

Broadcasting Transmission Services: a review of the market

Question 1: Do you agree with our assessment of the relevant markets? If not please set out the basis for your disagreement.

We believe that Ofcom makes a fair assessment of the relevant radio markets.

However, Ofcom states (para 3.40) that the BBC treats BBC local radio as part of a national network, and that its approach to procurement of NA for BBC local radio is the same as for BBC national radio and has therefore only considered the commercial and independent sector. We disagree with this statement in that from our experience the BBC does NOT treat BBC local radio digital carriage as part of a national network, having to negotiate carriage on a multiplex by multiplex basis. Therefore to not include BBC local radio (digital) in its consideration of the differences between the supply of NA to national, regional / metropolitan and local radio stations could be a significant omission.

Question 2: Do you agree with our assessment that the DTT and radio NA markets are suitable for ex ante regulation on the basis of our assessment of the three criteria test? If not, please set out the basis for your disagreement.

We believe that Ofcom assessment that the radio NA market still requires ex ante regulation as a means to limit the potential for market failure and/ or an abuse of significant market power is correct.

We note (para 4.4) that Ofcom makes reference to an Arqiva statement that the “substantial expenditures necessary to challenge the physical infrastructure and the Group’s strong financial and contractual relationships with clients represent a high barrier to entry for competitors, resulting in the Group’s unique regulatory position.” Whilst Arqiva’s regulatory position is unique, we would not say that it is perfect or necessarily fit for purpose.

We also note (para 4.15) Ofcom’s view that it would have market failure concerns if, amongst others, Arqiva was “charging excessively high prices”. We question the definition used here by Ofcom of ‘excessively’ and would argue that Arqiva has pricing policies that do not reflect an open market.

Question 3: Do you agree with our proposal that no operator holds SMP in the DTT NA market or the radio NA market, as a result of the Arqiva/NGW Undertakings? If not, please explain why.

We do not agree with Ofcom’s assessment that no operator holds SMP in the radio NA market.

We are concerned that Ofcom makes statements about ‘Countervailing buyer power’ in relation to Arqiva’s position as the sole supplier of DTT NA (para 5.9) but no statement about Ofcom’s 90% dominance in radio NA, which could be a failure on Ofcom in assessing the whole marketplace.

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We note (para 5.15) that Ofcom places reliance on a CMA Review published in July 2015 (which we understand relies on evidence that the CMA collected pre-2012) which made the following conclusions:

- the package of behavioural remedies had been effective in passing back to the industry the agreed 17% and 3.21% cost savings on radio and TV contracts respectively;

From our experience, it is not clear that new contracts entered into with Arqiva subsequent to the Undertakings have benefitted from any cost savings gained by Arqiva from the Arqiva / NGW merger.

- customers had access to greater levels of information;

From our experience, there is no greater level of information provided which helps customers to understand the make-up of Arqiva's costs and whether the contracts offer value for money (as Arqiva highlight, as the controller of over 90% of DAB sites and therefore a monopolistic supplier, one has little real choice of not entering contracts with Arqiva).

- on balance, all major stakeholders had been content with the merger proceeding, subject to the safeguards the CC had put in place, despite the fact that this would result in a monopoly supplier to broadcasters of a function critical to their business.

From our experience, all major radio stakeholders have benefitted from the 17% and have been able to roll over contracts on pre-merger terms and conditions which are much more favourable than the new supposedly 'open' contracts that new customers post merger have had to enter. The result is that small operators have to pay significantly higher fees to Arqiva and are fully liable to pass through costs, whilst those who have been able to renew contracts on pre-merger terms and conditions do not have to incur.

The over-arching issue is the CMA undertakings have not created a market place in which all customers are dealt with in a fair and effective manner.

We had assumed at the time that the undertakings were being considered that NA pricing would be a cap on the price that Arqiva could charge, rather than be a non-negotiable bench-mark price.

The undertakings have moved a significant element of the risk of transmission from Arqiva to the customer, whilst at the same time being charged non-transparent pricing.

We agree with the concept that there should be less regulation and that there is no point in having duplicate regulation from Ofcom and the CMA on Arqiva's Broadcast Transmission Services. However, at this stage we do not believe that the Undertakings are fit for purpose and that a thorough rather than partial review of the undertakings should be undertaken by

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the CMA (for example one that involves the whole industry rather than the one or two dominant major radio stakeholders) as a pre-requisite of any change in regulation by Ofcom.