Regulation of over the top services

Overview

In my previous theme report, I argued that over the top services should be regulated to ensure the protection of users, and to ensure a level playing field for functionally equivalent services. However, I also argued that care must be taken to avoid inappropriate regulation (such as regulating the functionality of software), that the costs of regulation must be borne in mind to ensure that regulation is proportionate, and that, given the “over the top” nature of the services at issue, implementing regulation would be a challenge.

This theme reports examines each of the three main regulatory approaches — individual licences, class licences / authorisations, and open access — and argues that a regime based on general authorisation is the most appropriate for the regulation of over the top services. However, unlike the current approach, to be effective, such a regime would need to at least pan-European in nature, incapable of national variance — the outcome would be one set of requirements applicable to the whole of Europe.

Basic regulatory approaches

Communications regulation can be split into three main models.

In the early days of liberalisation, the individual licensing approach was attractive, enabling the regulator to select carefully from the possible providers, potentially raising money through auctions in the process, and then imposing a list of conditions, to ensure that the provider operated in the manner, and to the standards, expected. In particular, in the absence of a wider regulatory regime, individual licences were the only real option — if the conditions of operation did not exist in general law, they must either be included in the specific authorisation to operate, or else did not arise at all.

Likewise, an individually-awarded licence represented a reasonable security for investment, which was particularly important where the newly-licensed provider would need to roll

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out physical network infrastructure, whether connecting a cable to every house in a country, or else deploying a mobile network with sufficient coverage.

Whilst a good starting point for a regime beginning to liberalise, individual licences are a very cumbersome form of regulation. Once a regulator has established the basis of competition in its market, a move towards general authorisation is likely desirable — it reduces the load on the (probably under-resourced) regulator, and better enables an increase in competition, by allowing any entrant to provide services, as long as it complies with the regulatory regime. By removing barriers to entry, innovation is more likely to flourish, producing better, faster and cheaper services.

Since, generally speaking, regulation should only be imposed where market forces alone would not suffice, once a market is competitive, regulations should be limited to those which are strictly necessary — in particular, those which achieve outcomes which would not be attained by market forces alone.

If the market was perfectly competitive, and all desirable outcomes could be attained through competition alone, open access would mean that anyone was permitted to run a service. If a service does not meet the needs of the market place, there will be insufficient support, and it will fail; open access, in essence, is a Darwinistic form of regulation.

Currently, the European approach is still in the phase of general authorisation — with the 2002 regulatory framework, it was no longer permitted to require a provider to seek an individual licence, except for resources considered to be “scarce.”

**The best approach for over the top services?**

The need to regulate over the top services is fundamentally different to the need in the early days of liberalisation to regulate traditional telecommunications services. Rather than trying to effect and then manage the liberalisation of a previously

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2 Managing spectrum as a scarce resource, requiring individual licences, is perhaps driven as much by a desire to raise money than by regulatory need — in particular, Yochai Benkler has argued persuasively that the real scarcity was never spectrum, but computational power, which, thanks to advances in computer technology, is no longer the case.
restricted environment, with over the top services, we have an existing flourishing market, in which new entrants are regular, and the need for stimulus of investment and innovation minimal. Regulation of over the top services, one might argue, is perhaps more akin to attempting to control the wild west.

As I have argued previously, the need for regulation reflects the need to ensure consumer protection, on the basis that the current range of over the top services provides little in the way of privacy protection, or guaranteed access to emergency calling. Secondly, since over the top services are competing with traditional services, with people switching to Skype, FaceTime and Facebook chat to carry out conversations which previously would likely have been conducted over telephone lines, there is a need for a level playing field, with similar outcomes regulated in similar manners.

**Individual licensing regime?**

It is hardly worth considering individual licensing, but for the sake of completeness. An over the top service requires little in the way of investment to get started, and, as the current market place demonstrates, there is no need to stimulate competition artificially; there is already considerable evidence that individuals and companies are innovating to develop and deploy new services.

Such intrusive intervention would never be tolerated, and is entirely disproportionate to the goals it would be seeking to achieve.

**General authorisation / class licence?**

The simplest approach, at least within Europe, might be to extend the definition of “electronic communications service” to cover over the top services. Doing so would bring such services within the scope of the existing regime, automatically levelling the playing field, and establishing a need to comply with core consumer protections. In terms of simplicity and clarity, this approach may have much to commend it.

There is, however, a considerable problem.
Currently, general authorisations apply on a per-market basis; for example, a provider in the UK needs to comply with the regime as set out by Ofcom, whilst, in Germany, it is the principles established by the Bundesnetzagentur which are relevant. Although European directives set out a range of powers and restrictions on the actions of national regulators, the approach is to create harmony and not equivalence, allowing national regulators to design a local regime (within the scope of the overall framework) which best suits local conditions.

Per-market geographic regulation only makes sense, though, where the regulated service respects the geographic boundaries. Otherwise, a service provider would need to comply with multiple sets of laws — at worse, this may entail conflicting requirements whilst, at best, it is likely to constitute a “race to the top,” requiring the most conservative and demanding approaches from each country to be adopted, resulting in a very highly regulated and challenging operating environment. Neither is desirable as a regulatory approach.

For traditional services, this is no problem, as there are clear geographical constraints. If I wish to offer broadband in the UK, I need to have assets in the UK, and a connection to my subscribers’ houses. Likewise, if I wish to provide cellular coverage, I need to maintain a network of base stations. By requiring physical assets in the country, I am tied unambiguously to that jurisdiction.

This is not the case with over the top services; with no clear tie to any given country (excepting, perhaps, the situation in which the service requires a centralised server, which must be located somewhere), regulation requiring a service to comply with the laws of many different countries would be unworkable. This is the general situation in which we find ourselves with the Internet currently, struggling with the problem of applying national laws to a supranational network.

If we attempted to regulate over the top communications services by requiring providers to tailor the service to each country, we would increase the cost of delivery for anyone who complied. Whilst one market might consider that it is justified that services received within its borders must comply with its laws, this approach is shortsighted, recognising only that market’s individual needs — the argument does not recognise that
enforcing per-market requirements on a supra-national service would constitute, overall, a disproportionate burden, given the plethora of applicable, potentially conflicting, laws.

The outcome, in reality, would be a climate of non-compliance. Regulators would end up looking for regulatory sticks, and other threats, which could be used to enforce compliance, rather than designing a regime which recognises the needs (indeed, differences) of over the top services, but which remains focussed on securing the necessary desirable outcomes.

To design a more positive outcome, power would need to be taken away from national regulators, in favour of a more broad reaching authority. Whilst it is perhaps unrealistic to think that countries around the world would be able to agree on a unified approach to communications regulation, it may be easier to achieve this within Europe, with one Europe-wide regulation on the subject, incapable of national variance.

With a Community-wide authorisation regime, a service provider would need to take into consideration just one set of requirements for the whole of Europe. In doing so, not only would the interests of consumers across Europe be protected, but service providers would operate with a more certain regime than would exist if the current approach were simply extended to over the top services.

Of course, this does not solve all the problems, as it would not make provision for services which originate outside the EU. Without a global standard, or even a standard agreed between the countries most likely to give rise to new over the top services, there will always be the question of the enforcement of regulation against extra-territorial services. Given the potentially intractable nature of the problem, it may be that a good-and-achievable solution is better than a perfect-but-impossible solution, with a need to accept the inherent weaknesses.

With this in mind, perhaps the best solution for regulating over the top services would be to:

a.) establish a pan-European general authorisation regime, which does not require local implementation;

b.) ensure that the regime imposes the least rigorous and least expansive obligations possible to obtain the desired outcome, keeping the regime as light touch as possible; and
c.) attempt to agree these rules with other key markets — for example, the US — in an attempt to ensure that European-originating services are accepted in the US, and vice versa.

Open access / market-based regulation?

As with individual authorisations, it is questionable whether there is any merit in discussing an approach of open access. Whilst, to a libertarian, such an approach is attractive, it requires that the desired beneficial outcomes can be achieved in the absence of regulation.

As argued in my previous theme report, this is not demonstrated in the market at the moment — too few over the top services enable the calling of emergency services, for example and, without commitments as to privacy, it is questionable whether all services are of an adequate standard of protection.

In any case, if over the top services were to remain unregulated, the playing field as between traditional and over the top services would not be level. To resolve this, one would either need to ensure that traditional providers had certain benefits, unobtainable by over the top service providers, to counteract the regulatory imbalance, or else remove regulation across the board, leaving regulation to market forces for all communications services. As argued above, this is unlikely to achieve the desired outcomes. Similarly, it is unlikely that any market which adopted such an approach would comply with obligations under GATS and ABT, which would give rise to additional complexity.

Conclusion

To regulate over the top services, it is argued that an approach of general authorisation is the most desirable. However, recognising the supranational nature of the services, the regime would need to be at least pan-European, and ideally wider — exactly the same regulatory regime must cover all countries in Europe. With this, at least, a provider of an over the top service in one European country could be assured that the service is compliant with every state, resulting in a genuine single market.

Dealing with non-compliant services would remain a challenge, since lack of assets within Europe would restrict the regulator’s ability to sanction such services. One potential solution — but by
no means a desirable one — would entail blocking services at the border, effectively establishing a firewall around Europe, but considerable thought would need to be given to such an approach before it could be recommended.