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Cloud Computing: the reality; government procurement; and regulation/anti-trust: Address at Communicasia Singapore

16 June 2010

In June 2010 we addressed the Cloud Computing stream at the Communicasia conference, focussing on (a) how real the risks are, (b) issues for government procurement, (c) how legally to expedite transition from legacy to cloud computing contracts, and (d) the prospect of regulatory action as cloud computing emerges.

This paper is linked to three other June 2010 papers: (a) *Public Sector procurement and cloud computing* (b) *Cloud Computing for public sector lawyers* and (c) *Cloud Computing: Regulatory/Anti-trust risks and solutions.*

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Realism about cloud computing risks

In 2009, Bernard Golden wrote an excellent article in CIO called, *The Case against Cloud Computing*. He focussed on a number of perceived problems, and solutions.

We later did the same in CIO from a legal perspective in *The Case against cloud computing….revisited*.

We both concluded that perceived problems:

- are not always so serious after all;
- are often manageable; or
- have solutions on their way.

One of our key learning's was to compare cloud computing not against perfection but against the status quo. The debate often,

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however, compares the risks against nirvana, not against reality.

For example, are security issues with cloud computing overall worse than security issues that currently exist in typical business environments, with their high "people" risk? And is security really now the big risk anyway that many thought was the case in earlier cloud computing days?

Are the lousy SLAs typical of cloud computing really that much worse than what legacy providers offer (or the cloud computing offerings as they improve over time to attract large customers)?

Will quality of service really be that much more of an issue?

Yes, all these things are risks to consider. But they should be assessed realistically.

Government action and procurement

Government can influence markets in multiple ways. This includes the ability to regulate and to pursue regulatory action. We deal with regulation as to cloud computing below and also in our article, *Cloud Computing: Regulatory/Anti-trust risks and solutions*.

But the influence is much wider. For example, the size of Government's ICT spend means it has considerable market clout. Choices between and among cloud computing and legacy solutions can substantially impact the marketplace. The UK regulator, Office of Fair Trading, has relevant guidance for Government in markets: *Why competition matters - guide for policy makers*. This is highly relevant to Public Sector Cloud Computing.

Note also the related reports for the Office of Fair Trading by Frontier Economics published on the OFT website earlier this year. Choices should be made wisely, taking into account the broader impact of Government action and procurement on the market.

This is a particularly acute issue in relation to the evolution of cloud computing. Governments are starting to make choices between and among legacy and cloud computing options, and the particular structure. For example, one option is to limit the cloud to servers and systems operated only by government entities (the so called G-cloud).

We outline further details in our related article, *Public Sector procurement and cloud computing*.

Anti-trust and regulatory issues

While the rise of cloud computing presents opportunities for enhanced markets and competition, the reverse is possible too. Customers are potentially locked into particular solutions whether legacy or cloud based.

Many say there should be requirements for interoperability between systems and solutions, to enhance competition (to enable systems to work with each other; to avoid being "locked in" with one vendor etc).

Even for those with a "walled garden" approach, some argue that it is in their commercial interests, in the medium to long term, to accommodate interoperability. Otherwise they'll be left behind.

Commercial drivers are one thing; regulating (or pursuing regulatory remedies such as anti-trust claims) is quite another. Where should regulation draw the line?

This month's decision by the US regulator (FTC) to investigate Apple over the iPhone is an example of how issues could play out in a cloud computing context. The iPhone operates within a walled garden, discouraging interoperability (such as particular software for use on the phone) without Apple approval and ticket-clipping. Yet it is a great success story… so far.

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Should regulators step in, in relation to a service that has been available for only three years? Would innovation – which is fundamental to competition and successful markets – be reduced if Apple couldn't have the walled garden?

These are far from simple issues, with genuinely different views possible.

In a 12 June article on this development for regulator FTC, and Apple, the Wall Street Journal neatly summarised the dilemma:[1]

> "The iPhone was just introduced three years ago, and all of a sudden (Apple is) being accused of being a monopolist? To me, it's absurd," said Gary Shapiro, president of the Consumer Electronics Association, in an interview. "They don't even have a dominant position in smart phones – that's Blackberry."
>
> However, some antitrust enforcers say that if they wait until a tech company has cornered a market it may be too late. The technology sector has powerful "network effects" that, some say grant outsize advantages to first movers and make it particularly difficult for competitors to break in.

The same kinds of issues potentially come up in relation to new cloud computing apps. Should regulators act sooner or later? Would regulators look at an innovative, yet walled-garden, cloud computing solution within 3 years?

[1] *Apple's Mobile Rules To Get FTC Scrutiny*, The Wall Street Journal, 12 June 2010.

Commissioner Kroes of the European Commission has an interesting perspective on this. We develop that theme further in our related article, *Cloud Computing: Regulatory/Anti-trust risks and solutions*.

Are there quick ways out of legacy contracts to enable early cloud computing uptake?

A related issue is the perception that, under contract, the customer is stuck with the current supplier and type of service.

These perceptions can delay the introduction of the benefits of new services such as cloud computing.

However, organisations are not always stuck with legacy contracts and it is worth getting a legal review to see what early change is possible. By various means the company may be able to, entirely legitimately, get out of the existing agreement, or re-negotiate, more easily than appears at first sight.

A close review by legal specialists may show there is the ability to do so. Re-negotiation, applying a broader and more lateral approach, may also be possible. After all, many contracts are re-negotiated during their term. While legacy suppliers have incentives to retain their legacy revenues, some may be persuaded that it is best to try and move with the customer as it migrates to cloud solutions.

In a different context, we have dealt with the ability to re-negotiate informative contracts mid-term. See our article, *New Deals for Tough Times*. This provides some useful tips.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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