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Anticipated acquisition by Arqiva of Digital One Limited and other entities controlled by Global Radio Group

ME/4089/09

The OFT's decision on reference under section 33(1) given on 5 June. Full text of decision published 19 June 2009

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**Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.**

**PARTIES**

1. **Arqiva** is a wholly owned indirect subsidiary of Macquarie UK Broadcast Ventures Limited. Arqiva is active in the ownership of broadcast assets, provision of managed transmission services (MTS) and network access (NA)<sup>1</sup> to terrestrial television and radio broadcasters (both analogue and digital), has control of two of the three non-public service broadcast digital terrestrial television (DTT) multiplexes,<sup>2</sup> control of the local digital audio broadcasting (DAB) multiplex licence for Ayr, a 25 per cent interest in MuxCo which has interests in nine local DAB licences which have not yet launched, a 37 per cent share in the Digital One national DAB licence and provides multiplexing services<sup>3</sup> to DTT and DAB multiplexes.

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<sup>1</sup> Transmitter networks comprise of MTS (including installation of transmitters, network monitoring, signal quality assurance and maintenance) and Network Access (to sites and masts), which transmit content to people's homes/cars.

<sup>2</sup> A multiplex or mux is a group of channels/stations that are mixed together for broadcast over a digital TV/Radio channel. Digital multiplexes vary in the number of channels that can be transmitted, based on the bandwidth available. In order to transmit digital radio to the public, radio stations need to enter into an agreement with a multiplex owner to obtain access to part of the multiplex capacity (bandwidth). Multiplex owners are awarded the licence to the multiplex – and therefore the ability to sell capacity on the multiplex to new channels – by OFCOM.

<sup>3</sup> Multiplexing (known as muxing) is a process where multiple analogue message signals or digital data streams are combined into one signal over a shared medium.

2. Macquarie UK Broadcast Ventures Ltd (MUKBV) is a wholly owned indirect subsidiary of Macquarie UK Broadcast Holdings Ltd (MUKBH), which is owned by a consortium of investors. The largest shareholder in MUKBH, Macquarie Communications Infrastructure Group (MCIG), is a fund listed on the Australian stock exchange. Following the OFT's approval decision of 21 May 2009, MCIG will be acquired by the Canada Pension Plan Investment Board ('CPPIB'), a federal non-agent Canadian crown corporation created by a Canadian Act of Parliament in December 1997 to invest on behalf of the Canada Pension Plan. This CPPIB acquisition of MUKBH had no impact on the current transaction.
3. Global Radio Group (Global) was formed by the merger between Global Radio UK Limited and GCap Media plc. Global has a broad portfolio of national and local radio stations. Global controls a number of DAB multiplexes, specifically:
  - a) **Digital One:** Global holds a 63 per cent share in Digital One. Digital One is the only operational national DAB multiplex licence for commercial radio
  - b) **Now Digital entities:** Global wholly owns Now Digital Limited and Now Digital (Southern) Limited, owns a 67 per cent stake in South West Digital Radio and an 80 per cent stake in Now Digital East Midlands. In total, Now Digital entities own 18 local DAB licences that have been launched and four local DAB licences that have not yet been launched, and
  - c) **MXR<sup>4</sup>:** Global holds a 63 per cent majority shareholding in MXR which owns five regional DAB licences.
4. The combined turnover of Digital One and Now Digital is approximately [ ].

## TRANSACTION

5. The transaction envisages the acquisition by Arqiva of the remaining 63 per cent of Digital One and Global's interests in other entities which currently hold DAB multiplex licences. Arqiva will take control of Global's national and local DAB multiplex businesses and will acquire a minority shareholding in Global's regional DAB multiplex business. Specifically:

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<sup>4</sup> The remaining shareholders of MXR are: [ ]

- a) the acquisition of Global's shareholding in Digital One
  - b) the acquisition of Global's shareholding in the Now Digital entities, and
  - c) the acquisition of a non-controlling stake in MXR.<sup>5</sup>
6. The OFT has not concluded on whether Arqiva will have obtained material influence over MXR as (a) it is unable to do so given that the transaction has not been finalised; and (b) its conclusions in respect of the transaction remain the same (under present circumstances) regardless of whether Arqiva will be able to exert material influence on MXR. The OFT has assessed this transaction on the most conservative basis, that is, that Arqiva does have material influence over MXR for unilateral effects theories of harm and that Arqiva does not have material influence over MXR for coordinated effects theories of harm.
7. The OFT accepted the parties' submission as satisfactory on 7 April 2009 and the administrative deadline is 5 June 2009.

## **JURISDICTION**

8. As a result of this transaction Arqiva, Digital One and Now Digital will cease to be distinct. The UK turnover of Digital One and Now Digital does not exceed £70 million,<sup>6</sup> so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is not satisfied.
9. However, Global and Arqiva overlap in the ownership of local multiplex licences. Global wholly owns or holds majority shareholdings in 18 of the 40 launched local DAB licences and Arqiva wholly owns one additional licence, giving the parties a combined share of 47.5 per cent of all local DAB licences. On this basis, the share of supply test under section 23(1)(b) of the Enterprise Act 2002 is satisfied.

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<sup>5</sup> The parties have informed the OFT that there has, in principle, been an agreement on the minority shareholding in MXR, with Arqiva acquiring a 12 per cent interest and Global retaining a [ ] per cent stake ([ ] holding the remaining shares).

<sup>6</sup> UK turnover would remain below £70 million if MXR were to be included.

## **BACKGROUND**

### **Digital Britain review**

10. This acquisition takes place at a time of significant developments in the digital industry. In respect of digital radio in particular, calls for reform from content providers (that is, commercial broadcasters) have resulted from the lower than expected take-up of digital radio and subsequent calls by industry stakeholders for changes to the legislation surrounding ownership and access to DAB licences. The BERR Digital Britain review (the report of which will be published in June 2009) will set out a number of recommendations on how the UK should proceed in respect of digital media.
11. The final Digital Britain report will not be published until after a decision is made in this case and some recommendations are likely to require legislative changes which will not come into force imminently. While the OFT cannot take the Digital Britain recommendations as the factual background within which it should assess this merger, it does, where relevant, consider whether any Digital Britain outcomes would impact on its analysis of this transaction.
12. The Myers Report,<sup>7</sup> an independent report commissioned by BERR which is expected to impact on the Digital Britain review, makes a number of specific recommendations to make local DAB licences more flexible. These include the conclusion that it would be beneficial for all multiplexes to be owned by a single entity which is not a content provider and access to multiplexes becoming the subject of greater regulation. OFCOM has also confirmed to the OFT that a steer on the issue of whether legislative changes should be brought in to allow local multiplexes to merge to form larger local/regional multiplexes is likely to come from Digital Britain.

## **MARKET DEFINITION**

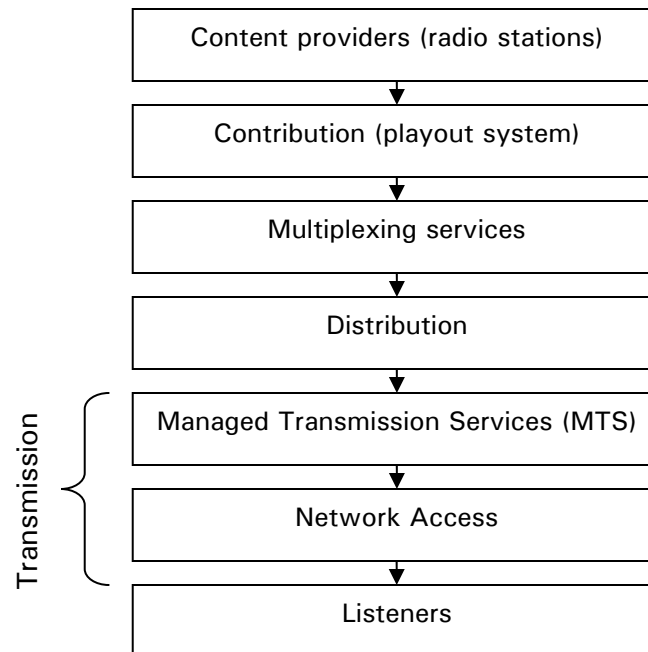
### **Product market**

#### Background

13. A summary of the supply chain in DAB radio can be shown below:

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<sup>7</sup> *'An Independent Review of the Rules Governing Local Content on Commercial Radio'* John Myers.



14. Below is a brief description of the various steps of the supply chain and the participants in each of them:

- Content Providers: these are predominantly radio stations.
- Contribution: playout is the process by which programme content is transformed from a number of individual tapes or digitalised formats into a continuous stream of content ready for transmission. The playout system transforms the radio content into a format that can be read by the DAB multiplexing centres. Arqiva is the main supplier of contribution services in the UK.
- Multiplexing services: DAB uses multiplexing and compression technology to combine and send multiple signals or streams of information on a carrier at the same time in the form of a single complex signal. The separate signals are then split out again at the other end. The technical operation of providing multiplexing services is outsourced by the multiplex operators to third party providers of such services. Arqiva is currently active in this market and holds all the commercial DAB multiplexing service contracts. Siemens is also active in providing multiplexing

services to the BBC.

- Distribution: the output interface from each multiplexing system connects to a bespoke distribution system. The distribution system uses a network of terrestrial circuits, microwave links and/or satellite links to interconnect each multiplexing system with its respective transmitter network. Arqiva is the main provider of distribution services in the UK.
- Transmission: each DAB multiplex has between one and 130 transmitters of varying powers to provide the required coverage within each designated area. Arqiva's DAB transmitter networks comprise of MTS (including installation of transmitters, network monitoring, signal quality assurance and maintenance) and NA (to sites and masts). Arqiva is the main provider of radio transmission services in the UK.

15. The above supply chain can be considered as the inputs required in order to broadcast digital radio. In this case as the parties do not overlap in the supply of these inputs it is not necessary to consider the relevant product and geographic market for each level of the supply chain rather we consider them as a system of inputs in the context of the non-horizontal theories of harm considered below.

16. The parties overlap horizontally, however, in respect of multiplex licences. Multiplex licences are awarded by OFCOM to multiplex operators, that can then further allocate bandwidth to content providers. Multiplex operators should be distinguished from multiplexing services providers that, as described above in paragraph 14, undertake the process of combining multiple signals (multiplexing services) on behalf of the multiplex operators. The OFT therefore considers the scope of the product market in respect of the ownership of multiplex licences.

#### Ownership of multiplex licences

17. The multiplex licences on the DAB platform consist of:

- a) two national radio multiplexes – one designated for public service broadcasting (BBC) and one commercial multiplex (Digital One)
- b) six regional radio multiplexes – five owned by MXR and one owned by Switch Digital Scotland (UTV/Emap), and

c) 40 local radio multiplexes.<sup>8</sup>

18. The parties overlap in the ownership of local DAB multiplex licences. In light of this, the OFT has considered what the relevant market should be in this case.

#### Analogue, digital, satellite and mobile platforms

19. The OFT firstly considered whether the DAB platform is in the same market as analogue, digital, satellite and mobile platforms, all of which can be used to transmit audio broadcasting content to listeners.
20. The OFT's market investigation has indicated that different platforms are not currently substitutes and are unlikely to become substitutes in the short to medium term.
21. The BBC submitted that analogue and digital are not effective substitutes for its services as digital radio offers superior performance and additional services, whereas analogue offers greater coverage and ready accessibility of reception equipment. Several other third parties commented that the differences in coverage and take-up between analogue and digital means they would not be considered substitutes. No third parties provided examples of content providers switching between platforms.
22. Similarly third parties considered that there is no substitution between terrestrial radio platforms (analogue and digital) and other platforms, such as satellite, internet or DTT. For example, Lincs FM indicated that terrestrial transmission is much cheaper than the other platforms and even if internet transmission becomes as readily available as terrestrial transmission the costs of equivalent streaming would be prohibitive. UCB informed the OFT that given that the coverage of DAB is less than 100 per cent they also use digital satellite, digital cable and the internet to ensure national coverage and therefore these platforms are seen as complements rather than substitutes.
23. The OFT also considered whether the analogue and digital platforms could be substitutes for new stations (as opposed to existing stations which have already invested in a particular platform). Competition is currently limited to new DAB licences provided to radio stations as existing DAB licences are co-terminus with the multiplex licences (so that multiplex owners and radio stations are 'locked in' to the DAB licence

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<sup>8</sup> There are, in addition, thirteen local DAB licences that have not yet been launched.

agreement until 2012 at the earliest). Given that digital switchover (DSO) in radio is not imminent<sup>9</sup> (unlike television), the OFT considers that in respect of new radio stations, there is some constraint on DAB from the analogue platform. However, third party comments suggested that the differences in take-up and coverage across the different platforms would make it unlikely that new digital stations would choose an alternative platform following a relative price change of ten per cent in the cost of broadcasting on each platform, so that under a small but significant non-transitory increase in price (SSNIP) test the DAB and analogue platforms would not belong to the same product market even for new radio stations.

24. Third parties suggested that in the long-term if DAB and internet radio become more widespread then, in theory, the platforms would become more substitutable, particularly if there is a DSO for radio as there is for television.
25. Whilst on the basis of a SSNIP test on the cost of broadcasting on each platform analogue radio would not be considered to be in the same market as digital radio the OFT's market investigation did indicate that analogue platforms do provide some level of constraint on the digital (and other) platforms (as a result of the fact that DSO is not imminent in radio). Overall, however, the OFT considers that at present, the digital radio platform is distinct from other audio broadcasting platforms.

#### Local, regional and national DAB multiplex licences

26. The OFT also considered whether local, regional and national DAB multiplex licences can form part of the same product market, that is, whether a combination of local licences could form a substitute for a regional licence, or whether a combination of regional/local could form a substitute for a national licence.
27. As indicated above, within digital radio there are three layers of licences:
  - a) National licences of which there is one designated for public service broadcasts and one commercial licence. National licences have coverage of 50 million adults at an access cost of about three pence per adult. National carriage is suitable for formats that have universal popularity (for example, Radio 1) or more niche formats (for example,

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<sup>9</sup> The Digital Britain interim report states that for DSO to be considered at least 50 per cent of radio listening needs to be digital – current figures are c. 10-12 per cent. DSO is therefore unlikely to occur in the short/medium-term.

classic rock) where appeal in any area is low, but over the whole country a sizeable audience can be achieved

- b) Regional licences of which there are six covering Central Scotland, North East England, North West England, South Wales/Severn Estuary, West Midlands and Yorkshire. Regional multiplexes give coverage to reasonably large populations at a slightly higher price of around five pence per adult. They avoid some of the wastage of the national licences and allow more geographically focussed advertising, and
  - c) Local licences of which there are 40 local multiplexes that have been launched and thirteen that have yet to be launched. Together, these cover a large part, but not all, of the UK. Local carriage is the most expensive at around 12 pence per adult, but is good for stations on small budgets or those which want to focus on local issues and advertising.
28. The OFT's market investigation revealed that whilst in theory there may be a situation where a group of local licences could offer the same coverage as a regional licence, in practice they are not considered effective substitutes. This is partly due to the fact that gaining access to several local licences would be notably more expensive than gaining access to a regional licence but also because in many cases there is no direct overlap between the regional and local layer in terms of coverage.
29. Regarding the possibility of aggregating regional licences to replicate national coverage, this is even more remote, since the six regional licences only cover a limited part of the UK.
30. Furthermore third parties indicated that a radio station's decision as to whether to gain access to a local or regional multiplex will be driven by their analogue radio strategy and a ten per cent change in relative prices of regional and local licences is unlikely to alter this strategy.
31. The OFT is aware of proposals that have come out of the Myers Report/Digital Britain whereby changes to the legislation may come into force in the future which would allow the merging of local multiplexes into larger local/regional multiplexes ('freedom to merge'), which may overlap more significantly with the existing regional multiplexes and therefore may be considered to be closer substitutes. However, as will be seen below, in this case the competitive assessment does not alter under this scenario and therefore it is not necessary to conclude on whether the

market for multiplex licences may be wider than just local licences in the future.

32. Based on the above, therefore, the OFT considers that local, regional and national multiplex licences form distinct product markets although it does not, for the purposes of this decision, need to conclude on whether this is in fact the case.

#### Local DAB licence market

33. In their submission, the parties argued that each individual local DAB licence is effectively a monopoly as radio stations make their decision on which local multiplex to gain access to partly on cost considerations, but mainly on where their current analogue stations are based, and once that decision is made and a local brand and advertising contact base is built up, it is unlikely that a station would switch to an alternative local multiplex, particularly given the long-term nature of carriage contracts (usually 8-12 years). Even though the OFT considered the possibility that for new digital only stations local DAB licences may be more substitutable for each other, the OFT's market investigation was largely consistent with the parties' view on each local DAB licence being a local monopoly.
34. The OFT has not found it necessary to conclude, however, on the scope of the relevant market in this instance as there are no competition effects arising out of the merger regardless of whether local DAB licences are viewed as local monopolies or as substitutable licences.

#### Geographic market

35. The OFT considers that the geographic market for each type of licence is the region for which it provides coverage. However, as it has left the product market definition open, it does not need to reach a conclusion in respect of the geographic market definition for DAB licences.

### **HORIZONTAL ISSUES**

#### **Local multiplexes**

36. Should the parties' view that local DAB licences form local monopolies be correct, there is no overlap between Arqiva and Global, as Arqiva owns only one local DAB licence and no regional or national licences, as discussed above.

37. If the relevant market is comprised of all local DAB licences that are launched, the acquisition gives rise to a very small increment (one local licence) out of a total of 40 local licences:
- 18 owned by Global (mainly in the Midlands and South of England)
  - 12 owned by Bauer Media (mainly in Scotland and the North of England)
  - three owned by a JV between UTV and Bauer (Bradford, Stoke and Swansea)
  - three owned by a JV between Global and Bauer – CE Digital (Birmingham, Greater Manchester and Greater London 1)
  - two owned by UTV (Aberdeen and Greater London 2)
  - one owned by Arqiva (Ayr)
  - one owned by a JV between Global, UTV & others (Greater London 3)
38. On this basis Global wholly owns or has a shareholding in 22 licences mainly in the Midlands and South of England and Arqiva owns one local licence in Scotland. Given the limited increment, the geographic dispersion of the portfolios and the lack of customer concerns we do not consider the acquisition gives rise to horizontal competition concerns.
39. The OFT also considered the impact of the merger on local DAB licences that are not yet launched. Arqiva has an indirect interest in nine of these licences through MuxCo (the highest indirect stake it has is 12.5 per cent) and it will acquire four local multiplex licences currently owned by Now Digital entities which are yet to be launched. There are no other multiplexes which remain to be launched. Even on this basis, however, the OFT does not consider that the transaction raises horizontal concerns for the following reasons:
- a) the OFT's investigation is consistent with the view that customers view local DAB licences more as local monopolies rather than substitutable licences
  - b) Arqiva's ownership of the nine multiplexes to be launched is through Muxco in which it owns a 25 per cent stake. Muxco in turn owns stakes in the nine local multiplexes up to a maximum of 50 per cent.

This means that Arqiva's indirect shareholding in the Muxco multiplexes ranges from six to 12.5 per cent which is not normally considered to be sufficient to confer material influence,<sup>10</sup> and

- c) it is by no means clear that these multiplexes will be launched as local licences [ ]. Other non-horizontal issues relating to whether Arqiva will have an incentive to delay the launch of the multiplexes are discussed below.

#### Regional multiplexes

40. At present, there are no overlaps between Arqiva and MXR in respect of regional multiplexes as Arqiva does not own any regional multiplexes. The OFT has considered the possibility, however, that given ongoing discussions regarding 'freedom to merge' between multiplex operators and OFCOM, adjacent local licences will be allowed to merge and therefore create regional multiplexes. In this respect, the OFT notes the following:

- a) this is by no means a certain outcome and will require a change in legislation following the Digital Britain review recommendations
- b) the OFT has not concluded whether Arqiva does in fact have material influence over MXR or, indirectly, over the nine local multiplexes which have not yet been launched, and
- c) should potential overlaps be examined, the only real overlap is between the local multiplex in North Yorkshire (in which MuxCo has a stake) and MXR's regional Yorkshire multiplex. In that case, however, there is no local multiplex which can be merged to create a 'regional' multiplex so there would not, in fact, be any horizontal overlap (since, for the reasons discussed in paragraph 28 above, the coverage and access pricing of local multiplexes differs from that of regional multiplexes so that they are not substitutes). In respect of the other areas where Arqiva has an indirect interest in local multiplex

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<sup>10</sup> The OFT has not, however, concluded on whether Arqiva has material influence in respect of the nine local multiplexes in question.

ownership, there is no area where a merger of local multiplexes (either between Muxco multiplexes and/or Now Digital multiplexes) would result in coverage that would be sufficiently similar to that of MXR regional multiplexes<sup>11</sup> so as to create a horizontal overlap.

41. In addition, the OFT has considered the possibility that, as described above in paragraphs 33 and 39 for local licences, the merged Muxco licences and the merged Now Digital licences/MXR licences could compete on a 'regional basis' even though they are not substitutes in terms of coverage area. In this respect, the OFT notes the following:
- a) as mentioned above, this eventuality is by no means a certainty
  - b) as discussed above, the OFT has not concluded whether Arqiva does in fact have material influence over MXR or, indirectly, over the nine local multiplexes which have not yet been launched, and
  - c) the OFT's market investigation is more consistent with the view that local multiplex licences are local monopolies and that strategy in respect of launches of new stations is currently determined by analogue and not digital coverage considerations.
42. The OFT does not, therefore, at this point in time, view regional licences as competing with each other where they do not have coverage overlap.

#### Conclusion

43. The OFT does not consider that the transaction raises any horizontal concerns either in respect of local multiplex overlaps or in respect of potential regional multiplex overlaps.

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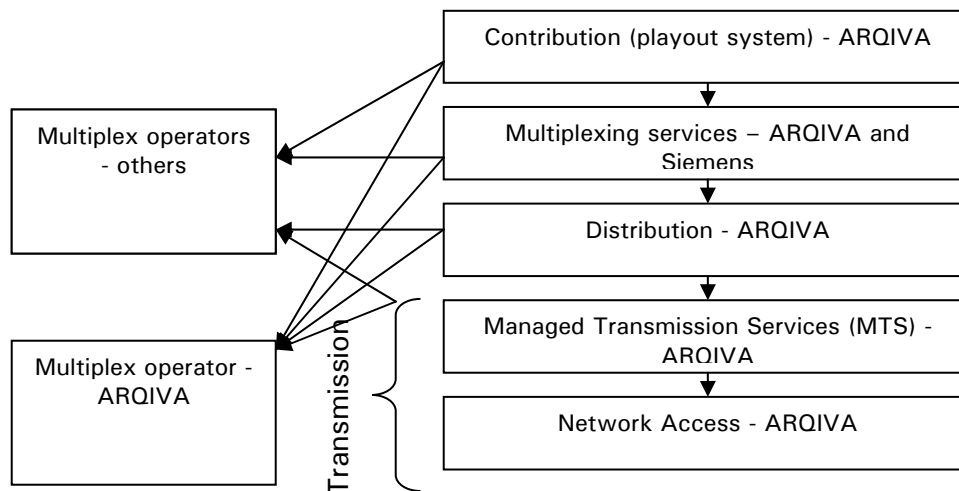
<sup>11</sup> There would be some limited overlap between the Northeast Wales and West Cheshire local multiplex and the Northwest England regional multiplex as well as the Lincolnshire local multiplex and the Yorkshire regional multiplex but the local muxes could not (under any merger possibility) cover the full extent of the regional coverage

## NON-HORIZONTAL ISSUES

### Vertical theories of harm

Foreclosure of multiplex licence holders (input foreclosure)

44. Arqiva has a dominant position in the provision of MTS and NA to radio broadcasters.<sup>12</sup> In addition, Arqiva and Siemens are the only providers of multiplexing services to multiplex licence holders and, Arqiva is the main player in the distribution and contribution sector. Following the transaction, Arqiva will also be a significant multiplex operator:



45. Arqiva's strong position in respect of almost all inputs, that are essential for multiplex licence holders, could be seen as giving it the ability to foreclose its multiplex holder competitors by either refusing to supply multiplexing services and/or MTS/NA to other multiplex licence holders, or by significantly worsening the terms on which these are available.

### Ability to foreclose

#### MTS/NA

46. Arqiva's ability to exercise its market power in order to exclude multiplex holder competitors is curtailed by the undertakings relating to the

<sup>12</sup> Macquarie UK Broadcast Ventures Limited/National Grid Wireless Group – CC Final Report March 2008.

Arqiva/NGW acquisition imposed by the Competition Commission (CC). These state that provision of NA shall:

- a) occur as soon as reasonably practicable after such a request, and
- b) be on fair and reasonable terms, conditions and charges.

47. Arqiva is therefore prevented by the undertakings from increasing prices to an unreasonable level and from refusing to supply these services. It therefore has no ability to foreclose multiplex operators via the MTS/NA input.

#### Multiplexing services<sup>13</sup>

48. Arqiva and Siemens are the only two companies providing multiplexing services, although at the moment, Siemens only provides multiplexing services to the BBC and not commercial broadcasters. Although Arqiva is in a strong position to provide multiplexing services it is by no means the only option available to multiplex operators. Siemens has indicated to the OFT that it would be willing to provide such services if requested. In support of this, OFCOM has indicated that the sunk costs associated with multiplexing services are not significant so that its view is that barriers to entry are low. It is not likely, therefore, that Arqiva will, post-merger, have the ability to foreclose multiplex operators by refusing to supply multiplexing services or by offering other multiplex competitors worse terms of supply to multiplexing services. Notwithstanding this likely lack of ability, the OFT has gone on to consider whether Arqiva would have the incentive to foreclose rival multiplex operators through multiplexing services.

#### Incentive to foreclose

49. The OFT considers that Arqiva lacks the incentive to foreclose rival multiplex operators. Arqiva has made significant investments in DAB and its incentive is to increase demand in order to increase its MTS/NA revenues. Given the undertakings given to the CC in Arqiva/NGW, Arqiva can only increase its revenues by increasing the number of radio stations on each multiplex (since it cannot charge monopoly prices on these).

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<sup>13</sup> The OFT considers that the analysis is similar in respect of contribution and distribution where Arqiva is in a strong position. However, the OFT's market investigation did not raise any concerns in respect of competitor foreclosure in these inputs.

50. The OFT does not, therefore, consider that Arqiva would have the incentive to leverage its position with respect to the price of multiplexing services or access to multiplex licences as it would lose revenue from multiplex operators for MTS/NA.
51. The OFT indeed considers that the merger will, for this reason, improve the multiplex operator's incentives to grow the DAB platform: whilst Global holds a wide portfolio of multiplex licences, its primary activities are in the provision of radio content. Global's incentives to actively promote DAB and increase the number of radio stations on each multiplex are reduced by the fact that any new stations would compete with Global's own radio stations. Indeed several third parties have commented that this has kept the cost of access to the multiplexes high.
52. Third parties also generally viewed the merger as providing greater transparency and ability to negotiate fairly.

#### Conclusion

53. The OFT does not consider that Arqiva has either the ability or the incentive to foreclose its multiplex operator competitors.

#### Foreclosure of the market for multiplexing services (customer foreclosure)

54. Arqiva is active in the provision of multiplexing services to DAB (and DTT) multiplex licence holders. Arqiva currently has all the multiplexing contracts, including those for Global, with the exception of the BBC TV contract. As such the OFT considered whether the extended portfolio of DAB multiplex licences acquired from Global would enable Arqiva to capture a sufficient number of multiplexing contracts such that Siemens would be foreclosed.

#### Ability to foreclose

55. Arqiva submitted that Siemens would be likely to continue to operate in the market post-merger thereby providing a choice for multiplex licence holders. Arqiva argued that Siemens had remained in the market with a single multiplexing contract for BBC TV and that there was no reason for it to exit. As Arqiva already hold all the commercial DAB multiplexing contracts there would be no reason to think that Siemens would consider exiting the market post-merger.
56. This view was broadly supported by Siemens. Siemens did not view the transaction as resulting in any significant changes as Arqiva is already

supplying multiplexing services to all the Global Radio Group interests. Siemens commented that there would be a reduction in the number of contracts that would be out to competitive tender in the future – specifically that the multiplexing contracts for the Now Digital entities and MXR would previously have been awarded through a competitive tender, but would now go directly to Arqiva. However, Siemens considered that these contracts do not come up very often anyway and that Arqiva would have been in a good position to win them even without this acquisition as Arqiva is Global's existing multiplexing provider.

57. Siemens did indicate that it was possible that it would invest less in the future in trying to win these multiplexing contracts when they come up for tender (given that there are so few of them and that Arqiva have a strong chance of winning). However, Siemens also mentioned that it intended to continue to supply BBC TV and should the BBC decide to put the radio contract out to tender (as this is currently done in-house) they would bid for it. Furthermore Siemens would be willing to supply other multiplex operators. As mentioned above, OFCOM has also confirmed that the sunk costs of entry into multiplexing services are low.
58. Given the information provided by Siemens the OFT is of the view that Arqiva does not have the ability to foreclose the market for multiplexing services, and therefore the OFT does not need to examine whether Arqiva has the incentives to foreclose Siemens.

#### Foreclosure of the market for MTS

59. The OFT also considered whether Arqiva's acquisition of control of a portfolio of DAB multiplex licences could result in foreclosure of the market for MTS by refusing access to its broadcasting assets to any other MTS provider.

#### Ability to foreclose

60. Arqiva submitted that the supply of MTS was central to the CC's assessment of the Arqiva/NGW case and that the undertakings agreed with the CC were directed at addressing Arqiva's market power in respect to MTS. The undertakings impose an obligation on Arqiva to provide access to its broadcasting assets to any other MTS provider on non-discriminatory terms. The OFT considers that the undertakings provided in Arqiva/NGW will be sufficient to prevent any foreclosure in the supply of MTS following the acquisition.

61. The OFT does not therefore consider that Arqiva would have the ability to foreclose the MTS market and therefore does not need to examine whether Arqiva has the incentives to foreclose the MTS market.

Arqiva's downstream market power distorting the market for DAB multiplex licences

62. The OFT considered whether Arqiva's market power in MTS and NA would place it in a better position to acquire future multiplex licences. In particular, the OFT considered whether its knowledge of the multiplexing services and MTS/NA costs of other potential multiplex licence bidders would give Arqiva an unfair advantage in relation to the structuring of their own multiplex licence bids.
63. Arqiva considers that the ownership rules outlined in the regulatory framework mean that Arqiva is restricted with respect to the national and local DAB licences it can acquire. The OFT notes that OFCOM raised no concerns in respect of this issue.
64. Furthermore, even if Arqiva did own all multiplex licences it is not clear that this would result in consumer harm. The high cost of multiplex access has been cited as the biggest obstacle to content providers launching new stations on digital radio and there is significant excess capacity on the majority of licences (with the possible exception of London). As Arqiva have the incentive to increase the number of stations operating on DAB by reducing access prices, Arqiva owning all the multiplexes might increase the take-up of digital radio in the short-run, increasing competition between radio stations to the benefit of consumers, compared to a situation where multiplexes are owned by content providers such as Global and Bauer. In addition, given the current perceived advantages of analogue licences and the fact that DSO in radio is not imminent, the OFT considers that there is competitive interaction between analogue and digital licences and that the prices of digital licences to be imposed by Arqiva would be constrained by those of analogue licences for the short to medium term.
65. Indeed the Myers Report suggested that all multiplex licences should be under common ownership by an organisation that does not own any content providers and that access to multiplex licences could then be regulated. This proposition has been supported by a number of third parties. Given that it is not clear whether these proposals will materialise, the OFT cannot take them into account in its competitive assessment. Even, however, if these proposals are not taken forward, the OFT does

not consider that Arqiva's ownership of a portfolio of DAB licences gives rise to any foreclosure concerns.

#### Potential harmful effects arising from Arqiva holding DAB multiplexes licences and providing multiplexing services

66. The OFT also considered whether the fact that Arqiva would be supplying multiplexing services would give it access to commercially sensitive information, including information on new customers (channel launches), replacement of existing customers, the sublease of multiplex capacity to third parties, and the introduction of technical changes which might affect available capacity, which would give them an advantage when selling multiplex capacity.
67. Arqiva submitted that whilst it had implemented procedures to address customer concerns in relation to this issue raised in Arqiva/NGW, it did not believe that it had access to any such information in advance of its release into the public domain.
68. Furthermore, given the limited overlaps between licences (between local licences and between local, regional and national licences) any commercially sensitive information Arqiva did have access to would be unlikely to have significant cross-over to other multiplexes. In addition, no third parties raised concerns with respect to this issue.
69. The OFT does not, therefore, consider that Arqiva's interests in multiplex ownership would enable it to gain an unfair commercial advantage in the exploitation of the DAB multiplex licences.

#### Delays in launching local DAB multiplexes being prejudicial to content providers

70. One third party – Passion Radio Oxfordshire, which operates a number of radio stations and owns two analogue licences and a 25 per cent share in the Oxfordshire local multiplex – raised a concern with respect to Arqiva's incentives to launch the DAB local multiplexes.
71. Specifically it was concerned that Arqiva may decide to delay the launch of the Oxfordshire multiplex whilst it waiting to see if the 'freedom to merge' legislation would materialise. Arqiva's reasoning for the delay would be that it could charge a higher price for access to a merged group of local multiplexes given the increased coverage it would offer.

72. OFCOM informed the OFT that the 'freedom to merge' issue has been raised by several multiplex owners who have already delayed the launch of local and regional multiplexes to see if they can launch with larger regional coverage instead and therefore this is not an 'Arqiva only' issue. OFCOM's view was that if the freedom to merge is to materialise, the steer will come from the Digital Britain report with the proposed merger having little or no affect on the decision. The ability to merge local licences will require changes in the legislation on multiplex licence ownership, but could happen reasonably quickly – possibly within a year – if strongly supported by the Digital Britain report as the way forward for digital radio.
73. Overall it appears that the acquisition will not affect whether or not changes to the legislation are brought into force to allow local licence mergers. Global may not have had an incentive to delay the launch of specific local licences where they also have radio stations waiting for digital launch, but, as discussed above, the OFT's view is that Arqiva has the incentive to increase multiplex capacity utilisation and therefore considers that Arqiva would only delay the launch if it considered the merged local multiplexes would be a more attractive offer to content providers. Whilst the acquisition could potentially delay the launch of Passion Radio Oxfordshire stations on local DAB, in the medium/long-term it may be expected to increase the overall number of digital stations, which could benefit consumers.

#### Conclusion on vertical effects

74. Given the increased incentives of Arqiva, as compared to Global, to increase capacity utilisation of the multiplexes, the existing undertakings given to the CC arising out of the Arqiva/NGW acquisition and the lack of customer and competitor concerns the OFT considers that the acquisition is unlikely to give rise to vertical anti-competitive effects.

#### **Conglomerate effects**

75. The OFT considered comments by third parties that, whilst they believed it was better in the short-run that multiplex licences were held by an organisation which was not also a content provider (as access prices may be expected to fall) that in the long-run Arqiva may be better placed to leverage its strong market position in the various levels of the DAB supply chain. Specifically, the concern was that Arqiva could reduce access prices to increase the number of digital radio stations thereby strengthening the DAB platform and then, when the current long-term contracts expire, it could significantly increase prices across the supply

chain. Stations would be obliged to pay this higher price if DAB has become a compulsory platform, particularly if the increase in the number of digital stations had led to a planned radio DSO.

76. In this respect, the OFT notes the following:

- a) there is no current plan for a radio DSO and that, whilst a small number of contracts come up for renewal in 2012, the majority of contracts do not come up for renewal until 2014-2016
- b) the UK digital radio industry is likely to face considerable changes over the next few years; take up has not been as widespread as anticipated and industry stakeholders and OFCOM are looking at whether changes to the legislation surrounding ownership and access to DAB licences are required to ensure the future of digital radio. In addition the Digital Britain report – due to be published in June 2009 – will set out a number of recommendations for how the UK should proceed with respect to digital radio, and
- c) Arqiva is also subject to the Arqiva/NGW undertakings which will remain in place and are intended to apply to any requests to re-new licences.

77. As such the OFT is not in a position to assess what the impact of the proposed merger will be on the digital radio industry over a longer-term time frame. Given the speculative nature of the long-term theory of harm and the on-going industry changes the OFT does not consider that it has sufficient evidence to conclude that the merger may be expected to result in a substantial lessening of competition relating to the re-negotiation of multiplex access prices post-2012.

## **COORDINATED EFFECTS**

78. Pre-merger the parties were already in a joint venture with each other (Digital One). Post merger, they will both be shareholders in MXR (Global 51 per cent and Arqiva 12 per cent). We understand that there are numerous joint ventures between content providers and multiplex owners. [ ] Given that the transaction will reduce Global's involvement and Arqiva's incentives are not aligned with those of other multiplex owners (because it has an incentive to grow the DAB market as much as possible given its significant investment in the transmission segments) we do not consider that the merger will give rise to coordination concerns.

## **THIRD PARTY VIEWS**

79. OFCOM raised no concerns in respect of this transaction.
80. Several third parties commented that in the short-term they preferred the situation where the multiplexes are held by a facility provider rather than a broadcaster, but that in the long-run it would be better if the multiplex licences weren't held by a provider of multiplexing services and MTS/NA. However, no concrete theories of harm or evidence were provided to the OFT to support the assertion that Arqiva could in any way leverage its market power in the DAB supply chain to raise multiplex access prices.
81. Passion Radio Oxfordshire raised a concern about Arqiva's incentives to delay the launch of the local multiplexes. However, as discussed in paragraph 73 above the OFT considers that this may in the medium term increase the number of digital stations to the benefit of customers.

## **ASSESSMENT**

82. There is limited horizontal overlap between the parties in the ownership of operational local DAB licences. Global wholly owns or has a shareholding in 22 licences and Arqiva owns one local licence. Given the limited increment and lack of customer concerns we do not consider the acquisition gives rise to horizontal competition concerns in relation to operational local multiplex licences.
83. Arqiva also has a stake in Muxco which in itself has stakes in nine local multiplex licences which are still to be launched. The transaction would also give Arqiva control of four additional multiplex licences which are still to be launched. In light of the uncertainty as to whether these licences are in fact to be launched and the fact that the OFT's market investigation is consistent with local multiplex licences being local monopolies rather than substitutes for one another, the OFT does not consider that the acquisition gives rise to horizontal competition concerns in relation to local multiplex licences that will be launched even if Arqiva's stake in Muxco were considered to grant it material influence.
84. The main activities of the parties are at different levels of the supply chain. Pre-merger, Global controlled a number of DAB multiplexes (national, regional and local) and owned a broad portfolio of radio stations. Arqiva, on the other hand, owned a single multiplex licence, but had a strong position in several of the other inputs required to broadcast digital radio, specifically multiplexing services, MTS and NA.

85. The transaction involves the transfer of Global's interests in multiplex licences, with Global retaining its radio stations. The OFT considers that Arqiva's interest in the downstream levels of the supply chain will give it the incentive to increase multiplex capacity utilisation by reducing access prices in order to increase the number of customers (radio stations) requiring these downstream services. In comparison, Global would have had a reduced incentive to increase DAB capacity utilisation as new stations may have been potential competitors with its own stations. Given Arqiva's incentives to increase multiplex capacity utilisation, the existing undertakings given to the CC from the Arqiva/NGW case (which will remain in place) and the lack of customer concerns, we do not consider that the proposed acquisition will result in vertical concerns in the short to medium term.
86. In light of the above, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

87. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.

## **ENDNOTES**

88. OFCOM noted, subsequently to the decision, that the current multiplex coverage range could change following the Digital Britain review so that there could be further overlaps between MXR and MuxCo. However, this does not change the OFT's analysis given its reasoning in paragraphs 39, 40 and 64.