EXPLANATORY MEMORANDUM TO

THE RADIO MULTIPLEX SERVICES (REQUIRED PERCENTAGE OF DIGITAL CAPACITY) ORDER 2006

2006 NO. 2130

1. This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

This memorandum does not contain information of special interest to the Joint Committee on Statutory Instruments.

2. Description

2.1 Digital radio multiplexes are the means by which a number of terrestrial digital radio services can be broadcast over the same frequencies in the UK. At present, the Broadcasting Act 1996 (as amended) allows up to 20% of the capacity to be used for data services instead of radio programmes. This draft order would increase the percentage to 30%.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 The draft Order is proposed to be made under section 54(3) of the Broadcasting Act 1996, as amended by the Communications Act 2003 (see section 259 of, and paragraph 113 of Part 2 of Schedule 15 to, that Act). The amended text of that section, so far as relevant to this draft Order, is as follows:

> "(1) A radio multiplex licence shall include such conditions as appear to OFCOM to be appropriate for securing—
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> ...
>
> (h) that, while the licence is in force, at least the required percentage of the digital capacity on the frequency or frequencies on which the service is broadcast is used, or left available to be used, for the broadcasting of services falling within subsection (1A).
>
> (1A) The services falling within this subsection are—

(a) digital sound programme services;

(b) simulcast radio services;

(c) programme-related services; and

(d) relevant technical services.

…

(2A) In subsection (1)(h), the reference to the required percentage is a reference to such percentage equal to or more than 80 per cent. as OFCOM—

(a) consider appropriate; and

(b) specify in the condition.

(3) The Secretary of State may, after consulting OFCOM, by order amend subsection (2A) by substituting a different percentage for the percentage for the time being specified in that subsection.

(4) No order under subsection (3) shall be made unless a draft of the order has been laid before and approved by a resolution of each House of Parliament."

4.2 Subsection (2), omitted above for brevity, defines expressions used in subsection (1A). Broadly, subsection (1A) covers digital radio channels (including digital equivalents of the national commercial stations – Virgin, TalkSPORT and Classic FM); services ancillary to those channels (e.g. digital radio can provide text alongside the audio broadcast, such as "now playing" information); and technical services connected with the broadcasting etc. of the main service.

4.3 While not formally linked, this draft Order should be read in conjunction with the draft Television Licensable Content Services Order 2006 which would expand the definition of a "television licensable content service" ("TLCS") under the Communications Act 2003 to include TV carried on a radio multiplex. The practical connection is that the Television Licensable Content Services Order would make legal changes to facilitate the exploitation of the higher data limit by innovative services.

5. Extent

5.1 This instrument applies to all of the United Kingdom, Jersey and Guernsey.

6. European Convention on Human Rights

6.1 The Minister for Creative Industries and Tourism, Shaun Woodward, has made the following statement regarding Human Rights:

> "In my view the provisions of the Radio Multiplex Services (Required Percentage of Digital Capacity) Order 2006 are compatible with the Convention rights."

7. Policy background

7.1 The Government is generally supportive of the development of digital audio broadcasting (DAB) and wishes to see the most appropriate regulatory regime in place. The instrument is being made so as to allow more data to be carried on radio multiplexes. This should allow for the development of innovative new services, in particular mobile TV, which will widen consumer choice and also encourage the take-up of digital audio broadcasting (DAB) by making DAB more widely available on mobile devices

7.2 Following its review, *Radio – preparing for the future*[1], Ofcom recommended to the Government that the data limit on radio multiplexes, the means by which DAB is broadcast, should be increased from 20%. Ofcom's view was that increased data services should allow new and innovative services to be developed which would increase consumer choice generally and encourage the take-up of DAB.

7.3 Following trials of a mobile TV service using the 20% data capacity, the evidence suggested that, to be commercially attractive, the service would need to offer five TV services which would require an increase in the data limit to 30%.

7.4 The DCMS has consulted on this proposal. All but one of the organisations which responded supported the change (14 out of 15) and some argued for an increase to more than 30%. Six individuals wanted the data limits to remain unchanged. One organisation did not support the proposals and questioned the legal powers of Ofcom to license the proposed mobile TV services and the competition analysis contained in the regulatory impact assessment. Ministers have fully considered these representations. They have concluded that they should proceed with their proposal to allow mobile TV services to be carried on a radio multiplex (see related order) and increase the data limits.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 There is no impact on the public sector.

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[1] http://www.ofcom.org.uk/consult/condocs/radio_review/radio_review2/

9. Contact

Stuart Brand at the Department for Culture, Media and Sport (Tel: 0207 211 6416 or e-mail: stuart.brand@culture.gsi.gov.uk) can answer any queries regarding the instrument.

REGULATORY IMPACT ASSESSMENT: DATA LIMITS AND DATA SERVICES ON RADIO MULTIPLEXES

June 2006

1. Title of proposal

1.1 Changes to the limit specifying the maximum amount of data which can be carried on a digital radio multiplex and changes to the definition of a “digital programme service” so as to allow television services to be carried on a digital radio multiplex.

2. Purpose and intended effect

Objective

2.1 To deregulate the restrictions on digital radio multiplexes so as to allow them to be used more flexibly in order to increase consumer choice, drive convergence and encourage the take-up of DAB enabled devices.

Background

2.2 Digital radio multiplexes are the means by which a number of terrestrial digital radio services can be broadcast simultaneously in the UK. At present, the Broadcasting Act 1996 (as amended) allows up to 20% of the capacity to be used for data services. This percentage can be changed by order and was increased from 10% to the current level in May 1998. This restriction is enforced by Ofcom.

2.3 TV channels carried on a multiplex would normally be considered as digital programme services (DPS). Under the current legislation, any multiplex that carries at least one relevant television service is a television multiplex. Thus, to put a television service onto a radio multiplex would convert it, legally, into a television multiplex. One consequence would be that 90% of the capacity would need to be devoted to television broadcasting or BBC radio (and associated services), leaving only 10% left for the commercial digital radio services currently occupying the multiplex, which woul mean that there would not be room for more than a fraction of them. We do not believe that this would be in the interests of radio listeners so we are therefore proposing to expand the definition of a “television licensable content service” (“TLCS”) to include TV carried on a radio multiplex This means that a radio multiplex which carries TV services can continue to be legally classified as a radio multiplex. The power to amend TLCS relies upon "technological developments" and we consider that the range of technological changes that have led to the provision of television on hand-held mobile telephones becoming a practical proposition is suffient to justify using the order making power in this way.

Rationale for government intervention

2.4 Ofcom has carried out a number of consultation exercises looking at, amongst other things, the future development of digital radio. One of the issues it consulted on was whether the 20% data limit should be increased so as to facilitate the development of innovative new services such as mobile TV. As a result of its consultation, it recommended to the Secretary of State for Culture, Media and Sport that the data limit on national multiplexes be replaced by a requirement for multiplex operators to carry a minimum number of services on national multiplexes.

2.5 The DCMS agrees that the results of the Ofcom consultation suggest that there is evidence of demand for an increase in the data limit and that such an increase should facilitate the development of new services which would benefit consumers, such as mobile TV. It is self-evident that the situation can change only through government intervention. If the Government does not raise the percentage, a number of innovative services may not be brought to market and DAB itself may suffer by virtue of not being part of a more compelling media package.

2.6 There is also evidence of consumer demand for such a service. BT has been developing a service which uses the 20% data capacity on the existing national multiplex for broadcasting TV and providing an electronic programme guide (EPG). The service, known as BT Movio, involves the use of a device which enables the user to make phone calls, listen to DAB radio and watch a TV channel. The service was been trialled within the M25 area last year for nearly six months.

2.7 The BT trials showed that people spent more time listening to DAB radio than watching TV, so it is hoped that making additional spectrum available for TV will also have the effect of stimulating DAB listening. At present, no phones have DAB radio so a service using phones with DAB digital radio could introduce new listeners to DAB and so grow the DAB audience.

2.8 The results of these trials also suggest that, to be commercially attractive, the service needs to provide at least five TV channels, which would require an increase in the data limit to 30%.

2.9 The specific change outlined by Ofcom would require primary legislation and is therefore not attractive, partly because it would take too long and partly because broadly the same effect can be more easily achieved through the use of secondary legislation. We therefore propose increasing the data limit to 30% by order. Ofcom are proposing to agree to one of the services on the national commercial multiplex being broadcast in mono for an 18 month period, after which it will revert to stereo (a second service will also be broadcast in mono but that is permitted under the terms of the existing licence). This will ensure that the same number of audio services continue to be available on the national radio multiplex and allow the number of TV channels to be increased from three to five.

3. Consultation

Within Government

3.1 DTI has been involved with the formulation of this policy and supports a relaxation in the data limits. DCMS have also sought the views of the Cabinet Office, OFT and the Small Business Service.

Public consultation

3.2 Ofcom has consulted extensively on this subject, starting in December 2004, and DCMS have subsequently discussed the matter with Ofcom, Digital One and BT.

4. Options

4.1 It is possible by order to set the data limit at any figure. For the purposes of this exercise, however, we will consider no change (i.e., maintain the 20% limit), an increase to 30%, an increase to 40% and an increase to 100% (i.e. no restrictions on data use).

No change

4.2 As outlined above, no change would mean that there can be no increase in the amount of data carried on a radio multiplex, and consequently it would not be possible to bring to market a more compelling mobile TV proposition better able to satisfy consumer demand. There is also a risk that DAB will suffer in the longer term by being left as a largely audio-only medium. There is, on the other hand, evidence to suggest that DAB will benefit from being part of a wider media and audio package. For example, the BT/Virgin Mobile trial indicated that participants consumed more DAB than TV. Far from undermining DAB, the association with mobile TV is likely to increase DAB listening as people who are currently not attracted to a DAB-only device may be more attracted to a device that offers DAB as part of a wider package including telephony and video.

30% limit

4.3 This would allow for five TV channels to be carried on a DAB multiplex, as opposed to the current three. This is the minimum that the BT trial suggested was necessary for a compelling commercial proposition. As indicated above, we believe that an attractive TV/DAB/phone package would be good for consumers in general and would be beneficial for the take up of DAB.

4.4 Raising the data limit of itself would not achieve anything because the current multiplex licence specifies the minimum number of sound services which must be provided, and the minimum bit-rate for each service. Unless Ofcom agree changes to the number of services and/or the bit-rates, it would not be possible for the multiplex operator to increase the amount of data carried on the multiplex and still comply with the terms of his licence.

4.5 Reducing the number of services is not attractive as it would clearly represent a reduction in listener choice. Ofcom therefore propose to allow one of the services on the multiplex to broadcast in mono for an 18 month period after which it will revert to stereo. In addition, the operator will reduce a second service to mono. This does not require the agreement of Ofcom as the licence only requires that it be broadcast in mono. On this basis, we propose, subject to consideration of the responses received on consultation, to introduce an order increasing the data limit to 30%.

4.6 Once the data limit is increased, the capacity made available can be used for any type of data service. It is not possible to require, for instance, that it is used for mobile TV or other audio-visual broadcasting services. In principle, therefore, it could be used for other sorts of data services such as business to business services. It is therefore possible that, if BT Wholesale decided it no longer wanted the capacity for BT Movio, the capacity could be used for a service entirely unconnected with radio or TV broadcasting. This is, of course, not a new risk as there is no requirement now that the data capacity be used in a specific way; the only difference is that the amount of capacity reserved for digital radio broadcasting will have decreased. Furthermore, it does not follow that the provision of other data services would be detrimental to DAB; if this were the case, there would be no provision for data use. Allowing some data to be carried on a radio multiplex allows the multiplex operator a degree of flexibility to develop a business plan which will better ensure the financial success of the multiplex, meet consumer demand for new services and provide a more secure basis for existing DAB services.

4.7 We consider that this option strikes the right balance between increasing consumer choice while maintaining the existing number of digital services. This is therefore our preferred option.

40% limit

4.9 All the same considerations above apply. In this case, however, it would not be possible to continue to broadcast the same number of DAB services on a comparable basis as at present. This would represent a clear reduction in listener choice for all DAB listeners and no corresponding benefit, as many may chose not to have the BT Movio service or similar.

100%

4.10 This approach would leave it entirely to the market to determine the appropriate balance between radio services and any other services. It would in principle be possible for the result of this to be that services which have the capacity to generate greater income that DAB would entirely take over the radio multiplex leaving no capacity for DAB. We do not believe that the potential loss of all national commercial DAB services would be in the interest of the consumer and therefore will continue to set an upper limit for data use on radio multiplexes.

Compliance and Enforcement

4.11 The compliance and enforcement issues remain the same regardless of the level at which the data limit is set.

Non-regulatory options

4.12 The purpose of this exercise is to increase the amount of capacity which could be used for data purposes. Because the limit is set out in legislation, any change can be effected only through regulation; there are no non-regulatory options.

5. Costs and benefits

Sectors and groups affected

Consumers

5.1 Consumers nationally will have access to a new multi-media service offering telephony, DAB radio and mobile TV.

Radio Industry

5.2 The analogue radio sector comprises 326 full-time analogue radio stations (excluding RSLs and community radio). This figure consists of 3 national commercial, 272 local commercial, 5 BBC nationals and 46 BBC local services.

5.3 As regards digital radio, there are currently two national multiplexes – 1 commercial and 1 BBC - and 46 local and regional multiplexes carrying 215 services. This figure consists of 8 (including 5 digital only services) national commercial, 164 local commercial (35 digital only), 10 (5 digital only) BBC UK-wide services, the World Service and 32 BBC local services[2].

5.4 Ofcom is currently proposing to license a second national commercial radio multiplex and the proposal to increase data limit to 30% will also apply to it.

Overall size of the radio industry

5.5 Total commercial radio revenues in 2005 were £530m[3]. Amongst the larger groups, Virgin Radio's turnover was £20.1 million in 2004 and profits were £3.1m. Emap's preliminary results for 2005 project turnover to be £167m in 2004/5. Profits were £35m. Its radio revenues were £98 million with profits at £22 million. Emap owns 86 digital radio stations on DAB and 8 national stations on Freeview, cable, satellite and on-line. According to GCap's 2005 interim report, revenue would be £111 million with operating profits at £14 million. GCAP has 57 analogue and 100 digital stations.

[2] Figures from Ofcom's "Radio-Preparing for the Future Phase 2" published on 19 October 2005
[3] Figure provided by CRCA

Chrysalis has estimated revenue for its Radio Division in 2005 to be £63 million with profits of £5.6 million. They own about a dozen radio stations and 5 local muxes. Chrysalis reported that it would carry losses on digital stations in the order of £3 million.

Other providers of mobile TV services

5.6 Other providers of mobile TV services may consider this to be unwelcome or even unfair competition. The question of unfair competition is discussed below. More generally, we are keen to see as wide a range of services as possible being developed so that consumers have greater choice. We believe that increased competition will drive innovation and produce better and more efficient services for consumers and citizens.

Benefits

5.7 The main benefit of this change is that it will allow the development of new mobile TV services which will increase consumer choice. We consider that this will also assist DAB by making it available as part of a new, attractive multi-media package including mobile TV and telephony.

5.8 There will also be benefits for UK industry as the UK is in the forefront of DAB technology: 95% of all world DAB products use UK designs, hardware and software IPR.

5.9 In the event that the additional data capacity is not used for mobile TV services, as is presently envisaged, we still take the view that increasing the flexibility with which digital radio multiplexes can be used is likely to lead will lead to the development of new types of services which will encourage DAB take up.

Costs

5.10 There will be no reduction in the number, but some reduction in the sound quality, of the services on the national digital multiplex. One of the services could have broadcast in mono at any time as it is permitted to do so under the terms of its licence. Ofcom will have to agree to the other service broadcasting in mono although this agreement will be for 18 months only. It is worth bearing in mind that a lot of the early, and most popular, DAB radios, (about 20-30% of total DAB sets) are mono so many listeners will not be affected by any change.

5.11 It would be possible, through the use of new improved compression technology, to maintain these services in stereo. However, this would have involved a one-off additional investment in the region of £0.5 million by the multiplex operator.

5.12 There may also be a potential impact on other existing or potential mobile TV providers insofar as this expanded data service proves to be more

attractive to customers. On balance, however, we believe that increased choice and competition will lead to better services for consumers.

6. Small Firms Impact Test

6.1 Insofar as the proposal affects small business, it affects only those in the radio industry. This proposal has been the subject to significant consultation by Ofcom and this process has not identified any specific impact on small business. In addition, the views of the Small Business Service were sought before this consultation document was issued.

7. Competition assessment

7.1 Formal measures of market power for the relevant sectors are not available, although, for the broadly defined "radio and television activities" grouping, official data show relatively high concentration. The relevant market sectors are also experiencing rapid technological change.

7.2 Ofcom considered the competition aspects of this issue last year (see Appendix A). We agree with Ofcom's analysis and conclusions that awarding spectrum for data use under the Broadcasting Act does not necessarily distort competition.

- Existing legislation gives Ofcom some discretion as to whether to award spectrum by auction or by beauty contest.

- There is good evidence of demand for capacity for data purposes.

- Standard economic theory suggests that major distortions to competitive processes are only likely to be caused by differences in the marginal costs faced by operators rather than by sunk costs such as auction fees.

- If implemented, administered incentive pricing for broadcast spectrum would mitigate any distortion.

- DAB radio multiplex licences contain both general and specific conditions to ensure fair and effective competition which restrict the ability of multiplex operators to obtain any unfair advantage in the market. Ofcom also has general powers under the Competition Act.

7.3 We would also add that anyone who has previously obtained spectrum by auction is free to apply for this spectrum on the same basis as anyone else.

8. Enforcement, sanctions and monitoring

8.1 Increasing the data limit is a difference in degree rather than kind and, as such, has no effect on existing enforcement, sanctions and monitoring arrangements which are a matter for Ofcom.

9. DECLARATION

9.1 I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed

Shaun Woodward
Minister for Creative Industries and Tourism