



# Additional Services Licence (Radio)

Statement following the consultation: Advertisement  
of an Additional Services licence

Statement

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## Section 1

# Executive Summary

## Background

- 1.1 Additional Services are services which use the spare capacity within the signals carrying sound broadcasting services on relevant frequencies, for example to transmit data. They can be provided under licences granted by Ofcom under the Broadcasting Act 1990 ("the 1990 Act").
- 1.2 The current Additional Services licence for radio, which is held by ITIS Holdings PLC ("ITIS"), is used to transmit traffic and road travel information to in-car navigational devices by using the RDS sub-carrier on the frequencies used to broadcast the Classic FM sound broadcasting service under licence INR1. The INR1 licence is held by Classic FM Ltd. The current Additional Services licence is due to expire on 31 December 2011.
- 1.3 In October 2010 Ofcom launched a consultation on matters relating to the advertisement of a new Additional Services licence. Our consultation document is at: <http://stakeholders.ofcom.org.uk/consultations/additional-services-licence/>.
- 1.4 This final statement document explains our decisions on the matters we consulted on. A new licence is advertised alongside the publication of this document.

## The consultation

- 1.5 The purpose of our consultation document was to consult on proposed decisions by Ofcom. These related to:
  - the determination of the amount of spare capacity available for the provision of the Additional Service under the proposed new licence;
  - whether the new licence should have a shorter duration than the maximum possible in the circumstances; and
  - the level of the (annual) payment to be made by the new licence holder based on a specified Percentage of Qualifying Revenue ("PQR").

A total of seven questions were asked about these matters.

- 1.6 The consultation document also set out the legal position on certain other matters relating to the proposed new licence. These included the process Ofcom will follow in considering applications for the licence and making an award decision. What we said on these matters was for the benefit of stakeholders. They were not matters on which we consulted although, where stakeholders took the opportunity to comment on what we said, we have considered what they said.
- 1.7 We received four responses to the consultation. Two were from commercial organisations, ITIS and Trafficmaster Ltd, and two from individuals.

## Ofcom decisions

- 1.8 A summary of Ofcom's decisions is in the paragraphs immediately below. In section 2 of this statement we explain what we proposed in our consultation document, what consultation respondents said about our proposals, our consideration of those responses and our decisions.

### Relevant frequency and spare capacity

- 1.9 Ofcom determines that the spare capacity within the signals carrying the Classic FM sound broadcasting service on the relevant frequency(ies) available for the provision of Additional Services under the new licence will be as proposed in our consultation document. That is, the same as under the existing Additional Services licence, and using the same spare capacity. This spare capacity is set out in Annex 2 to this statement. It is also set out in the advertisement of the new licence.

### Duration

- 1.10 No consultation respondents disagreed with, nor offered counter-arguments to, Ofcom's proposal to grant the new licence for a maximum duration that will end when sound broadcasting service licence INR1 (for Classic FM)<sup>1</sup> ends. We have therefore decided that the new licence should have the maximum duration we proposed.
- 1.11 Accordingly, the new licence will be for a maximum period of six years and two months,<sup>2</sup> but subject to earlier termination for any reason (as explained elsewhere in this statement and in the advertisement for the licence and accompanying draft licence terms).

### PQR

- 1.12 We asked a number of questions about our proposal to set the PQR at 4%. Having considered the consultation responses, Ofcom's decision is that 4% represents an appropriate PQR for the licence. It offers the possible benefit here of risk sharing (which some bidders may value) without having an undue effect on cash bids which should help to encourage a competitive auction and reduce the likelihood of an initial misallocation of the licence. We consider that this level of PQR would be consistent with our duties to secure the optimal use of the spectrum.
- 1.13 We have therefore decided to set the PQR at 4%.

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<sup>1</sup> National Sound Broadcasting licence INR1 (AN001), currently held by Classic FM Ltd.

<sup>2</sup> from 1 January 2012 to 28 February 2018, unless the licensee agrees a different start date with Ofcom (and the maximum duration of the licence will shorter if the start date is later)

## Section 2

# Additional Services licence

## Relevant frequency and spare capacity

### Consultation Proposal

- 2.1 In our consultation document Ofcom proposed that:
- 2.1.1 the new Additional Services licence should be a licence to use spare capacity within the signals carrying the Classic FM sound broadcasting service on the frequency(ies) allocated to and used by Classic FM Ltd under licence INR1; and
  - 2.1.2 the extent and nature of the spare capacity available to provide Additional Services under the new licence should be the same as that available under the current Additional Services licence.
- 2.2 We set out our proposed technical specifications for the new licence at Annex 1 to the consultation document and asked:
- “In conjunction with Annex 1, do you agree with Ofcom’s proposed determination of the spare capacity that would be available for the provision of the Additional Service under the proposed new licence?”*
- 2.3 All four of the respondents answered this question. Three were supportive of Ofcom’s proposal, although one, ITIS, qualified that support as set out below. One response apparently indicated disagreement, but was in fact also broadly supportive of our proposal, as we go on to explain.

### Grounds for proposal

- 2.4 As we set out in our consultation document, amongst the matters Ofcom is required to determine and specify in the advertisement for an Additional Services licence are:
- the sound broadcasting service or services on whose frequency or frequencies the services are to be provided; and
  - the extent and nature of the spare capacity: the capacity within the signals carrying the sound broadcasting service on a relevant frequency and which is available for the provision of Additional Services.
- 2.5 We said that, in considering these issues, we had borne in mind in particular one of our main general duties in performing our radio licensing function: promoting the interests of consumers in relevant markets; and our duty to make optimal use of the spectrum. Likewise, our duty to relating to the use of spare capacity within relevant frequencies. Also part of the relevant background, we said, are the comments repeated in paragraph A1.6 to this statement about a proper return for the use of the valuable and scarce spectrum. We said that, in light of these factors, we made the proposals set out above.

- 2.6 We explained our view that determining the available spare capacity to be (at least) the same as is currently available for Additional Services on the Classic FM frequency(ies) would have a positive impact consistent with the duties referred to above. The availability of that capacity enables the current licensee, ITIS, to provide a valuable service to consumers, using all the spare data capacity available to it. This is evidenced by the number of users of that service - some 2.4 million - generating profits for ITIS.
- 2.7 We also said it appeared to us that a similar service may not be capable of provision using a smaller amount of spare capacity (a reduction in the capacity would result in a lowering of the repetition rate, which would in turn mean a reduction in the amount and quality of data that could be transmitted).<sup>3</sup> We said that, as a result, the availability of less capacity would have a less positive impact less consistent with our principal general duty and that of securing the use of relevant spare capacity.
- 2.8 We qualified our proposals with the following points, however.
- 2.9 First, we explained that, at the time of the consultation document, licence INR1 ran until 30 September 2011, but was eligible for renewal under the provisions of the 1990 Act introduced by the Digital Economy Act 2010. We referred to the consultation document Ofcom had recently published in which we proposed that licence INR1 would, if Classic FM Ltd takes up its right to renewal on the terms determined by Ofcom, be renewed for seven years from its renewal date (then likely in January 2011).<sup>4</sup> We made clear the advertisement, award and grant of the proposed new Additional Services licence was subject to Classic FM Ltd taking up its right.
- 2.10 Second, we set out that, in determining the amount of spare capacity available on the relevant frequency(ies), we have to have regard to any need of Classic FM Ltd to be able to use part of the signals carrying Classic FM for providing services which are ancillary to programmes included in that service. We explained that our preliminary discussions with Global suggest that the same amount of spare capacity will be available on the relevant frequency(ies). We said we would confirm that position before the new licence is advertised. So, we explained, the advertisement, award and grant of the new Additional Services licence was also subject to further consultation between Ofcom and Classic FM Ltd about its use of the signals carrying its service.

## Consultation responses

- 2.11 As we indicate above, two of the responses to this question – one from an individual and one from Trafficmaster Ltd - gave unqualified support to Ofcom's proposals on relevant frequency and spare capacity. A third, from ITIS, gave support that it qualified as follows.
- 2.12 ITIS said it agrees that at least the same spare capacity as is currently available for Additional Services should be made available under the new licence. However, it also said that:
- 2.12.1 that capacity should be increased in line with the RDS-TMC technical standard ISO 14819-1; and

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<sup>3</sup> though, of course, the capacity is by no means bound to be used to provide a similar service.

<sup>4</sup> to run until January 2018, but subject to earlier termination. For example, pursuant to provisions now in sections 97A, 97B and 105A of the 1990 Act

- 2.12.2 the limit on the broadcast deviation level that applies under the current Additional Services licence should be increased under the new one, to improve RDS reception and increase coverage (so as to improve the current level of service).
- 2.13 In support of the first of these points, ITIS said the broadcast rate for the Additional Service under the new licence should be increased to the maximum set out in ISO 14819, which for, "... the 8A groups carrying the ODA TMC feature is 2.85 groups/second." It submitted that this would, "allow[ing] optimal use of the spectrum, and benefits for consumers."
- 2.14 ITIS also, nonetheless, acknowledged that, "Conceptually an increase in the broadcast rate may have a small impact on Classic FM." But, it submitted that, "... this would be so negligible as to be immaterial. Impact on Classic FM audio/RDS service would be small decrease in AF and/or RadioText repetition rates [*sic*]. This would not be visible or noticeable to listeners."
- 2.15 In support of the second point, ITIS said the, "..... Audio Programme deviation level of Classic FM" should be increased to the level typical in Europe (+/- 3 – 4 kHz). It submitted that, "Such a change would allow the AS/1 licence-holder to provide consumers with a level of service equivalent to that offered throughout Europe without any negative impact on the Classic FM service."
- 2.16 The fourth response to this question, from an individual, apparently indicated disagreement with Ofcom's proposal on spare capacity. That is, the respondent's direct response to Ofcom's consultation question was, "no." However, the rest of the response made clear that the respondent in fact agreed that the available spare capacity under the new licence should be as Ofcom proposed.
- 2.17 To explain further, the respondent said the new Additional Services licence under consideration should be a licence to use the spare capacity we proposed in our consultation document. But, the respondent contended, there is further spare capacity on the frequency(ies) used to broadcast Classic FM. That capacity should be used for Additional Services under a second Additional Services licence.
- 2.18 The respondent's contention as to the spare capacity available for this second licence was that that Classic FM does not exploit all the RDS radio features on the relevant frequency(ies). So, a second new Additional Services license, having what was described as, "a reduced data bandwidth dependant on negotiation with Classic FM's owners, Global Radio," should also be auctioned. The respondent submitted that a second licence would, "... enhance the value of the service capability to the taxpayer, while not reducing the quality of the broadcast."
- 2.19 Ofcom has considered these responses. Although the individual's response referred to above actually agreed with our consultation proposal, and disagreed only to the extent that it contended there should be a second new licence, we have considered that response together with ITIS's. This is because both go to the question of spare capacity on the relevant frequency(ies) and how much of it should be available under the new licence.
- 2.20 The first part of that consideration is as follows. Classic FM Ltd has now accepted the revised financial terms determined by Ofcom for the further renewal of licence INR1 for seven years (from 1 March 2011, but subject to earlier termination as set out elsewhere in this document). Accordingly, the new Additional Services licence will be a licence to use spare capacity within the signals used to broadcast the



Classic FM sound broadcasting service on the frequency(ies) made available by Ofcom for that service.

- 2.21 That leaves the question of the spare capacity available within the signals on that frequency for the Additional Services under the licence. In considering that question, we have taken into account our general and specific duties as they relate to Additional Services, as set out in the consultation document, and put ITIS's response to Classic FM Ltd, as follows.
- 2.22 We have the main general duties referred to in our consultation document and elsewhere in this document, when carrying out our functions, in particular to further the interests of consumers in relevant markets, where appropriate by promoting competition (section 3 of the 2003 Act). The things this duty requires us to do include, in particular, securing the optimal use for wireless telegraphy of the electromagnetic spectrum.
- 2.23 Alongside this, we have the more specific duty in section 115 of the 1990 Act, again as referred to in the consultation document. This requires Ofcom, "... to do all [we] can to secure that, in the case of each relevant frequency, all of the spare capacity available for the provision of additional services on that frequency is used for the provision of such services under additional services licences granted by OFCOM in accordance with [section 115]."
- 2.24 We have considered these duties together with further consideration of the following provisions of the 1990 Act:
- 2.24.1 section 114(2) of the 1990 Act which says the relevant "spare capacity" is any part of the signals, "... (a) ... not required for the purposes of the sound broadcasting service for the purposes of which the frequency has been made available; and (b) ... determined by Ofcom to be available for the provision of Additional Services;"
- 2.24.2 section 114(3) which says that, when determining the extent and nature of the spare capacity available for Additional Services on a relevant frequency used to broadcast national sound services, Ofcom must, "... have regard to any need of the person providing that service to be able to use part of the signals carrying it for providing services which are ancillary to programmes included in the service;" and
- 2.24.3 section 119 which says, "An additional services licence may include such conditions as [OFCOM] consider appropriate for securing that the provision of any additional service under the licence does not cause any interference with (a) the sound broadcasting service or services on whose frequency or frequencies it is provided ....."
- 2.25 We consider these provisions to mean that the main use of a relevant frequency is the relevant sound broadcasting service and that the provider of that service has, in effect, first call on the capacity in the signals on that frequency (hence, for example, the 1990 Act's references to capacity not required for the relevant sound broadcasting service and to protection against interference). This is consistent with the position in our consultation document, and alluded to in paragraph 2.41 of it in particular. But, subject to that point on main use, we must seek to make available as much (spare) capacity for Additional Services under an Additional Services licence as we think reasonably possible. This would go to securing that, between the sound

broadcasting service and the Additional Service, they make optimal use of the relevant spectrum.

- 2.26 We have considered the relevant responses, and put ITIS's point to Classic FM Ltd, on this basis. We have likewise considered whether all the spare capacity on the Classic FM frequency(ies) should be made available under the new licence proposed or whether some of it should be available under a second licence.
- 2.27 In putting to Classic FM Ltd the submissions made by ITIS in its consultation response (see above), we asked:
- 2.27.1 for confirmation of what percentage of the capacity on the frequency made available for the Classic FM sound broadcasting service Classic FM Ltd requires for the purposes of providing that service (including for providing services which are ancillary to programmes included in that service);
- 2.27.2 what would be the effects on the Classic FM service (including on any services which are ancillary to programmes included in that service) if the maximum broadcast rate under the proposed new Additional Services licence is 2.85 groups/second; and
- 2.27.3 what would be the effects on the Classic FM service (including on any services which are ancillary to programmes included in that service) if the RDS deviation level was increased to +/- 3 – 4 kHz for the purposes of the proposed new licence.
- 2.28 In response, Classic FM Ltd confirmed that, for the purposes of providing the Classic FM service – both audio (the programme service) and RDS data (the ancillary service) - it requires the capacity on the relevant frequency(ies) that is reflected in the current Additional Services licence. That is, a total audio deviation of +/- 75kHz, and a data capacity on the RDS subcarrier of 79%, with the RDS subcarrier having a deviation of +/- 2.5kHz.
- 2.29 It went on to confirm that it believes the Classic FM service uses fully the RDS capacity allocated to it. It noted that this is sufficient for its current requirements, and provides a satisfactory service to Classic FM listeners. But, it also said that the use by an Additional Services licensee of the remainder of the RDS capacity, "... hinders potential development of RDS based services by Classic FM." It added that if Classic FM wished to implement further features, such as RadioText Plus, the overall performance would be compromised by any reduction in the RDS capacity allocated to programme related information.
- 2.30 Classic FM Ltd also said it believes that, if both the broadcast rate and the deviation level were increased as ITIS put forward, the service provided by Classic FM to listeners would be materially compromised. And, it said, the proposed changes could have a materially detrimental impact on listeners.
- 2.31 As to the change in broadcast rate that ITIS referred to, Classic FM Ltd said the following. It believes that the effect on Classic FM listeners will be that the rate at which dynamic data from Classic FM is updated will be slower. This dynamic data includes data transmitted on Classic FM's frequencies to the receivers of its listeners (e.g. Traffic Announcements (TA) flags and RadioText) which would arrive at listeners' radio receivers slightly later than it does currently.

- 2.32 As to the change in deviation levels put forward by ITIS, Classic FM noted that the precise effect in practice would depend on the size of the change and so was not fully known. But, it said it was seriously concerned that such a change could have a negative effect on RDS coverage. That, in turn, it said, could have a negative effect on the quality of the Classic FM programme service for listeners.
- 2.33 That is, broadly speaking, where a station's signals are available from more than one transmitter, listeners' radio receivers work by adjusting to pick up the strongest signal. But, the change put forward could change the conditions under which those receivers will search for and switch to a signal of better quality. They would tend to stay with a worse audio signal for longer.
- 2.34 Classic FM Ltd said this will have a direct effect on the audio quality perceived by Classic FM listeners in their cars. It will mean the signal to noise ratio of the programme audio will deteriorate further before their radio receiver switches transmitters than it would have done with the lower RDS deviation. Classic FM Ltd said it therefore does not consider that the suggested change in the deviation level to be a "minor amendment" as ITIS submitted.
- 2.35 Ofcom has considered these responses alongside ITIS's consultation response and what we said in our consultation document. We note that Classic FM Ltd describes the capacity currently available for the Classic FM service (and ancillary services) as required for the provision of that service, and that it currently uses fully the RDS capacity available to it. We note also that it says the use of the remainder of the RDS capacity under an Additional Services licence, "... hinders potential development of RDS based services by Classic FM," and that if it wanted to implement other such features in future this could compromise other aspects of its service.
- 2.36 One question this raises is whether in fact *less* spare capacity should be made available for Additional Services under the new licence. In particular, whether, in light of the possible future development of RDS services by Classic FM Ltd, less capacity should be given to the new Additional Services licensee. Given what Classic FM Ltd said, this is something Ofcom must consider.
- 2.37 Having done so, however, we maintain the view that at least the same amount of spare capacity should be made available under the new Additional Services licence, on the basis that is more likely to be consistent with our general duty relating to optimal use of the spectrum. That is, allowing for possible future further use of RDS capacity by Classic FM would be to allocate that capacity on a more speculative basis, and risks that capacity not being used at all. Whereas, by contrast, making available for Additional Services at least the capacity currently available would enable the continuation of valuable existing services or the provision of alternative valuable services, and the benefits they provide to citizens and consumers. This is in line with what we said in the consultation document.
- 2.38 We do not, therefore, take the view that less spare capacity should be available for Additional Services under the new licence than under the present. As to whether there should be more, again we take the view there should not.
- 2.39 We take into account that Classic FM Ltd confirmed that it requires for the Classic FM service (and services ancillary to the programmes in that service) all the capacity within the signals carrying that service that is currently available to it. That, in itself, appears to us good reason not to increase the amount of spare capacity available for Additional Services under the new licence. That is, given the position of the relevant

sound broadcasting service as the main use of a relevant frequency, with the provider of that service having, in effect, first call on the capacity in the signals on the relevant frequency (with spare capacity defined as capacity not required for the purposes of the sound broadcasting service). That is in line with what we said in paragraph 2.41 of the consultation document, in particular.

- 2.40 We also take the view that what Classic FM Ltd said about the effects of increasing the broadcast rate and deviation level as ITIS suggested is plausible. In determining and making available spare capacity, Ofcom is required to balance the RDS coverage area (to match the main programme reception area) against the TMC robustness afforded by RDS deviation (taking into account that the main use of the capacity in the signals on the relevant frequency is the relevant sound broadcasting service). The reference book RDS: The Radio Data System by Kopitz and Marks (ISBN 0-89006-744-9) refers to this. Whilst it is possible to increase RDS deviation, this would come as a detriment to the Classic FM programme service. The reference book supports the description of the effects given by Classic FM in paragraphs 2.28 to 2.34 above.
- 2.41 This appears also to be consistent with the view of the Radio Authority which, in 2002, determined the available spare capacity for the current Additional Services licence to be the same as Ofcom has proposed for the new licence, including on the basis of transmission tests the Authority conducted then.
- 2.42 Accordingly, it appears to us that the spare capacity we proposed for the new Additional Services licence, with our proposed technical specification, is as much as is reasonably possible to make available, in light of the relevant needs of the Classic FM service. We consider that, in light of the relevant provisions, ITIS's submissions and our consultation with Classic FM Ltd, that is a reasonable view for us to reach and the basis for it is consistent with what we proposed in our consultation.
- 2.43 In particular, it is a position consistent with our general duty about optimal use of the spectrum. Likewise, with the requirement to do all we can to secure that all of the spare capacity available for providing Additional Services on the relevant frequency is used for their provision under an Additional Services licence. It is a position which allows for as much of the spectrum as reasonably possible to be used for Additional Services, whilst maintaining the main use of that spectrum (for sound broadcasting and ancillary services).
- 2.44 We have then considered whether all of that spare capacity – the same amount as available under the current Additional Services licence - should be available for Additional Services under the proposed new licence, or some of it under that licence and some under another. The latter would go some way at least to pick up on the individual consultation respondent's submissions referred to above.
- 2.45 Splitting the spare capacity between more than one Additional Services licence could also be consistent with our main general duties, and with securing optimal use of the spectrum in particular. Likewise with our more specific duty to do all we can to secure that all the spare capacity available for Additional Services on a relevant frequency is used to provide such services.
- 2.46 That is, it is possible that:
- 2.46.1 an Additional Service might not require the use of all the spare capacity we proposed for the new licence;

- 2.46.2 the provision of more than one Additional Services under more than one licence might result in more of the available spare capacity being used to provide Additional Services (in line with our specific duty under section 115 of the 1990 Act); and
- 2.46.3 were the available spare capacity used to provide more than one Additional Services under more than one licence, this could generate greater value for consumers than a single service under a single licence.
- 2.47 We have therefore considered this possibility, in addition to the question of the overall available spare capacity. Having done so, however, we attach most weight to three points.
- 2.48 First, we return to the point that the spare capacity under the current Additional Services licence enables ITIS to provide a valuable service to consumers, using all of that capacity. Again, this is evidenced by the number of users of that service - some 2.4 million - generating profits for ITIS. It is reasonable to take the view that that capacity would also enable others to provide a valuable service to consumers, whether a service of the same type or a different one.
- 2.49 Second, as we also said in our consultation document, it appears to us a similar (similarly valuable) service may not be capable of provision using a smaller amount of capacity (a reduction in the capacity would result in a lowering of the repetition rate, which would in turn mean a reduction in the amount and quality of data that could be transmitted).
- 2.50 Third, each of these points is supported by ITIS's consultation response that suggests it could, effectively, make use beneficial use of greater spare capacity within the signals on the Classic FM frequency(ies) to provide Additional Services. The same might well apply to others who could provide services under the new licence. This tends to indicate that, were the spare capacity available under the new licence different to that under the current licence, it should, if that were reasonably possible, be a greater amount under a single licence, rather than a lesser amount under each of two licences.
- 2.51 In light of these points, we take the following view. Namely, that making available under a single Additional Services licence - the new licence proposed – as much capacity as we think reasonably possible would have a more positive impact, more consistent with our main general duty and that of securing the use of relevant spare capacity, than making the same overall capacity available in smaller amounts under more than one licence. Again, the basis for this view is consistent with what we said in the consultation document.

## Conclusions

- 2.52 Accordingly, for the reasons set out above and in our consultation document, Ofcom determines that the spare capacity within the signals carrying the Classic FM sound broadcasting service on the relevant frequency(ies) available for the provision of Additional Services under the new licence shall be as proposed in our consultation document. That is, the same as under the existing Additional Services licence, and with the same technical specification, as set out in Annex 2 to this document. This is also set out in the advertisement of the new licence.

## Licence duration

2.53 In our consultation document Ofcom proposed that the new licence should have a maximum duration of around six years and one month (running from 1 January 2012 until sometime around the end of January 2018),<sup>5</sup> so that it expires when the Classic FM sound broadcasting service licence would expire<sup>6</sup>, rather than being any shorter. We set out our view that the proposed licence may not, under the current legal framework, be longer than the period proposed. We made clear we were consulting on the proposal that the licence should not be any shorter.

## Consultation Proposal

2.54 We asked in the consultation document:

*“Should the duration of the Additional Services licence be shorter than is proposed? If so, please comment on how long you consider it should be and explain why that is the case, providing any evidence you might have to support your analysis.”*

2.55 Again, we received four responses to this question, two from individuals and one each from Trafficmaster and ITIS, all supportive of our proposal.

## Grounds for proposal

2.56 In support of our proposal in the consultation document we noted that, under the 1990 Act, an Additional Services licence could be granted for *up to* twelve years, and that we are required to state in the advertisement of a new Additional Services licence its proposed duration. We therefore had a decision to make as to the duration of the new licence. Our proposal was that the licence should be for a maximum period of just over six years, so that it would expire at the same time as the Classic FM sound service licence INR1. This was on the following bases.

2.57 First, the new licence would be for the provision of an Additional Service using the spare capacity in the signals on the frequencies on which the Classic FM sound service will be broadcast under licence INR1.<sup>7</sup> This limits the new licence’s duration. This is the effect of relevant provisions of the 1990 Act - sections 114(1), 114(2), 114(3) and 116(1)(b)(ii), in particular – read in the light of the High Court’s judgment in the case of *Data Broadcasting International Limited (1) Simpleactive Limited (2) v Office of Communications (Ofcom)*.<sup>8</sup> They mean the new Additional Services licence could only be granted so it ends at the same time as licence INR1<sup>9</sup>.

<sup>5</sup> The precise dates depended on the precise renewal date of the Classic FM licence, which at the time of the consultation document was unknown.

<sup>6</sup> and would end if and when licence INR1 ends for any reason

<sup>7</sup> Classic FM Ltd has now taken up its right to further renewal of that licence

<sup>8</sup> [2010] EWHC 1243 (Admin), at paragraph 75 in particular:

“In any event, additional services are parasitic on spare capacity, as is evident from the definition in section 48 [of the 1990 Act which defines Additional Services for television in the same terms as section 114 for radio..... If there is no analogue signal carrying any television broadcasting service on a particular frequency, there can be no additional service using the spare capacity within that signal. ....”

<sup>9</sup> This is also relevant to the area in which the Additional Service may be provided. Our consultation document referred to the proposed licence as a “national” licence. Under the 1990 Act, there is no such thing as a “national” Additional Services licence. Our reference to the licence as “national” denoted only that the licence would be for spare capacity within the signals on the frequency used to broadcast the national sound broadcasting service, Classic FM. It did not denote that any service under the new licence would necessarily be “national.” The service can only be provided where the Classic FM service is provided, and which may change in accordance with the conditions of the Classic FM licence, INR1, and the statutory provisions that apply to it. Ofcom gives no warranty, makes no representation and assumes no obligation as to the population or size or

- 2.58 So, we said, the new Additional Service could be licensed for a maximum of around six years and one month, running from 1 January 2012 until sometime around the end of January 2018<sup>10</sup> when the renewed INR1 licence would be due to expire.<sup>11</sup> As Classic FM Ltd has now taken up its right to further renewal of licence INR1, that licence will run until 28 February 2018 (unless terminated earlier for any reason).
- 2.59 Second, as we also said, that is not the end of the matter as far as the duration of the new Additional Services licence is concerned. A question that remained for Ofcom was whether the new licence should in fact be granted for a shorter maximum period. Having considered all of the following factors, we proposed that, *in this case*, the licence should not be so granted.
- 2.60 In favour of granting the proposed new Additional Services licence for its maximum possible duration in the circumstances we took into account the following:
- 2.60.1 commercial reasons – including the desirability of possessing a valuable asset, such as a licence to use a scarce resource like capacity on the radio spectrum, for the longest possible period, to maximise return – suggest a licensee is likely to want the longest possible licence term; and
- 2.60.2 regulatory reasons: the longer the licence, the more bidders there are likely to be for it, and the more they might be prepared to bid, suggesting that offering a licence of the maximum possible duration in the circumstances would help promote competition for it and secure optimal use of the spectrum, fulfilling Ofcom’s duties, and help us do all we can to secure that spare capacity on a relevant frequency is used to provide Additional Services.
- 2.61 We also, however, took into account that as a regulator we should also consider other factors, like possibilities that technologies are evolving and/or developments in Government policy, like digital switch-over for radio. Likewise, that where licences are shorter this provides more opportunities for bidders to compete for them. We acknowledged that each of these factors might suggest an alternative view: that a shorter licence – offering the possibility of alternative use of the relevant spectrum at an earlier date - could secure the optimal use of the spectrum. In other words, awarding a licence for the maximum possible period might not necessarily be consistent with our duty.
- 2.62 So, we also considered whether there were reasons for awarding and granting the licence for a shorter maximum period *in this case*. We said one such reason could arise if there is an interest in the licence being shorter to secure greater flexibility in the use of relevant spectrum in the context of the Government’s policy, and any decisions it takes, in relation to digital switchover. We suggested, however, that the provisions referred to elsewhere in the consultation document, which could have the

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location of the areas capable of receiving the service provided by the Additional Services licensee pursuant to the Additional Services licence.

<sup>10</sup> The precise dates depending on if and when Classic FM Ltd took up its right to further renewal of licence INR1

<sup>11</sup> We noted that during the passage of the Digital Economy Act, the Government said in the Lords, “.... As the digital radio switchover proposes to move all national radio stations to digital-only, the future of the infrastructure, which these traffic services rely on for carriage, is uncertain. That does not necessarily mean that these services cannot continue on FM. The Government accept that there is a case for allowing the additional service licences, under which these traffic services are licensed, to continue on analogue after the switchover; not least because it would provide continuity of service for motorists ...” We said that it appears to Ofcom that the continued provision of an Additional Service using analogue signals after the switchover to digital of the host sound broadcasting service would require a change in the law, which is a matter for Parliament, not us.

effect of shortening the new licence's duration, mean there is little need to adopt a different (shorter) licence period in the interests of flexibility *in this particular case*.

- 2.63 We went on to say that it appeared to us a fair assumption that a shorter maximum licence period *in this case* – shorter even than the already relatively short maximum period possible in the circumstances - would necessarily reduce the attractiveness to bidders of the licence. That would result in fewer of them, prepared to pay less for the licence.
- 2.64 We therefore proposed that, given its relatively short maximum possible length in any event, there are reasons, consistent with our duty to secure optimal use of the spectrum, and other relevant duties, for granting the proposed new Additional Services licence for its maximum possible duration in the circumstances.

### Consultation responses

- 2.65 All four responses to our question on the new licence's duration were supportive of our proposal.
- 2.66 One individual respondent made no comment beyond indicating agreement with our proposal and another simply added that, "Ofcom presents a good case for the proposed duration."
- 2.67 Trafficmaster commented only that, "The proposed duration is satisfactory." ITIS, meanwhile, said, "ITIS agrees that the duration of the AS/1 licence should be set so that it can run until the end of the renewed Classic FM sound service licence, INR1."
- 2.68 ITIS also commented on Ofcom's view on the current legal position: that an Additional Services licence can only exist where there is a sound broadcasting service on a relevant frequency, and that this means that where the licence for the sound broadcasting service ends so must that for the Additional Service.
- 2.69 On this, ITIS said it:

".... welcomes Ofcom's recognition at paragraph 3.6 of the Consultation that an additional services licence can only exist where there is a sound broadcasting service on a relevant frequency as this does give bidders some indication of the consequences should the digital radio switchover occur during the licence period. However, this statement is not consistent with the Government's statement on the future of the additional services licence post FM switchover.

The Government's statement (referred to in footnote 10 on page 11) indicates that it may be possible for the additional services licence to continue beyond the switchover date. Ofcom have suggested that for this to happen there will be a change in the law. ITIS' reading of the Digital Economy Act does not concur with this view and ITIS would appreciate some clarification on this point."

- 2.70 ITIS also said that:

"If there is no switchover the INR licence is cancelled and re-let then we would argue that the AS/1 should continue for the full duration of the licence (6 years 1 month). Obviously if there is no sound service licence then the AS/1 would expire but cancelling the AS/1 because



Global loses their licence (given the auction process we have been through) is inequitable.”

- 2.71 In relation to both ITIS’s comments, we consider the position we set out in our consultation document is the consequence of the provisions of the 1990 Act referred to, read in the light of the High Court judgment we quoted. The effect of those provisions is that an Additional Service, and an Additional Service licence, is linked to and dependent on a particular sound broadcasting service, and the licence for it. If the latter ends, for any reason, so must the former. That is a matter of law, not Ofcom decision.
- 2.72 We are not aware of any provision of the Digital Economy Act 2010 which changes that position. Hence, our view that the continued provision of an Additional Service using analogue signals after the switchover to digital of the host sound broadcasting service would require a change in the law, which is a matter for Parliament, not Ofcom.
- 2.73 To take the specific point raised in ITIS’s second comment, if licence INR1 is terminated<sup>12</sup> because there is no digital switchover,<sup>13</sup> the same position applies. Under the current legal provisions, and if appropriate, a new sound broadcasting service licence for the relevant frequency would need to be advertised in these circumstances. Likewise, a new Additional Services licence on that frequency, once Ofcom had determined the amount of spare capacity available on the frequency in line with the relevant statutory provisions. Again, that is a matter of law, not Ofcom decision. For a different position to apply, Parliament would need to change the law.

## Conclusions

- 2.74 Given that no respondent’s disagreed with, nor offered counter-arguments to, Ofcom’s proposal to grant the new licence for a maximum duration that will end when licence INR1 ends, we retain the views set out in our consultation document. There appear to us, as there did at the time of our consultation document, sound reasons (as set out above), in line with our statutory duties and relevant provisions, for offering the new licence for the maximum duration proposed (that is, to expire when licence INR1 expires and otherwise to end when licence INR1 ends for any reason). We have therefore decided to do so.<sup>14</sup>
- 2.75 In fact, because licence INR1 has now been further renewed with effect from 1 March 2011, and its expiry date is now known (28 February 2018), we can be more precise about the new Additional Services licence’s duration. It will be a licence of a maximum of six years and two months,<sup>15</sup> but subject to earlier termination for any

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<sup>12</sup> Pursuant to section 105A of the 1990 Act

<sup>13</sup> Or for any reason pursuant to any power

<sup>14</sup> On the basis that the licence period will end earlier if the proposed licence and/or licence INR1 ends earlier **for any reason**. For example, sections 97A, 97B and 105A of the 1990 Act could have the effect of bringing to an end, effectively on two years’ notice, both licence INR1, and the new Additional Services licence, earlier than they would otherwise expire. This would occur either because both are terminated under sections 97A and 97B in connection with digital switchover, (or at least licence INR1 is), or because the renewed INR1 is terminated under section 105A in the event no switchover date is set, and that in turn means the linked Additional Services licence must end. Similarly relevant, and for similar reasons, are provisions such as section 111 of the 1990 Act about the revocation of radio licences, and any other provision that might result in the termination or end of a sound broadcasting licence before its expiry date. Given the links between INR1 and the Additional Services licence, a revocation of the former under section 111 would also result in the latter coming to an end. The same result would also apply if the INR1 licensee surrendered that licence. Any continuation of the new Additional Services licence, and the service under it, beyond the end of licence INR1 would require a change in the law.

<sup>15</sup> from 1 January 2012 to 28 February 2018, unless the licensee agrees a different start date with Ofcom (and the maximum duration of the licence will shorter if the start date is later)

reason (as explained elsewhere in this statement and in the advertisement for the licence and accompanying draft licence terms).

## PQR

### Consultation Proposal

- 2.76 The 1990 Act makes provision for payments the licensee is required to make in connection with the Additional Services licence. One is a payment of a percentage of qualifying revenue - the PQR - for each of the licensee's accounting periods that fall within the licence period. Ofcom is required to specify the PQR in the advertisement of the licence and to include in the licence conditions requiring its payment. In the consultation document we proposed that the PQR should be set at 4% for this licence.
- 2.77 In that document we set out a discussion of how the level of the PQR might affect the level of cash bids and so the outcome of the auction process. For the purposes of our analysis we assumed that firms were able to make a rational assessment about the revenues and costs (and therefore the overall profitability) of operating services using the licence. We also assumed that firms set their cash bids based on such an assessment and also took into account their beliefs about the likely bids made by other participants in the auction.
- 2.78 Our analysis focused specifically on two closely related objectives which we considered to be relevant in setting the PQR in this case:
- Encouraging a competitive auction; and,
  - Complying with our statutory duties.

We asked a number of consultation questions about our proposal.

### First PQR question

- 2.79 In the consultation we asked:

*“To what extent do respondents consider that different levels of PQR could bias the results of the auction? Please provide evidence to support your response. In particular we would welcome views on the factors set out in section 4 of this document and the extent to which different levels of PQR would affect firms' decisions as to whether to participate in the auction or not.”*

### Consultation Responses

- 2.80 Only one response – ITIS - addressed the issue of bias in the outcome of the auction process in any detail although we note that another- Trafficmaster - did express confidence that the basis for Ofcom's proposed PQR was well documented and acceptable.
- 2.81 ITIS was concerned that bias was inevitable in the auction process and that, in general terms, whatever the level of the PQR, the auction process was biased against the incumbent licence holder. However, it did agree with the statement made by Ofcom in the consultation document that “the one shot nature of the auction ought to encourage firms to bid the full amount that they value the licence.” It also

commented that the incumbent was likely to have the highest overall valuation of the licence compared to other bidders.

- 2.82 ITIS argued that there were two types of risk that were relevant in its assessment. The first was “commercial risk” and the second was “bidding risk”. It described commercial risk as the risks inherent with establishing a business based on the licence. It argued that this aspect of risk was low for the incumbent because the incumbent would be best placed to make an assessment of the issues about running a business whereas this risk would be high for new entrants.
- 2.83 In contrast “bidding risk” related to the risk associated with winning or losing the auction. ITIS said that it clearly has most to lose in losing the auction. The bidding risk was therefore high for the incumbent<sup>16</sup> but nothing for a new entrant does not have an existing business and stands to lose nothing if it does not win the auction.
- 2.84 ITIS used this taxonomy to explain its view about the potential biases in the auction as a result of a low (or zero) PQR or a “high” PQR.
- 2.85 ITIS argued that the PQR only affected the commercial risk and hence could influence the number and identity of bidders. It also commented that commercial risk was much higher for new entrants relative to an incumbent firm and thus the PQR would have greater significance to new entrants.
- 2.86 It suggested that a high PQR would reduce the commercial risk faced by new entrants and would encourage more bidders – in contrast to the position set out by Ofcom in the consultation document. It argued that the increased competition would result in higher prices forcing the incumbent to “overbid” in order to retain the licence.
- 2.87 The respondent also argued that if PQR was zero then the main determinant of the price bid for the licence would be the bidding risk. It argued that an incumbent would have to “overbid” to ensure it secured the licence as its bidding risk was high<sup>17</sup>. The respondent also expressed the concern that a competitor to the incumbent could participate in the auction simply to force up the amount the incumbent needed to pay to secure the licence.
- 2.88 A third respondent, an individual, did express the concern that the auction process and PQR only took into account monetary value and failed to recognise other factors of value, including what he described as “social and community economics”.

## Conclusions

- 2.89 In the consultation document we argued that prospective bidders should be able to adjust the level of their cash bid to take account of different levels of PQR and that without a particular reason, consistent with our duties, to structure the payments for the licence in a particular way, the actual level of the PQR ought not to have an impact on the outcome of the auction.
- 2.90 We note that, although ITIS did make a series of arguments in relation to both “low” and “high” levels of PQR, it did not give any indication of what it meant by these

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<sup>16</sup> It also expressed the concern that the award process would not recognise the value of the spectrum from continuing to serve existing customers.

<sup>17</sup> ITIS referred to the auction of the regional Channel 3 licences in 1991 as an example of where two incumbents ended up bidding twice as much as their nearest rivals to ensure that they “won” the auction and then not being awarded the licence because the regulator – the Independent Television Commission (“ITC”) - judged that their business plans were now not realistic because they involved paying so much for the licence.

terms e.g. what percentage PQR it considered to be “high”. The fact that the respondent also accepted the 4% level proposed by Ofcom suggests that it thought that a 4% level represented an appropriate balance between the different sets of concerns that it set out.

- 2.91 Whether the PQR were “low” or “high”, ITIS suggested that the incumbent licensee would have the highest valuation of the licence. For instance, in its discussion of what it termed “commercial risk”, the respondent argued that the incumbent would be best placed to make an informed assessment of the value of the licence. ITIS also accepted that the nature of the auction should encourage firms to bid the full amount they value the licence.
- 2.92 That should mean that the incumbent should be able to retain the licence. What would then be at stake was the amount it would have to pay to do so and that would depend on the extent of competition i.e. how many other bidders there were.
- 2.93 Ofcom notes ITIS’s argument that the incumbent’s position can actually be a handicap in an auction process: the response makes a number of references to the incumbent having to “overbid” or bid “excessively” in order to secure the licence and so retain its business.
- 2.94 As set out in the consultation document – given the auction structure - we consider that in a sufficiently competitive auction, firms would submit cash bids that were very close to the gross profit they expected to earn from holding the licence because this would be – in the limit – the amount that would drive net profits to zero. If a firm submitted a lower bid than its true valuation there would be a risk that it would be beaten by a rival bidder.
- 2.95 Taking the arguments that the incumbent has the highest valuation of the licence and that the nature of the auction should encourage firms to bid close to their true valuation, it appears to us that ITIS is really making an argument that the incumbent may have to bid more to secure the licence where there is competition than if competition for the licence were more constrained. For this reason we also consider that the terms “overbidding” or bidding “excessively” are subjective and do not imply that there would be a misallocation of resource as a result of different levels of PQR.
- 2.96 We note the comment that there could be “non-monetary” factors that are relevant to the award of the licence but the respondent that made this comment did not then suggest what those factors might be, beyond the unclear description cited above, nor how they might be taken into account. Accordingly we do not discuss this issue any further.
- 2.97 Accordingly we do not consider there is anything in these responses that suggests we should not aim for a cautiously set and modest positive level of PQR, like that (4%) proposed.

## Second PQR question

- 2.98 We asked in the consultation document:

*“To what extent do respondents consider that the risk sharing offered by positive PQRs is of significant value to bidders? If so, what level of PQR is required to maximise these benefits? Please provide evidence and analysis to support your response.”*

## Consultation Responses

- 2.99 One respondent – Trafficmaster - supported the choice of a PQR of 4% stating the reasoning behind it was thoroughly documented and acceptable.
- 2.100 As set out above, ITIS argued that a positive PQR would influence what it termed “commercial risk”. It believed that new entrants had much higher commercial risk relative to the incumbent and hence the risk sharing elements of PQRs was of greater significance to new entrants.
- 2.101 A third respondent – an individual - suggested the risk sharing offered by positive PQRs was not useful but offered no explanation of this statement.
- 2.102 None of the respondents suggested any particular value of PQR which would maximise the risk sharing benefits.

## Conclusions

- 2.103 In the consultation document, we argued that if total payments (i.e. cash bids plus PQRs) were weighted towards PQRs, the absolute size of licence payments would vary more in response to revenue fluctuations and this would help to dampen down the impact of demand shocks. Conversely, if the additional payments comprised only a cash bid there would be no adjustment in response to changes in market conditions and the firm would be exposed to the full effect. That is, the firm would have to bear the full risk of changes in expected revenue.
- 2.104 However, it was not clear to us the extent to which participants in the auction would put a value on this particular aspect of a positive PQR. If a firm or its investors disliked exposure to uncertainty, they might be in a stronger position in the auction if there was a positive PQR (rather than a zero PQR). In this situation the positive PQR could increase the value firms placed on the licence and might therefore encourage them to participate in the auction. This could promote the efficient allocation of the licence since firms that were deterred by risk might nevertheless be able to generate significant value for consumers and society, particularly if they were newer firms seeking to provide innovative services or adopt innovative business models.
- 2.105 The broad thrust of ITIS’s response seems to us to suggest that it expects a positive PQR to be of value to new entrants as a way of offsetting commercial risk. However, the response did not provide a systematic analysis of the extent to which firms valued at positive PQR as a way of sharing uncertainty or the level of PQR that would maximise these benefits. ITIS did refer to uncertainty about the scale of business a new entrant could achieve, the significant investments it would need to establish itself, especially if it proposed to use the licence for a service other than the provision of traffic information, but did not attempt then to relate these factors to the level of PQR.
- 2.106 As indicated above, the responses do suggest that we should consider a positive PQR. However, given the lack of clarity or indication about the significance of this issue, as set out in the consultation document, we consider that we should be conservative in setting the level of the PQR to take this into account. .
- 2.107 Again, therefore, we do not consider there to be a basis in these responses for setting the PQR other than at the sort of cautiously set and most positive level (4%) proposed.

### Third PQR question

2.108 We asked: *“Do you agree that a positive PQR would deter non-serious bidders who know they do not have the highest valuation for the licence?”*

#### Consultation Responses

2.109 In general respondents agreed that a positive PQR would deter non-serious bidders. One respondent - Trafficmaster - commented that paragraph 4.30 in the consultation document – which set out the thresholds that any applicant would need to meet - would also reduce the scope for non-serious parties to take part in the auction.

2.110 As indicated above ITIS suggested that a high PQR would reduce the commercial risk faced by new entrants and could increase the number of “spoiling bids” for the licence. It did, however, also express concern about non-serious bidders under a zero PQR scenario as well. It indicated that overall it was broadly content with the 4% PQR proposed by Ofcom.

#### Conclusion

2.111 Taking into account the above discussion, we continue to believe that a positive but modest PQR – in conjunction with the thresholds set out in paragraph 4.30 of the consultation document – would help in deterring non-serious bidders from participating in the auction process.

### Fourth PQR question

2.112 We asked in the consultation document: *“Do you agree with our analysis regarding the factors to take into account when setting the level of the PQR?”*

#### Consultation Responses

2.113 The majority of respondents agreed with the analysis presented by Ofcom in the consultation document.

2.114 As indicated above ITIS argued that a PQR of 4% would ensure that the award process accords with the legislative objectives of the auction even if it did not fully agree with the rationale set out by Ofcom in the consultation document.

2.115 Another respondent – an individual - commented that “human and emotive” factors which are not easily quantifiable should also be incorporated but did not suggest how that should be done.

#### Conclusion

2.116 Taking into account the above discussion and the arguments set out in the consultation document, we continue to believe our analysis suggests we should aim for a cautiously set and modest positive level of PQR.

### Fifth PQR question

2.117 In the consultation document we asked:

*“Do you agree that the PQR should be set at 4%, the same level as under the current Additional Services licence? If not, please provide evidence and analysis to support your response and explain what level of PQR you think would be appropriate.”*

## Consultation Responses

- 2.118 All the respondents that specifically commented on this point agreed with the 4% PQR proposed by Ofcom.
- 2.119 One respondent – an individual - agreed a 4% PQR was acceptable and also suggested that if there was provision for a second Additional Services the PQR for that should be 4% as well in order to be consistent with AS1.
- 2.120 Another individual respondent commented that 4% was a suitable PQR but that 1% should comprise monetary valuation and 3% other values to be determined. He did not explain how the other 3% of value should be assessed.

## Conclusions

- 2.121 We note the agreement of all respondents that specifically responded to this question.
- 2.122 Taking into account the above discussion and the arguments set out in the consultation document, we consider that 4% represents an appropriate PQR for this licence. It offers the possible benefit here of risk sharing (which some bidders may value) without having an undue effect on cash bids which should help to encourage a competitive auction and reduce the likelihood of an initial misallocation of the licence. We therefore consider that this level of PQR would be consistent with our duties to secure the optimal use of the spectrum, and have decided to set the PQR at 4% as proposed.
- 2.123 The computation of this qualifying revenue will be done in accordance with sections 118 and 121, and Schedule 7, of the 1990 Act, and with Ofcom’s published statement on such computation. More detail about this is in Annex 3 to this document .

## Award mechanism

- 2.124 We indicated in our consultation document our intention to take a two stage approach to the licence award:
- 2.124.1 inviting cash bids; and
  - 2.124.2 if there is more than one eligible bidder, considering whether exceptional circumstances exist which make it appropriate for Ofcom to award the licence to an applicant other than the highest cash bidder.

We indicated the process we intend to follow in relation to the second stage.

- 2.125 As we made clear in the consultation document, what we said was a statement reflecting the legal position under section 100 of the Act, rather than a proposed view on which Ofcom was consulting. We nonetheless acknowledged that the consultation was an opportunity for stakeholders to comment on our intended approach. One – ITIS - did so.

## Basis of approach

2.126 We noted in our consultation document that the rules for awarding the new Additional Services licence are set out in section 100 of the 1990 Act, and that most relevant among them for present purposes are sections 100(1) and 100(3). We noted that section 100(1) sets out what we called the 'highest cash bidder' rule:

“Subject to the following provisions of this section, [Ofcom] shall, after considering all the cash bids submitted by the applicants for a national licence, award the licence to the applicant who submitted the highest bid.”

2.127 We also noted the exception to the highest cash bidder rule in section 100(3):

“[Ofcom] may disregard the requirement imposed by subsection (1) and award the licence to an applicant who has not submitted the highest bid if it appears to them that there are exceptional circumstances which make it appropriate for them to award the licence to that applicant; and where it appears to [Ofcom], in the context of the licence, that any circumstances are to be regarded as exceptional circumstances for the purposes of this subsection, those circumstances may be so regarded by them despite the fact that similar circumstances have been so regarded by them in the context of any other licence or licences.”

2.128 We indicated our intention, in light of these provisions, to take the two-stage approach to awarding the new licence that is described above.

2.129 We said that, in the first place, there will be an advertisement of the proposed new licence in accordance with section 116 of the 1990 Act. This will, amongst other things, invite cash bids from applicants. We said we would then, on receipt of applications and bids, apply the thresholds referred to in the 1990 Act. If there is one bidder for the licence, and Ofcom is able to award the licence to that bidder,<sup>18</sup> or only one bidder to whom we could make the award<sup>19</sup>, we would do so.

2.130 If, however, there is more than one eligible bidder for the licence<sup>20</sup> we said we would consider whether there appear to us to be exceptional circumstances that make it appropriate for us to award the licence to a bidder other than the highest bidder. We indicated that, in doing so, we would be likely to do the following:

2.130.1 publish details of the bidders and their cash bids, including their amounts;

2.130.2 invite submissions from bidders and any other interested parties about why and how Ofcom should, or should not, exercise our discretion to award the licence to a bidder other than the highest cash bidder; and

2.130.3 publish those submissions and invite responses.

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<sup>18</sup> Taking into account, for example, the thresholds referred to earlier in this document, and the rules regarding the fitness and propriety of licensees, the holding of different broadcasting licences (often called the 'ownership' rules) and disqualified persons, all as referred to or set out in the 1990 Act

<sup>19</sup> This would be where only one bidder meets the relevant thresholds and it also meets all other relevant requirements, such as the need to be fit and proper

<sup>20</sup> That is, more than one bidder who meets the relevant thresholds



- 2.131 We concluded by saying that, in deciding whether exceptional circumstances exist which would make it appropriate for Ofcom to award the licence to a bidder who did not submit the highest cash bid, we would consider our statutory duties and all relevant evidence.
- 2.132 We adopted this approach on the basis that what section 100 of the Act, and 100(1) in particular, makes clear is that the primary mechanism by which an Additional Services licence is awarded is by auction to the highest cash bidder. That is the basic premise of section 100, and to which the subsequent provisions of section 100 are qualifications and modifications that apply in certain circumstances.
- 2.133 We also said that what is also clear, reading the whole of section 100, and in particular, sub-sections 100(1) and (3), is that, as the first stage in the award process, those who wish to obtain the licence have to submit cash bids. Sub-section (3) does not, for example, permit Ofcom to award the licence without having obtained and considered applicants' cash bids.
- 2.134 We went on to note, however, that sub-section 100(3) gives Ofcom discretion to disregard the highest cash bidder rule and award the licence to an applicant who is not the highest cash bidder where it appears to us there are exceptional circumstances that make it appropriate to do so.
- 2.135 We put forward the view that it is not possible for us to set out in advance the circumstances that might amount to 'exceptional circumstances' in the context of the highest cash bidder rule and the award of the new licence. And, we indicated our intention to adopt the approach described in paragraph 2.124 and the process in paragraph 2.130, on the basis it reflects the legal position, and Ofcom's obligations, under section 100 of the Act.

## Consultation responses

- 2.136 ITIS said our intended two-stage process for receiving cash bids and then considering "exceptional circumstances" breaches Ofcom's statutory duty. It proposed that bidders should make submissions about exceptional circumstances at the same time as submitting cash bids because:
- 2.136.1 bidders will need to take into account exceptional circumstances when assessing the level of any bid, in any event, because, "... the bidder with the higher monetary bid will need to consider carefully the likelihood of an appeal based on exceptional circumstance;" and
- 2.136.2 we have, "... an overriding statutory duty to ensure that "all of the spare capacity available for the provision of additional services...is used" (section 115)" and to "further the interests of citizens in relation to communication matters" (section 3(1)(a) of the Communications Act 2003), and, "These duties override any financial value placed on the licences ..... Ofcom must take all the details of the bid into account, not just the bid value but also the type and scope of the service to be provided .... and any exceptional circumstances that might apply...."
- 2.137 ITIS said that, by carrying out the assessment of exceptional circumstances in the intended two-stage process, very likely all we would do is "... *merely delay the award of the licence.*" And, we, "... *would be in breach of [our] statutory duty if Ofcom were to apply a two stage process, where stage one only considers the bid value and does not address exceptional circumstances.*"

## Ofcom conclusions

- 2.138 We have considered what ITIS said but maintain the view that our intended approach is consistent with the relevant statutory provisions and our duties, and is a reasonable and appropriate one in practice.
- 2.139 The process we said we would follow (see paragraph 2.124 above) is in line with section 100 of the Act. It is clear that section 100(1) requires cash bids to be made for the licence, and that section 100(3) requires Ofcom to consider whether exceptional circumstances apply once bids<sup>21</sup> have been made. It does not allow the award of the licence before, or without, cash bids. So, our approach gives cash bids their proper place as the primary means of allocating the licence.
- 2.140 But, our process also properly accommodates the possibility of awarding the licence to a bidder who did not make the highest bid on the basis that there appear to us to be exceptional circumstances that make it appropriate for us to award the licence to that bidder. We agree that we must consider whether there are exceptional circumstances that make it appropriate to so award the licence, and we have said how we will.<sup>22</sup>
- 2.141 Our intended process is also consistent with our general duties under section 3 of the 2003 Act, which is met, amongst other things, by securing optimal use of the spectrum (see Annex 2 of this statement). Likewise with our duty under section 115 of the Act to do all we can to secure that spare capacity within a relevant frequency is used for Additional Services.
- 2.142 As to the section 3 duties, we can expect the highest bidder in a competitive auction for a licence to be the applicant who values the licence most. And, that that bidder would so value the licence on the basis it will use it to provide a service most valued by consumers. So, in general, an award of a licence to that bidder would secure optimal use (efficient allocation) of the spectrum and meet our general duties under section 3. But, equally, our approach will enable us to take into account other relevant factors in line with those duties, as part of our consideration of exceptional circumstances.
- 2.143 As to the section 115 duty, we are making available spare capacity on a relevant frequency. We are adopting a process that will encourage applications (bids) in an auction that will lead to competition between applicants (bidders) to make the highest cash bid for the licence. By doing so, we will be doing all we can – in light of the provisions in section 100 for the award of that licence – to secure that all of the spare capacity available on the relevant frequency for the provision of additional services is used for the provision of such services under Additional Services licences granted by Ofcom in accordance with the relevant statutory provisions.
- 2.144 But, again, by making proper provision for considering the exercise of our exceptional circumstances discretion in line with our statutory duties, we are also adopting a process that allows for the proper consideration of relevant factors other than simply the level of bids. And, by making clear we will do so, we are also encouraging the participation in the award process of bidders who wish to have the licence and consider it should be awarded to them for a relevant reason.

<sup>21</sup> More than one bid in respect of which the relevant thresholds are met

<sup>22</sup> Provided there is more than one eligible bidder

- 2.145 In addition, from a practical perspective, we consider our approach to be a reasonable and appropriate one, for reasons including these:
- 2.145.1 our exceptional circumstances discretion only becomes relevant if there is more than one cash bidder for the licence (or more than one eligible<sup>23</sup> bidder);
  - 2.145.2 bidders will not know at the bidding stage whether they need to make a submission, nor what that submission should be;<sup>24</sup>
  - 2.145.3 the nature and relative size of bids may be relevant to what bidders say about exceptional circumstances, and what Ofcom decides about them; and
  - 2.145.4 it is quite likely the process would require a second stage anyway: for bidders' comments on other parties' exceptional circumstances submissions (and we have allowed time for this).
- 2.146 What these points indicate is that no party will be in a position at the bidding stage fully to make exceptional circumstances submissions, and Ofcom would not be in a position fully to assess them. They may not be necessary anyway. So, requiring bidders to make them at the bidding stage needlessly risks wasting bidders' and Ofcom's time and resources. And, our intended approach is an appropriate one.

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<sup>23</sup> Bidders who pass the technical and business plan thresholds

<sup>24</sup> For example, whether they would be, in effect, defending their position as highest bidder and saying we should not exercise our discretion, or saying we should exercise it in their favour as non-highest bidder

## Annex 1

# Statutory framework

A1.1 The framework for advertising and awarding an Additional Services licence is set out in the Broadcasting Act 1990 (again, “the 1990 Act”). The relevant provisions are mainly in Chapter IV of Part III of the 1990 Act, although section 100, in Chapter II of the same Part, is also key (and section 85, in Chapter I of Part III is also relevant). These set out Ofcom’s functions in relation to Additional Services and their licensing. Also relevant are Ofcom’s general duties, with which it must comply in performing these functions. These are in section 3 of the Communications Act 2003 (“the 2003 Act”).

## Ofcom’s duties

A1.2 Ofcom’s principal general duty, when carrying out our radio functions, is set out in section 3(1) of the 2003 Act. It is to further the interests of citizens – all members of the public in the UK - in relation to communications matters; and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

A1.3 To meet this duty, Ofcom is required to secure (amongst other things):

- the optimal use for wireless telegraphy of the electro-magnetic spectrum;
- the availability throughout the UK of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests; and
- the maintenance of a sufficient plurality of providers of different television and radio services.

A1.4 Ofcom must also take into account in relevant cases, amongst other things:

- the desirability of promoting competition in relevant markets;
- the desirability of encouraging investment and innovation in relevant markets;
- the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
- the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it; and
- the opinions of consumers in relevant markets and of members of the public generally.

A1.5 More specific duties are contained in the 1990 Act. Amongst these is that in section 115(1). This says we must do all we can to secure that, in the case of each relevant frequency, all of the spare capacity available for the provision of Additional Services on that frequency is used for the provision of such services under Additional Services licences.

A1.6 Also relevant, as part of the background to the statutory scheme in which we perform our duties, is the following statement made to the House of Commons during the passage of the Bill that became the 1990 Act,<sup>25</sup> by the then Home Secretary, David Waddington MP. He said of [what became] the 1990 Act's provisions relating to the auction of licences:

‘.Our proposal that Channel 3, Channel 5 and certain other licences should be allocated by competitive tender has two main objectives. First, we want to establish a fairer and more objective system for awarding franchises than the present one, which has few defenders, but at the same time to ensure high standards and diversity. Secondly, we have a clear duty, which some campaigners gloss over far too quickly, to ensure that the taxpayer gets a proper return for the use of the valuable and scarce national resources constituted by broadcasting rights and, in particular, the use of the frequency spectrum.’

## Ofcom's functions and powers

A1.7 Under section 85 of the 1990 Act, one of Ofcom's functions is the licensing of additional radio services. This includes advertising, awarding and granting those licences in accordance with Part III of that Act, in particular sections 100 and 114 - 118. Those latter sections set out the powers Ofcom has in order to perform this licensing function, and in the exercise of which it must fulfil its duties.

A1.8 Section 114 defines what an Additional Service is: any service which consists in the sending of electronic signals for transmission by wireless telegraphy by means of the use of the spare capacity within the signals carrying any sound broadcasting service provided on a relevant frequency.<sup>26</sup> It also defines what “spare capacity” is and provides for Ofcom to determine the spare capacity available for providing an Additional Service.

A1.9 In making that determination in relation to a relevant frequency on which a national sound service, like Classic FM, is provided, Ofcom must consider any need of the national service provider to be able to use part of the signals to provide services which are ancillary to its programmes services. Section 114 also provides for Ofcom to change, but not reduce, the amount of spare capacity determined to be available in respect of a particular Additional Services licence.

A1.10 Section 115 contains provisions relating to the licensing of Additional Services. For example, sub-section (6) says every licence to provide a national sound service shall include conditions Ofcom think appropriate for securing that the sound service licensee grants to an Additional Services licensee access to facilities reasonably required to provide the Additional Service.

A1.11 Section 116 deals with the advertising of, and application for, Additional Services licences. Sub-section (1) requires Ofcom to publish a notice of any proposal to grant a new Additional Services licence including, amongst other things:

- the period for which the licence is to be granted;

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<sup>25</sup> On 18 December 1989

<sup>26</sup> Classic FM is an example of a sound broadcasting service provided on a relevant frequency

- the sound broadcasting service or services on whose frequency or frequencies the services are to be provided;
- the extent and nature of the spare capacity which is to be allocated by the licence; and
- the percentage of qualifying revenue for each accounting period that would be payable by an applicant in pursuance of section 118(1)(c) if it was granted the licence.

A1.12 Sub-section (3) requires that any application for an Additional Services licence must be in writing and accompanied by (amongst other things) a technical plan indicating the nature of any Additional Services the applicant proposes to provide, its cash bid and such information as Ofcom reasonably require about the applicant's present and projected future financial position.

A1.13 Section 117 sets out the procedure Ofcom must follow in connection with the consideration of applications for, and awarding of, Additional Services licences. It does so by saying that, subject to certain modifications, section 100 of the 1990 Act applies.

A1.14 These sections make provision for Additional Services licences to be awarded by auction,<sup>27</sup> though one to which certain conditions and qualifications apply. This means that, although in principle the licence is awarded to the person who submits the highest cash bid, there are also some thresholds which must be met by any applicant, and Ofcom has some discretion to determine to whom the licence should be awarded.

A1.15 There are two thresholds. First, section 117(1)(a) says that, as far as they involve the use of an electronic communications network, the technical arrangements proposed by an applicant must be acceptable to us. Second, section 117(1)(b) says the services proposed to be provided under the licence must be capable of being maintained throughout the period the licence would be in force.

A1.16 We can only consider an applicant's cash bid where it appears to us to meet these thresholds. Of those applicants that meet them, the primary criterion for awarding the licence is that Ofcom shall award it to the highest cash bidder (and there are provisions for settling ties (by seeking further bids)). But, it is not necessarily the case that the highest bidder wins. Ofcom can choose to award the licence to an applicant who has not submitted the highest cash bid if it appears to us there are 'exceptional circumstances' which make it appropriate for us to award it to that applicant.<sup>28</sup>

A1.17 Certain other statutory rules are relevant in the context of this award process. For example, section 86(4) of the 1990 Act says Ofcom must not grant a licence to any person unless we are satisfied they are fit and proper to hold it. Section 88(1) of the same Act provides another example. It says, amongst other things, Ofcom must do all we can to secure that a person does not become a licence holder if he is disqualified from holding that licence by virtue of Part II of Schedule 2 to the 1990 Act. Section 89(1) of the 1990 Act is a third example. It says a person is

<sup>27</sup> And do so under a scheme which does not make provision for Ofcom to set an explicit reserve or minimum cash bid price in the auction, a point to which we return in section 4 below.

<sup>28</sup> There are also provisions which require Ofcom to refer an applicant to the Secretary of State for Culture, Media and Sport for approval if we are concerned that their source of funds means that it would 'not be in the public interest' to award the licence to them.

disqualified from holding an Additional Services licence if they have been convicted within the previous five years of any of a number of specified criminal offences relating to wireless telegraphy transmissions and broadcasting.

A1.18 Section 118 of the 1990 Act deals with financial payments an Additional Services licensee must make. It says the licence must include conditions requiring annual payment of his cash bid sum (increased by an appropriate percentage each year) and an amount representing the percentage of the qualifying revenue specified in the advertisement of the licence. It also provides for the composition of the qualifying revenue: all amounts which are received or to be received by the licensee or by any connected person and are referable to the right under the licence to use, or to authorise any other person to use, the spare capacity allocated by the licence.

A1.19 Also relevant are the provisions of the 1990 Act relating to the duration of the Additional Services licences. In particular, sections 86(3), 97A, and 97B:

- section 86(3) says an Additional Services licence must specify a period of no more than twelve years as the period for which it is to be in force;
- section 97A says the Secretary of State may nominate a date for digital switchover - a date after which it will cease to be appropriate for a service to continue to be provided in analogue form - for licences granted after 8 April 2010, including the new Additional Services licence; and
- section 97B provides that, where the Secretary of State nominates a switchover date, Ofcom must vary relevant licences so they end before that date (as long as this, in effect, gives licensees two years' notice of the end of the licence).

A1.20 Section 105A is also relevant, though less directly so. It provides for the possible termination of certain renewed sound broadcasting licences, including (if it is renewed) that under which Classic FM is broadcast, if digital switchover does not occur (either because no switchover date is nominated, or a nominated date is withdrawn and not replaced). In those circumstances, the Secretary of State may give notice to Ofcom fixing a termination date – a date after 31 December 2015 - in relation to specified services (provided under certain renewed licences), including potentially Classic FM. Ofcom would then have to amend the duration of all relevant renewed licences that would otherwise end after the specified termination date, so they end on or before it (again provided that, in effect, we give relevant licensees two years' notice of the end of their licences). This is relevant because it would also bring the licence period of the new Additional Services licence to an end.

## Annex 2

# Spare capacity

## Available RDS capacity

A2.1 The service is to be operated on the RDS sub-carrier conforming to IEC standard 62106:2009 Ed. 2.0 using one or more of only the following allowable features:

- TDC (Group 5A)
- Paging (RP) (Group 7A with part of Group 1A)
- TMC (Group 8A)
- IH (Group 6A only)
- ODA (Various allowable Groups: refer to specification)

A2.2 The group repetition rate available to the Licensee will be, to the extent necessary:

- an average of 2.4 groups/sec, averaged over any one-minute period
- a minimum of 1 group in any second
- groups/sec. for consecutive seconds in every five minute period in every hour;
- such parts of the overhead signalling capacity in the RDS bitstream, notably group types 3A, as are necessary for use of the above-referenced Additional Services groups.

A2.3 No further capacity beyond this is to be made available to the Licensee.

A2.4 The minimum deviation of the FM carrier due to the modulated RDS subcarrier shall be  $\pm 2.0$  kHz, and the maximum deviation shall be  $\pm 2.5$  kHz.



### Annex 3

## Computation of qualifying revenue

- A3.1 In section 2 of this statement, consideration has been given to one of the additional payments – the PQR (percentage of qualifying revenue). Ofcom is required under the Broadcasting Act 1990 and Broadcasting Act 1996 to draw up, and from time to time review, a statement setting out the principles to be followed in determining additional payment due in respect of qualifying revenue.
- A3.2 The statement setting out the computation of qualifying revenue published in October 2006 and currently in force may be found at:

<http://stakeholders.webstage.intra.ofcom.local/binaries/broadcast/other-codes/qualifying-revenue-radio-inr.pdf>