Multi-networked governance of networks: Regulating telecommunications in the United Kingdom

Abstract
Opinion polls suggest Scotland will reject independence, opening the way to a review of economic governance in the United Kingdom, a complex quasi-federal, asymmetric system of administrations and parliaments, the result of ad hoc changes over decades. One party wants telecommunications “devolved” to Northern Ireland, other would leave it at the United Kingdom, where there is wide support for a voluntary “digital champion” to boost Internet adoption amongst the elderly and the poor. There is network governance economic regulation at the global, EU, ministerial and regulator levels, though generally excluding the four nations: England, Northern Ireland, Scotland and Wales. There are no formal mechanisms to involve the three devolved legislatures in telecommunications governance, which is complex and lies partially beyond democratic oversight and judicial review. Improvements are required to simplify, increase transparency (e.g., more use of open data) and the widen involvement, enabling oversight and review.

Keywords: Devolution, Network governance, Telecommunications, United Kingdom

Introduction
Over the course of the last thirty years the United Kingdom of Great Britain and Northern Ireland (UK) has become one of the leading regulatory states, in which the direct provision of services by government has been systematically replaced by a myriad of regulated markets. Telecommunications is only one example, though the first and of particular interest because of the socio-economic importance of broadband Internet access and by being a prerequisite for the “digital by default” provision of government services for citizens. The telecommunications regulator, the Office of Communications (OFCOM), sits amidst a constellation of ancillary and overlapping bodies in the United Kingdom, including horizontal or cross-sectoral regulators (e.g., advertising, competition and data protection) and is embedded in trans-national networks of regulators across the European Union (EU) and beyond, notably in the Organisation for Economic Cooperation and Development (OECD) and International Telecommunication Union (ITU).

In parallel, the UK has created an unusual, asymmetric and unstable form of non-federal government with different sets of roles for devolved legislatures in Northern Ireland, Scotland and Wales. These are in the nineteenth century tradition of home rule proposals that sought to maintain the pre-eminence of Westminster. It stands in contrast to more

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conventional federal structures, which are codified, hierarchical, and symmetric, with clearly defined functions. For example, little, if any, attention was given to the regulatory state in the discussions over the Scotland Act 1998, the Calman Commission and the subsequent Scotland Act 2012, or in the current proposals for full fiscal autonomy. While different powers have been devolved to the Northern Irish and Welsh assemblies, few of the United Kingdom regulatory systems have been adjusted to take account of these changes. One result is strange, almost uncomprehending, exchanges between OFCOM and the Scottish Government, while the Advisory Committee for Scotland (ACS), appointed by OFCOM, sits to one side, unelected and unaccountable.3

Assuming that independence for Scotland is rejected in the referendum to be held in September 2014, the challenge will be to combine the regulatory state with asymmetric devolution, finding imaginative and effective solutions that deliver economic and social results for citizens with:4

- Accountability;
- Efficiency; and
- Transparency.

This must also engage with the networked governance systems of the EU and OECD.

There are two principal types of public intervention in markets for telecommunications and specifically for broadband Internet access concerning:

- Market power:
  - Sector regulation (e.g., wholesale access pricing), and
  - Competition policy (e.g., state aid rules and merger control);
- Positive externalities:
  - Network externalities (e.g., promotion of e-health, e-learning and e-dole), and
  - Overall economic growth (e.g., increasing availability/adoption and industry policy).

Interventions can be made at all levels, from the EU to local authorities, raising concerns about the need for and the costs of coordination, together with the risks of a lack of transparency. The multiplicity of ministries, agencies and authorities creates dangers of overlaps and blind-spots in the formulation, implementation and oversight of policies, with corresponding risks of forum shopping by and increased compliance costs for commercial players. It also creates considerable confusion for customers, whose knowledge probably extends only to the ASA and OFCOM, perhaps falling back on their local member of parliament. Yet at any one level, competition amongst regulators is considered beneficial, being likely to lead to experimentation, innovation, improved performance and the avoidance of regulatory capture.5,6

This paper considers first questions of network governance and federalism, setting the scene for more detailed consideration. Next the politics of broadband in the UK are briefly considered. Options for the governance of telecommunications in Scotland are then considered, based on the examples and UK precedents. Finally, conclusions are drawn and issues identified for further research.

3 Whereas, the appointment of a member for Scotland to the BBC Trust has, since the Scotland Act 2012, been subject to the agreement by Scottish ministers.
Varieties of capitalism

Research on the varieties of capitalism (VOCs) seeks to show how institutions of the political economies of nations can explain differing responses to globalisation and, more specifically, European integration, for example:

The removal of barriers to trade in goods and services enhances competition between member states without dictating the means by which competitiveness is achieved. It leaves scope for the coexistence of different varieties of capitalism.7

VOCs are the basis for claims that national settings strongly condition institutional choices, namely that countries adopt different reforms in efforts to adapt to globalization. However, Höpner and Schäfer argue that the EU institutions have driven the political economies of its member states (MSs) beyond such choices, requiring them to move closer to supposedly Anglo-Saxon forms of market capitalism:

Now, in order to deepen European integration, the Court and the Commission apply the principles of mutual recognition and of non-restriction to services, capital markets and free establishment.8

Interactions between the state, employers and trades unions are seen as key explanatory factors in the economic performances of different varieties of capitalism. There is substantial research on corporate political activity (CPA), in which firms seek to influence the policies formulated by governments, the laws enacted by parliaments and the rules adopted by regulators.9 Additionally, where there is effective rule of law, there will also be actions in the courts over any real or imagined disagreements. The purpose of such lobbying and litigation is to shape markets and competition to the advantage of the firm.

Bruff argues that VOCs are severely limited by their inherent institutional determinism.10 He calls for a much wider perspective, one that includes non-capitalist elements and issues, notably the use of Marxism as a framework for analysis.

Before considering VOCs and telecommunications, it is important to note the extent to which the latter diverges from neoliberalism. While there are global markets for equipment and a growing range of services, especially those delivered over the top (OTT), bypassing operators and significant elements of regulation, the core operator business is one closely tied to the state and to its ministry and regulatory authority. Consequently, it is one in which CPA is important in shaping competition and in delivering business strategies.11 Telecommunications is always a national market, even in the largest of states (e.g., India and the USA), because of the central importance of CPA for licences and regulation, and consequently for strategy and profits. While market forces are in evidence, they are mitigated and modulated by the institutions created and maintained by the country, and by the EU, in what are usually termed networks of regulatory governance.

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7 Martin Höpner & Armin Schäfer (2010) “A new phase of European integration: Organised capitalisms in post-Ricardian Europe” West European Politics 33 (2) 344-368. DOI: 10.1080/01402380903538997
8 Martin Höpner & Armin Schäfer (2010) “A new phase of European integration: Organised capitalisms in post-Ricardian Europe” West European Politics 33 (2) 344-368. DOI: 10.1080/01402380903538997
Telecommunications in the EU has gone through phases, from being largely resistant to the forces of globalisation, before succumbing to liberalisation of markets and their partial integration, incomplete privatisation, followed by the reappearance of significant divergences. Case studies of Britain, France, Germany, and Italy demonstrate that the varieties of capitalism in the telecommunications sector were significantly eroded. The central challenge is presently to increase the adoption and deployment of broadband, both fixed and wireless. Underlying this have been complex economic, political and institutional forces, sometimes aligned, for example, through network governance, or in conflict, for example, in the support of national champions.

The European Commission had considerable success in promoting liberalisation in customer premises equipment (CPE), mobile and fixed telephony, delivering a single market for manufacturers and operators, if not for customers. Gradually, it persuaded MSs to create regulators and to make them more, if not wholly, independent, aided by a certain collegiality amongst them.

While MSs adopted common goals for the widespread availability and adoption of broadband, the enormous variations in the available infrastructure, the approaches to supporting network deployment and the need for education and support programmes for prospective users meant that divergences became greater and more evident. National governments and regulators using a common regulatory toolkit, telecommunications legal framework and state aid rules, pursued quite different routes reflecting their VOCs, for example:

- The UK regulator used competition law powers to reach the Openreach agreement with BT;
- The French government provided state aid from the Caisse des Dépôts and alone in the EU used the provision for Services of General Economic Interest (SGEI);
- The Dutch government accepted a cable/telco duopoly; and
- Eastern European governments looked to cellular and fixed wireless.

The central economic question is how to pay for the infrastructure needed for high speed broadband, one which each member state answered differently, depending on its markets, the path followed and its political economy. The addition of universal adoption and the end of exclusion greatly widened the scope and complexity of policy formulation and implementation.

It is far from obvious that the issue of spectrum, used by telecommunications operators, broadcasters and the military, would be one on which EU member states would demonstrate resistance to integration. Its ability to generate political benefits is not especially obvious, save always that politicians like to see themselves on television and hear themselves on radio. Nonetheless, the political economies of member states have led to

13 The same could be said of debates on net neutrality.
sustained resistance to the transfer of powers to the European Commission, permitting only coordination mechanisms.\textsuperscript{17,18}

One source of divergence amongst the MSs was the system of appeals, with the courts dragging NRAs away from their orientation towards the EU and their solidarity with other regulators, towards domestic facts, analyses and precedents. The appellate systems proved a significant contributor to the VOC.

The VOC literature addresses nation states, treating even strongly federal states, such as Germany, as a single unit of analysis. While this is justified where powers are exercised at the federal level in a constitutional state, this is much more problematic in the United Kingdom, where powers are ambiguously divided and in telecommunications where powers may exist at several levels (e.g., Belgium). Insufficient attention has been given to differences with national single markets to differences amongst, for example, the German länder and the four UK “nations”.

\textbf{Network governance}

Federal states emerged in order to increase the joint power of their sub-federal units, to enjoy the advantages of being simultaneously small and large states. This has been evident in the discussions over the creation of fiscal and banking unions for the seventeen countries using the euro.\textsuperscript{19} Barroso, in his 2012 state of the EU address, set out the challenges and his proposed responses, calling for a federation of nation states.\textsuperscript{20} However, the 2014 elections to the European Parliament indicated a desire by many Europeans to slow or to reverse the trend towards an ever closer union.

The EU has a somewhat asymmetric structure, with different member states (MSs) participating in, for example, the Schengen Agreement and in the euro, while some MSs are still to join and others have opt-outs. Some telecommunication functions go beyond the EU, through bodies such as the European Telecommunications Standards Institute (ETSI) and the European Conference on Posts and Telecommunications (CEPT).

For three decades, the regulatory state has been an enduring theme in EU governance, with the separation of provision from oversight, allowing privatisation and the creation of markets.\textsuperscript{21} A significant part of the effort in the political analysis has been through the framework of the regulatory state.\textsuperscript{22}

All MSs must adhere to the telecommunications chapter of the EU acquis, including the three European Economic Area (EEA) states, and are bound together by network governance and by harmonisation measures. These span shared policies and legislation, implementation and regulation, standards and the accreditation of qualifications.

\textsuperscript{17} Colin Blackman, Simon Forge & Robert Horvitz (2013) “Liberating Europe’s radio spectrum through shared access” info 15 (2) 91-101
\textsuperscript{21} G. Majone (1994) “The rise of the regulatory state in Europe” West European Politics 17(3) 77-101.
For the regulation of network industries there have been delegations of powers by governments of the member states to EU institutions, notably to the European Commission (EC), but also to their domestic national regulatory authorities (NRAs). This was somewhat *ad hoc* and piecemeal in the 1980s and 1990s, though from the 1999 review it was more systematic. There continued to be considerable variations between MSs which the EC and EP sought to reduce the disorder and to complete the single market for telecommunications. This led to the introduction of harmonisation mechanisms, including European Regulatory Networks (ERNs), with powers delegated up from the NRAs and down from the EC. While these were supposed to result in more uniform regulation by co-ordinating approaches and functions, there have been no attempts even to measure the effectiveness of the measures and little evidence of success in harmonisation.

The ERNs were able to:23,24

- Link different institutional levels;
- Involve the private sector and consumers;
- Shift power from institutions to network organisations; and
- Switch away from hierarchical “command and control” relations to:
  - consultations,
  - negotiations, and
  - “soft” law.

The dual delegations were justified in terms of efficiency and better co-ordination in the implementation of the EU directives. However, it was possible only after MSs, under pressure from NRAs, protecting their jobs, had rejected the alternative of a pan-European regulator.

In telecommunications the result has been a very complex network of entities and processes (see Figure 1). There are differing degrees of formality and opacity in these bodies, with the parliamentary committee proceedings being relatively open, while the corresponding council working groups are closed.

Although regulation of the telecommunications sector was expected to fade away, as competition took hold, there have been few signs of this or that the NRAs will decline and fade away. If anything the ERNs helped to entrench the regulators for an indefinite future. Likewise, the efforts of the lobbyists have settled into an annual cycle which seems to have accepted that regulation is here for the long run, with nobody left to argue for its abolition.

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What is today known as the Body of European Regulators of Electronic Commerce (BEREC) emerged from the proposal for the High-Level Communications Group, just one of several harmonisation mechanisms in the 1999 Review. The NRAs simply refused to participate in the Article 7 procedure set out in the directive (see Figure 2), preferring a stubborn silence to the legally mandated peer review of their draft decisions. Inadvertently the mechanism for the regulation of trans-national markets had been made unworkable. This left the European Regulators Group (ERG) as the only network tool, alongside the hierarchical powers of the EC to issue recommendations, after taking advice from the Communications Committee (COCOM), comprising the ministries from MSs. The effect was greatly to enhance the status of ERG, but because of its pervasive secrecy, also to reduce overall transparency.

At the outset, Jean-Michael Hubert, the then French regulator, had warned that any EU-level group would need to have a variable geometry, since different national bodies should be involved in discussions of different topics. Yet, as first created, the ERG had a scope far beyond that of many regulators, so that it had later to be curtailed, since several countries had assigned regulatory powers to ministries, making harmonisation through regulators.

27 See Articles 15 and 16 of the Framework Directive.
impossible.\textsuperscript{29,30,31} Subsequently, BEREC complained that unnamed governments had been transferring powers from NRAs back to ministries.\textsuperscript{32}

**Figure 2**  The Article 7 procedure\textsuperscript{33}

In the 2006 review, Commissioner Reding called for a pan-European regulatory authority, arguing:\textsuperscript{34}

The most effective way to achieve a real level playing field for telecom operators across the EU would of course be to create an independent European telecom regulator that would work together with national regulators.

Her legislative proposal was for the European Electronic Communications Market Authority (EECMA) in which the EC sought “a fragmentation of European markets” and the absence of mechanisms for authorising cross-border services (e.g., mobile and IP-based services).\textsuperscript{35} This was significantly reshaped by the Parliament and the Council, becoming the strangely named Body of European Regulators of Electronic Communications, a rebranded ERG v3.0, reshaped in ways that also increased the influence of the EP.\textsuperscript{36,37,38} The NRAs and their

\textsuperscript{29} European Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services (2002/627/EC).


\textsuperscript{31} European Commission Decision of 6 December 2007 amending Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services (2007/804/EC). [This merely added Bulgaria and Romania to the list of members.]

\textsuperscript{32} BEREC. (2012). BEREC statement on independence of NRAs. (Riga: Body of European Regulators of Electronic Communications).


\textsuperscript{34} Viviane Reding “The review 2006 of EU telecom rules: Strengthening competition and completing the internal market”, Annual Meeting of BITKOM, Brussels, 27 June 2006, SPEECH/06/422.


network had themselves become a player, emphasising their “professional” standing, when they had no democratic credentials and had not even consulted stakeholders, but nonetheless, argued to strengthen their own ERN.39

For spectrum there are three bodies:

- Radio Spectrum Committee (RSC);
- Radio Spectrum Policy Group (RSPG); and
- European Conference on Posts and Telecoms (CEPT).

Their work involves extensive consultation amongst all the stakeholders, including ministries, regulators, manufacturers, network operators and, to a lesser extent, the users. CEPT extends far beyond the EU, including the countries of the former USSR.

Under the comitology rules, COCOM, RSC and RSPG permit participation by associations;40,41,42,43

- Consumers: BEUC and INTUG;
- Operators: Cable Europe, ECTA, ETNO and GSMA; and
- Manufacturers: Digital Europe.

It is only BEREC that conducts its business in secret, claiming some special need to avoid public scrutiny and stakeholder involvement. Moreover, its decisions and opinions appear not to be open to challenge in the courts nor is it held accountable before a parliament, giving it a remarkable democratic and judicial deficit. Where BEREC offers formal advice it might be possible to obtain review by the General Court of the EU. The mechanism for engagement with BEREC is through consultations on terms determined by the organisation itself.

PWC presented results of a rather narrow review of BEREC and its office.44 It suggested a need for BEREC to focus on the completion of the internal market, noted the absence of a system of accountability and that work programmes were too cluttered, often with issues that were less than strategic. Operators complained that their voices were not heard by BEREC, with limited feedback on their comments.

Since the European Council in Lisbon in 2000, the EU has had a strategy for jobs and growth, renewed up to 2020.45 One of its flagship policies is the digital agenda (DA), which is to deliver sustainable economic and social benefits from a digital single market.46 A key part of that is the association of the adoption of ICTs and, especially, broadband with GDP. Among the DA objectives are:

• By 2013: Broadband access for all;
• By 2020: Access for all at higher Internet speeds (30 Mbps or above) and 50% or more of European households subscribing to Internet connections above 100 Mbps.

These encompass the very different levels of infrastructure development and competition in member states.

The EC adopted a growth package for infrastructure, based on the insufficiency of investment in broadband.\(^\text{47}\) A Connecting Europe Facility (CEF) of €9.1 billion was proposed by the EC and agreed by Council.\(^\text{48}\) It will support broadband networks up to 50 per cent, plus 75 per cent for the removal of bottlenecks hindering the completion of the digital single market, while projects related to the digital platform for the European cultural heritage receive up to 100 per cent. In addition to broadband networks, the grants can be used to build infrastructure needed for e-government services to ensure interoperability and to meet the costs of running the infrastructure at European level. Barroso has spoken strongly in favour of the CEF, but has yet to gain the support of the Council.\(^\text{49}\)

The work of the OECD on telecommunications dates back many years, primarily through the CISP (formerly TISP) working party. It provides a forum for its member governments and industry to research, to discuss and to formulate best practice in policies, for example:\(^\text{50}\)

• Universal service policies in the context of national broadband plans;
• Proactive policy measures by ISPs against botnets;
• Measuring the broadband bonus
• OECD Internet Economy Outlook

Operators, manufacturers and enterprise users participate through the Business and Industry Advisory Committee (BIAC), of which the UK member is the Confederation of British Industry.\(^\text{51}\) Trades unions participate through the Trade Union Advisory Committee, the Trades Union Congress (TUC) being the UK member.\(^\text{52}\)

The International Telecommunication Union (ITU) is a much larger organisation, part of but predating the United Nations system. It has three principal areas of activity:

• Developing countries;
• Radiocommunications; and
• Standardisation.

The most important area is in radiocommunications, where its regular World Radio Conference (WRC) adopts binding regulations coordinating the use of spectrum. Elsewhere, in seeking to accommodate the diversity of its membership, any recommendations or advice tends to allow considerable scope for independent action.

An alternative and equally complex set of arrangements are in place for Internet governance involving:

• Internet Corporation for assigned Names and Numbers (ICANN):

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\(^\text{50}\) http://www.oecd.org/sti/broadbandandtelecom/

\(^\text{51}\) http://www.biac.org/

\(^\text{52}\) http://www.tuac.org/
MULTI-NETWORKED GOVERNANCE OF NETWORKS - REGULATING TELECOMMUNICATIONS IN THE UNITED KINGDOM

- Government Advisory Committee (GAC);
- Internet Engineering Task Force (IETF);
- Internet Architecture Board (IAB); and
- Internet Governance Forum (IGF).

These operate under the principle of multistakeholderism, with participation open to those willing and able to do so. However, certain elements are contracted out by the US Department of Commerce.

The complexities of European political and regulatory networks present significant problems for transparency and optimisation. The exceptionalism of the regulators, with their fascination with secrecy, seems entirely unjustifiable and for which no case has ever been made. Attaching complex national networks and processes to the EU and global networks of governance, with its multistakeholderism, requires considerable care if it is not to create further blind-spots, overlaps and inefficiencies.

Figure 3 attempts to map the relations between the institutions of the United Kingdom and those of the European Union, in terms of the governance of telecommunications. It certainly breaks the home rule principle of the primacy of Westminster, but also defies easy explanation or reform. From the perspective of the operators, it provides many opportunities for CPA, indeed it obliges them to participate, in order to be informed about the institutions and about their rivals.

**Figure 3** The United Kingdom in the European Union telecommunications governance network

Even within government there is a need for coordination between a variety of ministries and the agencies for which they are responsible, several of the ministries will be engaged in coordination work through joint ministerial committees with the devolved administrations.

in Belfast, Cardiff and Edinburgh. Table 1 shows the responsibilities of the various ministries in terms of telecommunications and the Internet. Again, such inter-ministerial consultation and the work of committees of the cabinet are relatively opaque to the public, even if the work of individual ministries is relatively transparent.

Table 1  Inter-ministerial coordination in the United Kingdom

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<td>Department of Culture, Media and Sport (DCMS)</td>
<td>Lead ministry for telecommunications and regulating telecommunications in the United Kingdom</td>
</tr>
<tr>
<td>Home Office</td>
<td>National security and policing</td>
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<tr>
<td>Ministry of Justice</td>
<td>Data protection</td>
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<tr>
<td>HM Treasury</td>
<td>Finance and economic strategy</td>
</tr>
<tr>
<td>Department of Business, Innovation &amp; Skills (BIS)</td>
<td>Economic policies</td>
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<tr>
<td>Department for Education</td>
<td>Child protection</td>
</tr>
<tr>
<td>Ministry of Defence</td>
<td>Spectrum user</td>
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<tr>
<td>Department for International Development</td>
<td>ICTs for development</td>
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</table>

Figure 1 shows a relatively narrow view of telecommunications regulation and OFCOM. However, as Table 2 makes clear, there are many more “regulators”, reporting to OFCOM or to a range of ministries, in some cases based on a statute or regulation, in other cases as self-regulation.
Table 2  OFCOM is not the only regulator

<table>
<thead>
<tr>
<th>Institution</th>
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<tbody>
<tr>
<td>Advertising Standards Authority (ASA)</td>
</tr>
<tr>
<td>Telephony Preference Services (TPS)</td>
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<tr>
<td>Ombudsman Services - Communications</td>
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<tr>
<td>Communications and Internet Services Adjudication Scheme (CISAS)</td>
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<tr>
<td>Phonepay Plus</td>
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<tr>
<td>Internet Watch Foundation (IWF)</td>
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<tr>
<td>UK Council for Child Internet Safety (UKCIS)</td>
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<td>UK Safer Internet Centre</td>
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<tr>
<td>Child Exploitation and Online Protection Centre (CEOP)</td>
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<tr>
<td>NICC - UK interoperability Standards</td>
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<tr>
<td>Go On UK - Digital Champion</td>
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<tr>
<td>NGN UK - Next generation networks</td>
</tr>
<tr>
<td>Office of the Telecommunications Adjudicator</td>
</tr>
<tr>
<td>Gambling Commission</td>
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<tr>
<td>Information Commissioner’s Office</td>
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</table>

The politics of broadband

There has been relatively little analysis of political debates concerning broadband, despite the large sums of money involved and the significant interventions and changes being proposed to the regulation of markets. Part of the problem may be the understandable interest in and distraction of the adoption into political processes of applications running over broadband networks, such as blogging and Twitter. Nonetheless, there is a useful role for deeper political analysis of broadband policies.

The 2010 UK general election illustrates the commitments offered by political parties, with their aspirations to world leadership, significant spending and economic benefits (see Table 3). The claims remained somewhat vague, in part because of the expectation of difficulties over funding due to the global financial crisis.

Liberalisation of mobile telecommunications identified the danger of political decision structures and private interests impeding rapid policy changes. The structure of institutions was found to have had a strong effect on outcomes, as did the relative strength of economic and political actors, with higher concentration of political power making faster decision-making possible, while more independent regulators slowed down liberalization – this is consistent with agency theories and additional layers of power slowing decision-making. Regulators did not always implement policies in the manner expected by the government and could abuse their informational advantages to collude with industry incumbents.

In some states of the USA there was an almost poisonous debate over municipal Wi-Fi, which had been planned as means to extend access to those likely to be unable to afford commercial broadband offers. Major operators lobbied the states to legislate to forbid

municipalities from building such networks, which was to have repercussions for the creation of municipal fibre networks.

Table 3  Broadband commitments in the United Kingdom general election of 2010

<table>
<thead>
<tr>
<th>Manifesto</th>
<th>Commitment</th>
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<tbody>
<tr>
<td>Labour Party</td>
<td>Britain must be a world leader in the development of broadband. We are investing in the most ambitious plan of any industrialised country to ensure a digital Britain for all, extending access to every home and business. We will reach the long-term vision of superfast broadband for all through a public-private partnership in three stages: first, giving virtually every household in the country a broadband service of at least two megabits per second by 2012; second, making possible superfast broadband for the vast majority of Britain in partnership with private operators, with Government investing over £1 billion in the next seven years; and lastly reaching the final ten per cent using satellites and mobile broadband. Because we are determined that every family and business, not just some, should benefit, we will raise revenue to pay for this from a modest levy on fixed telephone lines. And we will continue to work with business, the BBC and other broadcasting providers to increase take-up of broadband and to ensure Britain becomes a leading digital economy.</td>
</tr>
<tr>
<td>Plaid Cymru</td>
<td>Our businesses and homes also need an IT and communications infrastructure fit for the 21st century. Many parts of Wales still cannot access broadband or full mobile phone coverage - this is holding our businesses back. We want to prioritise access to broadband with the aim of providing super-fast broadband to our companies and homes. We will also campaign for compulsory mobile network sharing - giving people across Wales improved mobile coverage.</td>
</tr>
<tr>
<td>Sinn Féin</td>
<td>Ensure high-level broadband coverage across the north of Ireland, especially in rural areas.</td>
</tr>
<tr>
<td>Liberal Democrat Party</td>
<td>Support public investment in the roll-out of superfast broadband, targeted first at those areas which are least likely to be provided for by the market.</td>
</tr>
<tr>
<td>Conservative Party</td>
<td>We want Britain to become a European hub for hi-tech, digital and creative industries – but this can only happen if we have the right infrastructure in place. Establishing a superfast broadband network throughout the UK could generate 600,000 additional jobs and add £18 billion to Britain’s GDP. We will scrap Labour’s phone tax and instead require BT and other infrastructure providers to allow the use of their assets to deliver superfast broadband across the country. If necessary, we will consider using the part of the licence fee that is supporting the digital switchover to fund broadband in areas that the market alone will not reach.</td>
</tr>
<tr>
<td>Coalition Government</td>
<td>We will introduce measures to ensure the rapid roll-out of superfast broadband across the country. We will ensure that BT and other infrastructure providers allow the use of their assets to deliver such broadband, and we will seek to introduce superfast broadband in remote areas at the same time as in more populated areas. If necessary, we will consider using the part of the TV licence fee that is supporting the digital switchover to fund broadband in areas that the market alone will not reach.</td>
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Note: No commitments on broadband were offered by CPGB, DUP, SNP, SWP and UKIP.

In general, telecommunications and broadband have not been subjects of deep political controversy, with the exception of a few instances of more doctrinaire views for and against

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60 Adam Christensen (2006) “‘Wi-Fi’ght them when you can join them? How the Philadelphia compromise may have saved municipally-owned telecommunications services” Federal Communications Law Journal 58 (3) 683-704.


67 http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf
state ownership. In some developing countries there are arguments about the loss of jobs from the incumbent operator or about the dangers of foreign ownership. In Europe the issues have been more subtle, about setting objectives and the extent to which state support is required in their achievement. In the UK telecommunications was weakly political, especially under Blair and Brown when some policy formulation was delegated to the regulator. There has been a constant complaint from rural lobbyists about the insufficiency of services, though without ever making an economic case.

### Options for the future

The present administrative arrangements for the regulation of telecommunications are cumbersome and inefficient. For example, in response to a technical consultation by OFCOM on the licensing of mobile broadband, the Scottish Government called for changes to the licence conditions for UK operators in very simple, political terms, ignoring:

- Any cost implications for customers; or
- Any revenue implications for HM Treasury.

The infrastructure plan published by the Scottish Government for broadband contains an estimate for spending of £500 million, but it is very difficult to determine how much, if any, of the £200 million of the estimated state aid is to come from its own budget. There were able to obscure how much money had been contributed by Brussels, London and local authorities, to the point it was unclear whether they were investing anything and what the returns would be on this substantial investment.

While it intervenes in matters of telecommunications, it is unclear whether the Scottish Government adds value by doing so. Its legal authority is vague, seemingly coming from its pursuit of economic development – though it is doubtful that it would ever be challenged.

OFCOM is bound by:

- Policies set by the government of the United Kingdom;
- The Communications Act (as amended);
- The European Commission (e.g., Article 7 procedure); and
- Work with regulators in other EU member states, through BEREC and the RSPG.

Procedurally, it is relatively tightly bound by the use of better regulation (e.g., consultations and impact assessments) by UK legislation and policy, together with the very real threats of litigation by operators. Any decision taken by OFCOM that is not based on established policy and the record it has established will be challenged and is likely to be struck down in the courts.

One possibility would be to have four “national” representatives on the board of OFCOM, indeed the Scottish Broadcasting Commission suggested this in terms of the OFCOM Content Board. While it would not fit with the present operations of OFCOM, it is neither unreasonable nor infeasible. For the last decade the devolved administrations could have, but did not, nominated suitably qualified individuals. However, it seems very unlikely that such a set of national appointments would resolve any significant problems, since OFCOM deals in techno-economic matters.

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68 An example of this is the complex relationship between the government of South Africa and Telkom SA, in which the former asserts it wishes to define the roles to be undertaken by the latter.

69 Jeremy Hunt PC MP described the mobile operators as “judicially active”.

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Devoplus has suggested increasing the accountability of OFCOM to the Scottish Parliament and, by implication, to the Assemblies in Northern Ireland and Wales. It would be relatively straightforward to have the Communications Act amended to require OFCOM to submit its annual report to the three devolved legislatures, which already hear evidence from OFCOM in their committees. However, this fails to address the problem of how the independent regulator might reconcile potentially conflicting political directions, since accountability to four legislatures implies each can, at least to some extent, direct OFCOM. The Act expressly grants such powers exclusively to the UK minister by means of statutory instruments (SIs) and telecommunications remains a matter reserved for Westminster. It would be very difficult to devise legislation that would allow the devolved assemblies to issue directions to OFCOM, which could and eventually would conflict with directions from HMG or which might require it to impose different regulatory regimes in the four UK nations, ending the single UK market. Thus, the various legislatures could question regulators, debate their reports and make suggestions for changes, but the result would inevitably be different and divided views, which might not be reconcilable and almost certainly not at a techno-economic level.

The real disagreements do not lie at the techno-economic level at which OFCOM works, but at the political level. A regulator ought not to be required to balance the different political objectives of four legislatures and four administrations – instead the politicians should resolve any differences amongst themselves and present a unified set of policies and directions to OFCOM. The issues are of primarily of:

- Rural coverage;
- Quality of service;
- Pricing; and
- Availability.

While there are already meetings of a Joint Ministerial Committee (JMC) these are somewhat secretive affairs, with no public access to the meetings, to the papers or to the conclusions – even their sessions may not be announced. One obvious step would be to open such meetings, at least in terms of documentation and minutes. The ministers could be obliged to agree on advice to OFCOM, ensuring it received clear and agreed policy directions, if necessary set out in an SI, with similar arrangements made for other regulatory bodies.

The UK already has some arrangements for telecommunications that look like devolution, though these powers were never centralised from the Crown Dependencies. As a member of International Telecommunication Union (ITU) the UK negotiates numbering and spectrum resources. The Crown Dependencies legislate to allow OFCOM to assign spectrum and number ranges, using its participation in CEPT and ITU, including use of the UK international dialling code. Otherwise they have their own markets and operators, with their own regulators, even their own Internet country codes.

Sinn Fein has called for devolution of telecommunications to the Northern Ireland Assembly, the purpose of which seems to be either to create a separate regulator and licensing regime for Northern Ireland or to combine it with licensing and regulation in the Republic of Ireland. As with the Crown Dependencies it would be possible to assign each of the four nations, or such as wished it, the power to devise their own policies, to issue their own licences and to be implemented by their own regulator. The difficulty with this is that

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71 .gg for Guernsey, .im for Isle of Man, .je for Jersey.
72 As with Belgium, a coordinating committee of regulators might be helpful. Moreover it would make sense for representatives of the administration and of the regulator to participate in bodies such as BEREC, COCOM, and the RSPG.
the cost of splitting up the unitary UK telecommunications markets is very hard to estimate. At best such divisions could lead to several years of uncertainty as operators evaluated markets and as new ministries and regulators developed their policies and practices.

Any legislative powers devolved to Scotland or to other nations would require to be carefully managed in terms of treaty obligations to the EU, ITU and WTO. For example, if the NI Assembly was given powers over telecommunications it would still have to remain in compliance with the EU acquis. There would be a further problem of ensuring participation in the network government mechanisms.

The central question concerns the objectives which might require the devolution of telecommunications. The Sinn Fein argument about roaming charges, which are due to be eliminated by EU regulations by 2015, and rural broadband, which could be achieved by some additional subsidies, possibly coordinated with the Republic of Ireland. Yet it might be that Northern Ireland, Scotland and Wales would wish, for social or economic reasons, to have a different balance between support for rural provision, urban uptake and adoption by SMEs, views which needed to be reflected in licences, general authorisations and the regulation of operators.

One option would be to adopt a formal federal position in which telecommunications was a matter reserved exclusively for the UK government and parliament, expressly excluding the devolved legislatures. Doubtless, they would still try to intervene by use of procurement, but such interventions would be curtailed.

Alternatively broadband could be viewed as something special, creating a planning process, soliciting views from all parties, developing from these a draft plan for further consultation and finalisation. The plan would need to set out not only targets, but which of the various bodies had responsibility for achieving them. The process could then be reviewed every few years.

Assuming devolution of telecommunications is not needed or justified, and for the present there seems not to be a case, the issue is how to streamline the present arrangements. Some objectives in economic development are being met by state aid for broadband deployment. Clarifying the roles of the various entities to eliminate duplications seems essential, as is making their interaction much more transparent.

OFCOM has four national advisory committees which it appoints. It is very difficult to see how such body might be made more legitimate, suggesting the need for some mechanism or forum that engaged stakeholders in each nation more widely. A more appropriate model would be a group of all stakeholders, perhaps a Broadband Convention, with support for those without sufficient resources to participate.

One area where improvements are essential is the collection of statistics to improve our understanding of the use of ICTs at the levels of the four UK nations and local authorities. The improved coordination of survey instruments and data sets between OFCOM, the Scottish Household Survey and the Office of National Statistics would help ensure comparable data.

**Conclusion**

The varieties of capitalism, regulatory state and networked governance are valuable tools to explore the complexities of the regulation of telecommunications in the European Union and the United Kingdom. Admittedly, this paper has only begun the process, requiring considerably more work and much more detail.

Changes to the policy and regulatory arrangements for telecommunications in the UK are possible and some would be relatively easy to make. Yet, the biggest change, to split off
some or all of the four nations from the UK single market for telecommunications is extremely difficult to evaluate. In the case of independence such a split is essential and unavoidable, whereas with devolution or federalism it would be a matter of choice, one that needs to be evaluated very carefully.\textsuperscript{73} Were the European Union digital single market in place or even in prospect then the assessment might be very different, but national markets remain the reality. Similar issues arise in the case of “brexit”, a possible British exit from the European Union, following a 2017 referendum.

Having three levels of government and two tiers of quasi-independent agencies involved in delivering broadband appears to be excessive, with the resulting complexity bound to be counterproductive through overlaps, blind-spots, and forum shopping. Partly this is the result of vagueness in the UK constitutional arrangements and partly it is the result of the desire by all to be seen to be doing good by rolling out broadband networks.

Local authorities have control over access to rights of way and planning approval for civil works, plus an interest in boosting their local economies and reducing social exclusion, giving them a legitimate role in broadband. A case can be made for jurisdictional competition, that the better performance of one local authority will encourage others (e.g., “smart cities”). Similarly, the four nations might usefully compete in regulation.

Westminster retains legislative power in telecommunications and competition matters, which remain essential for the single UK market, with most of the regulation delegated to OFCOM. HMG has an exclusive international role in EU, ITU, OECD, WTO and other international bodies, though this could be made more transparent and accessible to devolved and local government, as it already is to industry.

Parliaments, Westminster and the three devolved assemblies, need to “get a grip” of the issues and hold ministers and regulators to account, both directly and through them the array of agencies and self-regulatory bodies. For example, it is very difficult to justify the involvement of the Scottish Government and the two enterprise agencies in the provision of broadband, in which they do not appear to add any value or any funding. It looks like political grandstanding, while it shirks responsibility for broadband adoption. The Scottish Government needs to adopt the better regulation approach which, by a quirk of the present constitutional arrangements, it seems able to avoid, operating outside the practices of the regulatory state, favouring instead rhetoric and opaque cross-subsidies.\textsuperscript{74}

Once the Scottish plebiscite it out of the way and the bulk of the Rural Broadband Scheme is in place, and with a general election approaching, it will be good time to evaluate what ought to be done. Further efforts are required to understand and to explain the present systems of regulation, in order that they can be simplified and improved. One obvious, if potentially simplistic, approach would be the development of key performance indicators (KPIs). A detailed examination of case studies using the varieties of capitalism, regulatory state and networked governance is important, both to test those theories and to improve our understanding of the problems. In anticipation of a new Westminster Parliament in May 2016, it is necessary to have a range of policies, with streamlined institutions and easier monitoring.

\textsuperscript{73} Ewan Sutherland (2013) “Independence and the regulatory state—Telecommunications in Scotland and the rest of the United Kingdom” Telecommunications Policy 37 (11) 1046-1059.

\textsuperscript{74} It is also accused of providing insufficient funding for its pensioner bus passes, forcing the companies to raise their fares for paying passengers to cover the costs.