Licensing Priorities for Broadcast Radio

Please see separate coversheet on behalf of Manchester DAB CIC,
City West Digital CIC and South of the River Digital Radio

NOTE: This submission responds to one question only.

Consultation question 3:

For post-launch SSDAB multiplex coverage improvement or extension requests only, do you agree with our proposed change in approach to our application of the rule which restricts overlap with local muxes to 40% of the population already covered by the local mux (the "40% ceiling")?

Response and reasoning

Ofcom proposes modest changes to the way it applies the 40% ceiling policy. The change proposed in this consultation should go beyond maintenance of a 'clear minority' i.e. less than 50% overlap. This, on its own, would be unlikely to deliver significant public benefit.

We put forward reasoning why the competition regulator should be much bolder in its approach and create a framework where competition can thrive and deliver best value for audiences. We say this because with the benefit of hindsight, there is no evidence to support the fears which led to the creation of this flawed policy in the first place.

We do not advocate unbridled expansion of Small-scale DAB (SSDAB) coverage and note that this would be unlikely anyway, because the constraints of the radio spectrum and the SSDAB wider frequency plan, in most cases, could never allow it. With that braking mechanism in place, we maintain that there is a case to take substantial steps in order to address an issue that is leading to bad outcomes.

We set out our case in four parts:

1. The strength of the established DAB market
2. Protectionism: the distortion of the DAB market
3. Consideration of the 40% ceiling policy from Ofcom's perspective
4. Proposal of a fresh approach

The strength of the established DAB market

Local Radio Multiplex Services (LRMS) and the wider established DAB radio market are in rude health across much of the UK. Three indicators demonstrate this: digital advertising revenue; DAB listening, and the number of programme services carried.

Digital revenue has nearly doubled since (pre-COVID) 2019

Commercial Radio Revenues 2019 and 2026 (source: RadioCentre)				
	2019	2026	% increase	**% year on year increase**
Digital Audio Revenue	£49m	£90m	83.7%	**14.9%**
Total Advertising Revenue	£693m	£747m	7.8%	**1.4%**

DAB share of listening has increased by 8 percent (3.2 percentage points).

Radio Share by Platform (source: RAJAR)			
Platform	Q2 2019	Q2 2022	Q2 2025
DAB	38.6%	40.8%	41.8%

Many multiplexes are close to full capacity. Some have adopted DAB+ and have seen a substantial take up in the number of radio services carried.

Multiplex capacity is finite. Once a DAB mux is full there is no longer a route to the broadcast airwaves for new entrant programme services. This has the effect of closing off opportunities for would-be broadcasters and prevents delivery of greater choice for listeners. This is not in the consumers' interest. While 'full' is good for LRMS an expanded SSDAB could help Ofcom achieve wider public policy aims.

Sample of services Carried in Local Radio Multiplexes 2019 and 2026 (source: Wohnort)					
	Number of services 2019	Number of services 2026	DAB	DAB+	Current Capacity
Teesside	10	12	✓		**FULL**
Bradford and Huddersfield	9	13	✓		**FULL**
Surrey	9	17	✓	✓	**78% FULL**
Coventry	8	9	✓		**82% FULL**
Leicestershire	11	11	✓		**FULL**
Lincolnshire	5	12	✓	✓	**77% FULL**

Today DAB commercial radio is in a different place, it is far stronger economically and has adopted DAB+ which has allowed this tier to add additional radio services and improve revenue and profitability further and all this while being underpinned by a BBC subsidy, resulting form carriage of BBC Local Radio services in each area.

- Full multiplexes prevent access for new services
- LRMS mux operators have not been economically impacted by SSDAB

Protectionism: the distortion of the DAB market

How we got to where we are
Successful lobbying by LRMS operators, of Legislators and Ofcom, has resulted in protectionism. This lobbying brought about the 40% ceiling policy at around the start of the decade.

The outcome – SSDAB is compromised
The legislative outcome, if not its intent, has been to ensure SSDAB is hamstrung to the extent that the platform's sustainability is compromised. Typical coverage from SSDAB multiplexes does not meet reasonable listener expectations because coverage improvements are often constrained by the 40% ceiling policy. The net effect: a bad outcome overall.

Retaining the 40% ceiling serves no one
A case can be made to abolish the 40% ceiling policy altogether because it is an anachronism. It does nothing to promote growth or support Ofcom in adopting the prevailing legislative duties and powers to which the regulator is held to account. Furthermore, preventing meaningful extension or improvement of SSDAB coverage, does nothing to serve the interests of consumers. In effect, it prevents best value for audiences.

The underlying question is: should Ofcom prevent SSDAB mux operators from delivering receivable signals into areas where listeners would normally expect to hear that service.

Under Ofcom's current approach, the LRMS operators remain unaffected while SSDAB continues to be impeded.

Consideration of the 40% ceiling policy from Ofcom's perspective

Applying the 40% ceiling policy is no longer desirable but it is recognised that Ofcom must observe its statutory requirements. It is acknowledged that for Ofcom, there is a conflict between prevailing legislative duties.

Currently, when considering SSDAB coverage, Ofcom is required to have regard to the desirability of ensuring the overlap with LRMS does not exceed 40% (the '40% ceiling). The term 'desirability' provides scope for discretion and has the effect of making this particular statutory bar, a low one.

This approach is mirrored by Ofcom's interpretation of another part of the SSDAB legislation, which the regulator observes when awarding a multiplex licence. In Ofcom's words the legislation states:

> Section 51(2) (ca) of the 1996 Act requires Ofcom to take into account the desirability (our emphasis) of awarding a small-scale radio multiplex licence to a body corporate that is providing – or proposing to provide – a C-DSP service in the locality being advertised (or involving such a person as a participant in the licence-holding company).

Following consultation regarding Section 51(2) (ca) of the Act, and no doubt after taking legal advice, Ofcom's published Statement: Licensing small-scale DAB - How Ofcom will exercise its new functions, concluded (in section 7.56):

> 'While we will indeed take this criterion into account in making licence award decisions, the legislation makes clear this is a <u>desirable rather than a required feature</u>, and it would not prevent a licence award to multiplex applicants not involving a C-DSP provider directly.'

In this scenario, Ofcom uses a discretionary approach. Frequently, the regulator has awarded multiplex licences to bodies corporate that are <u>not providing</u> (or proposing to provide) a C-DSP service. Importantly, in this function, Ofcom adopts a binary approach choosing, or not, to award a multiplex licence to a body corporate likely to provide a C-DSP service. There is no compromised approach to 'reflect legislative intent'. The term 'desirable' means desirable and not a 'required feature.'

It follows, the degree of scope that Ofcom has, lends itself to being well within the regulator's gift to routinely consider exceeding the 40% ceiling criterion and that it should not prevent approval of a request which in turn exceeds the ceiling by any amount – 60%, 80% or 100%.

This differs from the inference set out in this consultation where only a nominal increase appears to be proposed. This approach is far too cautious and could not be expected to yield any measurable public or economic benefit. It tinkers around the edges and achieves nothing.

Turning to the reason of applying the 40% ceiling policy, it is maintained that the ceiling was only introduced amid fears by LRMS operators that the development of SSDAB would damage their business model. With LRMS thriving, we now know that this is something that over the past five years has proven not to be the case.

The legislative intent was not to stifle growth in the medium to longer term, neither was it to act against the wider public benefit, but these are the outcomes that have now been created.

A view may be taken that Ofcom's proposed policy approach to heavily restrict greater overlap is still too conservative and notably, runs counter to a number of its other legislative duties and powers. These include:

- the desirability of promoting economic growth
- securing a wide range of radio services
- the maintenance of sufficient plurality of providers of radio services
- encouraging investment
- furthering the interests of consumers in respect of choice
- promoting competition in the provision of electronic communications services
- taking regulatory action only when it is needed with any action being proportionate

These objectives remain compromised so long as the 40% ceiling policy is implemented. We see, in summary, that legislation was framed to ensure SSDAB was smaller (in population terms) than LRMS. This was its intention. In practice the outcome of this legislation has created a situation where the fledgling SSDAB platform is hamstrung.

Control, limiting expansion already exists. The tight planning of the frequency spectrum for SSDAB means that a braking system exists, impacting across much of the UK, which in turn will constrain many SSDAB coverage improvement and extension requests. This renders the 40% ceiling policy no longer fit for its purpose.

In this context, a more flexible approach is called for.

Proposal of a fresh approach

A suggestion of how such a fresh approach might be applied is set out below.

<u>SUGGESTED APPROACH:</u>

- In cases where a given LRMS is full (or close to full) of radio services, and in the event of a SSDAB multiplex operator requesting improved or extended coverage which is likely to have the effect of exceeding the former 40% ceiling; it should be at Ofcom's discretion, subject only to spectrum availability, to allow increases, potentially up to 100%. *[In practice spectrum constraints will act as a braking mechanism]*

- In cases where the LRMS is not full, then subject to meeting certain exceptional circumstances (see suggestions below) and where a case has been made, Ofcom would be inclined to approve the request up to a ceiling of 75% of the overlapped population.

- For approval of a request, it is suggested that <u>only one</u> of the first five exceptional circumstances cases, set out below, needs to be made. In addition, exceptional circumstance number six (spectrum availability) would also require approval by Ofcom.

<u>The exceptional circumstances being:</u>

1 Where the primary objective of a SSDAB multiplex request is to enhance coverage within the licensed area and where any overspill is, in the view of Ofcom, incidental.

2 Where it would not be in the public interest to refuse an extended coverage request, such as where a city is partially served (i.e., Aberdeen) and the request would be to serve the whole of the single population centre.

3 Where it is demonstrable that a field strength of 63dB is an inadequate measure of coverage where real world DAB signal ‘not spots’ which are not identified by conventional coverage planning predictions, are still part of the population calculation, when applying the current 40% ceiling.

4 When planned coverage is across urban or dense urban areas and the proposal seeks to mitigate against real world DAB signal ‘not spots’ inside the original licensed area that in turn has the effect of distorting the calculation of the population ‘served’.

5 Where a second SSDAB multiplex with ownership similarities is in the same LRMS area, and is prevented from serving some of its core area, due to the current 40% ceiling.

6 Where the proposed enhancement does not create a negative impact on the wider frequency plan or cause undue interference with other occupiers of the spectrum.

The Exceptional Circumstances may be summarised thus:

Where -

- any overspill is incidental
- it is not in the public interest to refuse a request
- 63dB field strength does not achieve coverage aims
- coverage discrepancies exist (real world versus prediction) and the 40% calculation becomes inflated as a result
- relaxing ownership policy in relation to the 40% ceiling would be in the public interest
- the request is compatible with spectrum availability

<u>Exceptional Circumstances 3 and 4</u>

This response to Ofcom is on behalf of three SSDAB multiplexes serving Manchester, South London and West London. Each has encountered similar problems. We have gathered and continue to gather evidence which we are prepared to share with Ofcom.

This evidence shows - DAB signal ‘not spots’ which are not shown on planning tool coverage predictions, exist in the real world. Many are in urban or dense urban areas but Ofcom’s measurement for SSDAB is a 63dB field strength, suitable in Ofcom’s terms, for useful service in suburban settings, in contrast to a robust service. 63dB is therefore not suitable in urban or dense urban settings. In seeking to overcome this issue, a higher field strength if applied would have the effect of pushing out the contour of the 63dB field strength to the extent that the 40% ceiling is inevitably breached.

As an important aside, in cases where the 63dB contour is extended by virtue of the power sum, when the primary purpose is to improve coverage inside the licensed area, the measurement of the extent overlap should be disregarded.

Additional reception complications also exist. These are likely caused by recent major construction developments, incoming interference from co-block SSDAB services, public transport such as TFL telemetry systems, reverse A.C.I. by LRMS operators and other users of the electromagnetic spectrum. However, the coverage planning tool does not show the real world DAB signal ‘not spots’ we have identified, and indicates these areas as being served, when in fact, they are not. When population figures are calculated against this criterion (for the purpose of calculating the 40% ceiling) they are likely to be inaccurate as they overestimate population coverage.

To recognise these two points, the exceptional circumstances 3 and 4, have been drafted in the Suggested Approach (above) with these issues in mind.

Summary

The suggested approach (above) allows the regulator to apply the case-by-case model in a manner that can be defended, if challenged. It provides overall protection of the wider frequency plan while allowing for regulatory relaxation.

Our proposal allows for regulation that is proportionate and it acknowledges that SSDAB will, due to spectrum constraints alone, remain smaller (by population) than the corresponding LRMS. This renders the 40% ceiling policy not fit for its purpose.

This approach will, in many cases, remove the unwanted economic protectionist measures that are currently in place and will allow Ofcom scope meet a number of its other important statutory duties, not least, to promote economic growth.

We agree with Ofcom that there should be a change in approach with regard to the 40% ceiling. However, the minimal extent of change inferred by Ofcom would be largely ineffectual. Bolder steps, if taken, would deliver tangible public benefit.