

RADIOCENTRE RESPONSE TO OFCOM CONSULTATION 'BROADCASTING TRANSMISSION SERVICES: A REVIEW OF THE MARKET'

Summary

1. Arqiva owns an estimated 90% of broadcasting transmissions sites for radio in the UK. This is an extraordinary concentration of market power and means that practically all commercial radio broadcasters will need to purchase some of the services it offers in order to operate effectively.
2. This dominant position in the UK radio market remains undiminished by changes in consumption and distribution of radio in recent years. While it is possible to provide a radio service online or on cable, satellite or DTT, the vast majority of radio listening is still on broadcast platforms (FM analogue, AM analogue and DAB digital) so this is not a viable alternative or in any way a constraint on Arqiva's market power.
3. The focus of this review is on the regulated market for network access (NA) to radio broadcast sites. Ofcom provides a reasonable assessment of this market. Ofcom is right to conclude that Arqiva's dominance of the radio NA market is such that it still requires *ex ante* regulation that is designed to limit market power beforehand (rather than *ex post*, or after the fact) in order to minimise the potential for an abuse of significant market power.
4. The main regulatory constraint on Arqiva is the undertakings that were put in place by the Competition Commission in 2008 following the merger of Arqiva and NGW. Indeed this will be the *only* regulatory constraint if Ofcom proceeds with the proposed removal of the regulations that Ofcom put in place in 2005 (to limit the market power of Arqiva's predecessor organisations Crown Castle and ntl:broadcast).
5. Therefore it is important that Ofcom considers the impact and effectiveness of these undertakings (which it does in Section 5 of the document). However in doing this it relies heavily on analysis from the Competition and Markets Authority (CMA) based on research that was conducted mainly in 2012 or earlier. Ofcom does not appear to have done any further analysis of its own since that time.
6. Given that there has been no new or recent work on assessing the effectiveness of these remedies it is difficult for Radiocentre to give unqualified support for the view that Arqiva does not hold SMP in the radio NA market. This assertion could well be true, but more work should really be done to establish whether this is the case and in addition whether it is appropriate to remove the 2005 regulations.

Introduction

7. Radiocentre is the industry body representing commercial radio companies in the UK. Our members have a particular interest in the market for broadcasting transmission services. This is because managed transmission services (MTS) and network access (NA) to sites that enable broadcast transmission are an essential parts of the supply chain for radio. Therefore it is important that they are delivered as effectively and affordably as possible.
8. The importance of these elements means that Arqiva has an extraordinarily powerful position in the radio market due to the fact that it owns more than 90% of transmission sites for terrestrial broadcasting in the UK. For the vast majority of commercial radio broadcasters this means that it is practically impossible to operate a radio station without buying at least some services from Arqiva. For the purposes of this consultation this includes network access to broadcast

transmission sites, but may also mean using Arqiva's services to provide contribution, multiplexing, distribution and transmission of a broadcast signal (depending on the nature and location of the radio service).

9. Despite some gradual changes in the consumption and distribution of radio content there is also no evidence that a growth in capacity and competing delivery platforms has had any impact on Arqiva's extraordinarily strong position in this market. While the view has been expressed (at least in theory¹) that this could help address any problems of market power it is still far from the reality. As Ofcom acknowledges later in the document 'it is unlikely that a monopoly provider of NA services for radio could be constrained by broadcasters substituting provision via cable, satellite or IPTV, given the large majority of radio listening is over analogue or digital radio sets'(para 3.38).
10. Therefore Arqiva's dominant market position is undiminished by any of these developments and it is appropriate that it should remain subject to a number of additional regulatory obligations, which are examined in more detail later in Ofcom's report.

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

11. The continuing importance of broadcast for a viable radio business is reinforced in Section 3 of the consultation document. This is demonstrated by the fact that the vast majority of listening is via analogue radio (FM/AM) and digital broadcast radio (DAB). Indeed the most recent audience figures reported share of listening on analogue as being 55.9% and DAB as 30.9% (with a further 7.8% online and 5.4% on DTV)².
12. Ofcom also goes on to consider the wholesale market for the provision of NA services for radio (p.18-19). Its findings in this area are consistent with the 2008 merger report by the Competition Commission, which concluded that these services are essentially the same for analogue and digital radio. This would seem to be a reasonable approach given that the purchasing habits of the radio stations are essentially the same for NA, irrespective of whether the broadcast platform is AM analogue, FM analogue or DAB digital radio.
13. The only minor point that we would make relates BBC procurement, where the document states that 'its approach to procurement of NA for BBC local radio is the same as for BBC national radio' (para 3.40). While this may be true for FM and AM it is not true for BBC local services on DAB (where NA is purchased on a case by case basis as part of a package agreed with a network of individual multiplex operators) so there may be a question regarding the inclusion of BBC local in the market.
14. Aside from this point Ofcom makes a fair assessment of relevant radio markets overall. While there are clear differences in the operation of local, regional/ metropolitan and national stations they are still sufficiently similar to be considered as in the same market for NA services.

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.

15. There is clearly a need for an appropriate set of regulatory obligations to act as a constraint on Arqiva given its dominance of the radio NA market in the UK. Ofcom examines the

¹ [European Commission, Explanatory Note to 2007 Recommendation](#)

² RAJAR, Q1 2016

appropriateness of the regulation that is currently in place and whether this should continue to be *ex ante* (behavioural remedies that limit market power beforehand) or a less onerous *ex post* regime (regulation and competition law that is after the fact).

16. In assessing this approach Ofcom is required to take into account whether the market is characterised by high and non-transitory barriers to entry; a market with no effective competition within a relevant time horizon; and insufficiency of competition law to deal adequately with market failures.
17. Ofcom provides a fair assessment of these key criteria for determining whether this should continue to be in the form of *ex ante* regulation. In summary it concludes that:
 - the radio NA market is characterised by high and non-transitory barriers to entry;
 - there are no signs of the radio NA market moving towards effective competition;
 - competition law remedies alone would be insufficient to address market failures on the radio NA market.
18. Therefore Ofcom is right to conclude 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. Indeed some commercial radio operators would argue that even with this type of regulation Arqiva charges excessively high prices that are sometimes difficult to understand.

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.

19. In assessing Arqiva's market power Ofcom highlights the criteria that it considers to be most relevant to BTS markets, including structure of the market and barriers to entry; countervailing buying power; must carry obligations; and impact of the undertakings.
20. Ofcom's provisional conclusions on these issues offer a reasonable assessment of market power in the radio NA market.
 - **Structure of the market and barriers to entry** – This is considered in Section 4 of the document as part of the criteria on continuing with *ex ante* regulation. As noted above, Ofcom makes the reasonable conclusion that there are high barriers to entry and no signs of effective competition in this market.
 - **Countervailing buying power** – Ofcom makes no mention of the radio NA market when considering this point which is an unfortunate omission. Presumably its conclusion will be the same, in that it does not consider countervailing buyer power to provide sufficient constraint in radio NA market either. However this is not explicit and should be made clear.
 - **Must-carry obligations** – Ofcom's concludes that some form of must-carry obligations could potentially mitigate Arqiva's significant market power (SMP) but would not remove it entirely. This seems a fair assessment.
21. Ofcom goes on to devote most of its consideration of Arqiva's market power to the **impact of the undertakings** put in place by the CC in 2008. This is appropriate given that these are the main constraint on its market power (and will be the only such regulation in place if the 2005 regulations are removed).
22. Ofcom's provisional view of the effectiveness of the undertakings is informed by a review of merger remedies published by the Competition and Markets Authority (CMA) in July 2015. This

report itself drew largely on research published in 2012 (with many of the interviews taking place earlier than that).

23. These findings support the overall view outlined by Ofcom that the undertakings are continuing to work effectively and successfully to limit Arqiva's ability to exercise SMP (by acting entirely independently of competitors, customer and consumers).
24. However it is difficult for a third party like Radiocentre to make a definitive statement in support of Ofcom's view of the undertakings given that they are based on views from the industry that were collated over four years ago. There have been a number of changes in the UK radio market over the past four years and the pace of changes is increasingly rapid. So while Ofcom's assessment may be correct it is also possible that some radio operators may have a different view and assert that Arqiva retains significant market power notwithstanding these undertakings.
25. Given the lack of up to date information it may be useful for Ofcom (and/ or the CMA) to conduct new research on the views of the radio industry and a more detailed assessment of the continuing effectiveness of the undertakings. For example some commercial radio broadcasters have queried whether regulated pricing for NA has become a non-negotiable minimum price rather than a cap as it was intended to be originally.
26. To be clear we are not calling for a formal review of the undertakings themselves, but a more detailed analysis of their operation and effectiveness in 2016. Without this we do not feel able to give unqualified support for the position outlined by Ofcom (i.e. that Arqiva does not hold SMP in the radio NA market). As such it is also difficult for Radiocentre to support the recommendation of the removal of the 2005 regulations unreservedly.

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