

Department for Culture, Media & Sport
Broadcasting Policy Division



Consultation Paper on Data Limits and Data Services on Radio Multiplexes

24 April 2006

DCMS

CONSULTATION DOCUMENT

DATA LIMITS AND DATA SERVICES ON RADIO MULTIPLEXES

Introduction

1. This consultation paper seeks views on two connected proposals which together would enable television services to be carried on a radio multiplex. This would involve two orders being put before Parliament for approval: one would expand the definition of a “television licensable content service” (“TLCS”) under the Communications Act 2003 to include TV carried on a radio multiplex, and the other would raise from 20% to 30% the maximum proportion of the capacity on a radio multiplex that could be used for data services.

Redefining TLCS: technical and policy background

2. There have been significant technological advances since the enactment of the Communications Act 2003 which have made the transmission of streamed video images by means of a radio multiplex a practical proposition. In particular, digital audio broadcasting (“DAB”) was designed to achieve good audio transmission, and audio services can tolerate a higher rate of error in the signal.¹ Formerly, a multiplex operating on DAB technology could not be used for television, because streamed audio requires a much lower error rate: too many errors will cause the video stream to “freeze”. However, research resulted in 2005 in the development of a new DAB standard which achieved much lower error rates and so made possible the broadcasting of television services on DAB multiplexes. In addition, software developments² now allow good quality video to be broadcast at lower bit rates, so using less of the digital capacity on a multiplex. Finally, “digital rights management” programs are now available to protect the content in DAB broadcasts.

3. Other advances have made it possible to design services for reception on mobile, hand-held devices (as BT propose to do with their “Movio” service: see below). These include improvements that reduce the power consumption of the circuits that are used to process DAB signals, and the availability of low-cost LED screens suitable for hand-held receiving devices.

Legal details

4. The possibility that advances in broadcasting or other technologies would make changes in the regulatory regime potentially desirable was anticipated in both the Broadcasting Act 1996 and the Communications Act 2003. It is proposed to make an order to enlarge the definition of a TLCS in sections 232

¹ Essentially, gaps in the information that the receiver needs to decode the signal and produce an audible service.

² Especially in the field of more efficient “codecs” – algorithms that convert a signal into digital form for transmission, and back again for display by the receiver.

and 233 of the 2003 Act to include a television service carried on a DAB multiplex. The order would primarily rely on powers in section 234 of that Act, but other changes are needed using section 1(5) of the 1996 Act to alter the meaning of a digital television programme service. A draft of the order is to be found at [Appendix 1](#) to this paper. The result would be that a television service carried on a radio multiplex would be required to hold a TLCS licence (which is the type of licence currently required for cable and satellite services) and would be regulated in the same way.

5. At present, section 241 of the Communications Act 2003 effectively prevents TV services from being carried on radio multiplexes. We do not believe that it would be in the interests of consumers for this limitation on the use of radio multiplexes to continue. The order is drafted to avoid the application of this rule to a redefined TLCS.³

6. The rule in section 241 is there, in part,⁴ to prevent digital radio services from being crowded out by potentially more lucrative television services. In fact, we consider that the rule in section 54(1)(h) of the 1996 Act⁵ that at least 80% of the capacity on a radio multiplex must be reserved for carrying sound broadcasting or related services offers more than sufficient protection for radio. The second aspect of our proposals is to reduce the reserved capacity from 80% to 70% or, in other words, to increase the data limit of radio multiplexes from its current level of 20% of capacity to 30%. The order which would make this change is attached in draft at [Appendix 2](#) to this paper.

Rationale for change

7. Ofcom has consulted extensively on this question as part of their recent radio review, and has recommended to the Government that the data limit be increased from 20%. The reasoning, with which we agree, is that increased data services should allow new and innovative services to be developed which would increase consumer choice generally and encourage the take up of digital audio broadcasting

8. For instance, BT Wholesale have begun to develop a service, known as BT Movio, which uses the data capacity on the national commercial multiplex to provide TV services to a hand-held device which can also be used for telephony and to listen to DAB radio. BT research, from the trial with Virgin Mobile, indicates that, to be a compelling proposition to consumers, the service needs at least five TV channels as opposed to the current three. This could be achieved if the data limit were increased to 30%.

³ A TLCS is not a "relevant television service" for the purposes of section 241(9), and the amendment by the order of the meaning of a "digital programme service" ("DPS") in section 1(4) of the 1996 Act means that the definitions of a TLCS and a DPS do not overlap. If they did so, the rule in section 241 would apply, because a DPS *is* a relevant television service.

⁴ It also serves to ensure that the definitions of "television multiplex" and "radio multiplex" are mutually exclusive, which is necessary to secure the proper functioning of the separate regulatory systems that exist for each type of multiplex.

⁵ Section 54 was amended by the Communications Act 2003. The amended section is set out in Appendix 2 to this paper.

9. We are concerned that any increase in the data limit should not lead to a reduction in the number of services offered on the national multiplex. In order to increase the amount of spectrum available for data, we understand that Digital One, the multiplex operator, is proposing to broadcast one of its current services in mono (as permitted by its licence), and to ask Ofcom to allow it to broadcast a second service in mono. The second service will revert to stereo in 18 months time when technical changes introduced by BT will mean that its service can be carried on less multiplex capacity than is required at the outset. It is on the understanding that Ofcom will not agree to any reduction in the number of services broadcast on the multiplex, and will time-limit the reduction to mono, that we are proposing to increase the data limit to 30% of the multiplex capacity.

10. The main benefit of this change is that it should allow the development of new mobile TV services which will increase consumer choice. We consider that this will also assist DAB listening by making it available as part of a new, innovative multi-media package including mobile TV and telephony.

11. There may be a potential impact on other existing or potential mobile TV providers insofar as this service proves to be more attractive to customers. On balance, however, we believe that increased choice and competition will lead to better services for consumers.

Regulatory Impact Assessment

13. This is attached at [Appendix 3](#) to this consultation document.

Questions

1. Do respondents agree that DCMS should introduce an order which would allow TV services to be carried on a radio multiplex without the need for the radio multiplex to be reclassified as a TV multiplex?

2. Do respondents agree that the data limits on radio multiplexes should be increased to 30%?

Draft Order laid before Parliament under section 1(6) of the Broadcasting Act 1996 and section 234(3) of the Communications Act 2003 for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2006 No.

COMMUNICATIONS

The Television Licensable Content Services Order 2006

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

This Order is made by the Secretary of State in exercise of powers conferred by section 1(5) of the Broadcasting Act 1996⁽⁶⁾ and sections 234 and 402(3) of the Communications Act 2003⁽⁷⁾.

To the extent that this Order is made under section 1(5) of the Broadcasting Act 1996, the Secretary of State considers it appropriate to make it, having regard to developments in broadcasting technology.

To the extent that this Order is made under sections 234 and 402(3) of the Communications Act 2003, the Secretary of State considers it appropriate to make it, having regard to those developments and other developments in technology that have taken place.

In accordance with section 1(6) of the Broadcasting Act 1996 and section 234(3) of the Communications Act 2003, a draft of this Order has been approved by a resolution of each House of Parliament.

Accordingly, the Secretary of State now makes the following Order:

Citation and commencement

1. This Order may be cited as the Television Licensable Content Services Order 2006 and shall come into force on [.....] 2006.

Modification of the meaning of “television licensable content services”

2.—(1) In section 232 of the Communications Act 2003 (meaning of “television licensable content services”), in subsection (1)(a), after “satellite”, insert “or by means of a radio multiplex service”.

(2) In section 233 of that Act, in subsection (9), in the definition of “multiplex service” omit “, a radio multiplex service”.

⁽⁶⁾ 1996 c.55.
⁽⁷⁾ 2003 c.21.

Supplemental provision: licensing of television licensable content services

3. In section 235 of the Communications Act 2003 (licensing of television licensable content services), after subsection (6) insert—

“(7) A licence to provide a television licensable content service must contain such conditions as OFCOM consider appropriate for requiring the licence holder—

- (a) on entering into any agreement with the provider of a radio multiplex service for the provision of television licensable content services to be broadcast by means of that multiplex service, to notify OFCOM—
 - (i) of the identity of the radio multiplex service;
 - (ii) of the period during which the services will be provided; and
 - (iii) where under the agreement he will be entitled to the use of a specified amount of digital capacity, of that amount;
- (b) when any such agreement is varied so far as it relates to any of the matters mentioned in paragraph (a)(i), (ii) or (iii), to notify OFCOM of the variation so far as relating to those matters; and
- (c) where he is providing television licensable content services to the provider of a radio multiplex service in accordance with such an agreement as is mentioned in paragraph (a) but intends to cease doing so, to notify OFCOM of that fact.”

Amendment of the definition of “digital programme service”

4. In section 1(4) of the Broadcasting Act 1996⁽⁸⁾ (definition of a “digital programme service”), before paragraph (a) insert—

“(za) a service provided under the authority of a licence under Part 1 of the Broadcasting Act 1990 to provide a television licensable content service.”

Amendment of Part 2 of the Broadcasting Act 1996

5.—(1) The Broadcasting Act 1996 is amended as follows.

(2) In section 46⁽⁹⁾ (national radio multiplex licences), in subsection (4), after paragraph (d) insert—

“(da) the applicant’s proposals as to the broadcasting of television licensable content services.”

(3) In section 47⁽¹⁰⁾ (award of national radio multiplex licences), in subsection (2)(f), after “programme services” insert “, television licensable content services”.

(4) In section 49⁽¹¹⁾ (reservation of capacity for BBC services), in subsection (9)(b), after “providing” in the second place where it occurs insert “television licensable content services or”.

(5) In section 50⁽¹²⁾ (local radio multiplex licences), in subsection (4), after paragraph (d) insert—

“(da) the applicant’s proposals as to the broadcasting of television licensable content services”.

⁽⁸⁾ Section 1 was amended by sections 360(3) and 406(7) of the Communications Act 2003, by paragraph 74 of Part 2 of Schedule 15 to that Act, and by Schedule 19 to that Act

⁽⁹⁾ Section 46 was amended by the Communications Act 2003, Schedule 15, Part 2, paragraph 105. Subsection (1)(e) was repealed by Schedule 19 to that Act.

⁽¹⁰⁾ Section 47 was amended by the Communications Act 2003, Schedule 15, Part 2, paragraph 106. Subsection (4) was repealed by Schedule 19 to that Act.

⁽¹¹⁾ Section 49 was amended by the Communications Act 2003, Schedule 15, Part 2, paragraph 108. Subsection (9) was inserted by paragraph 108(1) and (6).

⁽¹²⁾ Section 50 was amended by the Communications Act 2003, Schedule 15, Part 2, paragraph 109.

(6) In section 51⁽¹³⁾ (award of local radio multiplex licences), in subsection (2)(g), after “programme services” insert “, television licensable content services”.

(7) In section 54⁽¹⁴⁾ (conditions attached to national or local radio multiplex licences), in subsection (1)—

(a) after paragraph (c) insert—

“(ca) that all television licensable content services broadcast under the licence are provided by the holder of a licence under Part 1 of the Broadcasting Act 1990 to provide such a service or by a person who for the purposes of Council Directive 89/552/EEC is under the jurisdiction of an EEA State other than the United Kingdom;”⁽¹⁵⁾

(b) in paragraph (e), after “programme services” insert “, television licensable content services”; and

(c) in paragraph (f), after “programme service” insert “, television licensable content service”.

(8) In section 56⁽¹⁶⁾ (multiplex revenue), in subsection (9), after the words “that radio multiplex service” in the definition of “programme provider”, insert “;

and this section and section 57 shall have effect as if references in this section to digital sound programme services included references to television licensable content services”.

(9) In section 63⁽¹⁷⁾ (digital additional services)—

(a) in subsection (1)(b), for “an ancillary service” substitute “a television licensable content service, an ancillary service, a relevant ancillary service within the meaning of section 232 of the Communications Act 2003”;

(b) in subsection (2), after ““ancillary service”” insert “(except in the expression “relevant ancillary service”)”; and

(c) in subsection (3)(a), after “programme services” insert “, television licensable content services”.

(10) In section 72⁽¹⁸⁾ (interpretation of Part 2), in subsection (1), after the definition of “technical service” (and before the definition of “television multiplex service”) insert—

““television licensable content service” has the meaning given by section 232 of the Communications Act 2003;”.

Address	<i>Name</i>
Date	Minister for Department for Culture, Media and Sport

⁽¹³⁾ Section 51 was amended by the Communications Act 2003, Schedule 15, Part 2, paragraph 110.

⁽¹⁴⁾ Section 54 was amended by the Communications Act 2003, sections 259 and 315, and by Schedule 15, Part 2, paragraph 113. Subsection (7) was repealed by Schedule 19 to that Act.

⁽¹⁵⁾ Council Directive 89/552/EEC (OJ No L298/23, of 17.10.1989) was amended by Directive 97/36/EC of the European Parliament and of the Council (OJ No L202/60, of 30.7.1997). Article 2 of Directive 89/552/EEC requires each Member State to ensure that all television broadcasts broadcast by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State. It also makes provision to determine which broadcasters are to be treated as falling under the jurisdiction of a particular Member State for the purposes of that Directive.

⁽¹⁶⁾ Section 56 was amended and repealed in part by the Communications Act 2003, Schedule 15, Part 2, paragraph 115 and Schedule 19.

⁽¹⁷⁾ Section 63 was amended by the Communications Act 2003, section 260(2) and (3).

⁽¹⁸⁾ Section 72 was amended by the Communications Act 2003, section 260(4) and Schedule 15, Part 2, paragraph 126, and repealed in part by Schedule 19 to that Act..

Draft Order laid before Parliament under section 54(4) of the Broadcasting Act 1996 for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2006 No.

COMMUNICATIONS

The Radio Multiplex Services (Required Percentage of Digital Capacity) Order 2006

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

This Order is made by the Secretary of State in exercise of powers conferred by section 54(3)⁽¹⁹⁾ of the Broadcasting Act 1996⁽²⁰⁾.

In accordance with that provision, the Secretary of State has consulted OFCOM.

In accordance with section 54(4) of the Broadcasting Act 1996, a draft of this Order has been approved by a resolution of each House of Parliament.

Accordingly, the Secretary of State now makes the following Order:

Citation and commencement

6. This Order may be cited as the Radio Multiplex Services (Required Percentage of Digital Capacity) Order 2006 and shall come into force on [.....] 2006.

Modification of the required percentage

7. In section 54(2A) of the Broadcasting Act 1996 (which specifies the percentage of the digital capacity on the frequency or frequencies on which a radio multiplex service is broadcast which must be used, or left available for use, for the broadcasting of digital sound programme services,

⁽¹⁹⁾ Section 54 of the Broadcasting Act 1996 was amended by sections 259, 315 and 360(3) of, and paragraph 113 of Part 2 of Schedule 15 to, the Communications Act 2003 (c. 21), and repealed in part by section 406(7) of, and Schedule 19 to, that Act of 2003. In the case of the amendments to subsections (1) and (3) and the partial repeal of subsection (7), those amendments or (as the case may be) repeals are subject to transitional provisions in paragraphs 30 and 64 of Schedule 18 to that Act of 2003. [This section was extended (with modifications) to Guernsey, by article 2(b) of, and paragraphs 1, 2 and 28 of Schedule 1 to, S.I. 2003/3192; to Jersey, by article 2(b) of, and paragraphs 1, 2 and 27 of Schedule 1 to, S.I. 2003/3203; and to the Isle of Man, by article 2(b) of, and paragraphs 1, 2 and 17 of Schedule 1 to, S.I. 2003/3193.]

⁽²⁰⁾ 1996 c.55.

simulcast radio services, programme-related services and relevant technical services), for “80 per cent.” substitute “70 per cent.”.

Address	<i>Name</i> Minister for
Date	Department for Culture, Media and Sport

EXPLANATORY NOTE

(This note is not part of the Order)

This Order changes from 80 per cent. to 70 per cent. the proportion of the digital capacity on the frequency or frequencies on which a radio multiplex service is broadcast which must be used or reserved for certain broadcasting services. The broadcasting services in question are digital sound programme services, simulcast radio services, programme-related services and relevant technical services. The Order applies to both national and local radio multiplex services.

PARTIAL REGULATORY IMPACT ASSESSMENT

1. Title of proposal

1.1 Changes to the limit specifying the maximum amount of data which can be carried on a digital radio multiplex and changes to the definition of a “digital programme service” so as to allow television services to be carried on a digital radio multiplex.

2. Purpose and intended effect

Objective

2.1 To deregulate the restrictions on digital radio multiplexes so as to allow them to be used more flexibly in order to increase consumer choice, drive convergence and encourage the take-up of DAB enabled devices.

Background

2.2 Digital radio multiplexes are the means by which a number of terrestrial digital radio services can be broadcast simultaneously in the UK. At present, the Broadcasting Act 1996 (as amended) allows up to 20% of the capacity to be used for data services. This percentage can be changed by order and was increased from 10% to the current level in May 1998. This restriction is enforced by Ofcom.

2.3 TV channels carried on a multiplex would normally be considered as digital programme services (DPS). Under the current legislation, any multiplex that carries at least one relevant television service is a television multiplex. Thus, to put a television service onto a radio multiplex would convert it, legally, into a television multiplex. One consequence would be that 90% of the capacity would need to be devoted to television broadcasting or BBC radio (and associated services), leaving only 10% left for the commercial digital radio services currently occupying the multiplex, which would mean that there would not be room for more than a fraction of them. We do not believe that this would be in the interests of radio listeners so we are therefore proposing to expand the definition of a “television licensable content service” (“TLCS”) to include TV carried on a radio multiplex. This means that a radio multiplex which carries TV services can continue to be legally classified as a radio multiplex. The power to amend TLCS relies upon “technological developments” and we consider that the range of technological changes that have led to the provision of television on hand-held mobile telephones becoming a practical proposition is sufficient to justify using the order making power in this way.

Rationale for government intervention

2.4 Ofcom has carried out a number of consultation exercises looking at, amongst other things, the future development of digital radio. One of the issues it consulted on was whether the 20% data limit should be increased so as to facilitate the development of innovative new services such as mobile TV. As a result of its consultation, it recommended to the Secretary of State for Culture, Media and Sport that the data limit on national multiplexes be replaced by a requirement for multiplex operators to carry a minimum number of services carried on national multiplexes.

2.5 The DMCS agrees that the results of the Ofcom consultation suggest that there is evidence of demand for an increase in the data limit and that such an increase should facilitate the development of new services which would benefit consumers, such mobile TV. It is self-evident that the situation can change only through government intervention. If the Government does not raise the percentage, a number of innovative services may not be brought to market and DAB itself may suffer by virtue of not being part of a more compelling media package.

2.6 There is also evidence of consumer demand for such a service. BT has been developing a service which uses the 20% data capacity on the existing national multiplex for broadcasting TV and providing an electronic programme guide (EPG). The service, known as BT Movio, involves the use of a device which enables the user to make phone calls, listen to DAB radio and watch a TV channel. The service has been trialled within the M25 area last year for nearly six months.

2.7 The BT trials showed that people spent more time listening to DAB radio than watching TV, so it is hoped that making additional spectrum available for TV will also have the effect of stimulating DAB listening. At present, no phones have DAB radio so a service using phones with DAB digital radio could introduce new listeners to DAB and so grow the DAB audience.

2.8 The results of these trials also suggest that, to be commercially attractive, the service needs to provide at least five TV channels, which would require an increase in the data limit to 30%.

2.9 The specific change outlined by Ofcom would require primary legislation and is therefore not attractive, partly because it would take too long and partly because broadly the same effect can be more easily achieved through the use of secondary legislation. We therefore propose increasing the data limit to 30% by order, subject to consideration of the responses received on consultation. Ofcom are proposing to agree to one of the services on the national commercial multiplex being broadcast in mono for an 18 month period, after which it will revert to stereo (a second service will also be broadcast in mono but that is permitted under the terms of the existing licence). This will ensure that the same number of audio services continue to be available on the national radio multiplex and allow the number of TV channels to be increased from three to five.

3. Consultation

Within Government

3.1 DTI has been involved with the formulation of this policy and supports a relaxation in the data limits. DCMS have also sought the views of the Cabinet Office, OFT and the Small Business Service.

Public consultation

3.2 Ofcom has consulted extensively on this subject, starting in December 2004, and DCMS have subsequently discussed the matter with Ofcom, Digital One and BT.

4. Options

4.1 It is possible by order to set the data limit at any figure. For the purposes of this exercise, however, we will consider no change (i.e., maintain the 20% limit), an increase to 30%, an increase to 40% and an increase to 100% (i.e. no restrictions on data use).

No change

4.2 As outlined above, no change would mean that there can be no increase in the amount of data carried on a radio multiplex, and consequently it would not be possible to bring to market a more compelling mobile TV proposition better able to satisfy consumer demand. There is also a risk that DAB will suffer in the longer term by being left as a largely audio-only medium. There is, on the other hand, evidence to suggest that DAB will benefit from being part of a wider media and audio package. For example, the BT/Virgin Mobile trial indicated that participants consumed more DAB than TV. Far from undermining DAB, the association with mobile TV is likely to increase DAB listening as people who are currently not attracted to a DAB-only device may be more attracted to a device that offers DAB as part of a wider package including telephony and video.

30% limit

4.3 This would allow for five TV channels to be carried on a DAB multiplex, as opposed to the current three. This is the minimum that the BT trial suggested was necessary for a compelling commercial proposition. As indicated above, we believe that an attractive TV/DAB/phone package would be good for consumers in general and would be beneficial for the take up of DAB.

4.4 Raising the data limit of itself would not achieve anything because the current multiplex licence specifies the minimum number of sound services which must be provided, and the minimum bit-rate for each service. Unless Ofcom agree changes to the number of services and/or the bit-rates, it would not be possible for the multiplex operator to increase the amount of data carried on the multiplex and still comply with the terms of his licence.

4.5 Reducing the number of services is not attractive as it would clearly represent a reduction in listener choice. Ofcom therefore propose to allow one of the services on the multiplex to broadcast in mono for an 18 month period after which it will revert to mono. In addition, the operator will reduce a second service to stereo. This does not require the agreement of Ofcom as the licence only requires that it be broadcast in mono. On this basis, we propose, subject to consideration of the responses received on consultation, to introduce an order increasing the data limit to 30%.

4.6 Once the data limit is increased, the capacity made available can be used for any type of data service. It is not possible to require, for instance, that it is used for mobile TV or other audio-visual broadcasting services. In principle, therefore, it could be used for other sorts of data services such as business to business services. It is therefore possible that, if BT Wholesale decided it no longer wanted the capacity for BT Movio, the capacity could be used for a service entirely unconnected with radio or TV broadcasting. This is, of course, not a new risk as there is no requirement now that the data capacity be used in a specific way; the only difference is that the amount of capacity reserved for digital radio broadcasting will have decreased. Furthermore, it does not follow that the provision of other data services would be detrimental to DAB; if this were the case, there would be no provision for data use. Allowing some data to be carried on a radio multiplex allows the multiplex operator a degree of flexibility to develop a business plan which will better ensure the financial success of the multiplex, meet consumer demand for new services and provide a more secure basis for existing DAB services.

4.7 We consider that this option strikes the right balance between increasing consumer choice while maintaining the existing number of digital services. This is therefore our preferred option.

40% limit

4.9 All the same considerations above apply. In this case, however, it would not be possible to continue to broadcast the same number of DAB services on a comparable basis as at present. This would represent a clear reduction in listener choice for all DAB listeners and no corresponding benefit, as many may chose not to have the BT Movio service or similar.

100%

4.10 This approach would leave it entirely to the market to determine the appropriate balance between radio services and any other services. It would in principle be possible for the result of this to be that services which have the capacity to generate greater income than DAB would entirely take over the radio multiplex leaving no capacity for DAB. We do not believe that the potential loss of all national commercial DAB services would be in the interest of the consumer and therefore will continue to set an upper limit for data use on radio multiplexes.

Compliance and Enforcement

4.11 The compliance and enforcement issues remain the same regardless of the level at which the data limit is set.

Non-regulatory options

4.12 The purpose of this exercise is to increase the amount of capacity which could be used for data purposes. Because the limit is set out in legislation, any change can be effected only through regulation; there are no non-regulatory options.

5. Costs and benefits

Sectors and groups affected

Consumers

5.1 Consumers nationally will have access to a new multi-media service offering telephony, DAB radio and mobile TV.

Radio Industry

5.2 The analogue radio sector comprises 326 full-time analogue radio stations (excluding RSLs and community radio). This figure consists of 3 national commercial, 272 local commercial, 5 BBC nationals and 46 BBC local services.

5.3 As regards digital radio, there are currently two national multiplexes – 1 commercial and 1 BBC - and 46 local and regional multiplexes carrying 215 services. This figure consists of 8 (including 5 digital only services) national commercial, 164 local commercial (35 digital only), 10 (5 digital only) BBC UK-wide services, the World Service and 32 BBC local services²¹.

5.4 Ofcom is currently proposing to licence a second national commercial radio multiplex and the proposal to increase data limit to 30% will also apply to it.

Overall size of the radio industry

5.5 Total commercial radio revenues in 2005 were £530m²². Amongst the larger groups, Virgin Radio's turnover was £20.1 million in 2004 and profits were £3.1m. Emap's preliminary results for 2005 project turnover to be £167m in 2004/5. Profits were £35m. Its radio revenues were £98 million with profits at £22 million. Emap owns 86 digital radio stations on DAB and 8 national stations on Freeview, cable, satellite and on-line. According to GCap's 2005 interim report, revenue would be £111 million with operating profits at £14 million. GCAP has 57 analogue and 100 digital stations. Chrysalis has estimated revenue for its Radio Division in 2005 to be £63

²¹ Figures from Ofcom's "Radio-Preparing for the Future Phase 2" published on 19 October 2005

²² Figure provided by CRCA

million with profits of £5.6 million. They own about a dozen radio stations and 5 local muxes. Chrysalis reported that it would carry losses on digital stations in the order of £3 million.

Other providers of mobile TV services

5.6 Other providers of mobile TV services may consider this to be unwelcome or even unfair competition. The question of unfair competition is discussed below. More generally, we are keen to see as wide a range of services as possible being developed so that consumers have greater choice. We believe that increased competition will drive innovation and produce better and more efficient services for consumers and citizens.

Benefits

5.7 The main benefit of this change is that it will allow the development of new mobile TV services which will increase consumer choice. We consider that this will also assist DAB by making it available as part of a new, attractive multi-media package including mobile TV and telephony.

5.8 There will also be benefits for UK industry as the UK is in the forefront of DAB technology: 95% of all world DAB products use UK designs, hardware and software IPR.

5.9 In the event that the additional data capacity is not used for mobile TV services, as is presently envisaged, we still take the view that increasing the flexibility with which digital radio multiplexes can be used is likely to lead will lead to the development of new types of services which will encourage DAB take up.

Costs

5.10 There will be no reduction in the number, but some reduction in the sound quality, of the services on the national digital multiplex. One of the services could have broadcast in mono at any time as it is permitted to do so under the terms of its licence. Ofcom will have to agree to the other service broadcasting in mono although this agreement will be for 18 months only. It is worth bearing in mind that a lot of the early, and most popular, DAB radios, (about 20-30% of total DAB sets) are mono so many listeners will not be affected by any change.

5.11 It would be possible, through the use of new improved compression technology, to maintain these services in stereo. However, this would have involved a one-off additional investment in the region of £0.5 million by the multiplex operator.

5.12 There may also be a potential impact on other existing or potential mobile TV providers insofar as this expanded data service proves to be more attractive to customers. On balance, however, we believe that increased choice and competition will lead to better services for consumers.

6. Small Firms Impact Test

6.1 Insofar as the proposal affects small business, it affects only those in the radio industry. This proposal has been the subject to significant consultation by Ofcom and this process has not identified any specific impact on small business. In addition, the views of the Small Business Service were sought before this consultation document was issued.

7. Competition assessment

7.1 Formal measures of market power for the relevant sectors are not available, although, for the broadly defined “radio and television activities” grouping, official data show relatively high concentration. The relevant market sectors are also experiencing rapid technological change.

7.2 Ofcom considered the competition aspects of this issue last year (see Annex A). We agree with Ofcom’s analysis and conclusions that awarding spectrum for data use under the Broadcasting Act does not necessarily distort competition.

- Existing legislation gives Ofcom some discretion as to whether to award spectrum by auction or by beauty contest.
- There is good evidence of demand for capacity for data purposes.
- Standard economic theory suggests that any distortions in competition are only likely to be caused by differences in the marginal costs faced by operators rather than by sunk costs such as auction fees.
- If implemented, administered incentive pricing (AIP) for broadcast spectrum would mitigate any distortion.
- DAB radio multiplex licences contain provisions requiring fair and effective competition which restrict the ability of multiplex operators to obtain any unfair advantage in the market.

7.3 We would also add that anyone who has previously obtained spectrum by auction is free to apply for this spectrum on the same basis as anyone else.

8. Enforcement, sanctions and monitoring

8.1 Increasing the data limit is a difference in degree rather than kind and, as such, has no effect on existing enforcement, sanctions and monitoring arrangements which are a matter for Ofcom.

Annex A

Extract from **Ofcom** publication "Radio – Licensing Policy for VHF Band III, Sub-band 3" (21 December 2005)

Ability to use a percentage of capacity on radio multiplexes for data services

4.66 Under the Broadcasting Act licensing regime, up to 20% of the capacity on a digital radio multiplex may be used for non-programme related services, including data and multimedia services.

4.67 Some respondents argued that licensing the new multiplexes under the Broadcasting Act regime could potentially have a distortive effect on competition, given that other spectrum which can be used for radio and multimedia services has been (e.g. 3G) and is proposed to be (e.g. L-Band) allocated via auction.

4.68 A confidential respondent argued that "the percentage of digital capacity rule creates an unacceptable risk of competitive distortion if the winners of the multiplexes are allowed to compete in other markets on what would essentially be an uneven playing field." The respondent goes on to argue that "the current and future usage of 20% of DAB capacity creates a risk of competitive distortion and we request that Ofcom ensures that competition is fair".

4.69 Ofcom agrees that any potential effects on competition need to be taken into account in deciding on the appropriate mechanism for releasing this spectrum to the market. However, Ofcom does not consider that the assignment of spectrum for use for data services by way of licensing under the Broadcasting Act will necessarily lead to a distortion of competition, as suggested by the respondents. It is clear that the relevant UK and European law allows for spectrum to be assigned either by way of auction or by way of beauty contest, and the regulator is given some discretion as to choice of assignment method depending on the circumstances of the case. Ofcom considers that it would be wrong to conclude that to assign spectrum that may be used for similar purposes by different methods would, by definition, be discriminatory or distortive of competition.

4.70 In the present case, Ofcom considers that the use of Broadcasting Act as the basis for assignment is justified, and the superior choice for the reasons set out in the consultation document and in this statement. Ofcom also considers that it would be disproportionate, and antithetical to the optimal use of spectrum, to restrict the use of up to 20% of the available capacity for data services, as suggested by some respondents. Ofcom considers that there is good evidence of demand for capacity for this purpose, as reflected in current developments in the market, the various analyses conducted over the past two years, and the various responses to successive consultations.

4.71 Ofcom notes three further points in this context. The first is that standard economic theory suggests that any distortions in competition are only likely to be caused by differences in the marginal costs faced by operators rather than by sunk costs such as auction fees (as long as these are fixed in the auction). This supports the view that it does not necessarily distort competition for some spectrum to be awarded by beauty competition whilst other spectrum may be awarded by auction, for an upfront fee, even if both tranches are used to provide services competing in the same market. It is also notable that different auctions can readily result in different prices being paid for competing spectrum, particularly if these take place at different times.

4.72 The second point to note is that Ofcom is currently in the process of considering the potential application of administered incentive pricing (AIP) for broadcast spectrum, including the available spectrum in VHF Band III, sub-band 3. If implemented, this would mitigate any distortion that may arise from the proposed allocation mechanism.

4.73 Finally, it is also relevant to recognise that the DAB radio multiplex licences contain provisions requiring fair and effective competition. These restrict the ability of multiplex operators to obtain any unfair advantage in the markets in which they operate.

4.74 It has also been suggested in response to the consultation that assignment of the spectrum in a way that allows use for data services under the Broadcasting Act, rather than by way of auction, may constitute State Aid. Ofcom does not consider that State Aid issues are likely to be relevant to this matter, though Ofcom will at all times ensure that it acts in conformity with any relevant laws.