By Ewan Sutherland

Media and telecommunications after independence

Introduction

In 1999 the parliament of the United Kingdom "devolved" powers to a newly created Scottish parliament, including press regulation, but not for competition, broadcasting or telecommunications. To complicate matters, an assembly was created in Wales and, following the peace settlement, another assembly in Northern Ireland. Each was different, with the UK Parliament holding different powers in respect of England, Northern Ireland, Scotland and Wales.

In 2011 the Scottish National Party (SNP) won the elections to the Scottish Parliament, promising a referendum on independence. Following agreement with the UK government on the necessary powers, it is to be held in September 2014. The possibility therefore is for partitioning off around 8 per cent of the UK ICT ecosystem, splitting markets for telecommunications and media, for which there are no applicable precedents.[1]

It is presumed that Scotland would become a Member State of the European Union, compliant with the *acquis communitaire* and participating in the various European regulatory networks (e.g., BEREC). The mechanism for membership is disputed, but it should be a simple matter.

The easiest way to comply with the *acquis* would be to make existing UK laws for media, telecommunications and competition into Scottish acts.

These could then be modified, for example, to change the names of the institutions and to reduce the size of boards. The new ministries, regulators and appellate bodies would need to be created before independence when they would take over full powers.

The SNP has proposed merging many of the existing sector regulators with the new competition authority, while removing broadcasting regulation, previously the responsibility of OFCOM, to a body for all media regulation.[2] This approach may require new transpositions of the EU directives - certainly it necessitates complex primary legislation that would take time to enact.[3]

The Scottish Parliament lacks the powers to create the legal frameworks until after independence, so that it would have to obtain from the UK Parliament the necessary authority.

Broadcasting

The biggest challenge for media with independence is the continuation of the television licence fee. The prospective loss of output from the BBC would provide those opposed to the licence fee an opportunity to seek its abolition in Scotland.

The need to negotiate with the BBC the purchase of some of its output presents editorial and financial challenges. Someone would have to buy enough to satisfy viewers and listeners, while retaining sufficient

money to pay for increased Scottish content, but with various additional calls on the money already evident.

A new broadcaster, built on those parts of the BBC in Scotland, would face immediate competition from Scottish Television (STV). It would also have to face Sky, which is a very strong player in the UK and Irish markets, not only in output, but in the purchase of media rights to sporting events.

Prior to the digital switchover, a commission was created by the Scottish government to examine broadcasting.[4] It argued for increased local production capacity, seeking a greater share of the commissioning from the BBC and Channel 4, while it advocated a new Scottish digital channel. Independence would bring something built on the BBC in Scotland, but the BBC in London and Salford would no longer have the same need to commission foreign production.

There has been considerable discussion in the UK about the issuance of royal charters by the Privy Council, a committee of senior UK government ministers, dating back almost to Norman times.[5] It is proposed this be used to create the body to regulate the press, following the Leveson Report.[6]

Regulation of the press being a devolved matter and in the absence of the exemplary damages awarded in English courts, the Scottish government created an expert group to evaluate the findings of Leveson. The resulting McCluskey Report, while still seeking to avoid prescription by statute, proposed a universal regime for publishers.[7]

However, the Scottish Government quickly distanced itself from this proposal. There is a continuing debate on the form of regulation for the press, including how to regulate bloggers.[8]

As a member of the EU, broadcasts from other Member States to Scotland, including those from England, would be governed by the amended Audiovisual Media Services Directive.[9] This has not yet been a factor in the debate in Scotland.

There is no shortage of broadcasting capacity with digital radio and television networks in place: DAB and Freeview. The challenge would be to fill the capacity.

Should the referendum fail for the SNP then the Scottish government would need to reconsider its role in the UK-wide media ecosystem and whether to seek devolution of some additional powers to Scotland.

Telecommunications

Becoming a Member State of the EU in March 2016 would require immediate action for telecommunications. The necessary legal instruments would have to be drafted in advance of the referendum, in order that legislation could be laid before a suitably authorised Scottish Parliament, soon after a yes vote. Creating a proto-regulator would need to be begun quickly in order to recruit suitably qualified staff, to rent offices and to set up administrative arrangements.

While UK licences and general authorisations could be "rolled over" or grandfathered for Scotland, it would be necessary to make some changes. Consequently, a consultation would be needed on the licensing framework, followed by consultations on the licences and general authorisations, with the possibility of appeals to a new Scottish competition appeal tribunal. Scotland has about one quarter of the population density of the UK so that coverage obligations might need to be varied or the costs of the additional coverage set out in the impact analyses that accompany the consultations.

The SNP administration in Edinburgh seems unhappy with the levels of rural coverage for mobile and broadband, suggesting it wants tougher licence conditions. A further issue is that since most of the rural broadband developments are being funded by the UK government, it would need to commit to at least the same level of spending.

Perhaps the biggest problem is of information asymmetry between the operators and the proto-ministry and proto-regulator. An operator might challenge the regulator to be allowed to raise wholesale or retail prices because of higher costs, but the regulator would lack the underlying cost information to determine if the request was valid or a bluff. Scotland would need to apply to

ISO for a two-letter country code to replace .UK, though the obvious combinations are taken.[10] Once independent, Scotland would apply

to join the United Nations and once membership was granted, it could apply to ITU for a country code to replace the existing use of +44.

Conclusion

The lessons from the independence exercise are of interest not only in Scotland, but are also relevant to Flanders, Wallonia, Catalonia, the Basque Country and, perhaps, Northern Italy.

The approach of the SNP administration in Edinburgh seems to be to complicate matters unnecessarily. It is proposing a remarkably short transition of 18 months from the plebiscite in September 2014 to independence in March 2016. The white paper setting out its detailed plans for post-independence Scotland is due only in November 2013. It would have to negotiate complex financial matters, the removal of nuclear bases, the writing and adoption of a constitution, EU membership and new laws and regulatory frameworks for media and telecommunications. At best, such haste risks errors by government, parliament, regulators and operators.

Splitting off part of a regulated single market and of the various integrated ecosystems is far from impossible, but does require considerable care.

Opinions polls suggest there is little chance of the SNP winning the referendum, with the no votes very likely to predominate. Thereafter, it is likely that the devolution arrangements will be re-examined, not only for Scotland, with some thought having to be given to how to regulate the media and telecommunications in a quasi-federal state.

Media and telecommunications

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[1] Ewan Sutherland (2013) "Independence and the regulatory state - Telecommunications in Scotland and the rest of the United Kingdom" *Telecommunications Policy* forthcoming.

[2] Scottish Government (2013) *Economic and competition regulation in an independent Scotland.* Edinburgh: Scottish Government.

[3] Ewan Sutherland (2013) *A short note on economic and competition regulation in an independent Scotland - The case of telecommunications.* http://papers.ssrn.com/abstract=2234521

[4] Scottish Broadcasting Commission (2008) Platform for success: *Final report of the Scottish Broadcasting Commission.* Edinburgh: Scottish Government.

[5] http://privycouncil.independent.gov.uk/

[6] http://www.levesoninquiry.org.uk/

[7] Expert Group on the Leveson Report in Scotland. http://www.scotland.gov.uk/Resource/0041/00416412.pdf

[8] Neil Walker (2013) The case against the case against the McCluskey Report. 21 March 2013. http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/1362/Neil-Walker-The-Case-Against-the-Case-Against-the-McCluskey-Report.aspx

[9] Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

[10] http://www.iso.org/iso/home/standards/country_codes/iso-3166-1_decoding_table.htm

News

An end to anonymity

A study of fifteen months of human mobility data for one and a half million individuals found that traces were relatively unique. Four spatio-temporal points were enough to identify uniquely 95 per cent of the individuals in a set of their hourly locations generated from mobile operators. Even coarsening the granularity of the data provided little more anonymity.

Yves-Alexandre de Montjoye, César A. Hidalgo, Michel Verleysen & Vincent D. Blondel (2013) "Unique in the Crowd: The privacy bounds of human mobility" *Scientific Reports* **3**, Article number: 1376. doi:10.1038/srep01376

Massive open online courses

One of the recent applications on the Internet to generate excitement is the offer of Massive Open Online Courses (MOOCs), which enable free or very low cost university-level education on truly enormous scales. Kevin Werbach (🐦@kwerb), well known from Supernova and as an advisor to the US Federal Communications Commission, offered a 6-week course from 1st April on Gamification: "the application of game elements and digital game design techniques to non-game problems, such as business and social impact challenges". He signed up over 50,000 students at https://www.coursera.org/course/gamification

Concerns include the true openness of MOOCs and the extent to which they can meet the needs of those underserved by the university market.