

Draft WGIG issues paper on competition policy, liberalization, privatization and regulations

This paper is a 'draft working paper' reflecting the preliminary findings of the drafting team. It has been subject to review by all WGIG members, but it does not necessarily present a consensus position nor does it contain agreed language accepted by every member. The purpose of this draft is to provide a basis for the ongoing work of the group. It is therefore not to be seen as a chapter of the final WGIG report, but rather as raw material that will be used when drafting the report. This draft working paper has been published on the WGIG website for public comment, so it will evolve, taking into account input from governments and stakeholders.

Introduction

This paper was developed to outline the issues and to help clarify the different perspectives on competition policy, liberalization, privatization and regulations.

The paper primarily deals with competition policy, liberalization and privatization in the telecoms sector given that this is the most relevant area of these policies or models to information and communication technologies (ICTs). The paper is not meant to recommend any particular economic model over another, and aims to recognize that there is no one solution for all economies.

There are a number of longstanding multilateral policy frameworks for telecommunications (telecoms) such as the telecom regime historically negotiated in the ITU and, more recently, the WTO's GATS.

These frameworks can be seen to relate to Internet governance in two ways. First, there is an indirect relationship. Multilateral telecom policy can impact the industrial organization of markets and traffic in the underlying telecom environment, for example, public switched networks and private leased circuits and networks, and to a significant extent the Internet "rides on top" of these and is impacted by how flexible or restrictive they are. Many of the telecoms carriers involved and subject to such multilateral rules provide Internet access services, and their policies and practices impact the ability of others (e.g. smaller ISPs) to provide such services.

Second, there are direct relationships. With regards to the transactions and content conducted over the Internet, the rules and commitments undertaken pursuant to the WTO instruments (GATS, GATT, TRIPs) may apply to varying degrees and hence can be viewed as part of the collective governance of such commerce.

In terms of Internet infrastructure, and providers of the facilities, services and applications, there are unresolved ambiguities which involve the international community, especially as technological convergence and the movement of "traditional" telecom services onto the Internet, for example, Voice over Internet Protocol (VoIP), becomes more widespread and central to the global information infrastructure.

1. Issue

Competition policy, liberalization, privatization, and regulations are seen by some actors as fundamental building blocks of the enabling legal, policy and regulatory environment to promote the information society and provide the necessary infrastructures to respond to the needs of all users.

In addition to road systems, airports and electricity, a modern telecoms system is seen as an essential pre-requisite for economic growth. Indigenous industries and home-grown companies of all sizes need the basic infrastructure of business to thrive at home, compete internationally, and contribute to overall economic growth. As liberalization, if coupled with adequate oversight and public service requirements, enables the provision of more, better and innovative communication services, it is an essential pre-condition for countries looking to maximize ICTs for economic growth and social development.

Some actors believe that competition, when applied to telecommunications, leads to more and better services at more affordable rates, and that experience supports this view. This is particularly relevant to Internet connectivity. Today in many countries, high telecommunications prices are constraining the Internet market. The constrained market, in turn, makes it economically unfeasible for Tier 1 Internet Service Providers (ISPs) to establish an Internet Access Point (IAP) in the country leading to even higher costs for the country's ISPs to reach the nearest IAP outside the country.

The successful transformation of a monopolistic telecom market to a competitive one requires effective and independent regulators coupled with fair and efficient judicial appeal systems. This is particularly important when the incumbent enters competitive markets and is the monopoly provider of the essential facilities upon which competitive services depend. Without effective regulatory authorities and fair judicial systems, viable competition is unlikely to emerge.

Regulatory frameworks are a means to authorize new operators' or service providers' market entry; ensure fair and non-discriminatory access to essential facilities; facilitate the roll-out of universal access; and provide for wholesale interconnection offerings. It is essential that regulations be transparently formulated and clear to all market players.

However, liberalization and the competition it brings are means, not ends. Governments are encouraged to consult the relevant stakeholders to decide and articulate at the outset what their objectives are. These objectives may differ from country to country and can include:

- Attracting new investment;
- Upgrading national infrastructure;
- Creating jobs;
- Contributing to improving universal access;
- Improving services, pricing and choice for the end-user community;
- Bridging internal and international digital divides;
- Encouraging innovation.

Governments are often concerned about privatization because of a perceived loss of control of resources that are considered to be strategic or revenue generating for the state.

2. Attribution to category / ies

This issue is relevant to the following categories:

- Equitable Distribution of Resources
- Access for all [Universal Access]

3. SWOT Analysis of the present system

An assessment of strengths and weaknesses of the present system (internal factors) and opportunities and threats (external factors)

Competition, liberalization, privatization, regulations

Strengths

The system is both a high-level one, and allows for flexibility at a national level to introduce these components in a tailor-made way to meet different priorities, needs, levels of development and differing structures. Once commitments at international and national levels are made there are strong systems in place to ensure compliance.

There are many examples and resources that demonstrate the positive effects of competition, particularly in the context of telecommunications, on the flow of information in and out of countries. ¹

Weaknesses

One of the weaknesses is that while existing bodies such as ITU and WTO provide rules and a platform for negotiations, the degree of participation is voluntary. Although members are not required to be signatories to certain agreements they remain sovereign with respect to implementing them. There are provisions for a dispute resolution procedure with respect to implementation of certain WTO agreements. Members are also not mandated to continue to make offers and further liberalize their markets to any particular level. However, some would mention this as a strength, as it allows each country to freely determine and adjust its policies in time.

Some view the present system of enforcing competition policy, liberalization and privatization through reliance on an international body---the WTO---as being a weakness. This view considers the ability and credentials of the WTO to elicit consensus from developing countries in particular as being wanting in recent years and the recent focus in the WTO on agricultural trade issues is seen to have a negative effect on telecommunications and ICT issues.

Opportunities

The opportunities may differ from country to country and can include:

- Attracting new investment;
- Upgrading national infrastructure;
- Creating jobs;
- Contributing to improving universal access;
- Improving services, pricing and choice for the end-user community;
- Bridging internal and international digital divides;
- Encouraging innovation.

Threats

Possible challenges of competition may involve higher prices for local calls and monthly subscriptions, for instance, while the tariff rebalancing takes place. However, both prices for local calls will go down in the long run as consumers will enjoy a greater variety of services and pricing choices as a result of competition.

In addition, under monopoly, the incumbent operators generally are large and powerful employers who provide substantial direct and indirect revenues to governments. Introducing competition creates a threat to the incumbents both as employers and as social contributors. As the incumbent struggles to become more competitive, this may result in initial job losses, however as the incumbent becomes

¹ ICC's Telecoms liberalization: an international business guide for policymakers, details this issue and can be found at: http://www.iccwbo.org/home/menu_electronic_business.asp#tools

more competitive, it will have the ability to develop new services and reach out to new markets at home and abroad resulting in better security for employees in the medium to long term.

One risk, however, is associated with the liberalization process not being fully successful or completely implemented. If liberalization only leads to the establishment of a few big private players, some actors highlight that the resulting market will be oligopolistic, and prices, which are no longer subject to governmental oversight, may be determined through a cartel. This could lead to higher or increased prices. An adequately strong anti-trust policy is a requirement to successfully complete liberalization processes.

Also, if local players are too small, they might prove too fragile to resist global competition in a liberalized market. This might lead to the local industry being acquired or destroyed by foreign competitors, thus putting control over national telecommunications outside of the country, and denying opportunities for the creation of local job places and for the local reinvestment of profits.

4. Actors

Governments are the main actors, both as member states of the international organizations where International regulations and trade policy is discussed and in setting their national regulatory frameworks. Governments also are the key actors in taking steps to liberalize their telecommunications markets domestically as well as through bilateral and multilateral agreements.

Other potential stakeholders include telecommunications companies who are interested in investing and potential Internet Service Providers (ISPs) and investors in general.

5. Forums [see section regarding Actors above]

WTO
ITU

(a) Who participates

WTO: governments, observers

ITU: governments, ITU sector members including sector members from the private sector

(b) Nature of forum

Intergovernmental primarily

6. Governance mechanisms

(a) Objectives of the rules system

Rules systems can have different objectives, which might be complementary or, at times, contradictory. At present, there are two primary systems agreed at the international level by governments. These are the International Telecommunication Regulations (ITRs) and various agreements of the World Trade Organization (WTO, notably the General Agreement on Trade in Services (GATS))

The objective of the ITRs is to promote the development of telecommunication services and their most efficient operation while harmonizing the development of facilities for world-wide telecommunications.

The objective of the WTO agreements is to encourage liberalization of telecoms markets to increase international competition.

Both instruments provide a multilateral system for governments to negotiate and to make binding commitments and establishes rules and safeguards for such commitments. Both are intended to lead to a wider array of better quality and more affordable services to the consumer.

Some countries have indicated that there may be inconsistencies between the ITRs and the WTO agreements, other countries do not support this view. The ITU is currently studying the question of whether, and if so how, to revise the ITRs.

(b) Content of principles, norms and rules

The competitive safeguards required should be consistent with the 1996 WTO Reference Paper and may include:

- Non-discriminatory access to unbundled services, on non-discriminatory terms;
- Non-discriminatory, transparent, and cost-oriented interconnection terms for competing service providers;
- Non-discrimination in notice and specifications for network technical data affecting the attachment, interconnection, and deployment of services and equipment;
- Non-discrimination in access to proprietary customer data subject to the customers' option to have such data withheld;
- Preventing cross-subsidies from services or facilities provided on an exclusive or dominant basis;
- Establishing appropriate cost-accounting practices;
- Providing for audits and regulatory oversight.

Licenses are seen by some actors as one of the keys to success in the liberalization process. They provide the basic certainty and legal security investors and lenders need to invest the huge amounts of money necessary to install or to upgrade telecoms infrastructure. For telecoms liberalization to bring a fully competitive telecoms market, the view is that market entry should be subject to as few barriers and restrictions as possible. The General Agreement on Trade in Services (GATS) and the 1997 Agreement on Basic Telecommunications of the World Trade Organization (WTO) include trade rules applicable to licensing. Signatories of the Agreement on Basic Telecoms, as well as countries joining the WTO, are required to comply with these rules on licensing:

- They should be objective and non-discriminatory;
- They should be transparent;
- Numbers of individual licenses should be unlimited except in the case of limited resources such as spectrum;
- Criteria for granting licenses should be based on the objective of encouraging full competition;
- Any remaining foreign ownership restrictions should be progressively removed.

As outlined in the introduction section of this paper, there is ambiguity between telecoms and the Internet, and the application of multilateral rules, including the WTO disciplines, to new services provided with new and convergent technologies. There are differing opinions on the application of specific agreements, such as the WTO Reference Paper to these services. One of the challenges is to determine how multilateral agreements apply to new technologies and whether they are responsive to market trends.

7. Adequacy measured against criteria / benchmarks set out in the WSIS Geneva, Declaration of Principles:

Both the WTO and ITU are multilateral intergovernmental bodies. They provide platforms for discussion and action towards greater liberalization, market access and for setting appropriate and necessary regulations at a global level.

The ITU has sector members that provide private sector input on telecommunications regulations, and other matters within the scope of the ITU's mission and mandate. The WTO is primarily a forum for governments only.

Input from other stakeholders comes from government outreach and consultations within their countries, at their discretion.

Civil society groups express serious concerns about the lack of actual possibilities to participate and influence decisions at these institutions. Also, the strong pro-liberalization policy enacted by the WTO has been the subject of significant complaints – including street turmoil – by citizens and civil society groups, who view these policies as favouring a few strong countries and big industry players, and work against developing countries, small and medium enterprises, citizens, and consumers.

In theory they could participate in the work of ITU either by paying the full sector membership fees or by requesting waiver of fees. But the current cost,² and the complexities of the process for requesting waiver of fees are well beyond the means of most Civil Society groups active in these processes. This is in sharp contrast to the practice in both ICANN and virtually all other (taxpayer-supported) UN agencies, some of which have hundreds of accredited civil society organizations (CSO). Very few CSOs have been permitted to participate in the ITU over the past 140 years, and at present there appears to be little prospect that member governments will change the rules to facilitate such participation.

WTO

The WTO is multilateral. Some actors may not feel the process is as transparent or accessible as they consider necessary.

ITU

The ITU is multilateral. Some actors may not feel the process is as transparent or accessible as they consider it should be.

8. Additional comments

Some actors believe that ex ante regulation should be limited to particular bottleneck situations: preventing dominant suppliers from abusing their market power;

² <http://www.itu.int/members/index.html>

In the context of the 2004-2005 biennium, annual fees range from 71 000 Swiss francs for Full Sector Member; 31 500 Swiss francs for membership in ITU-R only or ITU-T only; 15 750 Swiss francs for membership in ITU-D only; 3,937.50 Swiss Francs for Associates participating in the work of ITU-D and 1,968.75 Swiss Francs for Associates from developing countries; In the context of the 2002-2003 biennium, the annual amount of financial contribution for Associates participating in the work of ITU-R or ITU-T is 10'500 Swiss Francs.

others believe that the scope for ex ante regulation should be broader; yet others believe that it should be narrower. Some believe that markets for value added services, including Internet services, are already competitive and therefore do not require ex ante regulation, others disagree with that view. There is general agreement that regulatory intervention may be needed when experience shows that the existing competitive system has not met the general public interest.

Some believe that basic telecommunication markets (including packet switched networks according to WTO) do require ex ante regulation until a truly competitive market exists; others disagree with that view.

Some believe that the 1996 WTO Reference Paper, which sets out the essential competitive safeguards for telecoms liberalization, should be used as the source of the appropriate ex ante regulation for countries wishing to embrace a full liberalization process; others disagree with that view.

A recent study³ outlines challenges to meaningful participation of developing country delegates in ICT Governance institutions, including the ITU and WTO, including:

“Although many developing countries are members of established intergovernmental organisations with ICT responsibilities, such as the ITU and WTO, there is not as yet an effective connection between the agendas of these organisations, their decisions, and the international development goals set out in the UN Millennium Declaration. In spite of considerable effort, there is still a “missing link” between ICT and development at the international policy level.

“It is important to emphasise that effective participation is not limited to what happens before and during meetings. The goal of inclusion means that developing countries must also have the capacity to assess the effect of decisions made by international ICT fora on their own development objectives, and to participate in the implementation of these decisions in their own countries, whether or not they were present when they were made.”

³ A study by the Commonwealth Telecommunications Organisation and Panos London, “Strengthening Developing Country Participation in International ICT Decision-Making”
http://www.cto.int/publications/louder_voices_final_report.pdf