

Broadband NGA and regulation: different approaches

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Introduction

Rather than discuss the detail of NGA regulation, I would like to offer a few observations on different approaches to regulation and in particular the relationship between regulation and the wider political process. My view is that the most important “missing link” in the UK NGA debate is a clear policy steer on where we want to get to – that is, what a good outcome would look like from the public interest perspective. The regulatory framework should follow on from that policy steer, not determine it.

It is instructive, in this context, to look at the contrasting approaches to NGA regulation in the UK (and most of the rest of Europe) – which I would describe as largely technocratic – and those in much of the Asia Pacific region – which are often driven more by political imperatives.

The technocratic approach is typically carried out by experts in their field, drawing on evidence and research, within a set of agreed rules. The more political approach involves a much closer link between political goals and regulatory initiatives, with little dividing line between the two.

I don't want to argue today that either approach is better than the other.

But because they can lead to very different regulatory decisions and in turn to outcomes, we need to understand fully why we might choose one approach over the other. We need to understand the risks and rewards of the different approaches. Are we in favour of a market-led approach even if the outcome of that approach is likely to be uncertain in timing and uneven in distribution? Or would we prefer to achieve a faster and more extensive NGA roll out, even if we have to invest public funds or tilt the regulatory framework to achieve our aims?

In the end this is not a choice for regulators, but for government. As Ed Richards said in his recent speech on NGA – “there are big strategic choices to be made”

The technocratic approach

Ofcom is perhaps the finest example of the technocratic approach in the world, involving highly qualified individuals, assessing evidence, making careful analytical judgements, in search of the “right” answer

Many of the things Peter Phillips spoke about in his presentation are consistent with this approach and hard to disagree with:

- Need to encourage efficient investment, not highest levels of investment
- As far as possible market-led
- Regulation to promote or mimic competition
- Careful assessment of reasonable rates of return for risky investments
- Careful consideration of the nature of and length of any transitional period
- Detailed analysis of markets and SMP
- And so on.....

There are huge benefits associated with this type of approach:

- Transparency and accountability
- Intellectual rationale and clear evidence base
- Some degree of certainty about the principles to be applied
- Efficient outcomes, if the market can be made to work.

But there are some drawbacks too:

- Not certain to produce the right result or the right result fast enough if the fundamental building blocks of market competition are not there (for example, if there is inadequate infrastructure competition, high entry barriers etc)
- Requires some very complex analysis and decision taking on behalf of the regulator in a complicated and fast changing market – can we be sure they will get it all right?
- May underplay wider social and economic costs and benefits – harder to quantify and take into account, and hence may have insufficient weight in any final judgement
- Regulator may have to balance conflicting duties and make policy trade-offs – which might be more appropriately done by elected officials rather than regulatory experts.

The more overt political approach

Contrast this with the approach taken in some leading Asia Pacific countries (here I am drawing on the essay by Steve Burdon in the Ofcom book: Communications: the next decade, which I co-edited).

Burdon describes how many governments in Asia Pacific “pro-actively manage competition, guided by clearly set benchmarks for the achievement of national interests”

Decisions on telecommunications and media issues are, he says, impossible to separate from the political process given their perceived importance in economic and social developments. “high profile and emotive issues which are critically important to electoral constituents”

In other words, countries from Hong Kong to Japan to Korea in their different ways have taken political decisions about the importance of NGA and then created the instruments to deliver those objectives.

This often means detailed development plans, with the main stakeholders – government, regulator, key players – all involved in planning and implementation. It also means commitments from government and regulator about the regulatory framework, designed to help create some investment certainty.

Could this approach be applied in the UK?

What would this look like if we decided to apply some or all of this sort of approach in the UK. How would Ofcom have to change its approach? Would it feel like a good thing?

Putting it bluntly, what “pro-actively managed competition in the national interest” often boils down to is “doing deals”

You (usually the main Telco(s)) invest, and we (government or regulator) will give you something in return.

What sort of deals might we imagine? I can think of three, but there are probably many more;

First, there may be a “deal” to reduce/remove regulation of NGA in return for investment commitments:

For example:

- Reliance on ex-post rather than ex-ante measures?
- Forbearance from regulation for a period of time?
- Forbearance in those geographic markets which offer the prospect of NGA competition?
- A commitment not to introduce price regulation for access to NGA, just a non-discrimination requirement (esp. if functional separation)?

The main objection to this approach is the risk of abuse of monopoly power should it result in a single dominant NGA provider. But I believe this deserves at least a second look:

- For example, it is not obvious that a monopoly NGA provider would always have an incentive to price users off the network – rather, it might well find ways of price discriminating to increase usage and get investment payback?
- Convergence may be redefining the extent of competition form adjacent markets – for example many of the services offered via

NGA might also be available on other platforms e.g. satellite, which offers some competitive challenge

- The prospect of monopoly fixed line provision might spur entry by wireless services, again adding to competition.

Finally, to borrow the phrase used by Ed Richards when discussing a possible NGA digital divide – that might be “a nice to have problem”.

The second type of “deal” I would classify as “Pro investment regulation”

This might involve:

- A clear position on net neutrality, to allow flexible pricing models
- A clear position on USO, to avoid excessive costs for NGA providers
- Short transitional phase – to allow a quick move from copper to fibre
- An end to a functional separation requirement for NGA

The third type of “deal” would involve more direct government action.

For example:

- Explicit fixed term monopoly franchises for NGA provision, with funds or other privileges attached, in return for investment commitments, perhaps in those areas in which commercial provision is unlikely.
- A clear and aggressive Government strategy as a major buyer of broadband services, to help guarantee demand
- Encouraging other public bodies, such as the BBC, to commit to supporting NGA in various ways e.g. content provision and promotion.

I am not suggesting that this is a coherent package, or that each and every suggestion is of value in the UK context. But these are some examples of

the initiatives we could be evaluating if we want a more pro-active approach to NGA roll-out.

In conclusion

There is no single right regulatory approach – we need to work out where we want to get to and then decide the funding (if any) and regulatory framework which will help take us there.

While an overt political approach of the type used in some Asia Pacific markets may be inappropriate in the UK context, this does not mean we can learn no lessons from the methods adopted elsewhere – it would be useful to have an in-depth look at why those countries chose their particular route to NGA, what assessments were made and why, and whether we should adapt any of their methods for our own context. This could be a real job for the technocrats! At the very least, it may be possible for Government to reach a clear decision on the preferred UK strategic or policy direction, which could then give better guidance to Ofcom as it develops the more detailed regulatory framework.