A short note on the regulation of broadcasting in an independent Scotland

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A SHORT NOTE ON THE REGULATION OF BROADCASTING IN AN INDEPENDENT SCOTLAND

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Executive summary

The Scottish Government has not presented a plan for the regulation of radio and television in its prospectus for independence, merely a few hints. This is despite its aspiration for a transition to independence and accession to the European Union in only eighteen months after the referendum.

The proposed regulatory architecture, the competition and consumer authorities, together with a multi-sector regulator, is sufficiently different from the existing system to require substantial primary legislation.

The Scottish Government has forgotten the need for a body to license and manage spectrum. Existing licences will have to be renewed, if only in Scotland, otherwise they will have to be split into Scottish and UK licences. The new Scottish licences will need to be based on Scottish statutes, regulations, authorities and courts. This will require two public consultations, each of several months duration.

A second omission is the authority for content which would license broadcasters under a broadcasting code. Again, licences would have to be split and renewed. Additionally, a new advertising standards body, with the associated codes, would be required. Other regulatory bodies omitted from the documents are for gambling and for the protection of children using the Internet.

The proposal to allow the BBC to broadcast from March to December 2016 outside the structures of Scottish laws, courts and regulators needs to be carefully considered. Equally, the proposal to honour its spectrum licences beyond 2017 needs further elaboration. Arrangements for the collection of television licence fees would need to be in place by March 2016.

In order to comply with the EU acquis, the Scottish Parliament would be required to enact primary legislation, in particular ensuring the independence of the broadcasting regulator. The laws and institutions would be required by March 2015, to allow one year, for the preparatory consultations, issuing of licences and the building up to full operations of the various regulatory bodies.

Keywords: Telecommunications, Internet, Radio, Television, Broadcasting, Regulation.

JEL codes: d43,d44,d45,d63,d72,d78,h41,h54,k21,k23,l12,l13,l41,l44,l52,l96,o38.
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1. Introduction

The Scottish Government (SG) has set out its “prospectus” for an independent Scotland, containing scant information on the future regulation of radio and television. The proposals are incomplete and insufficient, resulting in significant areas of uncertainty, which impairs the prospects for growth of the broadcasting and cultural industries. Considerable further work is required before September 2014, in order to put in place a plan that could be implemented in the event of a “yes” vote in the referendum, especially given the proposed very short transition to independence in March 2016.

Such a plan needs to encompass the transition of the licensing, management and regulation of spectrum, and of the regulation of content, including systems of appeals and the constitutional protections of privacy, free speech and media diversity. It also needs to be compliant with the European Union (EU) acquis (the body of treaties, laws, recommendations and so on), given the declared intention of all major political parties that Scotland become a member state of the EU.

For the regulation of the Internet and telecommunications the “prospectus” sets out some proposals, providing slightly greater detail than for broadcasting, but far from complete or sufficient. Some further information was provided in an earlier “green paper”. Similarly, some possible arrangements for the protection of consumers have also been described. In neither case is it clear whether these are the final positions of the Scottish Government, with only some of the proposals being included in the “prospectus”.

The plan for economic regulation is a significant move away from the present United Kingdom model, which comprises the Competition and Markets Authority (CMA), a non-ministerial department of the Department for Business, Innovation & Skills (BIS), and sector regulators for energy, rail, telecommunications and water. It is proposed that Scotland have single authorities for:

- Consumers;
- Competition; and
- Multi-sector regulation (MSR).

There is no mention made of the regulators for content or for spectrum.

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2 A related omission concerns gambling, with no proposal for a replacement for the UK Gambling Commission.
7 The CMA resulted from the combination of the Competition Commission and the Office of Fair Trading (OFT), effected by the Enterprise and Regulatory Reform Act 2013.
The principal legislation is currently the Communications Act of 2003, which transposed a group of EU directives on “electronic communications”. Additionally, the Wireless Telegraphy Act of 2006 contains measures for the management and licensing of spectrum. The Broadcasting Act of 1996 provides for the regulation of radio and television broadcasting, both terrestrial and satellite. In principle, it would be a simple matter to convert these three statutes into Scottish acts. However, the structural changes envisaged would make it difficult to “roll over” the Communications Act, suggesting it would be easier for the Scottish Parliament to start from scratch with the relevant EU directives in order to transpose them afresh. This would present a constitutional problem concerning the transfer of the powers needed to enact such legislation and challenges over the time required to debate topics of considerable complexity and of a frequently contentious nature.

The general view is that an independent Scotland would become a member state of the European Union, either by means of Article 48 or 49 TFEU. Such processes are complex and often protracted, with regular reports by the European Commission on negotiations with the accession and candidate countries in the Western Balkans, Turkey and Iceland. One of the concerns under “Chapter 10” has been to ensure not only that EU directives and subsidiary legislation have been enacted, but also that they are enforced. In particular, the EC has been concerned that efforts were required to ensure the political and financial independence of public service broadcasters “by having sustainable funding and transparent rules for appointing board members”. The EC noted the lack of “functional media self-regulation” and problems of “informal economic pressure” on broadcasters. Iceland, which has long been a member of the European Economic Area and thus largely compliant with the acquis, applied for EU membership, but then stopped the negotiations. Nonetheless, the EC had provisionally closed 11 of 23 negotiating “chapters”. It found that in a number of areas, the administrative capacity for effective implementation and enforcement of EU rules and policies was not fully in place. In 2012, the EC observed that the “independence of the national regulatory authority has to be strengthened further with the amendment of the Media Law”, while it also needed safeguards for its financial viability. A similar assessment would apply to Scotland, with the apparent weakness of planning being a likely cause for concern.

The next section considers what would be required to “honour” the existing licences. This is followed by analyses of the obligations and options for regulators of spectrum and of content. Proposals for the future of the BBC are then reviewed. Finally, conclusions are drawn.

2. The meaning of honour

The Scottish Government states that it would “honour” the existing licences for terrestrial and satellite radio and television:

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Following independence the Scottish Government plans to honour all existing TV and radio broadcasting licences to their expiry, maintaining access to all the existing programming and content that people currently enjoy. (Prospectus, p. 19)

However, it does not expand on what this might mean.

Some of these licences are for operators purely within Scotland, while others are for the United Kingdom as presently constituted and would need to be split – one licence for Scotland and another for the rest of the UK (see Table 1). Additionally, a growing number of over the top (OTT) services are available to Internet users in Scotland (e.g., Netflix, Spotify and WhatsApp) without any licence or general authorisation.

Table 1 Classes and examples of broadcasting licences

<table>
<thead>
<tr>
<th></th>
<th>UK-wide</th>
<th>Within Scotland</th>
</tr>
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<tbody>
<tr>
<td>Terrestrial radio – LW</td>
<td>Radio 4</td>
<td>-</td>
</tr>
<tr>
<td>Terrestrial radio – MW</td>
<td>Classic Gold</td>
<td>Moray Firth Radio</td>
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<tr>
<td>Terrestrial radio – FM</td>
<td>Classic FM</td>
<td>Radio Clyde 1</td>
</tr>
<tr>
<td>Terrestrial radio – DAB</td>
<td>BBC</td>
<td>Digital One</td>
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<tr>
<td>Terrestrial television</td>
<td>Channel 4</td>
<td>Glasgow TV</td>
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<tr>
<td>Satellite television</td>
<td>Sky TV</td>
<td>-</td>
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</tbody>
</table>

All existing broadcasting licences were issued by the United Kingdom authorities based on powers granted by British statutes, in conformity with EU directives and treaties. To “honour” the licences would require the relevant UK statutes to be “rolled over” or in some way recreated as Scottish legislation. The licences contain a variety of responsibilities on the part of broadcasters to UK regulatory authorities (e.g., observance of broadcasting codes and the reporting of statistics), which issue, oversee and can modify or cancel the licences, together with systems of appeal. These would all have to be replicated. Thus there would have to be Scottish:

- Statutes;
- Regulator(s);
- Licences; and
- A system of appeals.

Additionally, there would be Scottish laws governing libel, official secrets, privacy and so on. All of which would ultimately be judicable in Scottish courts, save where EU directives enabled cross-border broadcasting, in which case programming would be regulated by the relevant foreign authority, subject to the courts of that country.

The licences must not merely be “honoured”, but the terms and conditions must be clarified. Minimally, the licences would all have to be re-issued, if only to state that they were now licences for Scotland or some part thereof, that they were issued under a Scottish statute and that they were to be regulated by new Scottish bodies for content, signal distribution, spectrum and advertising, with litigation in Scottish courts. Certain licences contain coverage provisions, which might need to be restated in terms of the geography of Scotland.12 Where licences would become trans-national, for example, for

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12 Given Scotland has one quarter of the population density of the UK, the same coverage obligation in Scotland would incur substantially greater costs.
Border Television, Sky TV and Channel Four, then it would be necessary to comply with applicable EU directives and recommendations, which requires clarification.

The new Scottish authorities for spectrum and content would need several months prior to independence to set out their draft policies for licensing, to hold public consultations on these, to finalise their policies and then to conduct consultations on individual licences. Allowing for the recruitment of senior staff, this would require a legal framework in place by March 2015, in order that licences could be clear of legal hurdles before the day of independence.

3. A regulator for spectrum

The United Kingdom regulatory authority created by the Communications Act 2003 is the Office of Communications (OFCOM), responsible for spectrum management and licensing. The Scottish Government has made clear that it wishes to change OFCOM substantially, effectively eliminating its present character. Instead:

- Competition law powers (derived from the Enterprise Act of 2002), would be removed from OFCOM to the Scottish successor to the CMA;
- Consumer powers would go to the unitary Scottish Consumer Authority; and
- Sector powers for telecommunications and the Internet would go to the proposed MSR.

However, it does not indicate where spectrum management would be located.

References in the “prospectus” to spectrum are obscure and tangential to its management. For example, on page 320, there is mention of cooperation in the regulation of spectrum between OFCOM and its counterpart in the Republic of Ireland, COMREG, hinting at the existence of a Scottish spectrum regulator. What is clearly omitted is which body would implement the intended policy that:

In an independent Scotland, the Scottish Government will have direct control over the way in which spectrum licences are issued, ensuring maximum availability of mobile telephony and broadband throughout Scotland as a whole, including our rural areas (Prospectus p. 289).

In order to avoid technical interference and in pursuit of economic benefits, spectrum is managed by a global governance system presently involving the United Kingdom engaging with and being a member of:

- International Telecommunication Union (ITU);
- Conference on European Posts and Telecommunications (CEPT);
- EU Radio Spectrum Committee (RSC); and
- EU Radio Spectrum Policy Group (RSPG).

An independent Scotland would be expected to join and participate in the first two bodies and, once it was a member state of the EU, the last two.

The reference to OFCOM cooperating with COMREG, apparently refers to the work of minimising interference, for example, along the border in Ireland and some services in
the westernmost Wales and the Isle of Man.\textsuperscript{13} Along the future land border with England and in the Solway Firth it would be necessary to avoid interference between, for example, FM radio stations, with some loss of service being unavoidable.

The options for the Scottish Government would be to assign spectrum management and regulation to:

- A unit within a ministry;
- The multi-sector regulator; or
- A dedicated agency.

Given its proposed overall regulatory structure, any of these would be plausible, though the dedicated agency would seem the most effective, combining expertise and independence. The UK formerly had a separate Radiocommunications Agency.\textsuperscript{14}

4. A regulator for content

At present, broadcasting is regulated by the Content Board of OFCOM. Its Content and Standards Team deals with complaints of possible breaches of its Broadcasting Code including issues of harm, offence and breaches of privacy.\textsuperscript{15,16} OFCOM has delegated to the UK Advertising Standards Authority (ASA) the regulation of advertisements, based on a number of codes which the ASA has developed.\textsuperscript{17} The principal legislation is the Broadcasting Act 1996, supplemented by the Television Broadcasting Regulations (UK SI 2000/0054).

The hacking of mobile phone mailboxes by newspaper journalists led to the appointment of an inquiry by Lord Leveson.\textsuperscript{18} Following his report, HMG created, by means of a special Royal Charter, a Recognition Panel to approve the body that replaces the Press Complaints Commission (PCC).\textsuperscript{19}

There is no indication in the prospectus of where the Scottish Government intends to place the content regulatory functions of OFCOM, the ASA and the PCC. The “green paper” had hinted that it would be separate from economic regulation, but the “prospectus” failed to confirm this point.\textsuperscript{20} Certainly, judgements about content regulation might be thought to sit oddly alongside what would be largely economic regulation in the multi-sector regulator and the competition authority.

The Audiovisual Media Services Directive (2010/13/EU) amended and replaced the Television without Frontiers Directive (89/552/EEC), intended to facilitate broadcasting

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\textsuperscript{13} OFCOM manages spectrum on behalf of the Crown Dependencies.


\textsuperscript{15} The OFCOM Broadcasting Code is available at: http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/

\textsuperscript{16} See the Broadcast Bulletins: http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/

\textsuperscript{17} http://asa.org.uk/


\textsuperscript{19} http://www.pcc.org.uk/

\textsuperscript{20} “Capacity will be developed within the new regulator to advise on the regulation of broadcasting content.” (Prospectus, p 407)
between EU member states and to limit the need for licensing in each country. Article 2 (1) of which requires that:

Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

The Directive sets out how content regulated in one member state may be broadcast to another, as would be the case between Scotland and the rest of the UK, after independence and accession to the EU treaties.

While most member states have a media regulator, there is no direct obligation to create such an authority. There is flexibility in the structures, for example, the Belgian constitution assigns responsibility for media to its Flemish, French and German language communities, resulting in each having its own regulator, with a coordinating committee. Scotland could create a standalone entity or one combining press and broadcasting regulation, alternatively it could create separate English and Gaelic language regulators, or all four. Whichever is chosen, the bodies would need to be fully operational well before independence, in order to publish and to consult on the applicable codes.

The European Commission has paid considerable attention to the independence of media regulators, having recently completed a consultation following the preparation of a report. It is an issue frequently raised with accession and candidate countries, given concerns that governments have been too directly involved in media regulation and ownership. When the Scottish Government eventually explains its proposals for media regulation it will need to set out how the independence of the body or bodies concerned would be ensured.

Representatives of media regulators participate in EU governance networks, both an informal group and the European Platform for Regulatory Authorities (EPRA), helping to address issues arising from broadcasting across borders. Representatives of the Scottish media regulator(s) would be expected to participate in this work, at least from independence, if not sooner.

Even if Scotland was not a member state of the EU, the European Convention on Transfrontier Television would apply.

At present movies shown in cinemas and available for download and streaming are subject to a system of rating by the British Board of Film Classification. No proposal has been made for a Scottish counterpart.

A similar omission concerns the Gambling Commission.

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21 It was transposed by Audiovisual Media Services Regulations 2009 (UK SI 2009/2979) and The Audiovisual Media Services (Product Placement) Regulations 2010 (UK SI 2010/831).
25 http://www.epra.org/
27 http://www.bbfc.co.uk/
Arrangements for Internet content regulation presently include:

- Child Exploitation & Online Protection Centre (CEOP);
- Internet Watch Foundation (IWF);\(^\text{20}\)
- UK Council for Child Internet Safety (UKCCIS);\(^\text{30}\) and
- UK Safer Internet Centre.\(^\text{31}\)

No indication has been made about the replacement or replication of these bodies.

While the EU directives do not require an independent regulator for broadcasting, as they do for telecommunications, the creation of at least one body is unavoidable. Thus the Scottish Government needs to explain the structure and powers it envisages both for regulation of content and of advertisements. In particular, it needs to set out mechanisms to ensure the independence of that body from government. It must also decide on the mechanisms for the regulation of the press and the Internet, how it would deal with services that compete, but can be on-demand, rather than broadcast, on paper or on the Internet.

5.  The future of the British Broadcasting Corporation

The British Broadcasting Corporation (BBC) operates under a Royal Charter due to expire at the end of 2016, which will be renewed that year by HMG for whichever parts remain in the UK.\(^\text{32}\) The Scottish Government proposes to allow the BBC to continue broadcasting in Scotland until the end of 2016 and to receive licence fees from homes in Scotland. However, the Secretary of State has indicated that on leaving the UK, Scotland would also leave the BBC.\(^\text{33}\)

In the event of a yes vote, from 2017 the Scottish Government has stated that the BBC would be replaced by a state-owned Scottish Broadcasting Service (SBS). A complex barter arrangement is then proposed by which programmes produced in Scotland would be swapped for channels from London and Salford. Specific undertakings have been made about the continuation of a strange selection of programmes, including *Dr Who*, *Eastenders* and *Strictly Come Dancing*, always presuming the BBC continues to produce these.

The Scottish Government has not indicated which body would take over from the BBC the collection of television licence fees. A logical assumption would be the SBS, acquiring whatever resources, if any, the BBC in Scotland uses for such activities.

The interim arrangements raise complex legal issues. The BBC would on the day of independence be a foreign broadcaster for which there are provisions in the EU Directives, always assuming Scotland was an EU member state.

\(^{28}\) http://www.gamblingcommission.gov.uk/
\(^{29}\) https://www.iwf.org.uk/
\(^{30}\) https://www.gov.uk/government/policy-advisory-groups/uk-council-for-child-internet-safety-ukccis
\(^{31}\) http://www.saferinternet.org.uk/
\(^{32}\) DCMS (2010) *Broadcasting: An agreement between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation*. Cm 7853 Session 2010-11. The previous agreement was in Cm 6872.
The Scottish Government appears to wish to recognise a Royal Charter as an authority for broadcasting in Scotland, raising an issue unaddressed in the “prospectus”, about the status of such charters, their preparation by the Privy Council Office and their subsequent sealing by HM The Queen. A number of professional bodies and all universities operate under such charters, which would periodically require amendment and renewal. Consequently, some sort of replacement mechanism is required for the Privy Council Office, presumably something less obviously mediaeval than recreating the Scottish Privy Council, abolished at the time of the Union of the Parliaments.

The Scottish Government states it would honour all licences. However, it is unclear whether this includes the spectrum licences held by the BBC for analogue and digital radio and digital television. In any event, the BBC is unlikely to wish to broadcast in Scotland, if it is not receiving licence fees or their equivalent.

Presumably the existing BBC licences relating to the UK for medium wave, FM, DAB and DTT should be split, with those in Scotland being assigned to the SBS. The BBC long wave licence could not be split and would be retained by the BBC in London.

It is far from clear what the Scottish Government envisages happening from January 2017. The BBC channels are evidently expected to continue, while the SBS would presumably also begin to broadcast. While there appears to some space on DAB and DTT for additional channels, it may be that some BBC broadcasts in the MW and FM bands would have to be lost, even if the BBC was willing for them to be broadcast.

The role of the BBC Trust is:

34... to get the best out of the BBC for licence fee payers. We set the strategic direction of the BBC. We hold the Executive to account for its performance of its functions, and for its compliance with the law, with regulatory requirements, and with the policies, guidelines and codes that we set.

It operates in parallel with the OFCOM Content Board. For three-quarters of 2016 it would seem to be left exercising its functions, outside the reach of the Scottish Parliament and courts. The arrangements would be governed by the EU directives.

There is no indication of whether the SBS would have a body similar to the BBC Trust or would be under a media regulator.

6. Conclusion

The only plausible explanation for the omission from the prospectus of an area of such importance as broadcasting is the desire to avoid a conflict with the “red tops” over press regulation. Had the Scottish Government set out proposals for the regulation of broadcasting, then it would have been asked where the boundary lay between radio, television, the Internet and the printed media. This presents two problems, one of technological neutrality, where legislation needs to treat commercial actors even-handedly, avoiding regulatory arbitrage, and the highly contentious issue of press regulation, made especially difficult in the light of the behaviour of some journalists, which necessitated the Leveson Inquiry. It seems likely that the Scottish Government, in

34 http://www.bbc.co.uk/bbctrust/
order to avoid setting out a regulatory regime for the printed press, simply omitted all
mention of the regulation of content of any sort.

If the transition to independence were to be longer, for example, until March 2018 or
2020, then the need for early planning would be greatly diminished. It is the imminence
of that transition and the need to comply with the EU *acquis* that necessitates careful and
detailed planning in 2014 and not later. This is essential in order to reduce the risk of
mistakes and to provide for the legal certainty needed by commercial operators.

Contrary to the claims of several commentators, Scotland is not compliant with the EU
*acquis*. The UK is broadly compliant, but secession would require the replication of the
laws and institutions required by the EU *acquis*, together with evidence that they are
effective. There are a surprising number of omissions in terms of essential regulatory
bodies that would need to be replicated.

The Scottish Government now needs to set out a framework for the regulation of radio,
television, web sites and the printed media. This need not be the final institutional
arrangements, but does needs to be a plausible transition plan for its chosen timetable of
eighteen months, taking the full range of institutions, laws and licences from their present
United Kingdom basis to a Scottish framework of laws, institutions, licences and
regulations. It must also fill in the gaps, such as the absence of a spectrum regulator, a
broadcasting authority, a gambling commission, an advertising standards authority and
Internet protection bodies.

It is strangely ironic that the SNP has entirely ignored the issue of the independence of
regulators in its plans for Scottish independence. It would be essential to set out how the
institutions would be guaranteed to be free from inappropriate interference from
government.
A SHORT NOTE ON THE REGULATION OF BROADCASTING IN AN INDEPENDENT SCOTLAND

Abbreviations

AM  Amplitude modulation
ASA  Advertising Standards Authority
DAB  Digital audio broadcast
DCMS Department for Culture, Media and Sport
DTT  Digital terrestrial television
COMREG Commission for Communications Regulation (Republic of Ireland)
EC    European Commission
EEC  European Economic Community
EU    European Union
FM    Frequency modulation
HMG  Her Majesty’s Government
ITU  International Telecommunication Union
LW    Long wave
NOTW News of the World
OFCOM Office of Communications
OFTEL Office of Telecommunications
PCC  Press Complaints Commission
SG    Scottish Government
SI    Statutory Instrument
TV    Television
UK United Kingdom of Great Britain and Northern Ireland
WRC  World Radiocommunication Conference

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