demand-side barriers.² This includes digital illiteracy and unaffordability – indeed, 'connectivity is meaningful only if it can be provided at affordable cost and adequate speed.'³ Meanwhile, it is estimated that broader digital transformation allows for a \$4.3 trillion increase annually in global gross domestic product.⁴ Asia is poised to take over 40 per cent in global output, \$1.7 trillion, which comes from the expansion of the digital sector that also translates into

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¹Francis Mark A Quimba, Maureen Ane D Roselleon & Sylwyn C Calizo, Jr, 'Digital Divide and the Platform Economy', in Cyn-Young Park, James Villafuerte, & Josef T Yap (eds), *Managing the Development of Digital Marketplaces in Asia* (Asian Development Bank 2021) 191.

²World Bank, 'World Development Report 2021 Data for Better Lives' (2021) 159 <<https://wdr2021.worldbank.org/>> accessed 15 Feb 2022.

³*ibid.*

⁴James Villafuerte, Badri Narayanan & Thomas Abell, 'Digital Platforms, Technology and Their Macroeconomic Impact', in Cyn-Young Park, James Villafuerte & Josef T Yap (eds), *Managing the Development of Digital Marketplaces in Asia* (Asian Development Bank 2021) 87.

productivity improvement.⁵ The ITU estimates that a 10 per cent increase in broadband penetration in Asia-Pacific translates to GDP per capita increase of 0.5 per cent for fixed and 1.6 per cent for mobile broadband.⁶

However, for many developing and least developed countries, affordability of basic telecommunications services despite liberalisation of the sector is still a problem that prevents them in harnessing technology and transforming trade, education, health, agriculture, among others.⁷ This is evident in low-income countries' laggard performance under the Network Readiness Index (NRI) which surveyed 130 economies.⁸ Said index uses four key pillars to measure a country's network readiness – technology, people, governance and impact. The technology pillar assesses the country's level of technology which includes fundamental access level to information and communications technology (ICT), digital technology produced and the extent such countries are prepared for future technologies.⁹ The people pillar measures the application of ICT by individuals, businesses and governments,¹⁰ while the governance pillar is concerned with systems in place that promote activity.¹¹ The impact pillar assesses the economic, social, and human impact that participation in the network economy will bring.¹² While the top 25 countries are mostly from Northern and Western Europe, as well as the United States, Singapore, Korea, Japan, Australia and New Zealand,¹³ low-income economies occupy the bottom ranking, with Philippines ranking 83rd, below Sri Lanka and Indonesia.¹⁴

While much of the recent literature on telecommunications regulation has focused on the concurrent application of competition and regulation¹⁵ or when the latter can be supplanted by former,¹⁶ in markets where competition does not exist or has regressed, we must go back to ask a more rudimentary question. How to regulate telecommunications markets characterised by poor quality, low innovation and high prices such that competition can materialise and be sustained? This is relevant today for many developing and less developed economies, especially those ranking at the bottom of the NRI, as they stand in the cusp of digital transformation. While the question necessarily

⁵ibid.

⁶Raul Katz & Fernando Callorda, 'The economic contribution of broadband, digitization and ICT regulation' (International Telecommunications Union, 2018) 44 <https://www.itu.int/dms_pub/itu-d/opb/pref/D-PREF-EF.BDR-2018-PDF-E.pdf> accessed 18 Feb 2022.

⁷ibid 37.

⁸Soumitra Dutta & Bruno Lanvin (eds), 'The Network Readiness Index 2021' (Portulans Institute, 2021) 49 <<https://networkreadinessindex.org/>> accessed 18 Feb 2022.

⁹ibid 32.

¹⁰ibid 33.

¹¹ibid.

¹²ibid 34.

¹³ibid 36.

¹⁴ibid 43.

¹⁵Niamh Dune, *Competition Law and Economic Regulation: Making and Managing Markets* (1st edn, Cambridge University Press 2015) 187; Richard A Posner, 'The Effects of Deregulation on Competition: The Experience of the United States' (1999) 23 *Fordham International Law Journal* 57; Steven Semeraro, 'Speta on Antitrust and Local Competition under the Telecommunications Act: A Comment Respecting the Accommodation of Antitrust and Telecom Regulation' (2003) 71 *Antitrust Law Journal* 147; Maher M Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70 *Cambridge Law Journal* 113; John Temple Lang, 'European Competition Policy and Regulation: Differences, Overlaps and Constraints', in Francois Leveque & Howard Shelanski (eds), *Antitrust and Regulation in the EU and US* (1st edn, Edward Elgar 2009) 20; Margharetta Colangelo, 'The Interface between Competition Rules and Sector-Specific Regulation in the Telecommunications Sector: Evidence from Recent EU Margin Squeeze Cases' (2013) 14 *Competition and Regulation in Network Industries* 214.

¹⁶Howard Shelanski, 'Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy' (2007) 24 *Yale Journal on Regulation* 55; Francois Leveque & Howard Shelanski, 'Introduction: Balancing Antitrust and Regulation', in Francois Leveque & Howard Shelanski (eds), *Antitrust and Regulation in the EU and US* (1st edn, Edward Elgar 2009) vii; Dune (n 15).

touches on why general competition law is not adequate to ensure such outcome, it is only briefly discussed in this article to be expanded in a further study.

I use the Philippines as a paradigmatic example because despite gains from liberalisation and deregulation in the 1990s, the Philippine telecommunications industry continues to be hampered by poor quality of service, high prices, high barriers to entry and lack of meaningful alternatives for citizens. Indeed, Philippines has consistently ranked low in ICT indexes compared to its Asian neighbours.¹⁷

I argue that liberalisation of the telecommunications industry can only go so far in facilitating economic growth and improving consumer welfare. The presence of competition is a necessary precondition for this to occur, and to this end, an environment that will allow competition to flourish is indispensable. However, since the telecommunications sector is a network industry characterised by bottlenecks, huge sunk costs, network effects, the free market cannot be relied on to make this happen. It is then necessary for telecommunications regulation to be infused with competition law principles to ensure a robust, competitive sector that improves consumer welfare.

I demonstrate this proposition through examining the market failures in the Philippine telecommunications industry and undertake a comparative case study of the post-liberalisation laws of countries that have fared better in ICT development. I then recommend a reform agenda for the Philippines and other similarly situated countries to fully realise the economic benefits of the ongoing digital revolution.

The pursuit of liberalisation, privatisation and competition

The telecommunications industry has seen and are still seeing significant transformation. In the 1980s, telecommunications was mostly seen as a natural monopoly provided by the state¹⁸ such that duplication of bottleneck infrastructure brought about by competition is wasteful and economically inefficient.¹⁹ Technological developments such as digital switches, wireless networks, satellite technology, mobile phone technology, challenged the natural monopoly assumption as it became easier to circumvent entry barriers in providing telecommunications service.²⁰ Not only fixed costs were lowered, substitute networks and services were likewise created.²¹ Traditional demarcation of lines between those services provided under monopoly vis-à-vis in a competitive environment began to blur.²²

Alongside the rapid innovation due to convergence of telecommunications and computer technology²³ giving rise to a multitude of networks and services, state-owned companies' performance was substandard compared to private ones. Opening telecommunication markets to competition allows better results than regulated monopolies.²⁴ Not only do regulators as operators lacked the necessary technical skills; political considerations were likewise detrimental to the operation and regulation of these monopolies.²⁵

¹⁷International Telecommunications Union, 'Measuring the Information Society Report' (2018) <<https://www.itu.int/pub/D-IND-ICTOI-2018>> accessed 1 Jul 2021; Department of Information and Communications Technology, National Broadband Plan (2017) <<https://dict.gov.ph/wp-content/uploads/2017/09/2017.08.09-National-Broadband-Plan.pdf>> accessed 1 Jul 2021.

¹⁸Kirsten Rodine-Hardy, *Global Markets and Government Regulation in Telecommunications* (1st edn, Cambridge University Press 2013) 1.

¹⁹William W Sharkey, *The Theory of Natural Monopoly* (Cambridge University Press 1982) 12–28.

²⁰ibid 4.

²¹European Commission, 'Summary Report concerning the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment' COM (87) 290 final.

²²ibid 7 and 9.

²³ibid.

²⁴Damien Geradin & Michel Kerf, *Controlling Market Power in Telecommunications* (1st edn, Oxford University Press 2003) 7.

²⁵ibid; Lorraine Carlos Salazar, *Getting a Dial Tone Telecommunications Liberalization in Malaysia and the Philippines* (1st edn, Institute of Southeast Asian Studies 2007) 113.

Meanwhile, competition between supplier of goods and services, especially in an industry as critical as telecommunications, ensures that goods and services are offered to the public at the lowest cost possible.²⁶ It serves the public interest by inducing suppliers to become more efficient and to offer a greater choice of products and services at lower prices.²⁷ Thus, it was recognised that even when competition is imperfect, it still yields better outcomes than regulated monopolies.²⁸ These emphasised the role competition can play in fostering efficiency in the sector²⁹ as in a truly competitive market, individual suppliers do not have the power to unilaterally set and maintain prices or other key terms and conditions of sales.³⁰

The decision of firms on price, quantity and profit are dictated by overall market conditions and not unduly influenced by the actions of one or more large firms.³¹ Hence, introduction of competition to telecommunication markets were found to have positive effects on fixed line and mobile penetration rates and decrease in prices.³² In an empirical study of OECD economies, Boylaud and Nicoletti found that product market competition in the telecommunications industry yields productivity, improvement in quality and price reductions.³³

Countries also saw the need to modernise and improve the country's infrastructure as well as other non-economic public policy agenda³⁴ with privatisation as one mode of upgrading old telecommunications infrastructure and a way to line state coffers.³⁵ Hardy theorises that forces of globalisation likewise contributed to push the global trend, pointing to the role supranational institutions, including the World Trade Organisation, has played.³⁶

Thus, opening up the industry by lifting ownership restrictions, quotas and other restrictions to entry and exit was pursued globally, accompanied by privatisation of the telecommunications incumbent and establishment of an independent telecommunications regulator.³⁷ By 2002, more than 106 state-owned telecommunications operators have been privatised, while more than 129 countries have separate regulatory agencies.³⁸

Liberalisation... and then what? re-regulation for competition

The removal of legal barriers to entry to the telecommunications sector may allow competition to occur as a step towards developing competitive markets. However, the actual presence of competition is another matter. Experience in telecommunication markets around the world shows that introduction of effective competition has been more difficult and intrusive than in most other markets.³⁹

²⁶Ian Walden, 'Access and Interconnection', in Ian Walden (ed), *Telecommunications Law and Regulation* (5th edn, Oxford University Press 2018) 437; Hank Intven, Jeremy Oliver & Edgardo Sepulveda, *Telecommunications Regulations Handbook* (10th anniversary edition, ITU 2011) 5–1.

²⁷*ibid.*

²⁸Geradin & Kerf (n 24) 8.

²⁹*ibid.*

³⁰Richard Whish & David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 4.

³¹Helen Cabalu et al, 'A Policy Framework for Competition Policy in the Philippines' (Institute for Research into International Competitiveness, Mar 1999) 5.

³²Organisation for Economic Co-operation and Development, 'Regulatory Reform as a Tool for Bridging the Digital Divide' (2004) <<https://www.oecd.org/sti/ieconomy/34487084.pdf>> accessed 30 Jun 2021.

³³Olivier Boylaud & Giuseppe Nicoletti, 'Regulation, Market Structure and Performance in Telecommunications' (OECD Economic Studies No 32, 2001) <<https://www.oecd.org/economy/outlook/2736298.pdf>> accessed 1 Jul 2021.

³⁴Ian Walden, 'Telecommunications Law and Regulation: An Introduction', in Ian Walden (ed), *Telecommunications Law and Regulation* (5th edn, Oxford University Press 2018) 12; European Commission, Green Paper (n 21) 3 and 5.

³⁵Rodine-Hardy (n 18) 7.

³⁶*ibid* 22–27.

³⁷*ibid* xxi.

³⁸*ibid* 10, Appendix A.

³⁹Intven, Oliver & Sepulveda (n 26) 5–7.

Telecommunication markets are characterised by high fixed and sunk common costs,⁴⁰ network effects and economies of scale and scope.⁴¹ High capital expenditure is required to put up the network infrastructure, particularly the last mile or local loop linking homes and businesses to the network.⁴² The cost incurred in laying the network are common to a range of services that can be offered using said network.⁴³ Thus, additional output can be produced at nearly zero marginal cost.⁴⁴ This can provide space for price discrimination.⁴⁵ Once an operator achieves significant economies of scale, it possesses cost advantages relative to smaller player and could be utilised to deter entry.⁴⁶

Moreover, the presence of scale and scope economies in certain network components makes duplication difficult or undesirable, creating bottleneck facilities. In these circumstances, opening access to these facilities (eg, local loop, call termination and origination) and other scarce resources (eg, numbers, spectrum) including setting the terms of access are necessary to foster competition.

Network effects obtain in telecommunication markets as its value increases as more users join the network.⁴⁷ This implies that a smaller network is severely disadvantaged to the larger network if there is no interconnection⁴⁸ between the two as the larger network is incentivised to keep its ecosystem to itself. Hence, interconnection is a key policy and regulatory issue in promoting competition in the telecommunications sector.

As soon as the telecommunication markets are liberalised, the market is dominated by a firm with substantial advantages – 100 per cent market share, economies of scale, network effects, ownership of the only network infrastructure (which access is needed by potential entrants if they wish to compete in the market).⁴⁹ If unrestrained, such firms can abuse their dominant position through various anti-competitive practices, eg, predatory pricing, refusal to deal, margin squeeze, customer discrimination, excessively high prices and poor service, among others.⁵⁰

Consequently, re-regulation is done by states to introduce telecommunication specific regulations, including the creation of ‘new competition rules for newly liberalised telecommunications environments’ to prevent such outcomes.⁵¹ It also includes resolving interconnection disputes, providing for universal service obligations and a transparent mechanism to identify market players with significant market power.⁵² While deregulation was adopted pursuant to liberalisation, it did not necessarily lead to less government control as more often than not, ‘deregulation leads to re-regulation or what Vogel has termed “freer markets, more rules.”’⁵³ As pointed out by Savin, ‘regulation is needed to avoid market failure, increase competition, protect consumers and increase investment and overall welfare. Or to put in negative terms: where markets are failing, where the competition is inadequate, where users are not protected or where existing technologies are used inefficiently and new technologies are not introduced, it is the regulator’s role to step in and improve conditions.’⁵⁴ Government

⁴⁰ Andrej Savin, *EU Telecommunications Law* (1st edn, Edward Elgar 2018) 23.

⁴¹ Lisa Correa, ‘The Economics of Telecommunications Regulation’, in Ian Walden (ed), *Telecommunications Law and Regulation* (5th edn, Oxford University Press 2018) 30–34.

⁴² Rodine-Hardy (n 18) 3–4.

⁴³ Correa (n 41) 30.

⁴⁴ *ibid.*

⁴⁵ *ibid.* 31.

⁴⁶ Savin (n 40) 22.

⁴⁷ *ibid.* 21.

⁴⁸ Correa (n 41) 32.

⁴⁹ *ibid.* 28.

⁵⁰ Herbert Hovenkamp, *Principles of Antitrust* (1st edn, West Academic Publishing 2017).

⁵¹ Rodine-Hardy (n 18) 15.

⁵² *ibid.*

⁵³ *ibid.* xxi.

⁵⁴ Savin (n 40) 10–11.

intervention is necessary to respond to market failures, prevent abuses of market power and to improve economic efficiency.⁵⁵

While general competition law can be used to penalise anti-competitive practices of dominant operators, it is unable to address the inherent structural market failure of the telecommunications market.⁵⁶ Another difficulty is in an oligopolistic market, the firms' conduct may neither legally fall under an anti-competitive agreement or a collective abuse of dominance. Thus, regulation offers the only effective way to introduce competition or produce a more socially desirable outcome.⁵⁷

What then are the regulations necessary for competition to develop sustainably in the telecommunications market?

Literature on telecommunications policy has found pro-competitive measures to encompass licensing to allow market entry, interconnection, asymmetric regulation to foster competition where dominant operators are subjected to more regulation, eg, access to an incumbent's facility, access to scarce resources (eg, spectrum, numbers) under non-discriminatory terms and conditions⁵⁸ and measures that reduce switching costs for consumers, eg, number portability that allows customers to port their telephone or mobile numbers regardless of their carrier, and dialling parity which ensures no additional numbers need to be dialled when switching from one operator to another, price regulation, universal service, interoperability, among others.⁵⁹ Another important component is the application of general competition law to guard against abuse of market power and the prevention of anti-competitive mergers and acquisitions.⁶⁰

Of these, I focus on licensing, interconnection, and asymmetric regulation on the dominant carrier to ensure that it provides access to its key facilities and its pricing. While other pro-competitive measures are likewise crucial, these three measures have been long-standing issues in the Philippine telecommunications industry since 1988⁶¹ with the entry of new players in cellular mobile and international gateway facilities, and are frequently cited in policy and economic studies of the said industry as critical to sustain the liberalisation reforms and 'create and maintain a competitive marketplace.'⁶² It is not difficult to fathom why.

Prior to operating in a market, entrants would have to face the hurdle of getting authorisation from the relevant regulatory agency. In this way, licensing can be used as a potential barrier to entry in a market as unreasonable and burdensome conditions can deter market entry. It also

⁵⁵Intven, Oliver & Sepulveda (n 26) 5–2; Joseph Stiglitz, 'Promoting Competition in Telecommunications' (Centro de Estudios Economicos de la Regulacion, Working Paper no 2, Mar 1999) <https://ideas.repec.org/p/ris/uadewp/1999_002.html> accessed 2 Jul 2021.

⁵⁶Dune (n 15) 173.

⁵⁷ibid 176.

⁵⁸Geradin & Kerf (n 24) 9.

⁵⁹International Chamber of Commerce, 'Telecoms liberalization' (ICC Tools for E-Business, 2004) <<https://iccwbo.org/publication/telecoms-liberalization-guide-second-edition/>> accessed 30 Apr 2021; Organisation for Economic Co-operation and Development, 'Competition in Telecommunications' (Policy Roundtables, 1995) 7 <<https://www.oecd.org/daf/competition/sectors/1920287.pdf>> accessed 20 Apr 2021; Pierre A Buigues, 'The competition policy approach', in Pierre Buigues & Patrick Rey (eds), *The Economics of Antitrust and Regulation in Telecommunications: Perspectives for the New European Regulatory Framework* (1st edn, Edward Elgar 2004) 9; Martin Cave, 'Economic aspects of the new regulatory regime for electronic communications services', in Pierre Buigues & Patrick Rey (eds), *The Economics of Antitrust and Regulation in Telecommunications: Perspectives for the New European Regulatory Framework* (1st edn, Edward Elgar 2004) 27; Organisation for Economic Co-operation and Development, 'Enhancing Competition in telecommunications: protecting and empowering consumers' (Jun 2008) <<https://www.oecd.org/sti/consumer/40679279.pdf>> accessed 10 Jun 2021.

⁶⁰Dabbah (n 15).

⁶¹Salazar (n 25) 121–122.

⁶²Rafaelita M Aldaba, 'Opening up the Philippine Telecommunications Industry to Competition' (World Bank Institute Singapore, May 2000) 6. See also Edna A Espos, 'Institutions, Regulation and Performance: The Case of Philippine Telecommunications' (MSc thesis, City University London 2003) <https://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/01/Regulation_PhilTelcoms_Edna_Espos.pdf> accessed 1 Jul 2021; Romeo Agan Salac & Yun Seon Kim, 'A Study on The Internet Connectivity in the Philippines' (2016) 1 Asia Pacific Journal of Business Review 67.

gives regulators wide discretion or control over market entry that may be used to prevent competition from unfolding.⁶³ Removing unnecessary and onerous licensing regulations will encourage new players and new services for the benefit of consumers.

Interconnection refers to the linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.⁶⁴ Under the Philippine telecommunications law, it is 'the linkage ... of two or more existing telecommunications carriers or operators with one another for the purpose of allowing or enabling the subscribers or customers of one carrier or operator to access or reach the subscribers or customers of the other carriers or operators.'⁶⁵

Interconnection agreements are essential because it allows an operator's customers to reach a competitor operator's customers. If customers of the new player will be unable to call their friends and family that has a different operator, the new entrant will fail to garner customers to successfully compete in the market. At the first instance, competition will not exist because the entrant will be forced to exit without customers.

Access refers to making available facilities and/or services to another entity for the purpose of providing telecommunications services. This includes access to network elements and associated facilities, including connection of equipment, access to physical infrastructure (eg, buildings, ducts and masts), access to relevant software systems, access to fixed and mobile networks (particularly for roaming), access to conditional access systems for digital television services, access to virtual network services.⁶⁶

Asymmetric regulation which establishes different procedures and standards for different actors,⁶⁷ imposes on the dominant operator to provide access to its network and other key facilities. This is likewise crucial to level the playing field and curtail the dominant firm's market power. As stated, the telecommunications sector is dominated by the incumbent post-liberalisation. For competition to occur, new players who wish to enter the market would have to use the incumbent's network and other facilities that are difficult to duplicate, economically or technically. Should they be prevented in doing so, competition can only occur if a new entrant is able to match the scale and size of the incumbent and duplicate its entire network and other facilities.

A vertically-integrated incumbent then has an incentive to refuse to deal or engage in a margin squeeze and other unfair discriminatory practices that can hinder access to its essential facility⁶⁸ as these access seekers are also its competitors. Due to the incumbent's refusal to provide access in the supply of key facilities, as well as engaging in vertical price squeeze where a vertically integrated dominant operator that controls certain facility or service that are key inputs for competitors in downstream markets increase the price for the input while competing in the same downstream market to reduce or eliminate the margins of its competitors,⁶⁹ market foreclosure can result. Consequently, entrants are prevented from competing effectively against the incumbent. This is

⁶³European Commission, 'Towards a new framework for Electronic Communications infrastructure and associated services (The 1999 Communications Review)' COM (1999) 539 final, 22.

⁶⁴GATS: General Agreement on Trade in Services, 15 Apr 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994), Annex on Telecommunications.

⁶⁵Executive Order No 59 [1993] (hereinafter 'EO 59'), s 2.

⁶⁶EU Commission Directive 2002/19/EC of the European Parliament and of the Council of 7 Mar 2002 on access to, and interconnection of, electronic communications networks and associated facilities OJ L108/7, art 12 (hereinafter 'Access Directive').

⁶⁷David Levi-Faur, 'The Governance of International Telecommunications Competition: Cross-International Study of International Policy Regimes' (1999) 4 *Competition & Change* 93, 104.

⁶⁸Geradin & Kerf (n 24) 9.

⁶⁹Intven, Oliver & Sepulveda (n 26) 5-14-5-32.

especially acute in the telecommunications industry where bottlenecks are prevalent, such as the local loop and call termination in mobile networks.⁷⁰

In conjunction with granting access, regulation to ensure prices are fair, reasonable and non-discriminatory is also indispensable. One key cost component for entrants is such charges. If the charge is too high, it can deter entrants from entering the market concluding the business is insufficient to generate returns.⁷¹ Existing small players face difficulties in expanding and competing to offer lower rates. If the charge is too low, it may discourage building new networks.⁷² An appropriate balance is critical in establishing a sustainable access regime and the development of sustainable competition.⁷³

Failure to regulate for competition on these issues can either prevent the emergence of competition, stifle emerging competition or strengthen the incumbent's market power that can lead abuse against other operators.

A failed liberalisation experiment: the philippines telecommunications market

The Philippine experience in the telecommunications industry is evidence that liberalisation does not create or ensure effective competition.⁷⁴ While the national telecommunications law enacted in 1995⁷⁵ liberalised entry into the telecommunications market, except for the foreign ownership limitation and the requirement for a congressional franchise, history has borne out that it is ineffective in fostering competition in the long-run.

During the period when Philippine Long Distance Telephone Company (PLDT) was the country's sole telecommunications provider from 1932 to 1992, the industry was said to be 'in a dismal state'⁷⁶ – with low telephone penetration rates, telephone backlog and unreliable quality.⁷⁷ Liberalisation initiatives started in 1987,⁷⁸ which gained headway with the issuance of Executive Orders No 59 and 109 by then President Fidel Ramos.⁷⁹ Compulsory interconnection among telecommunication providers was mandated⁸⁰ to allow the subscribers of one carrier to access subscribers of other carriers⁸¹ and international gateway facility operators and mobile licensees were required to provide local exchange carrier service in unserved or underserved areas.⁸²

Cited benefits from liberalisation include an increase in foreign direct investment (FDI) flows from USD 0.89 million in 1990 to USD 292.3 million in 1997, entry of nine new firms, increase in new services, price reductions in international calls, mobile telephone and paging services, and increase in telephone density.⁸³

⁷⁰James B Speta, 'Rewriting U.S. Telecommunications Law with an Eye on Europe', in Brigitte Preissl & Jurgen Muller (eds), *Governance of Communication Networks: Connecting Societies and Markets with IT* (Physica-Verlag HD 2006) 15.

⁷¹Correa (n 41) 63.

⁷²ibid 64.

⁷³ibid.

⁷⁴Aldaba, 'Opening up the Philippine Telecommunications Industry to Competition' (n 62) 22.

⁷⁵Republic Act No 7925 [1995].

⁷⁶Aldaba, 'Opening up the Philippine Telecommunications Industry to Competition' (n 62), Executive Summary.

⁷⁷ibid; Rafaelita M Aldaba, 'PLDT-Sun acquisition: good or bad?' (Philippine Institute for Development Studies Policy Note No 2011-08) <<https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidspn1108.pdf>> accessed 10 May 2021; *PLDT v NTC and Express Telecommunications Co, Inc*, GR No 88404, 18 Oct 1990.

⁷⁸Department of Transportation and Communication, Department Circular No 87-1888 (1987).

⁷⁹Erwin A Alampay, 'ICT Sector Performance Review for Philippines' (Sep 2011) <<http://ssrn.com/abstract=2006072>> accessed 1 Apr 2020.

⁸⁰Epithecus Patalinghug & Gilbert Llanto, 'Competition Policy and Regulation in Power and Telecommunications' (Philippine Institute for Development Studies Discussion Paper Series No 2005-18) 5 <https://ideas.repec.org/p/phd/dpaper/dp_2005-18.html> accessed 21 May 2021.

⁸¹EO 59, s 2.

⁸²Executive Order No 109 [1993].

⁸³Aldaba, 'Opening up the Philippine Telecommunications Industry to Competition' (n 62) 6.

The reform process continued with the introduction of *Republic Act No 7925* or otherwise known as the *Public Telecommunications Policy Act 1995* (hereinafter 'RA 7925'). As a national policy, it sought to foster a healthy competitive environment, characterised by carriers' freedom to make business decisions and encouraging their viability but at the same time maintaining affordable rates.⁸⁴

RA 7925 still required a legislative franchise in the provision of telecommunications services⁸⁵ which covers local exchange carrier services, inter-exchange carrier services and international carrier services. Aside from the franchise, the operator needs to obtain a Certificate of Public Convenience and Necessity (CPCN) from the regulator, National Telecommunications Commission (NTC).⁸⁶ However, for value-added service providers, no franchise is necessary as long as it does not set up its own network.⁸⁷ Rates are no longer set using a 12 per cent rate-of-return methodology,⁸⁸ with RA 7925 merely providing that the regulator should establish rates and tariffs that are fair and reasonable.⁸⁹

By 2000, the cellular mobile market had five market players, with two major players, Globe Telecommunications, Inc. (hereinafter 'Globe') and Smart Communications, Inc. (hereinafter 'Smart'), a sister company of PLDT.⁹⁰ For local telephone service, there were seventy-six players with PLDT as the dominant player. For national long distance and international telephone service there were eleven players also with PLDT as the dominant player.⁹¹ Despite the entry of new players in the industry, PLDT was still the dominant operator as it owns the country's backbone network and has highest market share in fixed lines.⁹² As this article will discuss subsequently, this will affect the terms for the mandated interconnection and access pricing,⁹³ and the speed of the sector's development.⁹⁴

After a series of consolidations, notably the acquisition between PLDT-Smart and Digital Telecommunications, Inc. (hereinafter 'Digitel'), Globe and Islacom, Globe and Bayan Telecommunications (hereinafter 'Bayantel'), and the latest one in 2017 where PLDT-Smart and Globe jointly acquired a potential entrant despite objections from the antitrust authority – San Miguel Corporation's telecommunications assets,⁹⁵ the cellular mobile market was left with two market players, Globe and Smart. The broadband fixed-line wired market has PLDT-Smart garnering 71 per cent market share, Globe with 24 per cent market share and others at 5 per cent.⁹⁶ For the broadband wireless market, Globe has 86 per cent and PLDT-Smart has 14 per cent.⁹⁷ The fixed line voice market segment is likewise dominated by PLDT-Smart at 65 per cent and Globe 33 per cent, while all other players are at 2 per cent.⁹⁸

The country lags behind the ASEAN-5 counterparts on internet penetration levels, ranking 110th in fixed broadband penetration and 89th in mobile broadband penetration

⁸⁴Republic Act No 7925 [1995], s 4(f).

⁸⁵ibid, s 16.

⁸⁶ibid.

⁸⁷ibid.

⁸⁸Aldaba, 'Opening up the Philippine Telecommunications Industry to Competition' (n 62) 10; Patalinghug & Llanto (n 80) 15.

⁸⁹RA 7925, s 17.

⁹⁰Patalinghug & Llanto (n 80) 27 (Table 6).

⁹¹ibid.

⁹²For local telephone service, and domestic and international telephone service.

⁹³Aldaba, 'Opening up the Philippine Telecommunications Industry to Competition' (n 62) 24.

⁹⁴ibid 25.

⁹⁵Inquirer Research, 'What went before: SMC deal with PLDT, Globe Telecom' (Philippine Daily Inquirer, 24 Oct 2017) <<https://business.inquirer.net/239131/went-smc-deal-pldt-globe-telecom>> accessed 26 Jul 2021.

⁹⁶2019 Annual Report' (National Telecommunications Commission, 2019) 17 <<https://ntc.gov.ph/wp-content/uploads/2021/2019-ANNUAL-REPORT.pdf>> accessed 20 Jul 2021.

⁹⁷ibid 18.

⁹⁸ibid 19.

globally.⁹⁹ On the speed metric, the country has continuously been outperformed by its counterparts in ASEAN-5, consistently ranking as one with the slowest average download speed.¹⁰⁰

Despite poor connectivity and low quality of services, prices are one of the highest in the region. The World Economic Forum's Global Information Technology Report 2016 shows that the Philippines is behind the ASEAN-5 on affordability of information and communication services.¹⁰¹ Affordability of entry-level broadband service is at 7.53 per cent, way above the previous 5 per cent affordability threshold set by the UN Broadband Commission of monthly gross national income per capita.¹⁰²

In 2017, the Philippines ranked 108th out of 181 countries for mobile-broadband affordability,¹⁰³ compared to its neighbours Malaysia at 36th, Indonesia at 88th, Vietnam at 102nd, and the developed countries such as United States at 27th, United Kingdom at 28th, and Germany at 29th.¹⁰⁴ For fixed broadband prices, Philippines is at 118th out of 177 countries.¹⁰⁵ Malaysia is at 35th, Vietnam 53rd, Indonesia 123rd, United States 32nd, United Kingdom 31st and Germany at 33rd. The Philippines likewise lags behind in mobile cellular affordability, ranking 113th while Malaysia is at 36th, Vietnam 103rd, United States at 51st, United Kingdom at 23rd and Germany at 14th.¹⁰⁶

Public outrage over the 'cost, speed and coverage'¹⁰⁷ of telecommunications can be seen in social media postings in profiles of carriers,¹⁰⁸ the numerous legislative hearings on the sad state of Philippine telecommunications industry,¹⁰⁹ the threats of the President to 'hang' the CEO of Globe on one of its towers and to seize the operators' assets if they don't improve their services,¹¹⁰ the Philippine Telecoms Summit in 2017 organised by the Department of Information and

⁹⁹Department of Information and Communications Technology, 'National Broadband Plan' (n 17) 11.

¹⁰⁰ibid 12; Ver Marcelo, 'PH among lowest ranked countries in internet speed, availability' (CNN Philippines, 3 Nov 2017) <<https://cnnphilippines.com/news/2017/11/03/philippines-lowest-rank-internet-speed-availability.html>> accessed 14 Jun 2021; Delon Porcalla, 'Philippines internet 'second slowest' in Asean, ranks 110th worldwide' (Philippine Star, 28 Dec 2020) <www.philstar.com/headlines/2020/12/28/2066612/philippines-internet-second-slowest-asean-ranks-110th-worldwide> accessed 15 Jun 2021; Department Of Information And Communications Technology, 'State Of The Internet Report' (17 Oct 2017) <<https://dict.gov.ph/ictstatistics/state-of-the-internet-repor/>> accessed 10 Jul 2021.

¹⁰¹Department of Information and Communications Technology, 'National Broadband Plan' (n 17); Silja Baller, Soumitra Dutta & Bruna Lanvin (eds), 'The Global Information Technology Report 2016' (World Economic Forum, 2016) <http://www3.weforum.org/docs/GITR2016/WEF_GITR_Full_Report.pdf> accessed 26 Jul 2021.

¹⁰²Department of Information and Communications Technology, 'National Broadband Plan,' Executive Summary (n 17). The target is now 2% of monthly gross national income per capita. See ITU/UNESCO Broadband Commission for Sustainable Development, 'State of Broadband: Broadband as a Foundation for Sustainable Development' (International Telecommunication Union & United Nations Educational, Scientific and Cultural Organisation, Sep 2019) <https://www.itu.int/dms_pub/itu-s/opb/pol/S-POL-BROADBAND.20-2019-PDF-E.pdf> accessed 27 Jul 2021.

¹⁰³Based on the price of 500MB worth of mobile-broadband, both prepaid and handset-based. 'Measuring the Information Society Report 2018' (vol 1, International Telecommunications Union, 2018) 114, Table 4.3.

¹⁰⁴ibid.

¹⁰⁵The price of fixed-broadband basket. See ibid 134, Table 4.6.

¹⁰⁶ibid.

¹⁰⁷Department of Information and Communications Technology, 'The State of PH Telecoms Service' (4 Mar 2017) <<https://dict.gov.ph/the-state-of-ph-telecoms-service/>> accessed 26 Jul 2021.

¹⁰⁸See Facebook profiles of Globe (Facebook, 'Globe Telecom' <<https://www.facebook.com/globeph>> accessed 18 Aug 2022) and Smart (Facebook, 'Smart Communications, Inc' <<https://www.facebook.com/SmartCommunications>> accessed 18 Aug 2022).

¹⁰⁹Bella Perez-Rubio, 'Senator hits telcos for "constant poor internet service" in Philippines' (Philippine Star, 5 Mar 2021) <<https://www.philstar.com/headlines/2021/03/05/2082174/senator-hits-telcos-constant-poor-internet-service-philippines>> accessed 13 Jun 2021.

¹¹⁰Vittoria Elliott & Andrew Deck, 'Duterte, Dito, and the Duopoly,' (Rest of World, 2 Nov 2020) <<https://restofworld.org/2020/duterte-dito-and-the-duopoly/>> accessed 10 Jun 2021; Cliff Venzon, 'Duterte rocks Philippine telcos with threat to seize assets,' (Nikkei Asia, 28 Jul 2020) <<https://asia.nikkei.com/Business/Telecommunication/Duterte-rocks-Philippine-telcos-with-threat-to-seize-assets>> accessed 13 Jun 2021.

Communications Technology (DICT) in response to the problem,¹¹¹ and the Duterte administration's efforts to champion a third telco player.¹¹²

The enactment of a general competition law, the Philippine Competition Act (PCA) in 2015 has thus far proved insufficient in reforming the sector. As mentioned, the antitrust regulator, the Philippine Competition Commission, sought to prevent the acquisition by Globe and PLDT of a potential competitor and was met with injunctions from the Court of Appeals who also issued a gag order to prevent the authority from commenting on the possible anti-competitive effects of the acquisition.¹¹³ As of date, no case was brought by the regulator under the PCA for anti-competitive agreements or abuse of dominance against the incumbent telecommunication companies. In any event, ex post investigation of conduct abuse cannot address the structural barriers preventing the industry to become truly competitive.

As will be shown below, the weakness in the Philippines' telecommunications regulatory framework is demonstrated in the issues of interconnection and access, access pricing and licensing. The Philippines' experience and regulation on said issues are compared with Malaysia, the United States, and European Union. Malaysia is a neighbouring country part of ASEAN-5 that started on the path of liberalisation at the same time as the Philippines. Both countries have a colonial history with roughly the same GDP output.¹¹⁴ Meanwhile, the US is the Philippines' former colonial master and from which the Philippines patterned most of its laws, including its public service law. The EU, while a union of twenty-seven states, has one of the most developed ex-ante regulations on the telecommunications sector, and has deliberately infused said regulations with competition law principles, which is at the heart of and considered as 'primary EC law'.¹¹⁵ This provides useful guidance for contrasting with the Philippines' regulatory framework.

US and Malaysia, together with major EU economies, have robust telecommunications industries. For context, last year in 2020, the Philippine's fixed broadband price as a percentage of GNI is 7.9 per cent while Malaysia is at 2.2 per cent and the US at 1 per cent.¹¹⁶ For mobile cellular, Philippines is at 3 per cent, Malaysia 1.2 per cent and US at 0.8 per cent.¹¹⁷ Mobile broadband sees Philippines at 1.4 per cent, Malaysia at 0.6 per cent and the US at 0.4 per cent.¹¹⁸ Meanwhile, developed EU countries such as Germany and until recently a part of EU, the UK, had 1 per cent and 2 per cent respectively for fixed broadband and 0.4 per cent and 0.5 per cent for mobile broadband.¹¹⁹

¹¹¹Department of Information and Communications Technology (n 107); Department of Information and Communications Technology, 'PH Telecoms Summit Day 2 – DICT Leads Discussion on Competition in Telecoms Industry, Possibility of Third Player Entry' (17 Mar 2017) <<https://dict.gov.ph/ph-telecoms-summit-day-2-dict-leads-discussion-on-competition-in-telecoms-industry-possibility-of-third-player-entry/>> accessed 26 Jul 2021.

¹¹²ibid.

¹¹³Philippine Competition Commission, 'PCC Statement on PLDT's Petition for Certiorari and Prohibition' (12 Jul 2016) <<https://www.phcc.gov.ph/press-statements/pcc-statement-pldts-petition-certiorari-prohibition/>> accessed 31 Jul 2021; Tetch Torres-Tupas, 'CA orders PCC to answer PLDT motion to issue gag order' (Philippine Daily Inquirer, 20 Oct 2016) <<https://newsinfo.inquirer.net/828127/ca-orders-pcc-to-answer-pldt-motion-to-issue-gag-order>> accessed 1 Aug 2021; Miguel R Camus 'PLDT, Globe hit antitrust agency for violating gag order on Vega acquisition' (Philippine Daily Inquirer, 2 Jun 2017) <<https://business.inquirer.net/230621/pldt-globe-hit-antitrust-agency-for-violating-gag-order-on-vega-acquisition>> accessed 1 Aug 2021.

¹¹⁴However, GDP per capita figures show Malaysia with significantly higher than Philippines. See ASEAN Secretariat, 'ASEAN Key Figures 2019' (Oct 2019) <https://www.aseanstats.org/wp-content/uploads/2019/11/ASEAN_Key_Figures_2019.pdf> accessed 30 Jul 2021.

¹¹⁵Pierre Larouche, 'Contrasting legal solutions and the comparability of EU and US experiences', in Francois Leveque & Howard Shelanski (eds), *Antitrust and Regulation in the EU and US* (1st edn, Edward Elgar 2009) 85.

¹¹⁶ITU, 'Digital Development Dashboard' <<https://www.itu.int/en/ITU-D/Statistics/Dashboards/Pages/Digital-Development.aspx>> accessed 20 Jun 2021.

¹¹⁷ibid.

¹¹⁸ibid.

¹¹⁹ibid.

By using as case studies these economies that have been successful in fostering competition in their telecommunications industry (at the risk of over-generalisation), the gaps in the Philippines' telecommunications legal framework will come to the fore from which lessons can be drawn for countries looking to improve their ICT industries.

Countries in comparison to the philippine experience

United States

The US was one of the first country that sought to liberalise its telecommunications industry. The 1934 *Communications Act*¹²⁰ created the Federal Communications Commission (FCC) to regulate interstate telephone service. As technology progressed in the 1950s and 1960s, natural monopoly assumptions on the telephone service was challenged¹²¹ leading to the break-up of AT&T's monopoly in 1974 through an antitrust suit by the US Department of Justice (DOJ).¹²² One of the allegations against AT&T was that it was providing interconnection to its competitors on a discriminatory basis and unfairly cross-subsidising from its profitable local exchange services to inter-city services.¹²³ The resulting 7 independent local exchange carriers (ie, Bell Companies) were limited to engage only in local telephone service, thereby separating local and long-distance markets,¹²⁴ and were required to allow competing long-distance carriers access to their local exchange network 'on an unbundled, tariffed basis equal to that provided to AT&T and its affiliates.'¹²⁵

To promote competition, the FCC provided for asymmetric regulation, distinguishing between carriers with market power and those without, imposing additional obligations on the former.¹²⁶ It likewise prevented vertically integrated operators from leveraging their monopoly power in one market to extend their dominance in another through cross-subsidisation or discriminatory practices,¹²⁷ and eventually required accounting separation of the competitive segment vis-à-vis the monopoly segment of their business.¹²⁸

Competition between long-distance carriers eroded AT&T's market share from 90 per cent in 1984 to 55.2 per cent in 1994.¹²⁹ The break-up of AT&T's monopoly coupled with regulation on interconnection and access were key efforts in the US telecommunications industry's transition from monopoly to competitive markets.

The *Telecommunications Act 1996* went further in promoting a competitive environment in the telecommunications industry. It opened 'all telecommunications markets to competition'¹³⁰ by removing all legal barriers to entry in the local telephone market,¹³¹ prohibiting any law or regulation that will have the effect of prohibiting an entity to provide telecommunications services.¹³² The FCC gives blanket authority for carriers to provide domestic services, eliminating the requirement to obtain individual authorisations.¹³³ In this way, licensing as a barrier to entry was eliminated to allow competition to flourish.

¹²⁰Geradin & Kerf (n 24) 66.

¹²¹ibid.

¹²²ibid 67.

¹²³Ibid.

¹²⁴Karen Lee & Jamison Prime, 'US Telecommunications Law', in Ian Walden (ed), *Telecommunications Law and Regulation* (5th edn, Oxford University Press 2018) 198.

¹²⁵ibid 199; Geradin & Kerf (n 24) 66.

¹²⁶Lee & Prime (n 124) 199.

¹²⁷Geradin & Kerf (n 24) 68.

¹²⁸47 USC § 254(c)(7)(k); Geradin & Kerf (n 24) 69.

¹²⁹Geradin & Kerf (n 24) 69.

¹³⁰ibid 70, citing S Rep No 104-230, 1 (1996).

¹³¹ibid 71–72.

¹³²Speta (n 70) 15; 47 USC § 253.

¹³³Lee & Prime (n 124) 234.

In addition, the Act introduced re-regulation as Congress considered that merely removing legal and regulatory barriers to entry was insufficient to ensure effective competition.¹³⁴ Economic and operational barriers could harm competition, such as refusal to interconnect or providing discriminatory terms and conditions, which require additional obligations to be imposed on incumbent local exchange carriers (ILECs) that controls the local exchange networks.¹³⁵ Thus, ILECs were required to unbundle elements of their network and provide access,¹³⁶ eg, local loop used for the last mile,¹³⁷ local switching, signalling, databases, interconnection at any technically feasible point of the network at just and reasonable rate,¹³⁸ and provide resale at wholesale rates any service the ILECs provide at retail level.¹³⁹ All carriers were required to interconnect with other carriers,¹⁴⁰ prohibited from imposing discriminatory conditions on resale of telecommunications services,¹⁴¹ required to provide number portability and dialling parity,¹⁴² access to poles, conduits and other rights of ways to competitors.¹⁴³

To complement the granting of access, access prices or the price at which competitors can purchase or lease unbundled network elements from the ILECs were regulated by the FCC and reduced through switching the price methodology.¹⁴⁴

Years after the Act's passage saw expansion of available telecommunication services, increase in wireless carriers and subscription with decrease in prices, entry of players in the wireline market and a competitive internet market.¹⁴⁵ There was a dramatic decrease in cost to subscribers of long distance and international voice services.¹⁴⁶ According to the US Supreme Court, the Act contains an elaborate set of provisions that is 'an effective steward of the antitrust function.'¹⁴⁷ It removed legal and regulatory barriers to entry, imposed interconnection obligations among competing operators, provided for access to network elements of ILECs on non-discriminatory terms to enable competitors to use the IEC infrastructure to compete, and regulated access prices to ensure a level playing field for new and smaller players. Detailed, pro-competitive regulations were enacted to promote and preserve competition, and to prevent abuse of market power by incumbent operators.

European Union

Full market liberalisation was targeted to occur by 1 January 1998 in all Member States for voice telephony and telecommunications infrastructure.¹⁴⁸ In this regard, the Full Competition

¹³⁴Geradin & Kerf (n 24) 71.

¹³⁵47 USC § 251.

¹³⁶47 USC § 251(c)(3); Geradin & Kerf (n 24) 87–88, citing In re implementation for the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Fourth Further Notice of Proposed Rulemaking, FCC Docket No 99-238.

¹³⁷Douglas Ginsburg, 'Synthetic Competition', in Francois Leveque & Howard Shelanski (eds), *Antitrust and Regulation in the EU and US* (1st edn, Edward Elgar 2009) 8.

¹³⁸47 USC § 251(c)(2)(B).

¹³⁹47 USC § 251(c)(4)(a).

¹⁴⁰47 USC § 251(a)(1).

¹⁴¹47 USC § 251(b)(1).

¹⁴²47 USC § 251(b)(2) and (3).

¹⁴³47 USC § 251(b)(4).

¹⁴⁴Ginsburg (n 137) 8; Geradin & Kerf (n 24) 89, 99. Interconnection and unbundled network elements charges were set using the incumbent's Total Element Long-Run Incremental Cost. Prices for resale of the incumbent's retail services is a retail-minus method. See Geradin & Kerf (n 24) 99.

¹⁴⁵Shelanski (n 17) 70–75.

¹⁴⁶'Regulatory Reform in the United States' (Organisation for Economic Co-operation and Development, 1999) <<https://www.oecd.org/regreform/2506672.pdf>> accessed 3 Aug 2021.

¹⁴⁷Larouche (n 115) 79.

¹⁴⁸EU Commission Directive 96/19/EC of 13 March 1996 amending Commission Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets [1996] OJ L74/13, Whereas (2) (Directive 96/19/EC); Ian

Directive¹⁴⁹ required the withdrawal of exclusive rights for the provision of telecommunications services.¹⁵⁰ It stated that new entrants should have a choice on their underlying infrastructure to be able to compete with the incumbent operator¹⁵¹ as telecommunications operators use their control of access conditions to the network to engage in unfair competition against their competitors in the services market, eg, applying excessive tariffs, using information acquired as network provider to target clients in the downstream services market.¹⁵²

Said Directive required publication of terms and conditions for interconnection¹⁵³ provided on non-discriminatory, proportional and transparent terms.¹⁵⁴ This was extended by the Interconnection Directive¹⁵⁵ which required entities with significant market power (SMP) to meet all reasonable request for access to the network including at points other than network termination points.¹⁵⁶ SMP thereunder was presumed for a 25 per cent market share of a particular telecommunications market. The presumption was subsequently changed towards a general competition law assessment of dominance.¹⁵⁷

SMP operators were mandated to adhere to the principle of non-discrimination for interconnection defined as applying similar conditions in similar circumstances to entities with similar services and providing interconnection facilities and information with the same quality and under the same conditions as provided to their affiliates.¹⁵⁸

SMP operators were also required to provide all necessary requested information and specifications,¹⁵⁹ demonstrate charges are based on actual costs with a reasonable rate of return¹⁶⁰ and sufficiently unbundled,¹⁶¹ publish reference interconnection offers that detail the components of the interconnection offer and associated terms and conditions, eg, tariffs.¹⁶² They must likewise keep separate accounts for interconnection activities and other activities.¹⁶³

With the 2002 Access Directive, SMP operators may be obligated to meet access request for specific network elements and associated facilities, eg, unbundled access to the local loop, technical interfaces, protocols or technology for interoperability of services, co-location and other forms of facility sharing, operational support systems, among others.¹⁶⁴ Similar to Directive 97/33/EC,

Walden, 'European Communications Law', in Ian Walden (ed), *Telecommunications Law and Regulation* (5th edn, Oxford University Press 2018) 148.

¹⁴⁹Directive 96/19/EC.

¹⁵⁰ibid art 1(2).

¹⁵¹ibid Recital 6.

¹⁵²ibid Recital 7.

¹⁵³ibid art 1(6).

¹⁵⁴ibid.

¹⁵⁵EU Commission Directive 97/33/EC of 30 Jun 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L199/32 (hereinafter, 'Interconnection Directive').

¹⁵⁶ibid art 4.

¹⁵⁷Consolidated Version of the Treaty establishing the European Community [2002] OJ C325, art 82; Directive 2002/21/EC of the European Parliament and of the Council of 7 Mar 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33, art 14 (hereinafter, 'Framework Directive'). See EU Commission, 'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services' [2018] OJ C159/1.

¹⁵⁸Interconnection Directive, art 6 (a).

¹⁵⁹ibid art 6.

¹⁶⁰ibid art 7.

¹⁶¹ibid.

¹⁶²ibid Annex IV (provides a list of examples of elements for further elaboration of interconnection charges, tariff structures and tariff elements).

¹⁶³ibid art 8.

¹⁶⁴Access Directive (n 66).

requirements on non-discrimination, transparency including published reference offers, accounting separation were provided which extends to the access obligations.¹⁶⁵

These regulations were said to be ‘primarily designed to manage the transition to competition and was therefore focused on the creation of a competitive market and the rights of new entrants.’¹⁶⁶ The removal of exclusive rights freed up spaces for entry to take place (and eventually the grant of general authorisation which prohibits the requirement of an explicit decision or other administrative act before providers of electronic communications network and services can provide services),¹⁶⁷ while the asymmetric regulations on SMP operators for interconnection and access protected and encouraged development of nascent competition. New entry can be facilitated as they need not put in vast sums for initial investment and can start with using the existing networks of the incumbents, while being protected from abuses of market position of incumbents.

Thus, it was recognised that the inclusion of the SMP criteria demonstrate that ‘liberalization and harmonization of the telecommunications sector did not simply mean the removal of barriers to market entry and the establishment of a level playing field between participants.’¹⁶⁸ Due to the nature of telecommunications as a network industry, together with the legacy of national incumbents, asymmetric regulation was necessary to assist new entrants. As succinctly provided for in the Access Directive, there are markets ‘where there continues to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services’ justifying ex-ante rules ‘to ensure that the market functions effectively’.¹⁶⁹

Prices for interconnection and access were regulated to ensure its cost-based character. Regulations to assist ensuring the reasonableness of prices include transparency, non-discrimination and accounting separation¹⁷⁰ to prevent margin squeeze or unfair cross-subsidies.¹⁷¹

These pro-competitive regulatory elements remain in subsequent amendments to the regulatory frameworks, eg, Framework Directive,¹⁷² Authorisation Directive,¹⁷³ Access Directive¹⁷⁴ and in the most recent consolidated European Communications Code.¹⁷⁵

As in the case of the US, the EU found that re-regulation is necessary especially in early stages of liberalisation to constrain the incumbents and ensure fair conditions for entrants.¹⁷⁶ The EU

¹⁶⁵ibid arts 9–11.

¹⁶⁶Buigues (n 59) 10; The 1999 Communications Review (n 63) v.

¹⁶⁷EU Commission Directive 2002/20/EC of the European Parliament and of the Council of 7 Mar 2002 on the authorisation of electronic communications networks and services, OJ L108/21, art 3 (hereinafter ‘Authorisation Directive’); Anne Flannagan, ‘Authorization and Licensing’, in Ian Walden (ed), *Telecommunications Law and Regulation* (5th edn, Oxford University Press 2018) 311.

¹⁶⁸Walden, ‘European Union Communications Law’ (n 148) 174.

¹⁶⁹Access Directive, Recital 6.

¹⁷⁰ibid art 11.

¹⁷¹ibid art 13.

¹⁷²Framework Directive as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37.

¹⁷³Authorisation Directive as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37.

¹⁷⁴Access Directive as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37.

¹⁷⁵EU Parliament and Council Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36.

¹⁷⁶Cave (n 59) 28.

intentionally used competition law but in an ex-ante form¹⁷⁷ in its regulatory framework ‘to ensure the development of competitive market[s].’¹⁷⁸ Competition law principles such as dominance¹⁷⁹ and market definition applied in an ex-ante manner represented the best way to a ‘fully liberalized electronic communications market.’¹⁸⁰ The effect of these measures have yielded competitive markets with new entry, new services and lower consumer prices.¹⁸¹

Malaysia

Privatisation and liberalisation in the Malaysian telecommunications industry started in the 1980s when the private sector was allowed to enter the terminal equipment market in competition with the government, with further liberalisation in the value-added networks, radio paging and mobile cellular in 1984, 1985 and 1988 respectively.¹⁸² The telecommunications state entity transitioned to a corporate body in 1987.¹⁸³

The National Telecommunications Policy (NTP), a government policy paper, laid the basis for regulatory reforms in the sector. Crucially, it stated that the NTP’s main approach is to encourage competition.¹⁸⁴ The enactment of the *Communications and Multimedia Act 1998* (CMA) created a new regulatory framework for telecommunications and multimedia¹⁸⁵ using licensing, competition and access as policy measures for the development of the sector.¹⁸⁶

The licensing structure moved from specific technologies and services to four categories of activities, ie, network facilities, network services, application services and content application services. This allowed for competition to take place at ‘different levels along the upstream-downstream continuum of the industry’ that can enhance horizontal competition and encourage convergent services.¹⁸⁷ While licensing granted by the sector regulator was still required to enter the market, licensing based on the multiple layers of the telecommunications network and service promotes competition to take place at each layer and harnesses technology to create innovative services.

Even without a national competition law, the CMA incorporated antitrust provisions for the telecommunications industry.¹⁸⁸ To protect competition, CMA penalised anti-competitive conduct

¹⁷⁷Mario Monti, ‘Introduction’, in Pierre Buigues & Patrick Rey (eds), *The Economics of Antitrust and Regulation in Telecommunications: Perspectives for the New European Regulatory Framework* (1st edn, Edward Elgar 2004) 16.

¹⁷⁸Framework Directive, Recitals 20–21.

¹⁷⁹EU Commission, ‘Commission Recommendation of 11 Feb 2003 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services’ [2003] OJ L114/45. This Recommendation identified 18 markets susceptible for ex-ante regulation including fixed and mobile call termination markets, wholesale broadband access markets. The list of markets progressively got smaller to only two wholesale markets in the most recent 2020 Recommendation. See EU Commission, ‘Commission Recommendation of 18.12.2020 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 Dec 2018 establishing the European Electronic Communications’ [2020] OJ L439/23.

¹⁸⁰Buigues (n 59) 20.

¹⁸¹EU Commission, ‘Progress Report on the Single European Electronic Communications Market 2007 (13th Report)’ [2008] COM (2008) 153.

¹⁸²Cassey Lee, ‘Telecommunications Reforms in Malaysia’ (2002) 73 *Annals of Public and Cooperative Economics* 521.

¹⁸³Azhar Kazmi, ‘State of Competition in Malaysian Mobile Telecommunications Industry’ (2006) 4 *Competition Forum American Society for Competitiveness* 86.

¹⁸⁴Ministry of Telecommunications, Energy and Multimedia, ‘National Telecommunications Policy 1994–2000’ <[https://www.pmo.gov.my/dokumenattached/Dasar/28THE_NATIONAL_TELECOMMUNICATION_POLICY_\(1994_-_2020\).pdf](https://www.pmo.gov.my/dokumenattached/Dasar/28THE_NATIONAL_TELECOMMUNICATION_POLICY_(1994_-_2020).pdf)> accessed 21 Jun 2021.

¹⁸⁵Kazmi (n 184).

¹⁸⁶Lee (n 183) 532.

¹⁸⁷ibid.

¹⁸⁸ibid.

such as price fixing, market sharing, boycott of a supplier or a competitor, tying of products and services.¹⁸⁹ It also provided for the designation of SMP operators which empowers the regulator to direct the cessation of conduct that will have the effect of substantially lessening competition in any communications market, as well as the imposition of remedies.¹⁹⁰ As such, guidelines were issued to assess substantial lessening of competition¹⁹¹ and dominance in a communications market.¹⁹² These guidelines are in accordance with assessment of competitive harm under general competition law.

The CMA also recognised how access to essential facilities is a pre-requisite in ensuring a level-playing field for competition in the telecommunications sector. Hence, the CMA imposed an obligation on network facilities providers (NFPs) and network service providers (NSPs) to provide other NFPs and NSPs and other applications and content providers with non-discriminatory access to any post, network facilities or right of way.¹⁹³ It empowered the regulator to publish Access Lists that set out facilities or services that have access obligations,¹⁹⁴ and fix maximum prices for facilities and services under the Access List (ie, 'Mandatory Standard for Access Pricing').¹⁹⁵ Further, all operators were required to provide information reasonably necessary for the negotiation, conclusion and implementation of the Mandatory Standard on Access, and maintain a Reference Access Offer (RAO) for each facility or services in the Access List that the provider is required to provide to third parties. The RAO shall include terms and conditions on which an access provider will supply the facility or service.¹⁹⁶ As a necessary complement, the regulator required accounting separation for all operators.¹⁹⁷

Malaysia's liberalisation was accompanied by regulatory reforms that emphasised the role of competition for it to achieve efficiency and quality service in the telecommunications sector.¹⁹⁸ It utilised the licensing mechanism to promote horizontal competition in services and in facilities – preventing anti-competitive issues that may arise if operators are vertically integrated. It created conditions for entry to occur and flourish by requiring access and interconnection for facilities and services and regulating charges for these. Competition entered and flourished in cellular mobile, long distance and international voice markets.¹⁹⁹

The regulatory framework recognised that features of the telecommunications industry require re-regulation in ensuring a level playing field for competitors. As such, while it did not impose asymmetric regulation on dominant operators alone, it required access for all providers including those with dominant position. Further, as it did not have general competition law that can penalise

¹⁸⁹CMA, ss 135–136.

¹⁹⁰*ibid* s 139.

¹⁹¹Malaysian Communications and Multimedia Commission, 'Guideline on Substantial Lessening of Competition' (11 Jul 2014) <<https://www.mcmc.gov.my/skmmgovmy/files/attachments/slc.pdf>> accessed 21 Jun 2021.

¹⁹²Malaysian Communications and Multimedia Commission, 'Guideline on Dominant Position' (24 Sep 2014) <<https://www.mcmc.gov.my/en/resources/guidelines/guidelines/guideline-on-dominant-position-in-a-communications>> accessed 21 Jun 2021.

¹⁹³CMA, s 149.

¹⁹⁴*ibid* s 148.

¹⁹⁵Liew Sue Yin & Joel Prashant, 'Malaysia', in Emma Wright & Kemp Little LLP (eds), *International Comparative Legal Guides, Telecoms Media & Internet* (14th edn, Global Legal Group 2021) <<https://iclg.com/practice-areas/telecoms-media-and-internet-laws-and-regulations/malaysia>> accessed 21 Jun 2021 (hereinafter 'ICLG'); Malaysian Communications and Multimedia Commission 'Commission Determination on the Mandatory Standard on Access Pricing, Determination No 1 of 2017 (20 Dec 2017) <<https://www.skmm.gov.my/skmmgovmy/media/General/pdf/MS-Access-Pricing.pdf>> accessed 21 Jun 2021 (hereinafter 'MCMC Mandatory Access Pricing Standard').

¹⁹⁶Malaysian Communications and Multimedia Commission, 'Commission Determination on the Mandatory Standard on Access, Determination No 3 of 2016' (8 Dec 2016) <<https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/No-3-2016.pdf>> accessed 21 Jun 2021.

¹⁹⁷ICLG (n 196) 162.

¹⁹⁸NTP (n 185) 15.3.

¹⁹⁹Lee (n 183) 15; Salazar (n 25) 162–163, 185.

abuse of market power, Malaysia included in the CMA ex post competition law to apply to the telecommunications sector.

The Philippines

When RA 7925 was enacted, it was considered a landmark law credited for breaking away from the tradition of monopoly. Yet, its effectiveness in promoting competition is questionable. While the law pays lip service in ensuring competition in the telecommunications market by conferring upon the NTC the responsibility to mandate a fair and reasonable interconnection at reasonable and fair level of charges, it was deliberately vague in the role of NTC in the interconnection process²⁰⁰ effectively tying their hands in regulating interconnection. It likewise did not choose to make NTC autonomous from political pressures – no fixed term of office for NTC commissioners and no specification on penalties it can impose, preventing it from fulfilling its stated mandate to foster fair and efficient market conduct through guarding against unfair trade practices of carriers.²⁰¹

Congress intentionally sought to limit the power of the regulator, with one of the principal author of the bill documented to have stated that there should be minimum discretion on the part of NTC, ‘otherwise they will go wild.’²⁰² They placed their full faith and trust in voluntary arrangements between operators as the best alternative in fostering free and fair competition, ignoring (intentionally or unintentionally) how market power possessed by the incumbent could derail the benefits of liberalisation and progress to a competitive marketplace. The Act failed to foresee the repercussions of liberalisation without re-regulation that could level the playing field between new players and those with market dominance.

Thus, due to the ambiguity of RA 7925 on competition policy, lack of pro-competitive regulations and weak enforcement powers conferred upon the regulator, post-liberalisation gains were reversed with the market developing to be dominated by two national carriers, characterised by high entry barriers, plagued with high prices, and poor quality of service. ‘[C]ompetition (in the industry) was muted as the two telecommunications giants offered basically the same prices for their services.’²⁰³

An examination of the following regulatory issues in the telecommunications industry will reveal the flaws in the Philippines’ regulatory framework, demonstrating the necessity of adapting competition regulation in the sector as did the US, EU and Malaysia.

Issue 1: Licensing

Licensing can be a means to control entry and expansion in a market. It can be used to control against entry or as a way to introduce competition in a market. For instance, the harder the licensing process is, the more difficult and delayed competition can occur through the entry of new players to challenge existing incumbents. This leads to less alternatives for the consumer and less competitive pressure on the incumbents to provide lower prices, better quality and to innovate. On the other hand, if the goal is to introduce or encourage competition, asymmetric conditions can be (and usually) imposed on the incumbent player through a license, eg, requirement to interconnect on FRAND terms (fair, reasonable and non-discriminatory), or cost-oriented rates, accounting separation.²⁰⁴

The requirement of a legislative franchise for telecommunications entities to build and operate their own networks can take up significant resources for an entity – it has to obtain approval of both houses of Congress through a legislative process before the franchise can be passed into

²⁰⁰Salazar (n 25) 249.

²⁰¹RA 7925, s 5.

²⁰²Salazar (n 25) 247, 249, citing Bicameral Conference Committee on the Disagreeing Provisions of House Bill no 14028 and Senate Bill no 11, 20 Feb 1995; Records of the Senate, 18 Jan 1995.

²⁰³Aldaba, ‘PLDT-Sun acquisition: good or bad?’ (n 77) 2.

²⁰⁴Flannagan (n 167) 294.

law. Since it is a primarily political process, political motivations can colour the grant or withdrawal of the franchise²⁰⁵ which can deter organic entry by firms.

If the purpose of requiring a franchise is to ensure that a franchisee is technically and financially capable to provide the service,²⁰⁶ there does not seem to be any reason why this cannot be accomplished by the NTC who is the agency with the technical expertise in the field of telecommunications. Moreover, requiring two licenses from both Congress and the regulator, increases the administrative and financial burden on new firms and has a disproportionate impact on smaller players that want to enter the market. It was reported in a study that 'administrative burden on start-ups, including the amount of licenses and permits required, is shown to have a potentially significant negative impact on entry rates.'²⁰⁷ A lengthy, expensive and burdensome licensing process can only forestall competition from taking place in the telecommunications sector. Indeed, the Philippines is the only one in the ASEAN that still requires a Congressional franchise to enter the industry.²⁰⁸

In contrast, the United States and the European Union have sought to eliminate barriers to entry of entities that wish to provide telecommunications services. Section 253 of the *Telecommunications Act* of the United States struck down franchised monopolies given by states,²⁰⁹ while the Authorisation Directive of the European Union prohibited any explicit decision or administrative act as a precondition for providing communications network and services.²¹⁰ The Malaysian Parliament delegated its licensing powers to the regulatory agency. Philippines, meanwhile, continue to be subject to a dual licensing scheme thereby increasing barriers to entry in the telecommunications markets. This can only prevent or delay competition from taking place and gives advantage towards the incumbent operators as they are shielded from competitive pressure.

Issue 2: Interconnection and Access

The importance of interconnection lies in being essential to create and maintain effective competition and the development of the telecommunications market. It is recognised that incumbent operators do not have the incentive, without regulation, to interconnect with another operator that it competes with.²¹¹ However, a small entrant cannot survive in the market and compete effectively against the incumbent without interconnection to the incumbent's facility and services. For example, a new entrant offering mobile telephony services cannot acquire subscribers if it cannot call subscribers of other networks. Thus, refusal to interconnect, or a similar variety of it – imposition of unfair terms, as well as delaying the process, hinders market entry.²¹²

The same applies to the broader issue of access to network facilities and services. Insufficient access by entrants or smaller players prevents effective competition from developing. This is illustrated in the case of the Philippines.

During the pre-reform era, PLDT reportedly exploited its monopoly position by refusing to interconnect with potential entrants allegedly because there was no legal mandate for interconnection or it would be difficult to adapt to its system requirements.²¹³ After interconnection was made

²⁰⁵Espos (n 62).

²⁰⁶Flannagan (n 167) 296.

²⁰⁷Swedish Agency for Economic and Regional Growth, 'Regulation and Competition – a literature review' (Report 0218, Mar 2017) 14 <https://tillvaxtverket.se/download/18.7b586e5115b13ff864b24615/1490965697446/Regulation+and+Competition+-+170331_hela.pdf> accessed 4 Aug 2021.

²⁰⁸World Bank, 'Philippines Economic Update Braving the New Normal' (Report No 104611-PH, Jun 2020) 50 <<https://documents1.worldbank.org/curated/ru/845151468185031838/pdf/104611-WP-P149001-PUBLIC-Philippine-Economic-Update-PEU-April-2016-edition-final-for-release.pdf>> accessed 27 Jul 2021.

²⁰⁹Geradin & Kerf (n 24) 71.

²¹⁰Authorisation Directive, art 3; Flannagan (n 167) 311.

²¹¹Walden, 'Access and Interconnection' (n 26) 436.

²¹²*ibid* 436–437.

²¹³Salazar (n 25) 109, 121–123; *PLDT v NTC and Express Telecommunications Co, Inc* (n 77); *PLDT v Eastern Telecommunications Philippines, Inc and NTC*, GR No 94374, 27 Aug 1992.

mandatory,²¹⁴ how it was made and at what cost were left to operators' negotiations that can be skewed if a party has a higher bargaining position to begin with due to its control over essential facilities. RA 7925 contains no details on how interconnection should be carried out, only providing that the NTC should mandate a fair and reasonable interconnection of facilities through appropriate modalities.²¹⁵ Thus, PLDT held incumbency advantages thanks to its control of the telecommunications backbone facility.

Complaints regarding PLDT's delayed or insufficient interconnection, unequal access settlements or dispute on revenue-sharing arrangements have been documented.²¹⁶

One example cited was when Bayantel was negotiating with PLDT for interconnection which was going on for months, PLDT installed phones in Quezon City, Bayantel's service area, such that PLDT won many potential subscribers from Bayantel while interconnection was stalled.²¹⁷ Another was in early 2013, when Globe's head of National Carrier Relations Division wrote the NTC complaining that interconnection with PLDT has been pending for years despite orders from the NTC and public inconvenience.²¹⁸ Likewise, despite a 1990 Supreme Court ruling upholding NTC's 1988 order for interconnection between PLDT and Express Telecommunications Company (Extelcom),²¹⁹ interconnection was postponed.²²⁰ This reportedly forced the majority shareholder to sell her shares allegedly to the PLDT's ultimate controller.²²¹ After the buy-out, interconnection occurred.

Most recently in August 2022, the new third player to enter the Philippine telecommunications market, DITO Telecommunity (DITO), filed a case with the Philippine Competition Commission for anti-competitive behaviour by the two incumbent mobile service providers. It alleged that virtually no interconnection is being provided by the two incumbents with DITO.²²²

When details of interconnection are dependent on the carriers, a dominant incumbent carrier has the incentive to abuse its position by either delaying the process, imposing unfair terms and conditions or even engaging in a vertical price squeeze. There is no reasonable incentive for dominant players to interconnect with their competitors at the soonest possible time, and at the lowest possible cost.

With respect to access to network facilities and services, particularly network elements, RA 7925 is again silent. NTC sought to fill this gap by requiring all public telecommunications entities to provide non-discriminatory access to unbundled network elements 'in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service.'²²³ In view of access issues plaguing the industry, the NTC required the development of Reference Access Offers (RAOs)²²⁴ which acts as the default offer for access services (such that access seekers

²¹⁴EO 59, 'Whereas' clause.

²¹⁵RA 7925, s 5(c).

²¹⁶Patalinghug & Llanto (n 80) 11–12; Salazar (n 25) 109, 121–123.

²¹⁷ibid 12, citing Kim Dong-Yeob, 'The Political Economy of Telecommunications Service Market Liberalization: A Comparative Study of South Korea and the Philippines' (PhD Dissertation, University of the Philippines 2003).

²¹⁸GMA News, 'PLDT, Globe interconnection problems worsen' (GMA, 27 Feb 2013) <<http://www.gmanetwork.com/news/story/296976/economy/companies/pldt-globe-interconnection-problems-worsen>> accessed 2 Jul 2021.

²¹⁹PLDT v NTC and Express Telecommunications Co, Inc (n 77).

²²⁰Salazar (n 25) 122; Alvin Capino, 'Globe's Interconnection Woes' (Manila Standard, 22 Feb 2013) <<http://manilastandardtoday.com/2013/02/22/globes-interconnection-woes/>> accessed 2 Jul 2021.

²²¹Salazar (n 25) 122.

²²²James Barton, 'Dito accuses Globe and Smart of abusing dominance around interconnection' (Developing Telecoms, 9 Aug 2022) <<https://developingtelecoms.com/telecom-business/operator-news/13856-dito-accuses-globe-and-smart-of-abusing-dominance-around-interconnection.html>> accessed 18 Aug 2022; 'Globe to NTC: Require DITO to pay P622 million interconnection penalties' (CNN Philippines, 9 Aug 2022) <<https://www.cnnphilippines.com/business/2022/8/9/Globe-asks-NTC-to-require-DITO-to-pay-interconnection-penalties.html>> accessed 18 Aug 2022.

²²³National Telecommunications Commission, Memorandum Circular No 14-07-2000 (2000), s 10 (hereinafter 'NTC Rules for Interconnection').

²²⁴Memorandum Circular No 10-7-2007 (2007), s 3.2.

do not have to enter into skewed negotiations with the access provider) from all public telecommunications entities and submitted to NTC for its approval.²²⁵ In this way, an access seeker can merely agree to the approved RAO, which will automatically be constituted as the access agreement between the parties, facilitating interconnection and/or access and promoting transparency. The Commission explained that '(r)equiring network owners to publish their own terms and conditions of providing access to their infrastructure in a RAO, and making these transparent and accessible to interested parties is an effective means of discouraging anti-competitive behavior, to the extent that it would allow the Commission to detect and remedy those terms and conditions that are unfair, unreasonable and discriminatory, and that otherwise could be reached only because the negotiating positions of the parties are grossly unequal from the start.'²²⁶ It sees itself as being vested with power to ensure that interconnection agreements are fair, reasonable and non-discriminatory.²²⁷

However, the requirement on RAO remains on paper. Carriers have refused to submit their respective offers, and PLDT has reportedly stated that the NTC cannot compel telecommunication entities to reveal interconnection terms with other carriers, characterizing it as their trade secret.²²⁸ Thus, to date, no progress has been made in reaching the objectives of Circular No 10-7-2007.

Consequently, NTC has been characterised as 'predominantly a passive licensing and administrative agency rather than a pro-active policy formulating and implementing body.'²²⁹ A 2004 World Bank infrastructure study notes that the regulatory environment in Philippine telecommunications remains weak; with weak commitment mechanisms, weak ability to handle administrative intensity and weak capacity to process information since the NTC relies on the information and testimony furnished by the regulated entities.²³⁰ The inability of NTC to enforce subordinate legislation on interconnection issues stem from the dearth of provisions in RA 7925 on obligations that should accompany an interconnection mandate, as well as the very low penalty that NTC can impose (PhP200.00 or roughly USD 4.00 per day).

In contrast to the vague provisions and gaps in RA 7925, the ex-ante regulation in place in the US, EU and Malaysia are clear on the obligations of the incumbent operators.

In recognition that incumbent operators can use their control over the network to retard competition in the services market, EU's Commission Directives specifically allows NRAs to impose obligations on operators with SMP, which includes transparency, non-discrimination, access to network elements and facilities and publication of offers. The US' 1996 Act likewise required unbundling of network elements and providing access to competitors, interconnection at just and reasonable rates and resale at wholesale rates. Lastly, Malaysia's CMA similarly imposes obligations on NFPs and NSPs to provide non-discriminatory access on facilities and services as indicated under the published Access List. All operators likewise publish a RAO.

Clearly, the Philippine regulatory framework on interconnection and access, combined with a weak regulatory agency, does more in giving advantages to the incumbent operators than in fostering competition.²³¹ RA 7925 liberalised the telecommunications market but failed to introduce re-regulation – despite its rhetoric for a healthy competitive environment. This led to lengthy interconnection disputes that prevented entrants from successfully competing against the incumbents as can be seen in today's remaining duopoly in the sector.

²²⁵ *ibid.*

²²⁶ *ibid.*, Explanatory Note.

²²⁷ *ibid.*, 'Whereas' clause.

²²⁸ ABS-CBN News, 'NTC can't compel telcos to reveal interconnection terms,' (ABS-CBN, 20 Jan 2010) <<http://www.abs-cbnnews.com/business/01/20/10/ntc-cant-compel-telcos-reveal-interconnection-terms>> accessed 21 Jul 2021.

²²⁹ Elsie C Gutierrez, 'Q & A Promoting Competition in Philippine Markets' (Congressional Policy and Budget Research Department Policy Brief No 2013-05) 19 <<https://cpbrd.congress.gov.ph/images/PDF%20Attachments/CPBRD%20Policy%20Brief/PB2013-05%20QA%20Final%20colored.pdf>> accessed 10 May 2021.

²³⁰ *ibid.*

²³¹ Espos (n 62).

Issue 3: Access Pricing Regulation

Aside from the delays in interconnection and dangers of foreclosure, another result has been that interconnection charges in the Philippines are considered among the highest in the region, averaging USD 0.10 in contrast to its neighbours with rates that range USD 0.03 to USD 0.05.²³² This translates to higher rates shouldered by consumers.

RA 7925 states that NTC should establish rates and tariffs which are fair and reasonable.²³³ It is vague what it means by these two terms.²³⁴ There is no provision on access pricing in the law aside from giving NTC this mandate that interconnection charges should be fair and reasonable. To this end, NTC sought to regulate access pricing by requiring telecommunication carriers to submit for its approval bilateral agreements on access and interconnection. Under the regulation, NTC can disapprove the agreement if the charges are unreasonable, not cost-based and/or discriminatory.²³⁵

The regulation states that charges should match the underlying costs of the interconnection 'such that when a fixed cost is incurred, a fixed charge should be imposed and when a usage cost is incurred, a usage charge should be imposed.'²³⁶ Charges must be transparent and unbundled so that the interconnecting operator do not have to pay additional components or facility it does not need. While long-run incremental cost was mentioned as a formula to calculate the charges, it provides that this will not be imposed until the NTC prescribes a specific cost methodology.²³⁷ To date, the NTC has not prescribed such cost methodology.

New players and smaller firms have complained that it is difficult to obtain favourable interconnection agreement with PLDT or the latter has been charging unreasonably high fees.²³⁸ As PLDT has a stronger bargaining position with extensive nationwide backbone transmission network,²³⁹ PLDT has been said to have managed to dictate the pace of interconnection in the industry.²⁴⁰

In one case, NTC's attempt to reduce interconnection charges between local exchange carriers and mobile carriers were reversed by the court.²⁴¹ A group of local exchange carriers sought to revise the tripartite agreement of its members with Globe, Smart and PLDT to reduce the interconnection fees from PhP4.78/minute to PhP2.50/minute. Under the existing contract, PAPTELCO members are paying transport charge to PLDT at the rate of PhP1.14/minute and access charge to the mobile carriers at the rate of PhP3.64/minute, while the access charge paid to PAPTELCOM members is only PhP2.50/minute.²⁴² Since PAPTELCOM members are small players relative to Globe, Smart-PLDT, with weak bargaining position, they would be forced to accept the short end of the stick or run the risk of exiting the market.

NTC has generally taken a hands-off approach on interconnection fees until recently.²⁴³ Interconnection charge for mobile calls was regulated only in 2016 when the NTC reduced the charge from PhP4.00 to PhP2.50.²⁴⁴ Recently in 2018, this was further reduced to PhP0.50 after

²³²Edgardo V Cabarrios, 'Competition in the Philippine Telecommunications Sector' <https://www.dlsu.edu.ph/wp-content/uploads/pdf/vcri/aki/_conferences/manilaConference/competitioninthePhilippineTelecommunicationsSector.pdf> accessed 10 May 2021; Emie V Abadilla, 'Local telecom interconnection rates highest in the Asia-Pacific region' (Manila Bulletin, 13 Jul 2011) <<http://mb.com.ph/node/326560/local-telecom-interconnection-rate>> accessed 10 May 2021; Alampay (n 79) 36–37; National Telecommunications Commission, Memorandum Circular No 05-07-2018 (19 Jul 2018).

²³³RA 7925, s 17.

²³⁴Aldaba, 'Opening up the Philippine Telecommunications' (n 62) 10.

²³⁵NTC Rules for Interconnection, s 15.

²³⁶ibid s 43.

²³⁷ibid s 45.

²³⁸ALDABA, 'Opening up the Philippine Telecommunications' (n 62) 24–25.

²³⁹ibid 24.

²⁴⁰ibid.

²⁴¹*Smart v National Telecommunications Commission and Philippine Telecommunications Companies, Inc*, CA-GR SP No 129894 (12 Dec 2014).

²⁴²ibid citing NTC Decision dated 19 Dec 2011.

²⁴³National Telecommunications Commission, Memorandum Circular No 02-10-2011 (24 Oct 2011).

²⁴⁴National Telecommunications Commission, Memorandum Circular No 09-11-2016 (24 Nov 2016).

it recognised that Philippines has one of the highest rates compared to its neighbours (Singapore, Myanmar and Brunei have no charges, while Thailand has PhP0.56, Malaysia PhP0.40, Indonesia PhP0.93).²⁴⁵

The belated regulation can partly be explained by the fact that in practice, submission of inter-connection agreements by carriers is only made for notification purposes and not approval. RA 7925 says only submission is necessary, while also stating that rates for interconnection should be approved, giving rise to conflicting interpretations. Even worse, 'NTC's ability to intervene has been undermined by the problem of information asymmetry.'²⁴⁶ Contrary to legislations seen in the three case studied above, no transparency of information or requirement of disclosure is obligated on carriers or, at the very least, on those with SMP. As NTC does not have the necessary information from the telecommunications companies, it is difficult to provide for reasonable and cost-based rates. With this situation, 'NTC failed to aggressively enforce and speed up interconnection'²⁴⁷ and could not engage in meaningful regulation of interconnection charges even in cases where charges are skewed in favour of the dominant party.²⁴⁸

More generally on access prices for unbundled network elements and other services, these are left between market players and NTC has not regulated the same.

The experiences of the US, EU and Malaysia markedly differs from that of the Philippines. The 1996 Act provided for pricing standards for interconnection and network elements.²⁴⁹ Malaysia's regulator published a Mandatory Standard on Access Pricing²⁵⁰ that detailed the different access services with a ceiling price, pursuant to its powers under the CMA. The EU Directive allows NRAs to impose obligations relating to cost recovery and price controls for specific types of interconnection and/or access on those markets where there is lack of effective competition,²⁵¹ specifically warning that operators with SMP may apply a price squeeze 'whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition.'²⁵²

Unfortunately, RA 7925 seems oblivious to the dangers of leaving access issues in the hands of private parties, especially in an environment where dominant operators hold control over essential facilities. It not only forgot to mention and provide for access as a broader obligation than interconnection; it likewise failed to provide for obligations on non-discrimination, transparency, provision of necessary information and how interconnection and access prices should be regulated. As a stark contrast, the EU has a directive specifically for access where SMP operators can be obligated to provide unbundled access to bottleneck facilities, facility sharing, access to systems, technology, etc. Transparency of terms and conditions of access and interconnection to prevent discrimination and delays in negotiations and ensure interoperability²⁵³ are concomitant obligations.

Regulatory reforms to introduce and foster competition

As in most jurisdictions, the Philippine telecommunications industry developed under a monopoly environment. However, the industry was unable to maximise and sustain the gains it experienced post-liberalisation. One explanation for this outcome is the country's failure to introduce re-regulation of ex-ante competition rules to encourage and preserve competition

²⁴⁵National Telecommunications Commission, Memorandum Circular No 05-07-2018 (n 234).

²⁴⁶ALDABA, 'Opening up the Philippine Telecommunications' (n 62) 24.

²⁴⁷ibid.

²⁴⁸ibid 23.

²⁴⁹47 USC § 252(d).

²⁵⁰See MCMC Mandatory Access Pricing Standard (n 196).

²⁵¹Access Directive, art 13.

²⁵²ibid Recital 20.

²⁵³ibid Recitals 16–17.

after liberalisation, compared to other countries that have seen its telecommunications develop robustly.

The next step is to identify what reforms could be introduced, taking pointers at the frameworks adopted by the US, EU and Malaysia in the sector. These recommendations can likewise be adopted by similarly situated developing and less developed countries.

A new telecommunications law should be enacted with the following features.

First, no legislative franchise should be required prior to providing any type of telecommunications service. Consumer welfare is not served by transforming a regulatory approval process focused on technical and financial qualifications into a political matter. It merely deters and/or delay entry of firms that translates to less competition leading to higher prices, less innovation and lower quality of service. Going further in dismantling the franchise system, the provision of telecommunications service may be covered under a general authorisation scheme observed in the EU that allows any firm who wants to provide such service to do so without having to undergo a lengthy approval process. In this way, the country can encourage investment into and development of the industry by removing legal and regulatory barriers to competition.

Second, interconnection with details on how it is accomplished should be explicitly mandated under the law, regardless of SMP status, and on how to arbitrate enforcement disputes. This ensures end-to-end connectivity for the consumers' benefit and encourages entry by new and even small firms in the market increasing competition.

Third, the law should allow the regulator to impose additional obligations on operators with SMP, especially the obligation to meet access requests for SMP operators on specific network elements and facilities. It is ideal for a general list of access items be provided under the law to reduce ambiguity and possible challenges to the interpretation of the regulator as what happened with the FCC in the US.²⁵⁴ For example, as reflected in the EU's Access Directive, access obligations can apply to active and passive network elements, unbundled access to the local loop; technical interfaces, protocols or other key technologies for interoperability; operational support systems; other associated service; facilities sharing, etc.²⁵⁵

Fourth, interconnection and access obligations must be accompanied by additional obligations on non-discrimination, transparency including publication of a reference interconnection offer and disclosure of accounting information and network specifications. A mandate for interconnection and access may be rendered nugatory by being pressured to accept unfair terms and conditions, and by failing to obtain indispensable information for the access seeker to negotiate effectively.

Thus, the obligation of non-discrimination should be spelled out under the law to mean providing equivalent terms and conditions in equivalent circumstances, and providing information and services to third parties under the same conditions as it provides for its own services or of its subsidiaries.²⁵⁶ Meanwhile, market players should be required to provide necessary information for interconnection and access – this includes cost information, network and technical data, prices, among others, which facilitates access negotiations and regulation of access prices. The requisite information for a reference access offer should be provided under the law, similar to what the EU did in its Access Directive where Annex II specified the minimum list of items that must be included in a reference offer for wholesale network infrastructure access.

Fourth, the law should provide that access pricing is subject to regulation. While there are several pricing methodologies available used in the telecommunications industry, each has their own advantages and disadvantages.²⁵⁷ A study on the appropriate methodology should be undertaken by the regulator which best achieves the goal of promoting competition between operators but at

²⁵⁴Geradin & Kerf (n 24) 86–88.

²⁵⁵Access Directive, art 12.

²⁵⁶ibid art 10.

²⁵⁷Geradin & Kerf (n 24) 25–44.

the same time preserving incentives to build new and upgrade existing network and facilities.²⁵⁸ This is crucial as access charge levels have an impact on entry – a study demonstrated how entrants initially begin as resellers as this entail low sunk costs before investing in switching and conveyance and then in the local loop.²⁵⁹

Lastly, the law should confer sufficient powers to the regulator to enforce its provisions, ensure its institutional capacity and independence through fixed-term limits and financial autonomy.²⁶⁰ Steeper penalties must be provided for to deter firms from flouting the provisions of the law and regulations as seen taking place in this industry.

The role of the antitrust authority in enforcing general antitrust rules will complement ex-ante telecommunication specific regulation by the sector regulator. Since general competition law seeks to protect existing competition and does not structure markets to create conditions for competition or establish it as sought to be done by telecommunication specific regulation, it is imperative that the success or gains of the latter is safeguarded by the antitrust regulator.²⁶¹

Abuses of market power in the sector should be investigated and penalised to deter further anti-competitive behaviour that seeks to foreclose competitors from the market, as well as those that exploit consumers. Anti-competitive mergers and acquisitions should be prevented at the first instance so that market players will continue to exert competitive pressure on one another and keep prices low and high innovation levels. Eventually, should competitive markets emerge from the efforts of re-regulation, general competition law can supplant sector specific regulation.²⁶²

This article sought to demonstrate that post-liberalisation, re-regulation in the telecommunications industry is a must to ensure a robust and competitive industry beneficial to consumer welfare. Developing and less developed countries with poor ICT industries must act with all haste to regulate for competition today. Otherwise, we will not see the emergence of a sustainably competitive telecommunications market that can bridge the digital divide and deliver economic growth opportunities to the citizens.

²⁵⁸ibid 34.

²⁵⁹Cave (n 59) 29.

²⁶⁰Gigo Alampay, 'Reforming Philippine Telecommunications Law for Convergence and Competition' (30 Apr 2015) <<https://www.coursehero.com/file/16099019/ICT-LAW-REPORT-April-30-2015/>> accessed on 11 Aug 2021.

²⁶¹Stiglitz (n 55).

²⁶²Shelanski (n 16) 101.