The US Free Trade Agreement – how constrained is telecoms regulation?

Are the pricing of unbundled local loop and the provision of "safe harbour" on fibre loop investments constrained by our FTA with the USA, as Primus argues?

By 31 March, the US Trade Representative (USTR) must report on the compliance of US trading partners with multilateral and bi-lateral trade agreements involving the US. The process involves carriers and lobby groups providing "comments" (ie complaints) and "replies" to the USTR [1].

Traditionally, the focus of complaints to the USTR is on leased line pricing, mobile termination rates and on developing countries like China. This year, Primus has singled-out Australia with the express purpose of getting the USTR to "exert pressure" on the Australian Government when he meets our Minister for Trade.

Prime beef

Primus makes a number of allegations but in the context of its fear that "Telstra's campaign is gaining traction with the Prime Minister's office", the key objective is clearly to cut across any cabinet instruction to the ACCC to average unbundled local loop (ULL) prices.

Primus argues that averaged ULL prices would constitute anti-competitive cross-subsidisation and cannot be "cost oriented". Telstra argues that ULL price averaging follows from its regional retail price parity obligation and the OECD's observation that such arrangements should be mirrored in corresponding wholesale prices or artificial regulated arbitrage windows will occur. Under the USFTA, the Australian government has the discretion to direct the regulator in policy matters affecting universal service.

In the USFTA (and WTO reference Paper), there is no precise definition of the term "cost oriented" and, if there were no policy considerations, the level of de-averaging will depend on what is practical and reasonable to do. For example, traffic costs vary by time of day but changes in de-averaged prices will change traffic distribution; and unit costs, ad infinitum.

The WTO's first (so far, only) attempt to regulate trade in telecoms services at the behest of the USTR fudged the task of clarification: "The panel's decision runs 227 pages with 1052 footnotes, yet it does not cite – much less rely upon – any scholarly work on telecommunications regulation, industrial organization, antitrust policy, international trade, or any other branch of economics." [2]

The biter bit?

A second important objective for Primus is to protect its investment of up to $60 million in DSLAMs to take advantage of ULL. It claims that if the government aids Telstra in its fibre loop modernization, this would constitute "indirect expropriation" of competitive carriers' stranded DSLAM investments. I do not believe that would be the case if it were

policy to forbear from regulating all fibre investments [3]; and the US practices such forbearance itself giving rise to similar dilemmas [4].

Could the Primus claim for compensation for any "indirect expropriation" have actually triggered Telstra's kite flying about seeking compensation from the government for expropriation in the form of below cost access pricing (AFR, 13 February)? If Telstra follows through with this apparent threat, it would be decided in the High Court rather than the Australian Competition Tribunal where the price of line sharing is now being reviewed.

Australia looking good

Australia has a good track record in liberalization – I have argued in previous columns that it has been over zealous and misguided in some respects. I think it could be argued that it has gone further than the US since the USFTA specifically protects mobile carriers in the US from having to provide mobile number portability and allows US States to exempt carriers in their respective jurisdictions from offering number portability and preselection ("dialing parity").

There is an open invitation to carriers to attend the USTR dialogue with our Minister for Trade. What problems have Australian carriers encountered in the US that are inconsistent with the USFTA?

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[1] The Primus comment on Australia and Telstra reply can be found at http://www.ustr.gov/Trade_Sectors/Telecom-E-commerce/Section_1377/Section_Index.html

[2] Hal Singer and Gregory Sidak, *Uberregulation without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services*, 57 Federal Communications Law Journal 1 (2004)

[3] Annex 11-B, clause 4 of the USFTA says "Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations".

[4] See *Scrapping the CAN: overseas approaches* in Exchange Vol. 17 No. 47, 2 December 2005