

Digital One's Response to the Ofcom Consultation
"Future pricing of spectrum used for terrestrial broadcasting"

1. Digital One operates the UK's only national commercial DAB digital radio multiplex. Its shareholders are GCap Media (63%) and Arqiva (37%).

Digital One's transmission network (which is operated by Arqiva) is the world's biggest DAB digital radio network with coverage well in excess of 85% of the British population.

Digital One's multiplex broadcasts:

- the three INRs (Classic FM, Virgin Radio and talkSPORT);
- four digital-only national stations (Capital Life, Core, Oneword and Planet Rock) with a further station being launched in the next few months;
- TV channels and an Electronic Programme Guide broadcast as part of BT Movio.

Digital One is a leading stakeholder in the UK's Digital Radio Development Bureau and the WorldDAB Forum (which is responsible for the DAB digital radio standard and works to coordinate the international roll-out of Eureka 147 based technologies).

2. Digital One is licensed under the 1996 Broadcasting Act, and has licence obligations which help deliver public policy benefits. These limit Digital One's ability to use the spectrum it has been allocated in the most efficient manner (in economic terms). For example:
 - the obligation to operate a transmitter network which delivers high population coverage;
 - the obligation (at the direction of the Secretary of State for the Department of Culture, Media and Sport) to carry the three INRs and to offer each INR an amount of capacity dictated by the regulator;
 - the obligation to use at least 70% of the total multiplex capacity to broadcast audio services;
 - the obligation to broadcast services of particular characteristics defined in Digital One's licence unless Ofcom agrees the nature of the services can be amended under the terms of the 1996 Broadcasting Act;

- the obligation to broadcast audio services at or above particular bit rate minima defined by Ofcom;
- the obligation to broadcast using a particular technology;
- the obligation to broadcast audio services in formats specified by Ofcom;
- the obligation, in 1999, to take a significant long-term risk and for the shareholders formally to assure the Radio Authority of their preparedness to incur significant losses, if necessary, to enable the launch of DAB digital radio in the UK;
- the obligation to incur significant costs in the promotion and marketing of digital terrestrial sound broadcasting in the UK.

Ofcom is committed only to regulate where necessary and, therefore, each of these obligations helps secure particular public policy benefits. Some impact on Digital One's ability to use the spectrum efficiently and all have a cost. These costs are not recognised in the Paper which put the cart of spectrum efficiency before the horse of broadcasting policy.

This runs counter to the Government's statement on these issues which suggested that consideration of the extent of the regulatory burden faced by commercial radio should be conducted prior to any decision on **whether** to apply some form of AIP to the sector. "The Government recognises, however, that the regulatory framework for commercial radio seriously constrains the way in which sound broadcasters may use spectrum. Further work is needed to assess if there is scope for spectrum pricing to apply to sound broadcasters."¹

3. One of the benefits of the creation of Ofcom is the regulator's ability to consider issues from all relevant angles simultaneously e.g. spectrum efficiency alongside the public policy issues specific to broadcasting. In Digital One's view, the Paper² focuses on Ofcom's duty to secure "the optimal use for wireless telegraphy of the electro-magnetic spectrum"³ but does not properly take into account Ofcom's duty to secure "the availability throughout the United Kingdom 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"³.

¹ Page 35, "Government Response to the Independent Review of Radio Spectrum Management", 15 October 2002

² "Future pricing of spectrum used for terrestrial broadcasting", a consultation published by Ofcom on 27 July 2006

³ Communications Act 2003

Ofcom's proposal to introduce a specific tax from a specific date (to deliver efficiency in the use of spectrum) needs to be matched by:

- an economic impact assessment into the new tax's impact on commercial radio and the sector's ability to continue to deliver a range of quality radio services throughout the UK;
- plus, a specific proposal for how commercial radio will be given either tax relief or public funding to enable it to continue to deliver socially desirable broadcasting in ways defined by regulation from the same date.

In the Paper, Ofcom argues that it is not appropriate for AIP to be discounted in order to secure socially desirable broadcasting but that any intervention should take place in the market for the delivery of such outputs. Whilst a mechanism for such intervention exists for the BBC and may be considered for Channel 4, Ofcom has not flagged an intention to develop such a system for commercial radio.

It is not adequate for Ofcom to say that "Broadcasters themselves are also free to press for a relaxation of the technical and on their use of spectrum"⁴ and that therefore they should pay the full opportunity cost for the spectrum they use. Changes to regulation are not agreed simply because broadcasters ask for them. Digital One has experience of Ofcom blocking or delaying regulatory changes that have the potential for spectrum to be used more efficiently.

4. In arguing that it is fair to introduce this new tax on terrestrial broadcasting Ofcom highlights that AIP is already being introduced for other sectors which deliver public policy benefits e.g. the Emergency Services and Defence. These sectors are publicly funded, which makes AIP a very different proposition. Like the BBC, the Emergency Services and the armed forces are able to seek public money to fund this new cost. Commercial Radio has no such funding mechanism, although the Paper and the underlying consultants' report⁵ allude to the possibility that commercial radio could seek relief from other forms of taxation.

⁴ Page 19, the Paper

⁵ "Study into the potential application of Administered Incentive Pricing to spectrum used for Terrestrial TV and Radio Broadcasting" Indepen and Aegis, October 2005

5. It causes concern that the consultants' report appears to consider whether because the public policy benefits of broadcasting are difficult to quantify the task should be entirely abandoned.

“In simple terms, this overall position within broadcasting policy – and one clearly endorsed by the Ofcom reviews – suggests the very simple conclusion that it will not be possible to neatly quantify social value of broadcasting. More research on these measures of value would be necessary before they could reliably be used in key regulatory decisions.”⁶

During the period of consultation, Digital One has asked Ofcom for assurances that the regulator is committed to introduce, in parallel, mechanisms to protect and preserve the social and public policy benefits delivered by UK commercial radio or to remove the regulatory burden. The answers give us further cause for concern as they fall short of any binding commitments in plain English.

Digital One's question: “Although AIP has been applied to other areas such as emergency services and defence where there are overt public policy issues, they are all *publicly* funded. The government's response (cited in the consultation paper) suggested that there were particular issues that would be examined for commercial radio related to its regulatory burden? Has Ofcom explored the ways in which commercial radio might be compensated for its regulatory burden e.g. Digital One is obliged to make capacity available for the analogue INRs, the 30% data limit, obligations to provide high population coverage etc.”

Ofcom's answer: “Ofcom does not believe the current level of regulatory burden on commercial radio to be excessive. At the same time Ofcom recognises that future developments may make it more or less feasible for commercial radio to continue to meet public policy goals, as expressed through existing licence obligations, and that consequently these goals and obligations may, at some future date, need to be reviewed. Such a review might also consider the case for an element of public funding, but this is not something that Ofcom is considering currently.”

Digital One's continuing concern is that Ofcom is not properly considering the impact of its proposals on commercial radio's ability “to

⁶ Page 26, “Study into the potential application of Administered Incentive Pricing to spectrum used for Terrestrial TV and Radio Broadcasting” Indepen and Aegis, October 2005

continue to meet public policy goals, as expressed through existing licence obligations”. Furthermore, Ofcom’s commitment is expressed in terms of a **possibility** of a review, relaxation of licence conditions or public funding. This is both unfair and a failure to place proper emphasis on Ofcom’s duties specific to broadcasting.

Digital One’s question: “Following on from the above, and given some of the things the government said in 2002, ultimately (thinking aloud) is there a plan/aspiration to remove the regulatory burden on Digital Terrestrial Sound Multiplexes by 2012?”

Ofcom’s answer: “Ofcom is not currently looking at this.”

Digital One’s continuing concern is that Ofcom is charging AIP on a full opportunity cost basis, as if Digital One were free to use its spectrum in any way it chooses while neither offering to reduce regulation nor implement a funding mechanism to recognise the extent to which regulation prevents Digital One from delivering the potential opportunity cost value from its spectrum.

Digital One’s question: “There seem to be some tensions between Ofcom’s ultimate decision not to auction the next phases of Band III spectrum but instead to use the Broadcasting Act 1996 framework and the fact that AIP will estimate an opportunity cost for spectrum based, among other things, on what it would have generated at auction. How has this tension been resolved?”

Ofcom’s answer: “We see no tension. For as long as parties are willing to offer DAB services compatible with the requirements of the B Act licences that we offer, notwithstanding our proposal to charge AIP, we see no problem with awarding such licences through a B Act process whilst charging a level of AIP that reflects the opportunity cost of the spectrum.”

Digital One remains keen to explore with Ofcom the extent of these tensions, which are real. Licence obligations limit the value an operator is able to derive from spectrum. A licence awarded under the Wireless Telegraphy Act alone (as originally considered by Ofcom for the next wave of Band III licensing) would allow an operator the ability to achieve maximum value. Without modification, AIP as Ofcom is proposing it would tax an operator at the level of full opportunity cost and, at the

same time, leave an operator with the further costs (or opportunity costs) stemming from its licence obligations.

6. Ofcom proposes to introduce AIP for DAB digital radio multiplexes from 2012, two years earlier than for DTT multiplexes. This choice of date seems to run counter to Ofcom's principle of technology neutrality. Digital One would urge Ofcom to re-examine this proposal and introduce AIP for all platforms from the same date i.e. 2014.

There is a good argument that Ofcom should consider an even later date for DAB digital radio multiplexes. The Government's statement on these issues in 2002 placed emphasis on the importance of broadcasters being given every possible encouragement to work for digital switchover and suggested that AIP should only be introduced for DTT once switchover was achieved. The same principle would suggested that AIP should only be introduced for radio once switchover is achieved.

7. The consultants' report ⁷ raised the issue of who are the "decision makers" in relation to spectrum allocated to broadcasting. The report raises the possibility that it might be fair to require the Department of Culture, Media and Sport to pay AIP for broadcasting spectrum.

Digital One would highlight that often the regulator is the key decision maker. For example, Digital One first requested a change to the regulation of bit rate minima for radio stations during the Radio Authority's existence and has continued to press for a change since Ofcom's creation in 2003. Ofcom has yet to make a decision on this issue, which has the potential for delivering a more efficient use of spectrum.

The consultants' report suggests that DAB digital radio's audio coding is not efficient. However, the audio specification is mandated by Ofcom.

Digital One believes that, in terms of the efficient use of its spectrum, both DCMC and Ofcom are "decision makers" and that the proposal that, as such, they should share an obligation to pay AIP does not appear to have been fully and properly considered.

⁷ "Study into the potential application of Administered Incentive Pricing to spectrum used for Terrestrial TV and Radio Broadcasting" Indepen and Aegis, October 2005

8. In the radio industry, the INRs have always made payments to the Treasury via PQR to recognise the opportunity cost of using spectrum for radio broadcasting. For commercial DAB digital radio multiplexes, the Broadcasting Act 1996 defined how Additional Payments could be made as a Percentage of Multiplex revenue (PMR). Digital One has always believed that PMR was the mechanism defined in legislation as a spectrum charge.

Digital One believes that any system for AIP should, on a pound-for-pound basis, take into account any PMR payments assessed for a DAB digital radio multiplex operator.

9. Digital One understands that Ofcom is committed to introducing AIP for broadcasting and is focussed on the benefits this promises to yield in terms of the efficient use of spectrum. Ofcom recognises that “the application of AIP may have an impact on the financial capacity of broadcasters to deliver broadcasting policy goals”⁸ and yet offers unfinished proposals for how commercial radio’s contribution can be safeguarded. It seems unfair that the BBC can simply add the projected AIP costs to its licence fee bid while a commercial operator is left facing a new tax bill.

Ofcom has highlighted that the solution for commercial operators lies either in a new form of funding or a relaxation in regulation.

Ofcom has outlined a timetable for the introduction of AIP in 2012 or 2014. There seems to be no necessity to finalise the AIP system in isolation without Ofcom sharing responsibility for defining how its Communications Act duties specific to broadcasting can best be secured alongside its AIP proposal. Ofcom describes as “a challenge”⁹ the task of “maintaining socially valuable broadcasting after the introduction of AIP”⁹. Digital One is keen to work with Ofcom, and the rest of the radio industry, to rise to that challenge. Given Ofcom’s potentially conflicting duties, until that task is complete it would be premature to finalise the system for AIP.

⁸ Page 23, the Paper

⁹ The Paper , page 6