

RADIO – PREPARING FOR THE FUTURE
Response to Ofcom Consultation on Phase I
By Capital Radio PLC

Introduction

1. Capital Radio plc holds 22 UK analogue licences across London, the South Coast, the Midlands, South Wales, the North East, the North West and central Scotland. We also operate 58 digital services on local and national digital multiplexes. Capital's stations broadcast to over 8 million adult listeners each week and we employ approximately 700 people across our radio broadcasting interests.

2. The Company is in the process of merging with GWR to create the UK's largest commercial radio company, with an anticipated 40% market share. While this response to Ofcom's consultation is made by Capital, it is made very much with a view to the future.

Preliminary comments on Section 4 of the Review: Why does Ofcom intervene in the market?

3. The Ofcom analysis of a possible consumer rationale for intervening in the market disregards many of the business realities of commercial radio. It is not possible to provide a viable radio service to a niche audience which is too small or otherwise unattractive to attract sufficient advertising revenue to support the service. This is irregardless of whether or not there is spectrum scarcity: in an advertiser-funded model a lack of spectrum scarcity is in fact likely to lead to greater audience fragmentation making it even harder for niche services to attract sufficient audiences to be viable. This is directly opposite to the conclusions drawn in Appendix D2 of the Review. The legislation (s.105(1)(a) of the Broadcasting Act 1990) requires Ofcom to take viability into account when determining whether or not to award a new licence. We therefore believe that the only possible market intervention which can be made to ensure niche, commercially non-viable programming is made available is through obliging the BBC to provide it.

4. For the analysis to be complete, there must be clear identification of the BBC's role as a public service radio provider, as distinct from any public purpose to be satisfied by the independent sector. Within the independent sector itself, it would be useful to separate INR, ILR and community radio, all of which serve different functions and are regulated according to different statutory criteria. Seeking to identify a single set of public purposes for radio is not helpful.

5. Ofcom's starting point should be the Broadcasting and Communications Acts which give a clear indication of Parliament's intentions. Ofcom should begin by determining whether the licensing and regulation of each sector of independent radio delivers Parliament's objectives. For ILR this relates to issues of range and diversity, fair competition, commercial viability, and delivery of localness. Ofcom's regulatory objectives should be focussed on any identified weaknesses in fulfilling these

objectives. Instead, the analysis focuses on where weaknesses *might* lie without (statutory) regulation, which in any event is not within Ofcom's powers to change.

6. An important factor not examined in the Review is the effect of the competition between the BBC and the commercial sector on potential market failure. We would argue that the BBC's competition for the commercial sector's audiences leads to a failure to provide the non-commercial niche services which only a publicly funded provider can afford to broadcast. And, rather ironically, it is the commercial sector's competition for the BBC's audiences which preserves and augments ILR's focus on providing localness in programming. ILR *cannot* compete with the BBC for the big name, national presenters or events. What it can do better – its *sine qua non* – is to provide a local focus and community orientation. This commercial imperative to be local mirrors the regulatory intentions in the Communications Act. And the coincidence of objectives means that there is less need for regulatory intervention than would be the case were it not for the presence of the BBC in the market. This is a significant differentiating factor to the example of France referred to in the Review.

CONSULTATION QUESTIONS

I. Localness

The USP of local radio is its localness. But why should localness be regulated for, unless there is demonstrable market failure? The response should aim to be non-interventionist: identify where there is market failure (i.e. places where the provision of local radio is poor), and wherever possible, increase competition in those areas by awarding new radio licences. Regulation for localness should only become necessary where market failure cannot be remedied through competition. Ofcom has not provided evidence of any existing perceived lack of localness in radio, yet is seeking to increase regulatory burdens in this area.

1. Should formats be used as the primary tool of regulation for analogue commercial local radio?

Yes. The Broadcasting Acts require a successful applicant's proposals for programming to be included in their licence. Over the years, these obligations have been reduced from detailed "promises of performance" to more generalised formats. There is no evidence that regulation through formats is not effective, and would seem to be the best way of getting a balance between avoiding micro-regulation and ensuring licensees provide the specific type of service for which they were awarded the licence.

2. How best to ensure the provision of a high quality news service, including local and national news:

A preliminary question should be whether a high quality news service is a regulatory objective for the station in question. No existing licences stipulate the *quality* of news to be offered, only – depending on the individual format – the frequency and type (local, entertainment news, etc) and in certain cases the length of bulletins. Ofcom has a statutory duty to ensure quality *as a whole* across independent radio, not for

every station nor indeed for every station which offers news. Although most ILR stations broadcast news, the importance placed on news by the licensee and its listeners varies. For some stations (e.g. local full service stations, or stations affiliated to local newspapers) news will be very important. For others (e.g. those whose main purpose is music provision, especially niche formats) it will be less important (or the emphasis may be on specialist rather than local news). In such cases, treating news provision as a desirable externality requiring intervention is introducing an element of regulation which was not intended by Parliament. As with the regulatory regime for public service television, Ofcom should be examining whether the quality of ILR *taken as a whole* is of adequate quality rather than setting potentially interventionist standards for every individual licensee.

- **Should news hubs be allowed in order for stations to operate in the most operationally effective way?**

Ofcom's own research demonstrates that local radio is not a prime source of local news, rating third or fourth highest as a source of information about areas from neighbourhood to regional size.

Nonetheless 91% of respondents said provision of local news was important on local radio.

Licensees should be allowed to decide for themselves whether news hubs will act for the benefit or detriment of their stations. Ofcom must bear in mind that it is not in licensees' own interest to provide a poor service which will transfer listeners from their stations – particularly to the BBC. We believe it is likely that news hubs will only add value for smaller stations operating within geographically homogenous areas with low populations, and therefore areas of relatively low local news incidence.

- **Should the localness guidelines include a requirement for each station to provide direct and accountable editorial responsibility, based within the licensed area, for the provision of a news service equivalent at least to full time professional journalist cover for all hours, as specified in the format, for when local news will be provided.**

No. While we agree that there should be someone in editorial control of a station for every hour that it is live on air – and editorial responsibility includes responsibility for news – there should be no specific requirement for the presence of a professional journalist in the licensed area. First, there are difficulties in defining 'professional journalist'. (Would Ofcom expect to endorse NUJ membership as a measure of professionalism?) Second, it may be more effective for a journalist to be working out of a news hub, but able to phone in stories to a programme editor at the station, rather than be based at the station him/herself. This is particularly so for the smallest stations. For large, metropolitan stations, we would expect licensees to continue to employ a number of full-time journalists, but this should be an operational, not a regulatory decision.

- **Is there a better way to achieve the objective that focuses more on output rather than input?**

Clarity is required about the objective. If the objective is to ensure quality local news provision, then Ofcom will need to assess the output of all the stations in a given area. We believe there is no substitute for listening to output to judge compliance with formats.

3. Should decisions on automation be left to stations themselves to decide?

Yes. Capital Group stations do not normally automate programming, but we believe that programme makers are best placed to determine how to make the most attractive programming for their listeners.

4. Should the requirement for studio location within the MCA be relaxed, to within the licensed area?

Yes, it should be relaxed, but we consider that there may be problems using the term “licensed area” and would suggest the limit be the station’s own TSA. “Licensed area” is not an exact definition, requiring the exercise of Ofcom’s discretion, and hence the regulator’s prior approval. The TSA is the self-defined area that the station markets to and it is not in a licensee’s interest artificially to expand the area of its TSA. We suggest that requiring stations to have their studio located within their TSA would involve lighter touch, less interventionist regulation, in line with Ofcom’s general principles.

5. Should stations be free to network material as they see fit outside of the hours specified in the format as being local?

Yes. We would hope that Ofcom would remain open to requests for format variation to permit occasional high quality networked programming to be broadcast during ‘local programming time’, subject to compliance with statutory requirements.

6. Should stations be required to maintain a format and localness file (both at their premises and online) demonstrating how it is meeting its obligations?

We consider there are significant weaknesses with this idea. Despite claiming Ofcom doesn’t want to regulate inputs, the ‘file’ will be expected to include details of inputs such as where programming is produced and presented from, and details of automation. This suggests that Ofcom will be applying standards in these areas; why else would the information be collated? In the interests of transparency and openness, the industry needs to know how Ofcom will apply information about automation and other inputs.

The best way of assessing whether stations are complying with their formats (and therefore with their localness obligations) is by listening to the service. However, an alternative means of regulating would be for Ofcom to request (either on a spot-check, but preferably on a risk-assessed basis) detailed schedules identifying the nature of all local programme elements (which could be verified by listening to taped output). Maintaining an up-to-date ‘format and localness file’ would be an expensive and resource-intensive administrative burden, especially for smaller stations, which is a disproportionate response to a not clearly identified problem.

7. Do we agree with Ofcom's revised localness guidelines and the factors to be taken into account in the provision of localness?

Our only concerns with the revised guidelines relate to the section on how localness should be delivered. This continues to fall within problems relating to input, rather than output regulation.

The draft localness guidelines include a requirement to demonstrate that all hours of local programming (as set out in the format) include elements of local material. This completely disregards the nature of much radio programming, especially on music services, and goes much further than current regulatory requirements. E.g. Xfm broadcasts locally-produced and presented specialist music shows in the evening (as per its format), which concentrate on playing and discussing the music, not the fact that the station is in London.

Regulating for where material is made is input regulation, which Ofcom says it wishes to avoid. The Communications Act says that Ofcom has a duty to secure that local programmes include "a suitable proportion" of locally-made programmes. Ofcom says that it will consider "a suitable proportion" to be whatever a licensee proposes in its licence application, and hence is in its format. However, Ofcom appears unwilling to be flexible about change, indicating that any request for a significant change to the amount of locally-made programmes would be likely to constitute a substantial alteration to the character of a service.

It is difficult to see how the location of production necessarily contributes to the *character* of a service. Ofcom's own research shows that only a small majority (56%) of listeners said they thought it important for local radio presenters to be based in the local area. Yet a similar majority (57%) said they enjoy listening to presenters from the local area. But Ofcom, properly, is not suggesting that stations must employ local presenters! The importance and relevance to localness of where production takes place will depend very much on the nature of the radio service itself.

There is not a 'one-size-fits-all' answer here. For small local full service stations, where the programming is produced may have more of a direct bearing on format compliance than for a larger, more niche service. Ofcom should consider requests for format changes in this area on a case-by-case basis, to determine whether a change would actually impact on the station's *character*.

We consider the 'yellow card' system works well and is taken very seriously.

II. DIGITAL RADIO

We are very disappointed that Ofcom remains reluctant to embrace a vision for digital radio. The ability and willingness of existing operators to simulcast (and pay enormous amounts for transmission costs which do not reap additional revenues) is finite. If Ofcom do not foresee moving to digital switchover, it would be helpful for our business planning to know sooner rather than later. There are undoubted problems with analogue radio switch-off (even greater than for TV), but there are other options (e.g. partial switchover making use of cheaper dual-band radios, thus freeing up

analogue spectrum for smaller and community-based radio), which ought to be considered.

**8-10. Views on proposals to allocate VHF Band III Spectrum for:
three blocks to provide local Broadcasting Act multiplexes; and
one or two blocks for General (i.e. WTAct) national multiplexes**

Independent radio historically is primarily a local medium. This is reinforced through government policy as reflected in the Communications Act 2002 which concentrates on localness. We believe that Ofcom policy with regard to the future of radio, including DAB, should focus on local radio and that DAB should be a delivery medium primarily for local radio services. Both satellite and DTT are platforms which are suitable for delivery of national services, but not local, which further suggests that DAB spectrum should be allocated principally for local use.

As Ofcom recognises, the current diversity of services on local multiplexes arises largely from the quasi-national networking of out-of-area digital services. If there is an increase in the number of national multiplexes, many of these services will migrate to being national, leaving significant holes in capacity and funding for local multiplexes. Therefore, any action taken by Ofcom to increase the availability of DAB spectrum for national services must carefully consider the knock-on effect on the local multiplex market; the removal of these quasi-networked services could lead to the non-viability of local multiplexes and the loss of local DAB provision altogether in some areas.

11. What demand do you envisage for nationally-allocated DAB compatible spectrum?

We would advise Ofcom to hold back from auctioning national DAB spectrum unless and until it has received clear expressions of interest from a wide variety of potential users. The business model to support new national multiplexes must include non-radio use; as explained above, migration of existing quasi-networked services from local multiplexes could devastate the local multiplex market.

12. Should the limit for data capacity be raised from 20%? If so, to what level? For what purpose?

Given licensing obligations to provide a certain number and types of programme service, the use to which multiplex operators make of excess capacity should be for them to decide. Improvements in compression techniques will, over time, enable operators to choose between offering more audio or data services. This choice should be a commercial one, subject only to compliance with licence programming requirements.

For the time being the 20% limit on data capacity on local multiplexes is sufficient for current purposes, although we would welcome confirmation that there is no intention of applying any restrictions on the proportion of this capacity which can be used for non-programme related purposes. We would also welcome a flexible measurement of this 20%, perhaps over a 24hour or week basis, to enable greater use for, e.g. data downloads overnight.

Ofcom should be aware that devices are currently in development which would enable greater use of DAB for a wide range of data applications, similar to 3G telecoms applications. It is therefore possible that we may request further relaxation of the 20% limit in the future as and when these enhancements become available.

13. Should the limit for data capacity on DTT multiplexes (which currently carry radio) be raised from 10%? If so, to what level?

As discussed below, one of the public purpose objectives of radio should be universal (or as near universal as possible) access. It is becoming clear that Freeview is increasingly being used as a means of radio listening in DTT homes, yet there is no available capacity for adding services to the platform. We believe there is no reason to set a ceiling for data capacity, as the market can decide whether spectrum should be used for radio, television, or other purposes, subject always to compliance with programme obligations set in the licence. However, it may be politically palatable to set a limit, in which case we would recommend the ceiling be raised to 20%, in line with DAB Broadcasting Act multiplexes. Even with an increased limit, it will be for multiplex operators to determine whether to allocate capacity for sound broadcasting, rather than television or other purposes.

14. Should the minimum bit-rate limit for DAB be abolished and replaced with a co-regulatory system akin to that applied in TV for picture quality?

Yes, we agree with Ofcom's proposals. As Ofcom notes, the quality of an audio broadcast is a combination of the bit rate and the quality of the source material. A high bit rate will not compensate for initial poor quality audio. Nonetheless, we believe that the industry should strive to ensure consistent, good quality and would support Ofcom's suggested method of achieving this. However, we are hopeful that Ofcom would discuss with industry the frequency and level of detail of reviews. We would also like to know what triggers the application of the BS1116 process and who will be expected to pay.

Planning of DAB spectrum

Although not mentioned in Ofcom's review, we would strongly urge Ofcom to re-plan all of the existing Band III spectrum currently used by DAB once a decision has been taken about how much additional spectrum will be made available within the Band. This should enable the increase of frequency re-use distances and therefore potentially to increase the field strengths of existing networks without a significant increase in transmitter numbers. A re-plan would also provide an opportunity to reconsider existing constraints on "editorial areas" which currently limit multiplex coverage. While a re-plan might require existing operators to change frequency blocks, this would not involve as major an upheaval to listeners as, say, a frequency change using analogue spectrum.

III. FUTURE LICENSING

15. How should Ofcom allocate further MW frequencies between commercial and community radio?

The future of MW should not be considered without a longer-term framework for FM and DAB. For example, has Ofcom considered a gradual migration from FM to DAB, leaving FM for smaller and community radio services? Just as radio moved from MW to dual band FM/MW, there is potential for future radio to be DAB/FM.

16. How should the advertisement of new commercial MW licences be accommodated into existing FM licensing plans?

We see no reason to advertise new MW licences in the foreseeable future. However, MW should be made available for community radio and RSL use.

IV. STRATEGIC FRAMEWORK FOR RADIO

17. Our views on the proposed strategic framework for the future regulation of radio which aims:

- **to enhance choice, diversity and innovation for consumers at the UK, national, regional, local and community levels.**
- **To secure citizens' interests through the provision of radio designed to meet public purposes**
- **To do this with as little intervention in the market as possible, consistent with meeting Ofcom's objectives, in a way that is as consistent as possible across media and across platforms.**

As a broad statement of objectives this is reasonable, but needs to be broken down into its individual elements. We raise some points below.

18. How important is it to develop a set of public purposes for radio, and what should they be?

The public purposes of radio have to do with the rationale for the free use of public spectrum, and additionally in the case of the BBC, the use of public funding. The different public benefits received by the public and private radio sectors indicate very different levels of public return, or public purposes. A starting point for this discussion should be to identify what public service radio ought to be and the extent to which it is delivered by the BBC. The public purposes of independent radio are set out in the relevant legislation: from providing a range of INR services, to a diversity of local radio services catering to a variety of tastes and interests which (taken as a whole) are of high quality, to the more detailed public purposes identified for community radio.

- **Is the set of public purposes developed for TV a useful starting point?**

“to inform ourselves and others and to increase our understanding of the world through news, information and analysis of current events and ideas;

According to Ofcom's own research, listeners think the provision of local news is important on local radio, and 87% of the sample is satisfied or very satisfied with what they get. But also according to Ofcom's research (see Figure 34 on p. 66) local radio is not a priority source of news or information (either at local or national level).

There is therefore a serious flaw in Ofcom's proposal that news provision should be a public purpose for local radio.

“to stimulate our interest in and knowledge of arts, science, history and other topics through content that is accessible and can encourage informal learning;

There has never been any indication from government or a broadcasting regulator that independent radio ought to be providing this sort of programming material. However this ought to be included as part of the expectation on public service radio.

“to reflect and strengthen our cultural identity through original programming at UK, national and regional level, on occasion bringing audiences together for shared experiences; and

This 'purpose' is completely TV-centric and clearly is inappropriate for radio. Virtually all of UK radio consists of original programming. This does not require regulation. Radio is **local** as well as national and regional. Given the nature of the radio market and the very large number of radio stations available throughout the UK, it is clearly inappropriate to consider a 'purpose' of radio to bring audiences together for a shared experience. In fact the very nature of radio listening is very much a solitary experience, with much listening done alone rather than in groups.

“ to make us aware of different cultures and alternative viewpoints, through programmes that reflect the lives of other people and other communities, both within the UK and elsewhere.”

While this statement might reflect some BBC radio programming, it is not relevant to independent radio, the strength of which is to reflect back to listeners their **own** lives and communities.

- **What else should be added or taken away? (In relation to ILR)**

The starting point of this discussion should be the statutory intentions behind the licensing and regulation of independent local radio: range and diversity, appeal to local tastes and interests, fair competition, commercial viability, and delivery of localness.

With regard to independent local radio, the importance of the delivery of music, entertainment, and companionship cannot be overrated. Local radio provides friendship and community connection for millions of listeners; it is important not to patronise listeners through high-minded regulatory goals. For many listeners, local radio provides a link to their community, be it geographical or a community of interest (“I'm part of Fox FM” or “I'm an Xfm listener.”).

A source of local news and information (despite research respondents claiming radio is not even their third choice for sourcing local news!)

Universal or near-universal access, thereby maximising the use of spectrum – the public good 'given' to independent radio.

- **What is the relative importance of the different elements?**

We have listed them in their order of importance.

- **Are there things better delivered by radio than other media?**

Yes, companionship, community connection, and interaction.

19. How would the public purposes be best delivered?

- **How important is plurality of provision?**

A degree of plurality is important to preserve a range of sources of news and information, but given ILR's relative unimportance as a source of news – and the strict regulation for accuracy and impartiality in news – it is not a vital factor. Indeed, concentration of ownership can actually extend programming range and choice, as a single owner will provide non-competing programming rather than compete for the most attractive popular audience.

- **How much of what commercial radio currently does could be classified as meeting public purposes?**

As stated above, public purposes need to be identified according to the various sub-sectors of radio. We have sought to identify the public purposes of local commercial radio.

- **How well does the current market structure help fulfil public purposes?**

The current market structure, and licensing regime, is key to supporting these public purposes – especially in extending the range of services available. This supports the creation of local communities of interest, as well as geographic communities.

What is missing in the discussion of public purpose is a definition of public service radio. What is it? And is it being provided by the BBC? To what extent should the BBC's publicly funded programming be distinctive from ILR's, and what regulation is required (of the BBC, as well as of ILR) to ensure the public interest is properly served?

- **Should the BBC's radio archive be made available more widely to commercial players?**

Given the format restrictions on commercial radio stations, this would only benefit those stations with formats involving older material. Any release of archive material on the open market would therefore have to be done in a way not to distort the market for programming content.