

**Final report for the Ministry of Economic
Affairs**

Commercial radio frequency licensing

A case study of policies and legal considerations
in Belgium, Denmark, France, Germany, Ireland
and the UK

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1 Executive summary

1.1 Introduction

In the Netherlands, all commercial analogue radio licences were assigned in 2003 using a comparative selection process (also known as a “beauty contest”). The licences have a duration of eight years and will expire on 1 September 2011. The Ministry of Economic Affairs is considering various options for assigning the rights to these licences after 2011.

To inform its policy making, the Ministry of Economic Affairs has asked Analysys Mason to compare the approaches taken by six European countries (Belgium, Denmark, France, Germany, Ireland and the UK) to the initial assignment of commercial analogue and digital radio licences and to the re-assignment of these licences upon expiry.

1.2 Background

In the EU, commercial radio broadcasting licences are typically awarded for a limited duration, after which an extension or new assignment procedure is required to allow further use of the spectrum. EU legislation on frequency management (in particular the Framework Directive and the Authorisation Directive) requires national regulatory authorities to assign radio frequencies for an “appropriate duration”, according to a set of harmonised conditions and to objective, transparent and non-discriminatory criteria¹. However, it also allows Member States to take into account democratic, social, linguistic and cultural interests related to use of the frequencies. EU legislation also requires the allocation and assignment of radio frequencies to be managed as efficiently as possible. The regulatory framework applies to transmission networks and services but does not cover the content of services (such as broadcasting content) delivered over electronic communications networks. Generic EU Treaty requirements state that actions of public authorities must be proportionate (i.e. not go beyond what is necessary to achieve the objectives of the Treaty), subject to the freedom of establishment for economic operators (i.e. allow persons or companies to carry out an economic activity in a stable and continuous way), and not hinder the internal market. EU policy on state aid seeks to protect the internal market by creating and maintaining a level playing field. In short, the legal hierarchy can be summed up by noting that any assignment of a licence is subject to:

- the explicit conditions of the Framework and Authorisation Directives (i.e. the use of objective, transparent and non-discriminatory criteria)
- overriding EU Treaty requirements on e.g. proportionality, freedom of establishment and the internal market.

¹

In fact these criteria have been part of EU legislation since the 1990 Services Directive, 80/388/EEC.

However, these conditions and requirements are tempered by the broadcasting goals of an individual Member State.

1.3 Approach

Analysys Mason has conducted this study with legal support from law firm Hogan & Hartson. Our approach has involved a combination of both desk research and interviews with representatives from the relevant national regulatory authorities, in order to describe both the historical and current situation, as well as policy considerations and legal experiences.

In preparation for each interview, we conducted a phase of preliminary desk research to enable us to describe the licensing and regulatory situation in each country. Our desk research involved an extensive review of relevant regulatory and legislative documents, and a scan of relevant websites (various relevant authorities, radio stations, news sites, etc.). The interviews themselves took place by phone. Interview minutes were reviewed by the interviewee to ensure that we had recorded the interviewee's comments correctly. After each interview, we carried out further in-depth desk research in order to analyse any additional information provided by the interviewee.

1.4 Summary of findings

1.4.1 Regulatory guidance

In general, lack of interpretation of EU legislation by the courts in individual Member States means that limited guidance is available for national policy makers and legislators on how to reconcile the criteria from EU Directives, requirements from the EU Treaty and national policy goals (see Section 1.2). There is also little guidance on what constitutes an "appropriate duration" for the assignment of radio frequencies in practice, and how this affects the options for extension. As a result of this lack of guidance, to some extent the relevant authorities in the countries researched for this study seem to believe that they have freedom to define licensing and extension policies. To date, these authorities have not reported experiencing any tension between EU criteria or requirements, and their existing national policies on extension. However, in the UK Ofcom has indicated that the award of automatic licence extensions, for which the national licence holders are lobbying, could conflict with EU regulations on matters such as state aid.

In the countries researched, licences are generally assigned on the basis of objective, transparent and non-discriminatory criteria, and there are usually clear circumstances that motivated extensions (see Section 1.4.2). It should also be noted that EU legislation may allow Member States to offer exceptional extensions in pursuit of 'general interest objectives'².

² Article 5.2 of the Authorisation Directive states: "Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law, such rights of use shall be granted through open, transparent and non-discriminatory procedures."

1.4.2 Extension policies

Figure 1.1 on the following two pages summarises our main findings regarding the extension policy in each country we have researched. The table provides an overview of the dates of licence awards/expirations and legislation, summarises the duration of licences and extensions, and provides information on the motivations for licence extension.

In the countries we have researched, where licence extensions have been granted, these either happened because there was insufficient interest from other parties, and/or they were granted because of the following particular circumstances:

- *The original licence conditions included a provision for extension.* In Ireland, for example, the licences that were awarded between 1989 and 1991 specified their basic and extended duration as part of the licence terms. In Belgium, licences awarded between 2001 and 2007 had a duration of nine years, with the possibility of a further nine-year extension. These durations were specified in legislation that pre-dated the licence awards.
- *There was a wider policy of changing the expiry date of licences in order to align them with other licences.* In France and Denmark, for example, some licensees received a one- or two-year exceptional extension in order to align the expiry date of the licences, and give the regulator sufficient time to re-engineer the frequency plans in analogue bands.
- *There was a wider policy of extending existing licences in return for investment in digital radio.* In the UK, for example, legislation introduced in 1996 allows an incumbent to have its licence extended for eight years if the station simulcasts on the digital terrestrial platform, otherwise the licence can be revoked (which, however, proved difficult in practice). In general, such extensions either:
 - had been provided by legislation introduced at a very early stage (1996 in the UK) relative to the take-up of digital radio and the maturing of EU legislation on radio licensing, or
 - were in fact already part of previous legislation, in which case investment in digital radio merely allowed the incumbent to bypass a fairly straightforward compliance check (2004 in France) to qualify for the extension, or
 - are part of legislation that is currently being prepared, with exact qualification conditions still to be defined and aligned with EU regulations and requirements (2008 in Ireland).

	<i>Key dates in radio licensing</i>	<i>Licence duration, extensions and their timing</i>	<i>Motivations for extensions and other remarks</i>
Belgium (Flanders)	<p>2001: national analogue licences awarded</p> <p>2002–7: local analogue licences awarded</p> <p>2003: regional analogue licences awarded</p> <p>2005: basic regulatory framework</p> <p>2008: complement to regulatory framework on digital radio licensing</p> <p>2009: beauty contest for digital broadcasting multiplex</p> <p>2010: first analogue licence due for extension</p> <p>2016: new frequency allocation plan</p>	<p><i>Analogue licences</i>: 9-year original duration + one 9-year extension</p> <p><i>Digital licences</i>: 15-year original duration + one 15-year extension</p> <p>The government of Flanders has no practical experience of licence extension, because the first licences will not expire until 2010</p>	<p>When licences were originally awarded legislation already provided for a 9-year extension</p> <p>The extension period for analogue licences may now be shortened to facilitate spectrum re-planning; new draft legislation foresees an annual renewal process</p>
Denmark	<p>1988: first local analogue licences awarded</p> <p>2002: basic regulatory framework on programme licences</p> <p>2003: two national analogue licences awarded</p> <p>2004: basic regulatory framework for radio spectrum</p> <p>2005: policy framework reflecting the ambition to free up spectrum for commercial radio and replan spectrum</p> <p>2005: start of digital simulcast by national licensees</p> <p>2006: one national analogue licence re-assigned after original licensee handed back its licence</p> <p>2007: consolidation of regulatory framework on content broadcasting</p> <p>2010: expiration of local licences to allow for spectrum re-planning</p>	<p><i>Existing national programme licences</i>: 8-year duration, no extensions</p> <p><i>New national programme licences</i>: duration to be determined on a case-by-case basis</p> <p><i>Existing local programme licences</i>: until the start of 2006, licences had a 5-year duration and no provision for extension. In 2004/5, extensions were allowed. Since 2007, all existing licences have been extended until the end of 2010</p> <p><i>New local programme licences</i>: new licenses that are issued will expire by December 2010</p> <p>Frequency licences require applicants to have programme licences, and so have the same duration</p> <p>Digital licences have not yet been awarded. National broadcasters have the right and obligation to broadcast on public broadcaster's digital transmission network for the duration of their analogue licence</p>	<p>The extension of existing local analogue licences until end of 2010 was motivated by the need to facilitate spectrum re-planning</p> <p>The 2004/5 extensions were only allowed if they concerned uncontested licences, i.e. licences for which there was no competing demand</p>
France	<p>1986: basic regulatory framework</p> <p>1991: first analogue licences awarded</p> <p>1994: renewal process introduced by law</p> <p>1996: renewal of analogue licences</p> <p>2001: exceptional extension of analogue licences</p> <p>2004: amendment to regulatory framework for digital radio licensing</p> <p>2006: exceptional extension of some analogue licences</p> <p>2006–8: calls for interest in re-assignment of analogue licences</p> <p>2010: award of digital licences in some parts of France</p>	<p><i>Analogue licences</i>: 5-year original duration + two 5-year extensions</p> <p>Such 5-year extensions resulting from the law are usually granted, but licence holders have to fulfil certain conditions</p> <p>In 2006, legislation exceptionally further extended some analogue licences until 2007 and 2008</p> <p><i>Digital licences</i>: 10-year original duration + two 5-year extensions</p> <p>Again, such 5-year extensions are likely to be granted, but licence holders have to fulfil certain conditions</p> <p>When an extended licence expires, it is re-assigned by means of a beauty contest</p>	<p>The possibility to extend analogue licences by 2x5 years was provided by legislation in 1994, after the first analogue licences had been awarded but before EU legislation that culminated in the Authorisation Directive fully matured. The extension option was motivated by a desire to give commercial broadcasters more legal certainty</p> <p>The 2006 exceptional extensions were motivated by the need to facilitate spectrum re-planning</p> <p>The possibility to extend digital licences (to be awarded in 2010) was established by 2004 legislation and so will be known when the licences are awarded</p> <p>The 2004 legislation also gave parties who are awarded a digital licence an <i>automatic</i> 5-year extension to their analogue licence. This automatic extension is intended to stimulate investment in digital radio</p>

	<i>Key dates in radio licensing</i>	<i>Licence duration, extensions and their timing</i>	<i>Motivations for extensions and other remarks</i>
Germany	<p>1980s: first analogue content licences awarded</p> <p>1987: basic regulatory framework for content licensing</p> <p>1996: basic regulatory framework for spectrum licensing</p> <p>1998: first digital spectrum licences awarded</p> <p>2004: amendment to regulatory framework for spectrum licensing</p> <p>2008: binding guidelines on maximum duration of spectrum licences</p> <p>2013: first expiration of spectrum licences</p> <p>2015: formal date for digital switch-over (unlikely to be maintained)</p>	<p>Spectrum licences were originally assigned for a limited period, with the possibility of extension. Binding guidelines in 2008 introduced maximum durations:</p> <ul style="list-style-type: none"> <i>Analogue spectrum licences:</i> no longer than 10 years, and not beyond 2015 <i>Digital spectrum licences:</i> no longer than 10 years, and not beyond 2025 <p><i>Content licences:</i> typical duration of 7–10 years, depending on federal State. When a licence expires, the State regulator investigates whether there is interest from other potential licensees. If so, it holds a beauty contest; otherwise the licence is re-assigned to the incumbent (which happens in most cases)</p>	<p>The possibility to extend spectrum licences was provided by law that predated award of the affected licences. Also, the binding guidelines that specify a maximum duration predated the affected licences</p> <p>The regulator has no experience of re-assigning spectrum licences, but it appears that extensions are unlikely, as the regulator expects significant interest from competing parties</p> <p>Content licences are typically only extended if there is no competing interest, or if the incumbent wins the beauty contest (and has its licence re-assigned)</p> <p>Some federal States are considering extending all analogue content licences to align them with the 2015 expiry date for analogue spectrum assignments. Other States have stopped issuing new analogue content licences</p>
Ireland	<p>1988: basic regulatory framework</p> <p>1989: first (local/regional) analogue licence awarded</p> <p>1996: re-assignment of national analogue licence due to failure of initial licensee</p> <p>2001: call for interest in re-assignment of commercial analogue licences</p> <p>2001: updated regulatory framework</p> <p>2003: expiration of first analogue licence</p> <p>2006–8: re-assignment of national analogue licences</p> <p>2007: amended regulatory framework</p> <p>2009: amendment to regulatory framework</p>	<p><i>Analogue content licences:</i> 7-year original duration + one 7-year extension</p> <p><i>Spectrum licences:</i> because these are coupled to content licences they have the same duration</p> <p>Following expiry, licences are re-assigned (and have usually been won by the existing licensee)</p> <p>The 2008 Broadcasting Bill is likely to grant an additional 4-year extension to existing analogue licences for analogue incumbents that win a sound broadcasting multiplex licence for simulcast purposes</p>	<p>The 7-year extension possibility was specified in the licence itself</p> <p>The 4-year extension allowed by the 2008 Bill provides an additional incentive to invest in digital radio</p>
UK	<p>1970s: local/regional radio licences awarded</p> <p>1990: basic regulatory framework</p> <p>1992: first national licence awarded</p> <p>1995: second and third national licences awarded</p> <p>1996: amended regulatory framework (renewal option + digital radio)</p> <p>2003: amended regulatory framework (4-year extension for analogue licences)</p> <p>2009: policy document on digital switchover</p> <p>2011: expiration of first national licence</p> <p>2012: expiration of second and third national licences</p>	<p><i>Analogue licences (first assignments):</i> 8-year original duration + 8-year renewal (provided by 1996 legislation, if simulcasting on digital) + 4-year extension (provided by 2003 legislation)</p> <p><i>Analogue licences (re-advertised):</i> 5-year duration or until 2015 (whichever is longer)</p> <p><i>Digital spectrum licences (awarded until 2009):</i> 12-year duration</p> <p><i>Digital spectrum licences (awarded after 2009):</i> 8-year duration</p> <p><i>Digital content licences:</i> until surrendered by holder</p>	<p>Over the past decades, broadcasters have retained the right to broadcast much longer than specified in their original licence conditions. This was possible for various reasons:</p> <ul style="list-style-type: none"> The 8-year renewal option (1996) was introduced to stimulate investment in digital radio The 4-year extension option (2003) was introduced to align the duration of analogue and digital licences Incumbents have often had their licences re-assigned, either through a fast-track procedure following a lack of interest from other parties, or because they have won a beauty contest <p>In response to lobbying from national licence holders for further extension in 2011/12, policy makers and legislators are considering this. However, Ofcom notes that this could conflict with EU regulations on e.g. state aid</p>

Figure 1.1: Summary of licensing situation in the countries researched, focusing on commercial licences and the extension policy [Source: *Analysys Mason, 2009*]

Alternatively, some regulators are relaxing certain content requirements of existing licences (Ireland), or in a beauty contest favour applicants that demonstrate a commitment to invest in digital technology (some German federal states). It should be noted that in the countries researched, every case of extension was either a one-off or a double extension. Serial extensions are not offered, although in Flanders, in the event that the government has not yet made a decision on licence re-assignment, a licence is automatically extended up to the moment when the government does make its decision.

All of the countries we have researched are finding it difficult to encourage the take-up of digital radio. For example, in relation to the linkage between assigning licences and stimulating digitalisation, Ofcom has indicated that the right to withdraw a licence if the licensee does not meet the renewal condition requiring provision of a digital simulcast service is (politically) difficult to enforce in practice, as such a withdrawal would lead to protests from listeners.

On the basis of just six case studies, and without also conducting a thorough assessment of public radio policies, it is difficult to draw any overall conclusions on the relationship between a country's digital radio policy (particularly its linkage with analogue radio licensing) and the take-up of digital radio. However, it is clear that those countries in which digital radio has been (relatively) successful are also the countries where there are strong incentives (UK) or even obligations (Denmark) relating to investment in digital commercial radio. In contrast, digital radio is less popular in countries with little (France and Ireland) or no (Belgium) facilitating legislation. The exception to this seems to be Germany, where legislation generally seems quite facilitating, but digital radio has still not been very successful. The case for any causal relationship between *commercial* radio legislation and digital radio take-up is however further weakened by the belief that digital radio take-up is mainly driven by *public* broadcasters instead of commercial broadcasters, as was stated by some of the interviewees.

1.4.3 Assignment process

Most of the countries we have researched use a beauty contest as the award mechanism for radio broadcast licences. In the UK and Denmark, however, *national* licences are awarded through an auction process while *local* licences are awarded through a beauty contest process. The 2008 Broadcasting Bill in Ireland will include a financial bid in its beauty contest procedure for both national and local licences, as an additional criterion.

Where a licence has been re-assigned after the end of its regular duration (and after any extension or renewal period, where applicable), the general procedure in most countries we have researched seems to be to:

- advertise the licence to gauge the level of interest from other potential licensees
- re-assign the licence to the incumbent if there is insufficient interest from other parties, often using some sort of fast-track procedure
- if more parties are interested in the licence, use a competitive procedure.

In practice, this procedure often results in licences being re-assigned to the incumbent, either due to lack of competition or because the incumbent's track record and starting position put it in a stronger position to win a competitive procedure. Nevertheless, in principle a competitive procedure is followed in cases where the demand for licences exceeds supply (i.e. in case of scarcity).

2 Introduction

This report has been prepared by Analysys Mason Ltd and Hogan & Hartson LLP on behalf of the Ministry of Economic Affairs in the Netherlands. It contains a summary of our assessment of the approaches taken by six European countries (Belgium, Denmark, France, Germany, Ireland and the UK) to assigning commercial analogue and digital radio licences.

2.1 Background to study

In the Netherlands, all commercial analogue radio licences were assigned in 2003 using a comparative selection process (also known as a “beauty contest”). The licences have a duration of eight years and will expire on 1 September 2011. The Ministry of Economic Affairs is considering various options for assigning the rights to these commercial radio licences after 2011.

To inform its policy making on this matter, the Ministry of Economic Affairs asked Analysys Mason to compare the approaches taken by various European countries to assigning commercial analogue and digital radio licences. Besides policy considerations, the issue of how to (re-)assign licences has to be examined in the light of European legislation (as discussed in Section 2.4 below).

2.2 Study objectives

The study seeks to understand why and how other countries have chosen to re-assign or extend commercial radio licences. In particular, we aim to answer the following questions for each country:

- Have radio licences been extended or re-awarded?
- What were the policy reasons for deciding to either extend or re-award the licences?
- What legal considerations, both in terms of national and European legislation, were taken into account?

2.3 Approach to research

The approach we have taken involved telephone interviews with the relevant national regulatory authority in six countries (Belgium, Denmark, France, Germany, Ireland and the UK) complemented by desk research.

Because of the federal government structure in Germany and Belgium, there is no *single* relevant national authority. To enable us to gain a national perspective, in Germany we held an interview with BNetzA (which is responsible for transmission licences but not for content broadcast licences), rather than with individual State Media Authorities. In Belgium, we interviewed the Flemish Department of Culture, Youth, Sport and Media, on the basis that Flanders represents the

larger part of Belgium, in both demographical and economical terms. The following people have been interviewed for this study:

- **Belgium** (Flanders): Johan Bouciqué, Media Advisor, Department of Culture, Youth, Sport and Media
- **Denmark**: Lars M. Banke, Head of Division, Ministry of Culture. We also contacted Kasper Nyrup Madsen (Senior Advisor, Danish National IT and Telecom Agency) to discuss more specific areas
- **France**: Marie-George Lonnoy, Deputy Head of Radio Service, Conseil Supérieur de l'Audiovisuel (CSA)
- **Germany**: Elmar Zilles, Unit Head Broadcasting, and Klaus Michels (BNetzA)
- **Ireland**: Celene Craig, Director of Broadcasting, Broadcasting Commission of Ireland (BCI). We also contacted Peter Moran (Manager of Spectrum Planning Broadcasting, Irish Commission for Communications Regulation) to discuss more specific areas
- **UK**: Neil Stock, Head of Broadcast Licensing, Office of Communications (Ofcom).

In preparation for each interview, we conducted a phase of preliminary desk research to enable us to describe the licensing and regulatory situation in each country. Our desk research involved an extensive review of relevant regulatory and legislative documents, and a scan of relevant websites (various relevant authorities, radio stations, news sites, etc.).

On the basis of this preliminary desk research, we refined the general questionnaire (which was based on the research questions defined by the Ministry), to focus each interview on the key issues for that particular country. The interviews themselves were conducted by phone, and usually lasted about an hour. After each interview we prepared a set of minutes and sent these to the interviewee for review, to ensure that we had recorded the interviewee's comments correctly.

After each interview, we carried out further in-depth desk research in order to analyse any additional information that was provided by the interviewee (e.g. legal proceedings, additional regulatory documents).

The findings presented in this report are a synthesis of this preliminary desk research, the interviews, and the in-depth desk research that followed the interviews.

2.4 EU legal context

In order to give a frame of reference for the country assessments, this section summarises the relevant legal provisions relating to commercial radio licensing at an EU level.

Radio frequency licensing is governed by the EU regulatory framework for electronic communications networks and services. This regulatory framework consists of:

- Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Framework Directive"), and

- four specific Directives on the authorisation of electronic communications networks and service³, including Directive 2002/20/EC (the “Authorisation Directive”).

This framework contains broad principles for radio frequency licensing, which apply to any grant of rights of use, and thus also should apply to extensions or re-assignments. There is limited guidance and very few judicial interpretations of how these principles should be applied in practice. Thus, we describe those broad principles set out in the Framework and Authorisation Directives concerning the following processes:

- determining that the number of licences must be limited
- assigning the licences to applicants
- applying conditions to the licences
- defining the duration of each licence.

Limiting the number of licences

Article 7.3 of the Authorisation Directive requires Member States that limit the number of rights of use (i.e. licences) to do so on the basis of objective, transparent, non-discriminatory and proportionate selection criteria. These selection criteria must also give due weight to the objectives of Article 8 of the Framework Directive (technological neutrality, the promotion of cultural and linguistic diversity as well as media pluralism, the promotion of competition in the provision of electronic communications networks and services, the development of the internal market and the promotion of the interests of the citizens of the EU). Recital 18 of the Framework Directive permits Member States to take proportionate steps to promote specific services where this is justified, with the example given of digital TV (radio is not mentioned) as a means of increasing spectrum efficiency.

Assigning licences to applicants

The EU regulatory framework provides broad rules for both selection criteria and procedures. Member States must base assignments of rights of use on objective, transparent, non-discriminatory and proportionate criteria (Article 9(1) of the Framework Directive),⁴ while following the extremely broad set of policy objectives and regulatory principles in Article 8 of the Framework Directive (as discussed in the previous paragraph). In the latter, the most pertinent is Article 8(2)(d), which requires Member States to encourage efficient use and effective management of radio frequencies. In granting these rights, Member States must use open, transparent and non-discriminatory procedures (Article 5.2 of the Authorisation Directive).

³ The other three Directives of the EU regulatory framework are: Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the “Access Directive”), Directive 2002/22/EC on universal service and users’ rights relating to electronic communications services and networks (the “Universal Service Directive”), and Directive 97/66/EC of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecoms sector.

⁴ These criteria were also applicable to Member State licensing decisions under the 1997 Licensing Directive 97/13/EC, OJ L 117/15, 7 April 1997.

<i>Applying conditions to licences</i>	Article 6 of the Authorisation Directive provides that the rights of use (i.e. licences) for radio frequencies may be subject to conditions which shall be objectively justified in relation to the service or the network concerned, non-discriminatory, proportionate and transparent. These conditions should be limited to what is strictly necessary – a list of permissible conditions is set out in the Annex to the Directive, and includes “maximum duration”.
<i>Defining licence duration</i>	Article 5.2 of the Authorisation Directive provides that where a Member States grant rights of use for a limited period of time, “the duration shall be appropriate for the service concerned”.

These principles generally apply to the assignment of rights of use for electronic communications networks and services, which include broadcast distribution facilities. However, there is one important caveat: this regulatory framework preserves the ability of Member States to use different criteria or procedures in relation to facilities used for broadcasting. Thus, Article 1(3) of the Framework Directive states that the entire framework is “without prejudice” to measures taken to pursue general interest objectives, “in particular relating to content regulation and audio-visual policy.”⁵ Article 5.2 of the Authorisation Directive sets out broad principles for selection procedures, and also states that this requirement is “without prejudice to specific criteria and procedures adopted ... to grant rights of use of radio frequencies to providers of radio or television broadcast content services...”.

In summary, EU legislation requires open and non-discriminatory procedures for the award of licences, which should also apply to the re-assignment of licences once they have expired. At the same time, EU legislation may allow Member States to offer exceptional extensions or otherwise vary their selection criteria and procedures in order to pursue “general interest objectives”. In general, lack of interpretation of EU legislation by the courts in individual Member States means that limited guidance is available for national policy makers and legislators on how to reconcile the criteria from EU Directives, requirements from the EU Treaty and national policy goals (as mentioned in Section 1.2). There is also little guidance available on what constitutes an “appropriate duration” in practice, and how this affects options for licence extension. In any case, EU legislation may allow Member States to offer exceptional extensions in order to pursue ‘general interest objectives’.

2.5 Outline of report

The remainder of this document describes the findings of our research in each country studied, with one chapter for each country. Each chapter contains the following sections:

⁵ Recital 6 of the Framework Directive broadens the scope of these general interest objectives in the audiovisual and content regulation field, by listing objectives “such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors.”

- Section x.1 describes the licensing situation in each country (the number of licences, their duration, any extensions that have been awarded, etc.)
- Section x.2 describes the current national legal framework, providing an overview of its key elements
- Section x.3 describes the status of the digitalisation of commercial radio in each country and measures that have been taken to stimulate this, and considers whether these are linked to analogue licensing
- Section x.4 describes the policy considerations behind licensing decisions, and decisions on extensions in particular. It also provides insight into how the relevant authority evaluates its policies and decisions, particularly in relation to extensions, legal challenges and EU legislation
- Section x.5 provides concluding comments, highlighting the main lessons that can be learned from that particular country.

The final chapter summarises our conclusions from this study. It discusses the regulatory guidance that is provided by EU regulation, and summarises the extension policies and assignment processes that are used by the countries we have researched.

3 Belgium

Because of the federal government structure in Belgium, there is no single relevant national authority. We therefore chose to assess the Flemish situation, as Flanders represents the larger part of Belgium in both demographical and economical terms.

3.1 The licensing situation

In Flanders, there are currently 2 national (4FN and Q-music), 5 regional and 294 local analogue commercial radio broadcasters. These parties have received a broadcasting recognition (specifying non-technical conditions), and this is coupled to a frequency, which in turn is coupled to a transmission licence (specifying technical conditions). Thus, a transmission licence is only awarded to the recipient of a broadcasting recognition. The national recognitions were awarded in 2001, the regional recognitions in 2003, and the local recognitions over the period 2002 to 2007.

Recognitions are awarded on the basis of a beauty contest (see Section 3.2.2 for the selection criteria). Although the contest does not include a financial bid, applicants are required to pay an administrative fee: for local recognitions this is a one-off payment of EUR250; for regional recognitions it is a one-off fee of EUR2500 plus yearly administrative costs; and for national recognitions it is a EUR25 000 one-off fee plus an annual charge equivalent to a set percentage of turnover.

The initial duration of a commercial analogue recognitions is nine years, beginning as soon as the transmission licence is issued. The Flemish Media Decree stipulates that an analogue recognition can be renewed once, for another nine years. The scope for extension was therefore clear at the time the recognitions were issued. A recognition holder can request an extension, and if the government takes no action the recognition is extended automatically (see Section 3.2.2). However, the Flemish government is currently considering whether to restructure the commercial radio landscape by introducing new types of recognition, and possibly changing the number of national, regional or local licences which can be granted. This would require a new frequency plan in order to free up spectrum. In order to allow this to happen, new legislation is being prepared to align the timing of all licences, so that the new frequency allocation plan can be prepared and implemented by 2016.

Local and regional radio broadcasters are allowed to co-operate, but not on a structural basis; that is, they are allowed to broadcast the same content for up to 21 hours a day. The regional broadcasters co-operate under the name 'Nostalgia' (the only exception being Limburg, but this geographical gap is filled by a number of local broadcasters in the region). The proposed new legislation stipulates that local broadcasters cannot co-operate with regional broadcasters, and vice versa – they can only co-operate among themselves.

3.2 The national legal framework

3.2.1 Introduction

The Flemish licensing framework was established by the Decrees on radio and TV broadcasting by the Flemish Parliament, co-ordinated by a decision of the government on 4 March 2005 (and updated on 15 September 2008), as complemented by the 18 July 2008 Decree by the Government of Flanders related to the conditions and the procedure for obtaining a licence for the provision of a broadcasting network and related transmission licences.

The Flemish licensing framework applicable to commercial radio broadcasting distinguishes between licences for analogue and digital radio services, as set out below.

3.2.2 Analogue radio services

In accordance with the Decrees on radio and TV broadcasting co-ordinated on 4 March 2005, as complemented by the 18 July 2008 Decree, in order to provide a broadcasting service, national, regional and local private radio broadcasting companies are required to be recognised by the government of Flanders following the advice of the Flemish Media Regulator (Article 31§3 of the 2005 Decrees).

Article 33 provides that the recognitions for private radio broadcasting companies are allocated for nine years, starting on the date of the entry into effect of the transmission licence. According to this Article, the recognition can be officially withdrawn if the private radio broadcasting company has not begun transmission within nine months after the decision for its recognition.

A new application for a recognition must be submitted at least six months before expiry of the recognition. If the government of Flanders has not taken a decision when the recognition expires, the recognition is tacitly extended up to the moment that the government of Flanders does take a decision. Under Article 39, the government of Flanders determines the procedure for submitting applications for recognition. Applicants for recognition must submit applications by means of a tender. In order to be recognised, radio broadcasting companies have to comply with several conditions concerning:

- their legal structure
- the content of their programming (including an obligation to transmit in the Dutch language, and an obligation to broadcast at least four news programmes per day, covering a diverse range of subjects)
- the media experience
- the financial and business plans, and
- their technical infrastructure.

Regional and local radio broadcasting companies also have to ensure that diversity is promoted at the regional and local levels (e.g. by demonstrating a relationship with the local community, offering a level of local content).

Being a recognised broadcasting company is not sufficient to be authorised to provide a broadcasting service. Indeed, Article 118 of the 2005 consolidated Decrees specifies that holding a written transmission licence and/or a transport licence issued by the Flemish Media Regulator is required in order to be able to own or exploit transmission equipment. These technical licences are linked to the recognitions granted to private broadcasting companies, being only granted to recognised private broadcasting companies under Article 31§1 or to radio broadcasting networks. The government of Flanders determines the specific details of and the process for the application, amendment, suspension or withdrawal of transmission and transport licences.

Transmission licences (defined under Article 2 as licences “for the exploitation of any equipment intended to transmit signals of radio broadcasting services”) apply for the duration of the recognition of the private broadcasting companies allocated by the government of Flanders, i.e. nine years.

As far as transport licences are concerned, their duration is determined by the government of Flanders. These licences cover “the exploitation of any equipment intended to carry out the transport of signals for broadcasting purposes by radio connections” (Article 2).

3.2.3 Digital radio services

Under Article 134 of the 2005 Decrees, written permission must be granted by the Flemish Media Regulator in order to be able to propose a radio broadcasting network. A radio broadcasting network refers to an “electronic communication network by which radio programme signals in digital form are transmitted to third parties by terrestrial transmitters, whether or not in coded form”, as defined in Article 2.32 of the 2005 Decrees.

The 2005 Decrees specify that the government of Flanders determines the duration of these licences, the conditions for obtaining them, the arrangements and the procedures for seeking, changing, suspending or withdrawing them. Such details are provided by the Decree dated 18 July 2008 specifying the conditions and the process for the award of licences to provide a radio or TV broadcasting network and for the award of relevant transmission and transport licences for the digital frequencies specified in the Decree dated 12 October 2007.

Radio broadcasting network licences are granted through a call for interest process organised under Chapter 4 of the 2008 Decree. First, the applicant has to meet admissibility conditions. These conditions are set out in Article 135 of the 2005 Decrees and by Chapter 2 of the 2008 Decree. Under Article 135, the provider has to be set up in the form of a company or a statutory legal person whose object is to install and operate a radio broadcasting network in the Flemish Community. If the government of Flanders imposes additional obligations, these obligations shall

be objectively justified in relation to the relevant network, non-discriminatory, proportional and transparent. Article 136 specifies that the provider of a radio network shall use the digital capacity of the network to transmit radio programmes. Under Article 3 of the 2008 Decree, an applicant shall not be a provider of electronic communications networks offering chargeable broadcasting or electronic communications services, nor a company in which companies offering chargeable broadcasting or electronic communications services have authority.

If only one applicant meets such admissibility conditions, the licence is granted to the applicant immediately. However, if more than one applicant meets the admissibility conditions, a comparative inquiry shall take place. During such an inquiry, applications are assessed with regard to the following criteria:

- optimal use of the frequency allocation
- fair, reasonable and non-discriminatory access to infrastructure
- technical experience
- financial resources
- population coverage
- timing of roll-out of service
- quality and number of programmes.

Aside from these criteria, the licence winner has to pay EUR250 per transmitter and a small percentage of its revenues.

Under Article 19 of the 2008 Decree, the Flemish Media Regulator grants the transmission and/or transport licence to the holder of a broadcasting network licence, after having granted him the network licence. Transmission and/or transport licences are granted for the duration of the network licence.

Radio broadcasting network licences and related transmission and/or transport licences are granted for a 15-year period, which can be extended for another consecutive period of up to 15 years. Such an extension must be requested one year before expiration of the initial duration period. The Flemish Media Regulator grants such extension after assessing the extension application, having regard to the same criteria as those used during the comparative inquiry for grant of the initial licence (as detailed in Article 6 and set out above).

Holders may lose their licence if they do not use the frequencies they have been awarded for a period of two years.

3.3 Link with digitalisation

For *analogue* licences, although there is a distinction between content recognitions and transmission licences, there is no organisational distinction between the content broadcaster and the operator of the transmission network; both licences are granted to the same entity. With regard to *digital* radio, however, the situation is quite different. Here, the distinction between content and transmission licensing is reflected in organisational boundaries between operators and content

broadcasters. The entity which wins the beauty contest for a digital spectrum licence can offer its services to interested parties in the market, such as content broadcasters or packagers of multiple content broadcasters.

The public broadcaster, VRT, has transmitted on digital audio broadcast (DAB) since 1997. VRT has its own transmission infrastructure, which is currently being privatised. In 2009, Flanders will hold a beauty contest for one digital broadcasting multiplex licence. This beauty contest, which will be conducted on the basis of the criteria listed in Section 3.2.3 above, is only open to network operators, not content providers. The licence on offer will have a duration of 15 years, with the option of a 15-year extension.

The Department of Culture, Youth, Sport and Media has indicated that there seems to be little interest in this licence from the market. This could be explained by the fact that only broadcast network operators are allowed to participate (which excludes the content providers, but also the mobile and fixed operators). The only likely participant is the privatised transmission operator of VRT.

Flanders does not yet have a switch-off policy for analogue radio. This is partly due to the fact that there is still no clarity as to which standard will be dominant, and nor is there agreement at the EU level about the standard(s) to adopt. To date, the Flemish government has not yet established any regulatory incentives to stimulate investment in digital radio, but it is conducting analysis to investigate the take-up of digital radio services, to identify any obstacles to this take-up, and to assess which regulatory and policy incentives would be possible/advisable. At present, investments in digital radio are left to the market.

3.4 Policy considerations, legal experiences and evaluation

Despite our research and our discussions with the Department of Culture, Youth, Sport and Media, we have been unable to ascertain the reasons underlying the original entitlement to extension in the current legislation. Regarding the expiry of recognitions and the possibility of radio stations objecting to having to stop operations, we understand from our interview that the duration of existing licences will be respected but that a process of annual renewal is foreseen in the new draft legislation.

There have been around 45 cases where the government of Flanders was challenged on the outcome of a beauty contest during the period 2003–2005. These cases were judged on the basis of whether or not the procedures were followed correctly. The government of Flanders won all but one of these court cases. The exception is a case in Sint Niklaas, where it was decided that the winner should not have been granted the recognition, because the procedures had not been followed correctly. However, a period of four years had passed since the recognition was awarded, and the challenger did not try to claim the recognition (although it has made a claim for damages).

To date, the government of Flanders has had no experience of extending recognitions: the first case may possibly occur in 2010. It appears that the broadcasting industry has not yet considered this issue, although in 2006 there were questions about extensions and a possible linkage with

DAB. At the moment, however, there is no such linkage. The Flemish government does not yet have a policy on how to treat a request for extension, and legislation does not prescribe a procedure for the extension of analogue licences (although there is a specific procedure for extending digital licences). It is likely that other parties are interested in the national licences.

EU legislation did influence Flemish regulation on TV broadcasting, but had no impact on regulations for radio broadcasting. There have been recent changes in Flemish regulation with respect to radio broadcasting, however. As a result, a distinction is now made between analogue FM broadcasting and broadcasting via other means (cable networks, digital, Internet, radio-on-demand, etc.). For analogue FM broadcasting, explicit authorisation is required from the Flemish government, whereas for broadcasting via other means it is sufficient to make a notification of that service to the Flemish regulator.

State aid has never been an issue in relation to commercial radio licences. No state aid is currently given to radio broadcasters.

3.5 Conclusion

Broadcasting legislation in Flanders distinguishes between broadcasting recognitions, transmission licences and transport licences. The latter two licences cover the use of spectrum, while the recognition covers the right to broadcast content. However, the recognition and licences are coupled (that is, become effective on the same date), and have the same duration. Analogue recognitions have a duration of 9 years and can be extended once on request for another 9 years (compared with a 15-year duration plus a 15-year extension for digital licences). If the government of Flanders has not made a decision on the extension request before the recognition expires, the recognition is automatically extended up to the moment when the government does make its decision. It should be noted that the extension option was included in the recognition conditions from the point of their award. In fact, the duration of the extension may now need to be limited, so that all recognitions expire in 2016, in anticipation of a major spectrum re-allocation. As such, the Flanders case does illustrate how existing extension rules can be changed to reflect preparations for the introduction of a new spectrum plan.

With the first recognitions having been issued in 2001 (and not due to expire until 2010), the government of Flanders has no practical experience of extending them. Recognitions are awarded on the basis of a beauty contest. The government has faced numerous legal challenges from parties that failed to secure a recognition, which illustrates the risk of additional legal and administrative costs that can be incurred as a result of using a beauty contest mechanism. As long as the correct procedures have been followed, however, experience shows that the issuing authority always wins such cases.

The government of Flanders has no regulatory incentives in place to stimulate investment in digital radio. Instead, this is left to the market and to the party that acquires the new digital broadcasting multiplex licence in 2009.

4 Denmark

4.1 The licensing situation

In Denmark, radio is dominated by the public broadcaster, DR (the Danish Broadcasting Company). Commercial radio was first introduced locally in 1988, and then nationwide in 2003. All radio stations, local and national (other than DR) need a programme licence and a frequency licence. Programme licences are issued after either an auction or beauty contest, and programme licensees then receive a frequency licence automatically. The mechanism used for local licences is a beauty contest, unless the responsible Minister decides otherwise.

As well as the three permanent channels provided by DR, Denmark has three quasi-nationwide FM channels:

- FM4 (100% population coverage) is required to provide “a varied public service-oriented channel providing classical music, supplemented with the presentation of rhythmic music, jazz and Danish music, cultural programmes and programmes of social interest and debate, etc.” (Broadcasting Act, Article 11.4).
- FM5 (78% population coverage) “shall include news programmes from the whole country. Programming may not be regionalised. A licence to provide such programmes may not be granted to DR” (Broadcasting Act, Article 11.5).
- FM6 (38% population coverage, mostly in Copenhagen) does not have any requirements with regards to the content of its programming.

Because of the mixed mandate of the FM4 licence, it was felt that it would not be possible to *auction* this licence. Instead, a beauty contest was held. After this beauty contest, involving six applicants, the Radio and Television Board awarded the channel to DR.

FM5 and FM6 licences with an eight-year duration were sold in an auction in June 2003. The FM5 licence was won by Sky Radio, and Talpa Radio bought FM6. However, Sky Radio returned the FM5 licence to the regulator, claiming that the coverage was not in fact 78%. The same licence was re-auctioned in August 2006, and won by state-owned TV 2. TV 2 Radio started broadcasting in November 2006, but only lasted until June 2008, when the licence was re-assigned to SBS-radio free of charge (TV 2 still pays the licence fee). SBS-radio now operates under the name Nova FM. As a result, there are now two nationwide commercial radio broadcasters in Denmark: Nova FM and Talpa Radio.

In October 2008, a public consultation was held into a proposal to allow the Ministry to extend the programme licences of the FM4 and FM5 channels without holding an open tender. The rationale for this proposal is that no political decision has yet been made regarding future use of the FM4 channel, and until this decision is made the Ministry wants to avoid a situation where this channel can no longer be used. The same proposal covers extension of the FM5 channel, to maintain

parallel regulation of these two channels. At the time of preparing this report, no decision had yet been taken on this issue.

As well as national licences, the Radio and Television Board issues licences for 117 local radio areas. At present, the Board administers 326 licences for local radio⁶, of which 151 are commercial. Each local radio licence is awarded by means of a beauty contest, with the aim to ensure a plurality of radio programming in each area. The Board does not specify a particular programming profile, but each applicant must state its programming profile, to enable the Board to assess to what extent it contributes to overall plurality. When a licence is granted, the successful applicant is bound by the programming profile it submitted. Since 2002, local radio stations have been free to collaborate with other stations, and on that basis several chains of radio exist, the most significant being those involving SBS (nationwide) or regional daily newspapers.

Until 28 February 2006, local analogue radio licences had a duration of five years, after which they were re-assigned by means of a beauty contest. In most cases, these beauty contests resulted in the former licensee securing the licence. In advance of the introduction of a new broadcast law, and in preparation for possible replanning of the FM band, local boards (which were abolished in 2006) were allowed to grant extensions of these licences without open tenders in 2004 and 2005. Thus several one- or two-year extensions were granted. In November 2007, all licences for local commercial radio were extended so that they would remain in force until the end of 2010. This extension was applied to all original licences and extensions thereof. The reason for aligning the expiry date of all licences to be December 2010 was to facilitate replanning of the FM band, if a decision is made to proceed with this (see below). The December 2010 expiration date therefore also applies to any new local licences. Since 2006, the duration of new national commercial licences is determined on a case-by-case basis instead of being specified by law.

4.2 The national legal framework

In Denmark, responsibility for radio licensing is shared between the Radio and Television Board and the National IT and Telecom Agency (NITA):

- The Radio and Television Board is an independent regulatory authority that falls under the Ministry for Culture, with responsibility for the assignment of programme licences under the Radio and Television Broadcasting Act (consolidated Act n°338 of 11/04/2007).
- The NITA is an independent regulatory authority under the Minister for Science, Technology and Innovation, in charge of technical aspects of frequency planning and licensing, alignment with other spectrum users and international co-ordination under the Act on Radio Frequencies (Promulgation order n°680 of 23 June 2004).

These two types of licence are discussed below.

⁶ 175 of the local stations are non-commercial, while 151 sell advertising. This split is not part of the beauty contest or the technical licensing, but rather reflects whether the station is able to obtain financial support from the Board.

4.2.1 Programme licences

Chapter 8 of the Radio and Television Broadcasting Act specifies that the provision of programme services by a radio and TV enterprise under Danish jurisdiction shall require a licence from the Radio and Television Board. Licences for programme services provided by means of terrestrial broadcasting are awarded by the Radio and Television Board following a tender (Section 45.2 of the Broadcasting Act). The Ministry for Culture defines the rules on tender procedures and licences, including rules on the provision of programme services and the terms of licences, on a case-by-case basis.

It should be noted that the Radio and Television Broadcasting Act no longer distinguishes between national, regional and local programme services. Indeed, Chapter 9 (applicable to local radio and TV services) in the 17 December 2002 version n 1052 was repealed in December 2005. In the current version of the Radio and Television Broadcasting Act, Chapter 8 applies equally to national, regional and local programme services.

Section 92 of the Radio and Television Broadcasting Act specifies that the use of radio frequencies in order to provide programme services shall be subject to a licence granted by the NITA pursuant to the Act on Radio Frequencies. If such a licence is withdrawn, lapse or revoked, the Minister for Culture may decide that the programme licence shall lapse.

4.2.2 Frequency licences

The Act on Radio Frequencies, promulgation order n°680 of 23 June 2004 applies to the use of radio frequencies. It is explicitly stated that this Act contains rules that implement parts of the Framework and Authorisation Directives.

Section 32 of the Act on Radio Frequencies reasserts the link between programme and frequency licences, providing that the NITA's issue of a licence for radio or TV purposes is subject to the applicant having being authorised to provide programme services under the Radio and Television Broadcasting Act.

The frequency licence is provided automatically by the NITA once a programme licence has been awarded, as before a programme licence is issued it is always verified that sufficient frequency space is available. The sections in the Act on Radio Frequencies that specify tender and auction procedures for frequency licences (which are invoked in the event of frequency scarcity) are therefore typically not applicable in cases where the intention is to use the frequency licence for radio purposes.

A frequency licence for radio purposes issued by the NITA shall end if the licence holder's programme licence has ceased or has been withdrawn for an indefinite duration.

Under Section 11, Part 4 "Licences and use of radio frequencies" of the Act on Radio Frequencies, the NITA specifies technical terms for the use of licences. In particular, these terms include:

- specific radio engineering requirements
- requirements for the purpose of avoiding interference
- requirements aimed at realising international frequency co-operation and co-operation within the EU
- requirements aimed at meeting broader societal needs.

Section 33 the Act on Radio Frequencies provides that, with regards to licences for radio purposes, the NITA may specify terms based on media policy considerations (in addition to the terms mentioned in Section 11), subject to negotiation with the Minister for Culture.

As regards the terms of licences for radio purposes, the NITA may take into account media policy considerations, subject to negotiation with the Minister of Culture (Section 33(2)).

4.3 Link with digitalisation

DAB radio has been relatively successful in Denmark, with outdoor coverage reaching over 90% of the population. In 2008, 25% of households had a DAB receiver (equating to a total of 500 000 across Denmark). The take-up of digital radio has primarily been driven by the public broadcaster, DR. The interviewee from the Ministry of Culture feels that legislation on digital commercial broadcasting probably had a fairly limited impact on the take-up of digital radio in Denmark.

The Danish government has the stated objective (as per its policy agreement from 2005) of offering more additional frequencies and opportunities for commercial stations, both on the analogue and digital platforms. However, the interviewee from the Ministry of Culture acknowledged that the credit crisis may have an impact on the level of interest that commercial parties show in these developments.

The two national commercial stations, operating the FM5 and FM6 channels, have the right to use 245kbit/s digital capacity on the basis of DR's transmission network, and an obligation to simulcast (which they began doing in August 2005). Both stations that originally operated these channels were expecting to make a loss on their digital service (in 2005, Sky Radio stopped operations all together). At present, Nova, which now operates the FM5 channel, provides a simulcast programme, while Talpa Radio (FM6) managed to accommodate both a simulcast programme and a DAB-only programme. The Danish government plans to auction programme licences for the second DAB multiplex, next to the multiplex now operated by DR. However, the auction was postponed in 2007, awaiting a final decision on the replanning of the FM band.

Local commercial radio has not yet begun using DAB. Since 2002, Denmark has been able to establish a regionalised DAB network in the L-band. The original plan was to use this DAB network for local DAB radio, but in 2007 the government decided to reserve it for mobile TV.

Denmark has not yet defined a policy for digital switchover. The interviewee referred to the criterion used in Norway, where it is stated that a switch-over date will be determined once 50% of the population is on DAB. However, given uncertainty regarding the economics of proposals to

replan the FM band, the interviewee also highlighted that it might be preferable to close down analogue services and migrate all broadcasters to DAB instead (although small community radios might continue to use FM).

4.4 Policy considerations, legal experiences and evaluation

Until 2006, local programme licences had a five-year duration and were then re-assigned. National commercial programme licences, when offered for the first time in 2003, had a duration of eight years. In general, the interviewee from the Ministry of Culture believes that in most cases this re-assignment of local (commercial and non-commercial) programme licences has resulted in former licensees being awarded their licences again for a further five-year period. In cases where licences were not assigned to the former licensee, this has sometimes caused protests, but there have been no legal challenges, as licence conditions always clearly specified the limited duration.

As mentioned earlier, in order to provide additional frequencies for nationwide broadcasting and local commercial radio, the Danish government is proposing to re-plan the FM frequency band. Several alternative plans are now being considered, which vary according to whether frequencies for all existing commercial local stations are being maintained, and whether DR's frequencies are also considered for replanning. The replanning process could yield between four and six additional national channels. Political debates on replanning have focused on the cost for society to implement this plan; it seems likely that it would take a long time for the benefits of this replanning to outweigh the costs.

The extensions that were applied to all local commercial licences in 2007 aligned the expiry dates of licences to at 2010, in preparation for this spectrum replanning. The implementation of a new spectrum plan will require substantial co-ordination (with neighbouring countries, for example). Exact timescales required to establish a new spectrum plan were therefore unknown when it was first envisioned, hence a phased approach by which several one- or two-year extensions were granted. There have been no legal challenges to the intermediate extensions. The interviewee indicated that, because new licences have continued to be made available, newcomers have still been able to access the market, and so there has been little motivation for them to challenge the extensions made to existing licences. Such new comers have to cope with the expiry by 2010 and hence their business model has to allow for a short pay back period. This however was facilitated by the fact that since 2002, collaboration with other stations is allowed. Consequently, new frequencies can be used with very low start-up costs because programmes from other frequencies can be broadcasted on the new frequencies. Moreover, some of the local licensees were non-commercial, and hence could rely on financial grants to support their business plan.

However, legal challenges did occur on a different matter. When Sky Radio handed back its national licence in November 2005, it sued the Radio and Television Board, claiming that the coverage offered by its licensed FM channel was less than the 78% it had been offered. The court rejected the claim. Sky Radio has now appealed against this decision.

According to the interviewee, the EU Framework and Authorisation Directives have not really been an issue in legal discussions on radio licensing in Denmark. However, the issue of state aid was considered in recent discussions on the costs associated with commercial digital broadcasting. These costs largely comprise the cost-based transmission fee paid to DR (which owns the transmission infrastructure) and music fees (which are relatively high in Denmark). Discussion of these music fees has focused on whether they should be based on the number of potential listeners, or the number of actual listeners. Currently, the DAB service provides a higher coverage than the analogue service. As a result, digital music fees are higher than analogue music fees. We understand that this has caused dissatisfaction among commercial broadcasters, who feel that the digital fees mean their digital broadcasts are not commercially viable. Discussions are now being held to decide whether to reduce these fees. However, it was acknowledged by the interviewee that such a measure could conflict with EU regulation on state aid if not approved by the EC through the notification procedure.

4.5 Conclusion

Denmark has never extended commercial radio licences, except for the recent extensions of local licences that were made in preparation for a planned spectrum replanning. Until 2006, licence durations were specified in the Broadcasting Act. Local programme licences issued till that year had a duration of five years and national commercial programme licences, when offered for the first time in 2003, had a duration of eight years. Once local licences expired, they were re-assigned by means of a beauty contest. The first national commercial programme licences will expire in 2011.

The limited duration and re-assignment procedure for commercial programme licences was clear from the moment a licence was issued, and so there has been no legal challenge to licence re-assignments. Since 2006, the duration of new national commercial licences has been and will be determined on a case-by-case basis, and will be specified in the licence.

5 France

5.1 The licensing situation

In France, the first commercial analogue licences were granted in 1991. Legislation introduced in 1994 established a licence renewal process (see Section 5.2.2), as a result of which licences have been renewed twice (first in 1996, and for a second time in 2001). Upon expiry of the second extension period in 2006, legislation was introduced which exceptionally extended some of the licences until 2007 and 2008. The aim of this exceptional extension was to give Conseil Supérieur de l'Audiovisuel (CSA, the audiovisual regulatory authority), time to re-engineer the global frequency planning in AM and FM bands. This gave an opportunity for the CSA to optimise frequency plans, and enabled it to offer around 22% more frequencies to broadcasters. A total of 13 calls for interest for analogue licences took place between 2006 and 2008 and two others are planned for 2009, potentially leading to 15 new licensees. The licences associated with the ongoing calls for interest will be issued in 2010/11. Some of these additional licensees will be replacements for existing licensees (such as those whose licences were reclaimed due to financial difficulties), while some of them will relate to the additional frequencies that have been made available. As a result, the number of commercial broadcasters will increase.

At present there are almost 900 commercial radio broadcasters active in France. These broadcasters are split into five categories⁷:

- Category A (community radio stations, often eligible for public funding): 561 operators
- Category B (independent local stations): 184 operators
- Category C (local or regional stations, mostly affiliated with stations in Group D): 108 operators
- Category D (thematic stations with national coverage, such as Skyrock and NRJ): 25 operators
- Category E (nationwide 'generalist' radio stations, i.e. Europe 1, RTL and RMC Info), providing political and general information): 3 operators.

Applications for renewal are reviewed one year before expiry of the licence, and renewal is granted if a number of conditions are met (see Section 5.2.2). After a licence has been renewed twice, each for a period of five years, a new call-for-interest process is launched. The CSA has thus organised calls for interest in the period from 2006 to 2008. A licence winner is selected on the basis of a number of criteria, the most significant relating to the protection of pluralism and diversity, and the requirement to avoid anticompetitive behaviour (see Section 5.2.2). Regarding the protection of pluralism, the criteria basically seek to assure that the portfolio of radio stations should consist of a mixture of national, regional and local stations, provide sufficient general and political news, and represent the diversity of social and ethnic views/groups within the country.

⁷

Figures reflect the status at 31 December 2008 (source: 2008 CSA Annual Report).

Applications from the incumbent are treated in the same way as applications from prospective new licensees. The level of competition is assessed using a level playing field approach at local level and national level. Therefore the same criteria that are used for incumbents are applicable to the award of the licence to a newcomer. If licences are re-awarded to an incumbent, in some cases it will not receive the same frequencies (as there may have been a process of frequency re-engineering).

5.2 The national legal framework

5.2.1 Introduction

The licensing framework applicable to commercial radio services is provided by Law n°86-1067 dated 30 September 1986 on freedom of communication (updated version). Under Article 22 of the 1986 Law, the CSA is responsible for the licensing of frequencies allocated to broadcasting services. The French licensing framework distinguishes between FM private radio services and digital radio services, as described below.

5.2.2 FM private radio services

Article 29 of the 1986 Law provides for a call-for-interest process for “FM private radio” licences. “FM private radio” covers the five categories of service listed in Section 5.1. Calls for interest can be either “general” or “partial” (in the latter case, they involve only certain geographical areas or categories of service).

Prior to the call-for-interest process, a public consultation can be held if licensing decisions regarding use of the radio electric resource are likely to result in significant modifications to the relevant market (Article 31 of the 1986 Law, as amended by the Law dated 9 July 2004). Such a public consultation process has been used several times in 2005.

The CSA publishes calls for interest, specifying the geographical areas covered, the frequencies, and the categories of service involved. After the call for interest is closed, the CSA compiles a list of eligible applicants and carries out the selection phase. At this stage, the CSA assesses the benefits of each application for the public. In doing so, it considers two main criteria, based on:

- the protection of pluralism and diversity
- the requirement to avoid anticompetitive behaviour (Article 29 al.5).

In addition to these main criteria, a number of secondary criteria are reviewed. The CSA assesses:

- the experience of the applicant in communications activities
- financing and exploitation perspectives of the services
- the ownership structure of the applicant

- the applicant's plans to safeguard pluralism, by reflecting a diverse range of opinions, and
- the applicant's commitment to contribute to the production of local programmes and promote musical diversity (Article 29 al.6).

At the end of the selection phase, the CSA publishes the list of successful applicants and the frequencies plan on its website.

After the selection phase, the CSA concludes a convention with each selected applicant (Article 28 of the 1986 Law). Each convention sets out obligations relating to the service to be provided (including duration, content, format and target audience), and includes an obligation for at least 40% of songs played to be in the French language (half of which must be from new artists or productions). Technical conditions related to the transmission sites are also specified in each convention. If the CSA and the applicant reach agreement on these programming and technical conditions, the CSA grants a licence.

A FM private radio licence lists the operator's obligations and the technical conditions of use for the relevant frequencies. A licence has a maximum duration of five years, although under certain conditions (Article 28-1, I) it can be renewed twice without a call-for-interest process, for a five-year period each time. The renewal process (which was introduced by the 1994 Law) shall not take place in the following circumstances:

- if such a renewal prejudices the protection of pluralism at the local or regional level
- if the financial situation of the licence holder is such that the service cannot be delivered in a satisfactory manner
- when the allocation of the frequencies has changed
- if the holder has suffered administrative sanctions
- if the service no longer meets the criteria of the category for which the licence was granted.

Having considered these factors, the CSA is required to announce its intention to go through a renewal process with or without organising a call-for-interest process (Article 28-1 II). If no agreement has been reached on the renewal conditions at least six months before a licence is due to expire, the licence is not renewed and a call-for-interest process is organised in accordance with Article 29.

Since the Law dated 1 February 1994 came into force, the CSA has had the option of granting temporary licences to companies, associations or organisations which request such licences for exceptional events linked to local life (Article 28-3 of the 1986 Law as updated). Temporary licences are granted on application and without the need for a call-for-interest process. They have a maximum duration of nine months.

5.2.3 Digital radio services

The legal framework for digital radio services in France is set out in the Law dated 9 July 2004, which amended the 1986 Law.

According to Article 28-4 of the 1986 Law as amended, a public consultation process shall be organised when the frequencies awards are susceptible to have a significant impact on the radio landscape. On the basis of the responses to the consultation, of the availability of frequencies allocated to analogue broadcasting and of the technical requirements, the CSA reaches a decision on the specific details of the award and of the call-for-interest process.

During the call-for-interest process, either service providers (Article 29-1 II) or service distributors (Article 29-1 III) can apply for a licence. Selected applicants have to establish an agreement with the CSA before the licences are granted.

In a situation where an applicant for a digital licence already has an analogue licence (authorised under Article 29) for a particular geographical area, the digital licences may specify an obligation to broadcast in digital mode the same services in the same area already authorised in analogue mode. For such an integral simulcast digital broadcasting, the CSA may grant licences for use of the same analogue radio spectrum without organising a call-for-interest process.

Article 28-1 provides that digital licences shall have a maximum duration of ten years. Conditions for renewal are the same as those for analogue licences. That is, digital licences can be renewed twice without a call-for-interest process, for a five-year period each time and under the conditions of Article 28-1 I, mentioned above. Eighteen months before expiry of the licence, the CSA notifies its intention whether or not to the renewal process will require a call for interest (Article 28-1 II). If no agreement is reached at least nine months before a licence is due to expire, the licence is not renewed, and a call-for-interest process is organised in accordance with Article 29-1.

The holders of a licence to broadcast in analogue mode under Article 29, which are granted a licence to broadcast in digital mode through calls for interest organised by the CSA under Article 29-1, shall have their existing analogue licence extended automatically (“*de plein droit*”) for a five-year period (Article 29-1, II). In addition, within the limitations of the available frequencies, these analogue broadcasters get priority in the assignment process for digital licences for services provided in the same geographical area.

5.3 Link with digitalisation

France has not yet established a specific switch-off policy for analogue radio service, as digital radio licences are only in the process of being awarded. Calls for interest for digital licences will only take place in 2009. In the current context, analogue licences are still being awarded with same conditions as in the beginning of the 1990s. Therefore, unless the lawmaker modifies the legal framework (regarding renewals), switchover cannot happen before the next 15 years.

As detailed in Section 5.2.3, digital radio licences are granted for ten years and have a renewal process similar to that for analogue licences. Analogue broadcasters that apply for a digital licence are given priority during the award process for the digital licence, and if their application is successful, they are automatically granted a five-year extension to their analogue licence. Calls for

interest took place in 2008 for the 19 most densely populated areas of France. The CSA is currently examining the expressions of interest that were submitted, and the award decision is due shortly. The licences to be awarded will run for ten years, from 2009 to 2019. Calls for interest for digital licences for some other parts of the country will be held in 2009, with licence award in 2010. The same criteria apply to the award of digital licences as for analogue licences. The only differences are the duration of the licence (ten years for digital, five for analogue), and additional specific technical requirements for digital. The renewal process set out in Article 28-1 will apply to digital licences, enabling the renewal of licences for two five-year periods.

5.4 Policy considerations, legal experiences and evaluation

Licences for analogue radio are awarded by means of a beauty contest for a period of up to five years. The original 1986 Law made no provision for a renewal process. However, commercial operators complained about the lack of legal certainty entailed by the absence of such a process. The law was therefore modified in 1994 to introduce a renewal process, allowing two five-year renewal periods.

There are very few cases where the CSA has rejected applications for renewal, based on its assessment of Article 28-1 criteria. For example, of the 138 renewal applications submitted to the CSA in 2006, only two were rejected.⁸ Similarly, of the 282 applications submitted in 2007, only 2 were rejected.⁹

There have been several cases where the CSA's refusal to renew a licence have been challenged in court by unsuccessful applicants. Two of these challenges concerned the criterion, added by the 2000 Law, according to which the CSA has to assess whether the financial situation of the holder means that the service cannot be delivered in a satisfactory manner:

- In an order dated 26 March 2002, the Conseil d'Etat (the French administrative supreme court) ordered suspension of the CSA's decision to refuse to renew the licence of SAPRODIF Méditerranée FM. The Conseil d'Etat decided that the CSA's decision had been based on hypothetical financial risks, not on enough material elements.
- In an order dated 7 July 2006, the Conseil d'Etat confirmed the CSA's decision not to renew Gold FM's licence, on the grounds that the applicant's deteriorating financial situation had an impact on its programming services. Through this order, the Conseil d'Etat specified the conditions under which the CSA might refuse to renew a licence on the basis of the financial situation criterion.

⁸ 'Nord Sarthe FM' did not fulfil the financial criteria, and 'Flash FM' no longer met the thematic criteria of Category A.

⁹ Neither SA Livecard Sport (Radio Live) nor SAS Onlysport France (Radio Événement) provided all the information needed for a successful application.

- The Conseil d'Etat also issued an order relating to the CSA's implementation of a change of licence category criterion. In its order dated 9 February 2004 relating to Association Radio Calaisis – Radio TSF, the Conseil d'Etat found that the CSA's refusal decision was justified.

The interviewee indicated that the CSA has not experienced any tension between the licence award and renewal processes implemented in France and the requirements of EC regulation. From the interviewee's experience, the Authorisation Directive has never been invoked by an unsuccessful operator when challenging a licence decision or a renewal decision of the CSA. Because no digital licences have been granted yet, the CSA has no experience of any possible conflict between EU regulations and French legislation providing for a five-year extension to an existing analogue licence coupled to the grant of a digital licence.

5.5 Conclusion

In France, commercial analogue and digital radio licences can be extended up to twice, each for a period of five years, on the basis of criteria that are usually met by the applicant. The option for extension was introduced in 1994 (that is, three years after the first commercial licences were issued), in order to give commercial operators greater legal certainty. At that time, the CSA had considered if there was interest from competing parties, but that was not the case.

Upon expiry of any extensions, a licence is re-assigned by means of a beauty contest. With the first commercial analogue licences having been assigned in 1991, many had to be re-assigned in 2006–2008. However, in 2006 a law exceptionally extended some of the licences until 2007 and 2008. This legislative change was therefore announced before expiry of the licences, and was motivated by the need to replan the AM/FM spectrum.

For the integral simulcast digital broadcasting of an analogue radio service already authorised, the CSA may grant licences for use of the same analogue radio spectrum for an additional five-year period, without organising a call-for-interest process.

The French case therefore shows that licences are issued on the basis of a competitive process, except for digital licences that are linked to an analogue licence (simulcast). Extensions are either the result of legislation (which specifies that two five-year renewals are possible), or motivated by other policy objectives (e.g. frequency replanning or the introduction of digital radio).

The only example of a legal case that the CSA lost highlights the risk of refusing a licence on the basis of a hypothetical financial risk. We have found no indication that the CSA has experienced any tension between the licence award and renewal processes implemented in France and the requirements of EC regulation.

6 Germany

Because of the federal government structure in Germany, there is no single relevant national authority. To enable us to gain a national perspective, in Germany we held an interview with BNetzA (which is responsible for transmission licences, but not for content broadcast licences), rather than with individual State Media Authorities. This interview was complemented by desk research and consultation with legal experts familiar with the German broadcasting sector, in order to illustrate generalised findings with State-specific examples.

6.1 The licensing situation

Commercial broadcasting has existed in Germany since the mid-1980s, when the first commercial licences were awarded. The Interstate Treaty on Broadcasting from 1987 set the course for a “dual broadcasting system”, with the side-by-side existence of public and commercial broadcasting.

There are between 300 and 400 radio content broadcasters in Germany. These broadcasters are typically focused on a particular State. With the exception of Deutschlandradio, there are no nationwide licensed broadcasters.

Content broadcast licences are awarded via beauty contests, at Federal State level. The duration of content broadcast licences varies by State, but is typically around eight years. When a licence expires it can easily be extended; this is typically what happens in practice, due to a lack of interest from other parties. The formal procedure is that when a licence expires, if there is no interest from other parties, a process is followed to extend the licence. However, if other parties are interested in the licence, then a beauty contest is started. In practice, it is very rare for a licence not to be re-assigned to the incumbent.

Analogue frequency assignments are issued at a federal level. They are unlikely to be simply extended when they expire, because there is likely to be more interest and competition for them. When they are assigned, several criteria have to be considered, as listed in Section 6.2.2. Frequency assignments for commercial analogue stations have been awarded on a regular basis since the introduction of commercial broadcasting in the 1980s. Over that period, a number of different regulatory approaches have been used. Initially, state-owned Deutsche Telekom operated the transmission infrastructure. Commercial broadcasters established a contract with Deutsche Telekom for the transmission of the content they provided. The duration of this transmission contract was typically aligned with the duration of the content broadcast licences.

The latest general regulatory change was the coming into force of the Telecommunications Act in 1996 (amended in 2004). Since 2008, new analogue frequency assignments generally have a duration of no longer than ten years, and in any event not beyond December 2015.

6.2 The national legal framework

6.2.1 Introduction

Germany's two-tier government (federal and state) is reflected in the country's broadcasting legislation and the distribution of responsibilities for broadcasting:

- Federal States have sole responsibility for culture and media, including broadcasting. It is therefore the responsibility of the 14 State Media Authorities to enforce EU and German broadcasting law as laid out in the Interstate Treaty on Broadcasting and in the individual State broadcasting laws. In particular, the State Media Authorities are in charge of licensing private broadcasters and supervising their compliance with obligations placed on them by statute and by the terms of their licences.
- The Federal Network Agency (BNetzA) is the federal telecoms regulator, with responsibility for all aspects of communications regulation that do not fall under the Federal States' jurisdiction. With regard to broadcasting services, BNetzA's competencies are restricted to the technical aspects of the broadcast transmission process. This includes licensing broadcast network operators and securing efficient and interference-free use of frequencies in accordance with the Telecommunications Act of 22 June 2004, as amended, taking into account broadcasting interests. BNetzA is, however, not allowed to apply any content-related criteria and must abide by the State Media Authorities' licensing decision when awarding a transmission licence to a particular broadcaster.

So, the State Media Authorities of individual States regulate the content side of broadcasting (in terms of licensing and supervision), on the basis of their own regulatory framework. The federal government is responsible for issuing transmission licences, assigning frequencies and general spectrum management. The regulatory and contractual relationships between the relevant parties can be summarised as shown in Figure 6.1 on the next page.

There is no regulatory involvement in frequency assignment at the State level, and no involvement in content distribution at the federal level. It should be noted that a content broadcaster and a frequency assignment holder could be part of one and the same organisation, as is the case for e.g. regional public providers like Westdeutschen Rundfunk (WDR) and other ARD providers (Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik). In this case, however, there is a regulatory split between the two parts of the organisation.

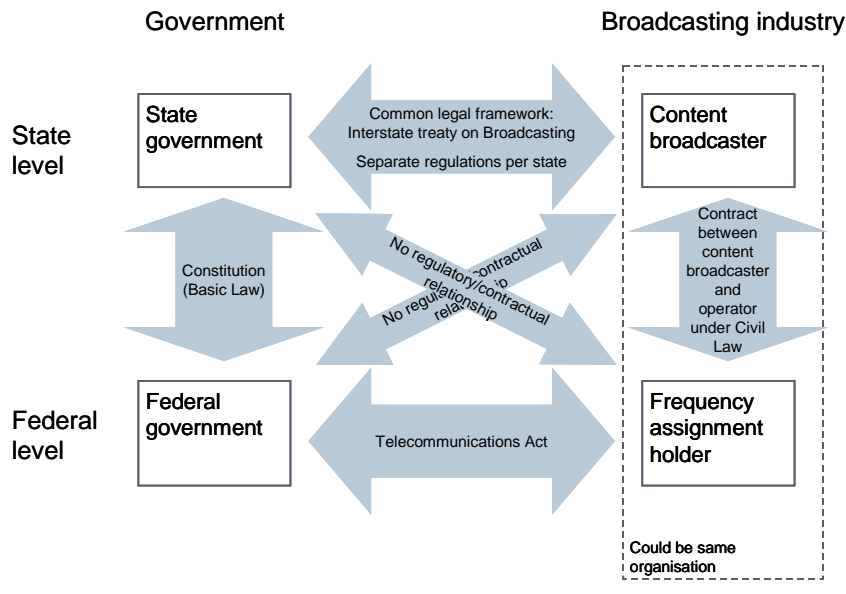


Figure 6.1: Regulatory and contractual relationships in the German broadcasting sector [Source: Analysys Mason, 2009]

6.2.2 Transmission licences

BNetzA is responsible for spectrum management and for assigning frequencies to operators in accordance with the Telecommunications Act of 22 June 2004, as amended. In accordance with Section 55 (8) of the Telecommunications Act, frequencies are assigned for a limited period, with the “possibility of extension”. This time limit shall be appropriate to the service concerned.

On 4 April 2008, BNetzA issued binding guidelines relating to the assignment of broadcast frequencies. The document sets the overall framework for BNetzA to assign terrestrial frequencies for radio and TV use (both analogue and digital). In particular, it is provided that all frequencies shall only be granted for a limited period of time, namely (i) in general for no longer than ten years, and (ii) in any event not beyond 31 December 2015 (for analogue radio) or 31 December 2025 (for digital radio and TV), respectively.

Under Section 61, where frequencies are not available for assignment in sufficient numbers or where more than one application has been made for particular frequencies, BNetzA may conduct an auction or invite tenders. Both award processes shall be governed by “objective, transparent and non-discriminatory” rules in accordance with the EU framework provisions (Section 55(1)). Frequencies intended for broadcasting services, however, shall only be awarded through tendering processes (i.e. beauty contests), as provided by Section 61(2).

Several criteria are to be considered during tendering processes (Section 61(6)):

- the tenderers’ specialist knowledge and efficiency
- the suitability of their plans (on aspects such as financial proposal, technology, commercial planning and coverage) for providing the telecoms service for which the tender has been invited, and
- the promotion of sustainable competition in the market.

In this selective procedure, preference is given to tenderers ensuring a higher degree of coverage of the particular telecoms services. It is specified that where the outcome shows several tenderers to be equally well placed, the decision shall be made by drawing lots. However, this does not apply to frequencies intended for broadcasting services.

Section 55(10) provides that a frequency assignment may be denied in full or in part when the use intended by the applicant is incompatible with the regulatory aims set out in Section 2(2), i.e.:

- to safeguard user interests
- to secure fair competition
- to encourage efficient investment in infrastructure and promote innovation
- to ensure provision of universal services
- to promote telecoms services in public institutions
- to secure efficient and interference-free use of frequencies
- to secure efficient use of numbering resources and protect public safety interests.

6.2.3 Broadcast licences

The Federal States are responsible for the content transmitted and for supervising those who broadcast programmes, in accordance with the Interstate Treaty on Broadcasting and the relevant State laws. Under Section 20 of the Interstate Treaty on Broadcasting, commercial broadcasters require a licence, pursuant to State law. These licences are granted by the State Media Authorities in accordance with the licensing principles set out in Section III, Subsection 1, Article 20 of the Interstate Treaty on Broadcasting and the relevant State legislation. Once a broadcaster has been licensed by a State Media Authority, it remains under the jurisdiction of this authority but also has the right to broadcast in any other Federal State. As a consequence, a nationwide commercial broadcaster does not need a separate licence from each individual State Media Authority.

The Interstate Treaty on Broadcasting only provides a specific framework for the award of licences to nationwide (TV and radio) broadcasters (Article 20a). The licensing procedures for regional and local broadcast services (which, for radio, are in practice far more important than the nationwide framework, because to date there is no nationwide commercial radio in Germany) are subject to individual State legislation. The detailed rules vary from State to State, but the underlying principles are similar. Firstly, not every individual or organisation can become a licence holder: public bodies (including public broadcasters), government authorities, political parties and their respective affiliates are excluded. Moreover, a licence applicant must provide evidence of sufficient financial, technological and organisational means to run a broadcast station. Where there is a scarcity of available frequencies (as is generally the case with analogue radio), the State Media Authority shall award the licence in a beauty contest, based on plurality criteria. Once granted, a broadcast licence runs for a period of seven to ten years, depending on the respective State legislation, but it can be extended thereafter.

6.3 Link with digitalisation

DAB in Germany covers nearly 85% of the country, with over 180 different radio stations available. Most are simulcasts of FM stations, but there are an increasing number of DAB-only channels. Regular digital multimedia broadcasting (DMB) services are available in 16 main cities, including Berlin, Düsseldorf, Frankfurt, Hamburg, Leipzig, Munich, Nuremberg, Regensburg and Stuttgart.

DAB is used by public and commercial radio broadcasters. The first DAB frequency assignments were made in 1998, with a 15-year duration. In addition, an assignment procedure for Digital Radio Mondiale (DRM) was established in 2005, but this has never been used. In 2008, new legislation limited the duration of new digital frequency assignments to in general ten years, and in any event no longer than December 2025.

Analogue frequency assignments are set to expire in 2015 at the latest, due to the switch-over which is formally planned for that year (but is likely to be delayed). Some States (e.g. Baden-Württemberg) are now considering whether to extend content broadcast licences to 2015, in order to align them with the expiration date of analogue frequency assignments.

It remains unclear what will happen after the analogue frequency assignments expire; AM/FM spectrum may be refarmed, but it could also be re-allocated to AM/FM use. Germany does not yet have an explicit and clear digital migration policy for radio: According to BNetzA, it has proved difficult to define such a policy. According to BNetzA, commercial broadcasters cannot afford to maintain a double transmission infrastructure. Given that only between 300 000 and 400 000 of the total 250 million radio receivers are currently digital, and that between 10 million and 20 million receivers are replaced per year, BNetzA believes that it would take 20 years to replace the entire base, even if digital capability was built into each receiver sold (which is not currently the case). BNetzA does not consider it feasible to maintain a double cost structure for 20 years, and so is reluctant to force broadcasters to invest in digital radio. According to BNetzA, the only valid practical policy is to set spectrum aside for digital use until broadcasters are ready to use it.

At the federal level, financing has been available to stimulate digital radio, but these budgets have recently been cut. Also, the re-launch of commercial radio which was planned for 2009 has been put on hold. However, digital radio plays a major role in the licensing process in many Federal States.

- Firstly, media law in some States (Mecklenburg-Vorpommern, Bremen) gives applicants in a beauty contest a higher score if they can demonstrate regional investment in digital studio capacities.
- Secondly, most media legislation promotes the digital switch-over. This usually means that no (or only few) new analogue content licences are now being issued. However, existing analogue licences are usually legally secure and can be extended at least once on the same terms and conditions as the original licences. Some examples of media legislation facilitating the switch-over are:

- In Saxony, applicants for frequencies with plans for digital use are strictly preferred up to 2010
- In the State of Thüringen, all terrestrial frequencies assigned since 1 January 2004 shall be issued to digital broadcasters only. (An exemption can be granted if the broadcaster also provides service in digital form on a different frequency, or if award of the particular analogue frequency is paramount for securing media diversity)
- The State Media Authority of Baden-Württemberg has the ability to issue licences for analogue broadcasting only, with a rescission caveat if this is necessary to enable the digital switch-over
- In Bavaria, no new licences for analogue broadcasting may be issued after 22 October 2003 (although the media authority may deviate from this principle for reasons of media diversity). However, this rule does not apply to broadcasters using one of the frequencies issued before that date.

6.4 Policy considerations, legal experiences and evaluation

The current regulatory framework in Germany features a clear split between federal licences for networks and spectrum, and State licences for content broadcasting.

As discussed in Section 6.1, content broadcast licences are generally extended due to a lack of competition. As a result, we understand from BNetzA that there is little experience of legal challenges to such extensions. The interviewee indicated that, in general, consideration is given to the issue of radio listeners losing access to existing radio stations, in the event that new entrants were to win the licences. If, however, competing interest does emerge, then a beauty contest is started. In one case, the EC examined decisions by a State regulator, including the length of the licence granted by that State.¹⁰ As a result, in 2003 the EC referred Germany to the European Court of Justice over the media law in the Rheinland-Pfalz region, due to the EC's view that the law was discriminatory and infringed the principle of freedom of establishment by giving licensing preferences to local terrestrial radio broadcasters. The EC partially based its opinion on the finding that the legislation doubled the length of validity of licences already granted (in effect, the licences granted to local broadcasters). Because there were numerous other reasons given by the EC for its view that the legislation had a discriminatory intent, we do not believe that the issue of licence duration alone would have determined the outcome of the case, and we do not believe that this example necessarily provides any lessons for other Member States.

¹⁰ The EC first publicly complained about the German measures in July 2000 (press release IP/00/880, 28 July 2000), but did not take court action until July 2003. See "*Broadcasting services: Commission refers Germany to Court over allocation of radio spectrum*" (press release IP/03/1103, 24 July 2003). We found no update to this case, and the EC's press release reported that Germany was already in the process of repealing the law, and so this may have settled the matter.

Spectrum licences are unlikely to be simply extended, because there is expected to be more competitive interest in them. However, Germany has no experience of this issue either, as the first licences issued under the Telecommunications Act do not expire until 2013. It should be noted that before the 1990s, state-owned Deutsche Telekom operated the transmission infrastructure and generally established contracts with commercial broadcasters. These contracts were typically aligned with the content contracts between these broadcasters and the Federal State.

6.5 Conclusion

The split between spectrum and content licensing, and the fact that the latter is the responsibility of individual States, makes the German radio licensing situation quite different from that in the Netherlands.

For both types of licence, however, the general procedure seems to be to:

- advertise the licence to gauge the level of interest from other potential licensees
- re-assign the licence to the incumbent if there is insufficient interest from other parties
- if more parties are interested in the licence, use a beauty contest (or an auction in some cases).

Spectrum licences are assigned for a limited period, with the “possibility of extension”. With the first frequency assignments only due to expire in 2013, BNetzA has no experience of re-assignments under the Telecommunications Act. However, the interviewee from BNetzA expressed the view that assignments are unlikely to be extended, because there is expected to be significant interest from competing parties.

Content licences run for a period of between seven and ten years, depending on the respective State legislation, but can be extended thereafter. In practice, due to lack of competition, content licences are typically extended. However, the formal process is that, when a licence expires, if there is no interest from other parties, then a process is followed to extend the licence. In contrast, if other parties are interested, then a beauty contest is begun. The federal Telecommunications Act implicitly rules out the use of auctions as the mechanism for frequency assignment.

In practice, it is very rare for a licence not to be re-assigned to the incumbent. Some States are now considering whether to extend all analogue content licences in order to align them with the expiration of analogue transmission licences in 2015. Without a formal beauty contest, it can be questioned whether this approach would comply with the Authorisation Directive. However, there appear to be strong grounds for such an approach, with many States no longer (or hardly ever) issuing new analogue content licences.

7 Ireland

7.1 The licensing situation

In Ireland, commercial radio was established by the 1988 Radio and Television Act. A number of problems arose during the period when commercial radio had just been introduced in Ireland: it appeared that some licensing areas were too small to support a profitable business, and some radio stations suffered from undercapitalisation. As a result, according to the interviewee, by the late 1990s there was a reluctance to issue new licences, as it would have hindered the slow process towards profitability for existing licensees in the emerging industry.

The local commercial licences that were issued as a result of the 1988 Act had a seven-year duration, but could be extended once for another seven years. The extension was awarded on request, but the licence could be subject to some changes. The first commercial licences were issued in 1989 and hence expired in 2003.

In 2001, expressions of interest were invited by the Broadcasting Commission of Ireland (BCI) before re-advertising licences that were due to expire from 2003 onwards, in line with the 1988 Act¹¹. The BCI awards licences through a beauty contest process. Applications are decided upon through a majority vote of the six BCI board members, with the chairman having the casting vote. The incumbents have usually been successful in these beauty contests. The interviewee from the BCI indicated that the main reason for this was a general lack of competition, with the industry being reluctant to apply for ‘somebody else’s licence’.

From 2001, the BCI started considering what kind of additional licences would be desirable. It was felt that, with local radio stations primarily focused on audiences aged 25 years and older and with an emphasis on local news and music, younger audiences were underserved. Therefore, it was felt that there was scope for a regional station targeting the youth audience. As a result, Beat FM, targeting the youth, became the first *regional* commercial radio station. More generally, the BCI has been considering how to improve the service to other segments, at all levels (national, regional and local), and is currently in the process of licensing a multi-city licence targeting audiences 45 and older, and a classic rock licence.

BCI invited applications for national and quasi-national licences in December 2005. The only applicants for these licences, in March 2006, were Today FM and Newstalk 106. BCI awarded a licence to Today FM immediately, and to Newstalk 106 after a public oral hearing. It signed ten-year contracts with these licensees (in September 2006 for Today FM and in March 2008 for Newstalk 106). The process for licensing a quasi-national religious radio station was slightly more

¹¹ As result of failure of the initial *national* licensee in 1991, this licence already had already been re-assigned in 1996 for ten years, with no option for renewal.

competitive, as two stations were invited to a public hearing and the new licence was awarded in April 2007 to Spirit Radio.

To summarise, at present Ireland has 1 licensed national commercial radio station (Today FM), 1 quasi-national commercial station (Newstalk), 4 regional commercial stations and 26 local commercial stations. Besides these commercial stations, there are a range of public, community, community-of-interest and institutional services. All licences issued for national, regional, local and special-interest services have a duration of ten years. Licences for community, community-of-interest and institutional services have a duration of five years. There are also temporary licences which cover 20 days in a 12-month period.

7.2 The national legal framework

7.2.1 Introduction

The Irish radio licensing framework is based on three main acts: the Radio and Television Act 1988, the Broadcasting Act 2001, and the Broadcasting (Amendment) Act 2007. When enacted, the Broadcasting Bill 2008 will amend all three of these acts, and consolidate 50 years of Irish broadcasting legislation. The Bill will also establish a single content regulator, the Broadcasting Authority of Ireland, which will assume the regulatory and complaint roles currently held by the BCI and the Broadcasting Complaints Commission. The Broadcasting Bill, published on 14 May 2008 and recently amended by the Select Committee on Communications, Energy and Natural Resources in December 2008, is expected to be enacted by the end of February 2009 and to come into force in the following months.

The Irish legislative framework applicable to commercial radio services distinguishes between sound broadcasting contracts, digital content contracts and multiplex contracts, as explained below.

7.2.2 Sound broadcasting contracts

Sound broadcasting contracts are defined as contracts under which sound broadcasters have a right and duty to establish, maintain and operate sound broadcasting transmitters serving the areas specified in the contract and to provide a sound broadcasting service (Section 4 of the 1988 Act; Section 63 of the Broadcasting Bill 2008).

A sound broadcasting contractor shall not be authorised to operate a broadcasting transmitter and to provide a broadcasting service under a broadcasting contract unless the Minister for Communications has issued to the Commission (the Independent Radio and Television Commission under the 1988 Act, which became the BCI under the Broadcasting Act 2001) a licence in respect of the sound broadcasting transmitter to which the contract relates. Such a

licence is valid for the same period of time as the broadcasting contract (Section 4 of the 1988 Act; Section 59 (2) of the Broadcasting Bill 2008).

Section 5 of the Radio and Television Act 1988 provides for a competitive application process for such contracts. In order to “secure the orderly development of sound broadcasting services and having regard to the availability of radio frequencies for sound broadcasting, to allow for the establishment of a diversity of services in an area catering for a wide range of tastes including those of minority interests”, the Commission invites expressions of interest in contracts for sound broadcasting services by publishing a notice in at least one national newspaper.

The Commission considers each application for a sound broadcasting contract, having regard to several key criteria outlined in Section 6 of the 1988 Act:

- the character of the applicant and its ownership
- the adequacy of its expertise, experience and financial resources
- the quality, range and type of programmes to be provided
- the extent of programmes to be provided relating to Irish culture
- the extent to which the applicant will create new opportunities for Irish talent
- the desirability of having a diversity of services in the area specified in the notice.

The Commission shall also have regard to the overall quality of the performance of the applicant with respect to the provision by him of a sound broadcasting service under any sound broadcasting contract held by him, at or before the date of the application (Section 60 (4) of the Broadcasting Act 2001).

The Broadcasting Bill 2008 will include a financial bid as an additional criterion in the beauty contest. Under Section 66 (1) of the Broadcasting Bill 2008, the newly created Contract Awards Committee shall consider, where directed by the Broadcasting Authority of Ireland (the “Authority”), the amount of a cash sum payment, as specified by the applicant during the course of its application, which the applicant is willing to pay to the Authority in respect of the award of the broadcasting contract.

Contracts for temporary sound broadcasting services may be concluded, for a period of up to 14 days. After the Broadcasting Bill 2008 comes into force, contracts for temporary services will be available for up to 30 days (Section 68 of the Broadcasting Bill 2008). Special conditions regarding the type of programmes to be broadcast are to be attached to these temporary contracts.

Special conditions in relation to programmes and advertisements shall be attached to sound broadcasting contracts. In particular, under such contracts, sound broadcasters shall ensure that a minimum of 20% of broadcasting time is devoted to news and current affairs programmes, provided no derogation is authorised by the Commission.

The terms and conditions of a sound broadcasting contract must specify its duration, as well as whether a contract may be renewed and, if so, the manner in which, the terms on which, and the period for which, the contract may be so renewed.

The Broadcasting Bill 2008 introduces a new fast-track extension application process that can be invoked at the discretion of the Contract Award Committee (CAC) when the only response made in good faith pursuant to the public notice is received from the incumbent, i.e. the holder of the existing sound broadcasting contract. Under Section 67 of the 2008 Bill, where the CAC decides to invoke this process, it shall issue a public notice on the Authority's website. If a person, other than the incumbent, within 28 days of publication of the notice, either submits in writing that it will apply for the award of a sound broadcasting contract or deposits a sum with the Authority not exceeding EUR25 000, then the CAC shall invite applications for award of the sound broadcasting contract or refer the matter to the Authority for direction. If no written submission or associated deposit are received, the CAC invites the incumbent to propose amendments to the terms of its existing sound broadcasting contract. After considering the changes proposed by the incumbent, the CAC shall either reject them and then proceed to a call-for-interest process or recommend that the Authority accepts the amended contract terms with the incumbent. Under the 2008 Bill, any contract extension shall be for a maximum of seven years.

7.2.3 Digital content contracts

Under Section 12 of the Broadcasting Act 2001 as amended by the Broadcasting (Amendment) Act 2007, the Commission may enter into a digital content contract with a person whereby that other person may supply a compilation of programme material for the purpose of its being transmitted as a broadcasting service by digital means. No competitive process is provided for such contracts under the Broadcasting Act 2001 as amended.

Digital content contracts contain specific conditions governing the content of the programmes broadcast and the sum of money the holder will pay if it fails to comply with the terms and conditions of the contract.

Section 55 of the Broadcasting Act 2001 provides that the terms and conditions of a sound broadcasting contract shall specify its period of validity as well as whether a contract may be renewed and, if so, the manner in which, the terms on which, and the period for which, the contract may be so renewed.

7.2.4 Multiplex contracts

Section 8 of the Broadcasting (Amendment) Act 2007 provides for a competitive application process for multiplex contracts. The Independent Radio and Television Commission (IRTC), having regard to the availability of radio frequencies for multiplexes, invites applications for multiplex contracts and may enter into such contracts.

The IRTC shall consider each application for a multiplex contract received having regard to several criteria outlined in Section 9 of the Broadcasting (Amendment) Act 2007. These criteria include:

- the character of the applicant and its ownership
- the adequacy of its expertise, experience and financial resources
- the proposed range and type of programme material or compilations of programme material to be included in the multiplex
- how the applicant proposes to secure continued inclusion of such material
- the technical proposal regarding the establishment, maintenance and operation of the proposed multiplex.

Section 10 of the Broadcasting (Amendment) Act 2007 provides that the terms and conditions of a multiplex contract shall specify its period of validity as well as whether a contract may be renewed and, if so, the manner in which, the terms on which, and the period for which, the contract may be so renewed.

Incentives are provided for digital terrestrial sound broadcasting (DTSB). Firstly, when transmitting in digital mode there is no statutory requirement to ensure that news and current affairs make up 20% of programming. Secondly, under Section 134 of the Broadcasting Bill 2008, when a call-for-interest process is organised for sound broadcasting multiplex contracts, the existing sound broadcasting contractors (the “relevant incumbents”) may be offered a simulcasting contract extension. The duration of the existing sound broadcasting contract shall not exceed four years.

7.3 Link with digitalisation

The interviewee from the BCI pointed out that take-up of digital radio in Ireland has been low so far, but that WiFi/Internet radio is now beginning to emerge. The interviewee therefore mentioned that there are doubts about the commercial viability of DTSB.

Ireland does not have a switch-off policy for analogue radio. In 2008, the regulator ComReg held a consultation and published its responses. As a result of this consultation, ComReg has stated that its intention is to introduce digital sound broadcast multiplex licences with a duration of ten years, as respondents indicated a broad level of support for this duration. It should be noted that ComReg issues these licences to RTE (Ireland’s national TV and radio broadcaster) and BCI. In turn, BCI can pass the benefit and obligations of these licences to third parties, and determine the duration of those contracts.

Ireland has been closely monitoring the UK’s policy on the digital switchover, as spectrum issues will have to be co-ordinated between the two countries. No decision has been taken in Ireland about which digital technology will be used, but the fact that the public broadcaster RTE already uses DAB may influence this decision.

The Broadcasting Act 2001 provided the basis for the digitalisation process in Ireland, which includes digital terrestrial radio. However, according to the interviewee priority has always been given to TV. There have been a number of digital radio trials, and the public broadcaster operates a

digital multiplex, but no commercial digital terrestrial radio licences have been issued. It seems clear that players in the market are focusing on FM.

The BCI has implemented two regulatory incentives relating to DTSB. Firstly, when transmitting in DTSB there is no statutory requirement for local news to make up 20% of programming. Secondly, under Section 134 of the 2008 Bill, a ‘relevant incumbent’ will have its licence extended for four years if this station simulcasts on a digital terrestrial basis. It is possible that this four-year period may be extended before this legislation is enacted, as market players believe that the current incentive is insufficient.

7.4 Policy considerations, legal experiences and evaluation

The BCI assigns licences using beauty contests because this enables it to maintain diversity and plurality. The interviewee pointed out that the relative popularity of radio in Ireland can be attributed to the large amount of local content that stations broadcast: 20% of time is dedicated to local news and current affairs, and there is ample provision for local Irish musical tastes. The 2008 Bill will introduce a financial bid as an additional criterion in the beauty contest selection process.

In Ireland, there have been several cases where licences were not renewed or extended, and the BCI has been challenged on its decisions a couple of times. In Ireland, such challenges are brought to court by way of judicial review, which focuses on whether the processes were followed correctly, not on the merits of the decision. The BCI has always won the cases brought against it.

In a case brought by North West Radio (NWR) against the BCI and North West Broadcasting limited (Ocean FM Radio), NWR challenged the BCI’s decision to re-assign its radio franchise licence for the area of Sligo Donegal/North Leitrim to another radio operator, Ocean FM Radio. Ocean FM had received its licence following a call-for-interest process, which was held after NWR’s licence had already been extended automatically for seven years.

This led to significant controversy, with NWR claiming that many listeners were disappointed. According to NWR, the BCI gave three reasons for not re-assigning the licences to NWR:

- The BCI considered that there should be more indigenous programming, instead of shared programming
- The BCI considered that, given the expected demographics of the region over the next ten years, a new station catering for a younger audience may be appropriate
- The BCI allegedly also mentioned that there were some shortcomings in the facilities that NWR provided for people with disabilities.

In challenging the BCI’s decision, NWR argued that it was in breach of the Framework Directive requirements for transparency, non-discrimination and proportionality, and in breach of requirements regarding appeal procedures, since no appeal was available that would reconsider the merits of NWR’s application.

In the judgement delivered on 23 June 2004, Mr Justice Michael Peart stated that the “[Framework] Directive had no relevance to the process of granting sound broadcasting licences such as the one under consideration in these proceedings”. According to Mr Justice Michael Peart, that process is concerned with the type of applicant, the nature of the proposed programming content, the financial viability and appropriateness of the proposed operation and the general suitability of the applicant for the licence. Mr Justice Michael Peart based his judgement on Recital 5 of the Directive, pursuant to which: “It is necessary to separate the regulation of transmission from the regulation of the content. This framework does not therefore cover the content of services delivered over electronic communications networks, financial services and certain information society services”. Mr Justice Michael Peart concluded that the Framework Directive relates to the regulation and assignment of radio frequencies, rather than the award of sound broadcasting contracts, and that NWR’s arguments based on this Directive were therefore not relevant to the case.

With the exception of the NWR case, according to the interviewee, the BCI has not experienced any tension between award processes implemented in Ireland and the requirements of EC regulation. The competitive process implemented in Ireland is based on the prevailing principles of pluralism and diversity, set out in the EU framework.

In the Kilkenny/Carlow/Kildare area, a re-organisation of district boundaries led to some local radio stations losing their licences in 2003 to CK Broadcasting Ltd (KCLR-FM) and Co Kildare FM Radio Ltd. This led to protests and lengthy court proceedings, as three companies, Carlow-Kilkenny Radio Ltd, Kildare Radio Ltd and Carlow-Kildare Radio Ltd challenged the decision of the BCI.

In a separate case, Kilkenny Community Communications Co-Operative Society Ltd (which had failed to have its broadcast licence for Kilkenny renewed), challenged the BCI’s decision to grant a licence to KCLR-FM.

Both cases went to the High Court and Supreme Court for hearing. In a judgement delivered on 31 July 2003, the Supreme Court rejected appeals by the plaintiff companies against the High Court’s decisions rejecting their applications that the BCI produce documentation relating to the manner in which the Commission assessed applications. The BCI was found to have acted properly.

The BCI gave no reasons for denying the licences to the incumbents, but news articles on the decision suggest that for one of the incumbents, a lack of local representation on its Board area may have played a role.

Despite these few cases, the BCI notes that the incumbents are generally in a better position to succeed in a beauty contest, because one of the criteria on which applicants are assessed is their relevant track record.

There has been at least one case, involving Radio Limerick One, in which a licence was withdrawn for breaches of statutory and contractual conditions.

7.5 Conclusion

The commercial licences that were issued as a result of the 1988 Act had a duration of seven years, but could be extended once for another seven years. The extension was awarded on request, but the licence could be subject to some changes. The first commercial licences had been issued in 1989 and hence expired from 2003, after which they were re-assigned by means of a beauty contest.

Besides the licence extension as an incentive to invest in digital radio, the BCI also is also relaxing some of its 'local content' requirements. Also, the 2008 Bill is likely to introduce the possibility for a four-year extension to an existing sound broadcasting contract to be offered to an analogue incumbent that wins a sound broadcasting multiplex contract for simulcast purposes.

The BCI indicated that despite the competitive process it uses for re-assigning licences, incumbents are generally successful when they re-apply for licences that have expired. This is partly because of a lack of competition (with potential players reluctant to apply for 'somebody else's licence'), and partly because incumbents are better positioned for a beauty contest in which one of the criteria is evidence of a relevant track record.

Although the BCI assigns licences by means of beauty contests, the 2008 Bill will introduce a financial bid as an additional criterion in the beauty contest. The 2008 Bill will also introduce a fast-track procedure for re-assigning a licence to the incumbent in cases where there is no competing interest.

The BCI has always won legal cases brought following challenges to its licensing decisions. The BCI believes that it has won cases because it has always followed the procedures correctly. The NWR case provides important jurisprudence on the applicability of the Authorisation Directive to radio licensing, with the judge concluding that the Directive relates to the regulation and assignment of radio frequencies, rather than the award of sound broadcasting contracts, and that NWR's arguments based on this Directive were therefore not relevant to the case.

8 UK

8.1 The licensing situation

The UK has three nationwide commercial radio licence holders, one transmitting in the FM band (Classic FM) and two in the AM band (Absolute Radio [formerly Virgin] and TalkSport). These national commercial licences were awarded by auction in the early 1990s, as a result of the 1990 Broadcasting Act. The three national licences included conditions relating to programming format. One of the licences could not be used for popular music, a second had to be primarily used for speech, while the format of the third licence should be different from the first two. Provided that these format requirements were met, each licence would simply be awarded to the highest bidder in the auction.

Apart from the three national commercial radio stations, there are about 350 regional and local licence holders in the UK. The first local/regional commercial radio station in the UK was introduced in 1973. Until 2008, local commercial licences were awarded on a regular basis.

The original duration of commercial radio licences was eight years, but when licences expire they have generally been extended. Firstly, the 1996 Broadcasting Act introduced the possibility of a (one-time) licence *renewal*, which added another eight years to a licence in return for provision of a DAB service. The addition of DAB to the licence constitutes a material change, hence the reference to a licence renewal instead of an extension. In this way, 8-year analogue licences could, on request, effectively be converted into 16-year analogue-plus-DAB licences. Secondly, the 2003 Communications Act included a provision for all analogue licences to be extended on request by four years (*extension*), in order to align them with the DAB licence duration of 12 years, as established by the 1996 Broadcasting Act. Note that this implies that these renewals and extensions were provided before the licences had expired.

As a result, the licence of the national FM licence Classic FM, which began broadcasting in 1992, will expire in 2011. The licence held by TalkSport (the national AM service which has been broadcasting since 1995) will expire in 2012, as will that of Absolute Radio (the second national AM service, which took over Virgin Radio in 2008).

Because the licensing of local and regional licences began in the 1970s, such licences have already expired following extension periods. Expired licences have been re-allocated on the basis of beauty contests, which have often resulted in licences being re-assigned to the incumbent (although there are six or seven cases where expired licences were assigned to another party).

8.2 The national legal framework

8.2.1 Introduction

The UK radio licensing framework is based on three main acts: the 1990 Broadcasting Act, the 1996 Broadcasting Act and the 2003 Communications Act. The UK legislative framework for commercial radio services distinguishes between analogue sound broadcasting licences, radio multiplex licences, and digital sound programme services licences, as described below.

8.2.2 Analogue sound broadcasting licences

Different award processes are used for the assignment of national and local licences. Whereas national licences are awarded by auction, beauty contests are used for local licences.

National licences

Sections 98, 99 and 100 of the 1990 Broadcasting Act provide for a competitive process for the award of national licences. Pursuant to Section 98, where the Radiocommunications Authority (which was replaced by Ofcom under the 2003 Communications Act) proposes to grant a licence to provide national service, it must publish a notice inviting applications for the licence. Any application has to be accompanied by the applicant's proposals for providing a service that would consist of a diversity of programmes calculated to appeal to a variety of tastes and interests, and by the applicant's cash bid in respect of the licence.

Under Section 99, the Authority shall not proceed to consider whether to award the applicant the licence on the basis of his cash bid, unless it appears that the applicant's proposed service meets diversity requirements.

The national licence shall then be awarded to the applicant submitting the highest cash bid, in accordance with Section 100 of the 1990 Broadcasting Act. In exceptional circumstances the Authority may disregard this requirement and award the licence to an applicant who has not submitted the highest bid. Under Subsection 11 of Section 100, the Authority may instead decide that it would be desirable to publish a fresh notice under Section 98 in respect of the grant of the licence, i.e. it may invite further applications for the licence.

In order to promote simulcast radio services, Section 257 of the 2003 Communications Act introduces another exception to the Section 100 rule that a licence should be awarded to the applicant making the highest cash bid. If, in a situation where one or more applicants proposes to provide a simulcast radio service corresponding to the service to be licensed, the highest cash bid is made by an applicant who is not a simulcast applicant, Ofcom may:

- disregard the requirement provided by Section 100 according to which the licence shall be awarded to the person submitting the highest cash bid, and
- award the licence to the simulcast applicant whose cash bid is the highest of the bids submitted by simulcast applicants.

Local licences

Sections 104 and 105 of the 1990 Broadcasting Act specify the award process to be used for the grant of local licences. Under Section 104, where the Authority proposes to grant a licence to provide local service, it should issue a notice inviting applications for that licence. To be eligible for licence award, applicants must submit a proposal that takes account of local interests. A proposal to provide a service has to cater for the tastes and interests of persons living in the area or locality for which the licence would be provided, or for any particular tastes and interests of such persons, and should broaden the range of programmes available by way of local services to persons living in that area or locality.

It is also specified in Section 104 (5) that if a local licence is due to expire, and the Authority proposes to grant a further licence for that service, a notice shall be published, unless it appears that to do so would not serve to broaden the range of programmes available by way of local services to the people living in the area for which the service is provided.

Section 105 of the 1990 Broadcasting Act sets out special criteria that have to be considered for the award of local licences:

- the ability of each of the applicants for the licence to maintain, throughout the period for which the licence would be in force, the service which he proposes to provide
- the extent to which any such proposed service would cater for the tastes and interests of persons living in the area or locality for which the service would be provided
- the extent to which any such proposed service would broaden the range of programmes available by way of local services to persons living in the area or locality for which it would be provided, and, in particular, the extent to which the service would cater for tastes and interests different from those already catered for by local services provided for that area or locality, and
- the extent to which any application for the licence is supported by persons living in that area or locality.

No cash bid shall accompany the application for local licences.

Expiration, renewal and re-advertisement of licences

As far as the duration of licences is concerned, Section 86 (3) of the 1990 Broadcasting Act provides that national and local licences “shall not continue in force for a period of more than 8 years”. This duration was extended to 12 years by Section 252 of the 2003 Communications Act, in order to align it with the duration of radio multiplex licences.

The 1996 Broadcasting Act gives licence holders the right to apply for their national or local licence to be “renewed on one occasion for a period of 8 years from the date of the renewal”, on condition that, inter alia, they “provide a simulcast radio service broadcasted in digital form”.

In addition, for national licences, where when an application for renewal granted, the simulcast radio service is not yet being broadcast in digital form, the Authority shall determine a date by which the broadcasting of such a service in that form must begin. Where the Authority has determined such a date, “[it] shall include in the licence as renewed a condition requiring a simulcast radio service to be broadcasted in digital form throughout the licence renewal duration”.

For local licences, Section 94 (12) provides that where the Authority renews a licence “[it] shall include in the licence as renewed a condition requiring the licence holder to do all that he can to ensure that the nominated local digital sound programme service is broadcasted by means of the nominated local radio multiplex service throughout the renewal period”. In general, the Authority has the power to revoke the licence if the licensee has failed to comply with any condition of the licence and does not take the steps needed to remedy such a failure. This gives Ofcom the legal basis for revoking the renewed licence of a radio broadcaster if it fails to provide a simulcast service.

Under Section 253 of the 2003 Communications Act, analogue licensees who held national or local ‘pre-transfer’¹² licences can apply for a four-year extension of their licence from the date of expiry.

In general, when a licence expires, Ofcom ‘re-advertises’ it. Ofcom’s notes of guidance for applicants, published on 28 November 2007, set out its general approach to the re-advertisement of local analogue licences for commercial radio. Re-advertised licences will be granted with an expiry date of 31 December 2015 or for a five-year period, whichever constitutes the longer period.

The award process set out in Section 104B of the 1990 Broadcasting Act shall be adopted. The first step is to organise a pre-advertisement phase. Rather than publishing a notice of advertisement, Ofcom may publish a notice, stating that it proposes to grant a further licence in the area, and inviting declarations of intent to apply for such a licence. Such declarations of intent are to be accompanied by an application fee and a cash deposit. Ofcom will not follow this pre-advertisement process:

- where the size of the licensed area is changing significantly
- where it considers that an incumbent licensee’s record of compliance with licence conditions is not satisfactory, or
- where an incumbent licensee does not formally confirm that it would submit a “fast track” application .

¹² A pre-transfer licence is an analogue licence granted under Part 3 of the 1990 Broadcasting Act before the “transfer date” (that is, 29 December 2003) and which has not been modified under this section or renewed at any time on or after that date.

If the only declaration of intent is submitted by the existing licence holder, Ofcom adopts a “fast track” licensing procedure that only involving the existing licensee. Otherwise, Ofcom ‘re-advertises’ the licence, inviting other parties to express interest and participate in a beauty contest.

8.2.3 Digital radio multiplex licences

Section 47 of the 1996 Broadcasting Act sets out the award process for national radio multiplex licences. Where the Authority proposes to grant a licence to provide a national radio multiplex service, a notice shall be published.

In determining whether to award a national radio multiplex licence (and if so, to whom), the criteria that have to be considered include:

- the extent of the coverage area
- the proposed timetables
- the capacity of the digital sound programme services proposed to appeal to a variety of tastes and interests, and
- whether the applicant has acted in a manner calculated to ensure fair and effective competition in the provision of such services.

Regarding the award of local radio multiplex licences, the same process has to be followed. In addition to the criteria used for national radio multiplex licences, other special requirements have to be taken into account (Section 51 of the 1996 Broadcasting Act):

- the extent to which the digital sound programme services proposed to be included in the service would cater for the tastes and interests of persons living in the area or locality for which the service would be provided
- the extent to which any digital sound programme services would broaden the range of programmes available by way of local digital sound programme services to persons living in the area or locality for which they would be provided, and, in particular the extent to which they would cater for tastes and interests different from those already catered for by local services provided for that area or locality, and
- the extent to which any application for the licence is supported by persons living in that area or locality.

Under Section 58 (1) of the 1996 Broadcasting Act, a radio multiplex licence shall continue in force for a period of 12 years. Under Section 58 (2) of the 1996 Broadcasting Act, “a radio multiplex licence which is granted within 6 years of the commencement of this section may be renewed on one occasion for a period of 12 years beginning on the date on which it would otherwise expire”. An application for renewal of a radio multiplex licence may be made by the licence holder not earlier than four years before it would otherwise expire and not later than ‘the relevant date’ (that is, the date when the Authority would publish a notice if it was to grant a fresh licence for that service, as from the date on which that licence would expire if not renewed).

Section 261 of the 2003 Communications Act modifies Section 58 (2) of the 1996 Broadcasting Act. Indeed, under the 2003 Communications Act, “a radio multiplex licence granted within 10 years of the commencement of this section may be renewed on one occasion – (a) in the case of a licence granted within 6 years of that commencement, for a period of 12 years beginning with the date on which it would otherwise expire; and (b) in any other case, for a period of 8 years beginning with that date”.

8.2.4 Digital sound programme licences

Pursuant to Section 60 of the 1996 Broadcasting Act, digital sound programme licences apply to digital sound programmes provided for broadcasting by means of a radio multiplex service. Licences can be national or local.

Applications for such a licence shall be made ‘in such manner as the Authority determine, and be accompanied by such fees (if any) determined by the Authority’. The only circumstances in which the Authority shall refuse to grant a digital sound programme licence are when the applicant is not a fit and proper person to hold the licence or when the applicant is considered as “a disqualified” person pursuant to Part II Schedule II of the 1990 Broadcasting Act.

Pursuant to Section 61 of the 1996 Broadcasting Act, a digital sound programme licence shall continue in force until it is surrendered by its holder.

8.3 Link with digitalisation

With approximately 9 million DAB listeners, digital radio has been relatively successful in the UK. Digital radio currently has a total share of all radio listening of 18.7%¹³. The development of digital radio in the UK is generally considered to be more advanced than in other European countries.

As mentioned in Section 8.2.2 above, current licence holders are entitled to an eight-year extension in exchange for their investment in DAB. Some have expressed the view that in practice, the licence holders which have received such an extension, have in fact not always met their investment obligations. However, our interviewee notes that without the simulcast obligation attached to licence renewals, DAB would be at a much earlier stage of development. As indicated in Section 8.2.2, Ofcom has the right to revoke a licence if the renewal condition to provide a simulcast service is not fulfilled. In practice, this would be difficult to enforce, as the withdrawal of a licence would lead to protests from this large base of listeners.

The Digital Radio Working Group, consisting of digital radio stakeholders and established by the Secretary of State for Culture, Media and Sport recently concluded in its final report¹³ that several measures should be taken to overcome barriers to further development of digital radio:

¹³ Digital Radio Working Group, Final Report, December 2008.

- The commercial radio industry must be granted a further renewal of its (national and local) analogue services which are carried on DAB, and of DAB multiplex licences. This extension should continue until digital migration is achieved
- Requirements on analogue localness should be relaxed. Currently, Ofcom requires that at least 10 hours of programming per day are produced locally
- Ofcom needs to be able to take structural measures, such as the ability to merge multiplexes
- The sector itself should improve the customer proposition by offering new national stations, improving reception quality and co-ordinating marketing efforts.

Ultimately, the DRWG believes these measures should allow the UK to switch over to digital. In its report, the DRWG has set out three criteria that must be met in order to trigger the digital migration process:

- at least 50% of listeners are tuned into digital platforms
- national multiplex coverage must be comparable to FM coverage by the time of migration
- local multiplexes must cover at least 90% of the population, and where practical all major roads within their licence area by the time of migration.

Once these criteria have been met, the DRWG believes that the government should announce a date for digital migration, ideally two years after the criteria have been met. In its report, the DRWG expressed the belief that these criteria can be met by 2015, and consequently migration could begin as early as 2017 (with local services probably being migrated later than national services). The interviewee from Ofcom expresses the opinion that the DRWG report reflects a general consensus in the radio industry and government. However, it was noted that there are still some sceptics regarding DAB.

In January 2009, the Department for Culture, Media and Sport, and the Department for Business, Enterprise and Regulatory reform released the draft Digital Britain report, which, on the subject of digital radio broadcasting, can be considered as the government's response to the DRWG report. In the draft Digital Britain report, the government announced action to support digital radio in seven areas.

- It makes a clear statement of government and policy commitment to enabling DAB to be a primary distribution network for radio
- It will create a plan for digital migration of radio, which it intends to put in place once the following criteria have been met
 - 50% of radio listening is digital
 - national DAB coverage is comparable to FM coverage
 - local DAB reaches 90% of the population and all major roads

- It will create a Digital Radio Delivery Group, which will include the retailers, the transmission networks, the BBC, the commercial radio companies, the car manufacturers, consumer representatives and the device manufacturers; the role of this group will be to increase the attractiveness, availability and affordability of DAB and to advise on the digital migration plan
- It will work with the BBC to explore how the broadcaster could extend its digital radio coverage to replicate at least current FM analogue coverage
- It will conduct a cost–benefit analysis of digital migration (as recommended by the DRWG)
- It will consult on new legislation to allow a one-off five-year extension of existing community radio licences, to bring them in line with other radio licences and recognise the important role they have in delivering social gain. It also intends to re-consider the rationale for the current restriction of 50% of funding from any one source
- It will commission an independent expert examination of the economic viability, continuing social contribution of, and most effective delivery methods for, local radio services existing localness legislation.

Ofcom considers it important that all current licences expire at the same point in time, so that it can intervene if needed for spectrum allocation purposes. Also, Ofcom and the relevant policy makers are considering whether regional licence holders should be allowed to co-operate or merge in order to gain economies of scale and hence improve their business case.

Ofcom stopped assigning new analogue licences in 2008, but recent awards and possibilities for renewal and extension mean that there will still be analogue licences beyond 2020.

8.4 Policy considerations, legal experiences and evaluation

The original 1990 Broadcasting Act deregulated the UK broadcasting industry. The legislation reflected the focus on free markets and privatisation of state-owned enterprises favoured by the government at that time. It implied that the BBC had to give up spectrum to make room for three newcomers. A focus on free markets also motivated the choice of auctions as the assignment mechanism for national licences. Local licences in the UK have always been assigned by means of beauty contests.

Over the past two decades, broadcasters have been able to retain their licences much longer than was stipulated in their original licence conditions. There are a number of reasons for this:

- The *renewal option* offered by the 1996 Broadcasting Act, which was motivated by the need to stimulate investments in DAB
- The *extension option* offered by the 2003 Communications Act, which was motivated by the desire to align the duration of analogue and digital licences

- The high success rate of incumbents in winning the re-assignment. As it is only *local* commercial licences that have expired in the UK to date, re-assignments have always involved a beauty contest. Given the advantages held by incumbents (in terms of experience, established listener base, etc.), beauty contests have often (although not always) resulted in licences being re-assigned to the incumbent.

There are, however, six or seven cases of expired licences being assigned to another party, instead of the incumbent. None of these decisions by Ofcom has ever been challenged by an incumbent, although its decisions have been challenged by other applicants (newcomers) who failed to receive a licence. Ofcom's decisions on those matters can only be questioned in proceedings for judicial review. Applicants have to prove that Ofcom's decision was illegal, irrational or unreasonable. There have been two cases of this kind, both of which were won by Ofcom.

- The first case related to award of the local radio licence for Ashford. The Chairman of A-Ten FM, Francis Wildman, lost his High Court case against the award of this licence to Lark FM in 2005. Francis Wildman argued that the award of the licence to Lark violated the basic human right of the people of Ashford to freely receive "information and ideas". However, the High Court rejected Mr Wildman's challenge and upheld Ofcom's decision, stating that there was "nothing irrational or unfair in this decision". Ofcom gave adequate reasons for the decision, although it did not specifically address why each of the unsuccessful applicants was considered to be less suitable than Lark FM.
- In the second case, John Griersons sought a judicial review in the High Court in relation to the loss of the Cornwall local radio licence, after it was awarded to Atlantic Broadcasting Ltd (Atlantic FM) on 7 March 2005. The case focused on Ofcom's assessment of the criteria that have to be considered in the award of local radio licences (Section 105 of the 1990 Broadcasting Act). The court refused to grant permission for judicial review, and upheld Ofcom's decision. John Griersons did not appeal against the High Court's decision.

When the national licences expire in 2011 (Classic FM) and 2012 (Absolute Radio and TalkSport), Ofcom will have to re-assign the licences using an auction, the first time this mechanism will have been used (in the absence of any policy or regulatory changes). The national licence holders are lobbying for automatic extension of their licences. UK policy makers and legislators are considering whether to allow an extension (possibly an automatic extension) of national licences. However, the interviewee notes that the introduction of an automatic extension could conflict with EU regulations on matters such as state aid. This, according to the interviewee, is still unclear and needs to be considered.

According to the interviewee of Ofcom, the EU framework has not had much impact on regulation in the UK, although the EU framework has had an impact on the allocation of spectrum for TV, at least in relation to the digital dividend.

8.5 Conclusion

The UK regulator uses both auctions (on a national level) and beauty contests (on a local level) to re-assign commercial radio licences. The UK's digital radio market and policy are more mature than those in the Netherlands, which makes the UK an interesting case for the Netherlands.

The UK case suggests that re-assignment decisions based on beauty contests are generally accepted by the market and, if challenged, also by the legal system. However, it should be noted that the grounds on which a party can successfully challenge Ofcom are quite limited (requiring proof that Ofcom's decision was illegal, irrational or unreasonable).

The UK is one of the few countries to (also) use a pure auction mechanism for assigning radio broadcasting licences. To date, however, the UK has yet to experience market response to re-assignments based on that mechanism.

Over the past two decades, broadcasters have been able to retain the right to broadcast much longer than was stipulated in their original licence conditions. There are a number of reasons for this:

- the *renewal option* offered by the 1996 Broadcasting Act, which was motivated by the need to stimulate investments in DAB. In practice, however, the investment obligations have not always been fulfilled by the broadcasters, and it has been difficult to enforce compliance
- the *extension option* offered by the 2003 Communications Act, which was motivated by the desire to align the duration of analogue and digital licences
- the high success rate of incumbents in winning the re-assignment, as a result of lack of interest from other parties (via a 'fast-track' procedure), or because they won the beauty contest (to date, only local licences have been re-assigned, a process which involves a beauty contest).

Although this might suggest that there is a precedent for awarding extensions during the duration of the licence, it has to be noted that these renewals and extensions were granted for specific reasons of public policy. The process whereby incumbents win a licence in a competitive beauty contest is obviously in line with the Authorisation Directive.

Looking forward, however, UK policy makers are considering whether to allow further extensions for existing licence holders.

- In the Digital Britain report, the UK government indicated that it would consider a one-off five-year extension of existing community radio licences, to bring them in line with other radio licences and recognise the important role they have in delivering social gain
- The national licence holders, facing expiry of their licences in 2011/12, are lobbying for automatic extension. UK policy makers and legislators are considering whether to allow an extension (possibly an automatic extension) of national licences. The interviewee from Ofcom indicated that this might be motivated by the government's stated support for DAB and its desire to encourage the radio companies to commit to this platform.

However, the interviewee notes that the introduction of an automatic extension could conflict with EU regulation on matters such as state aid. This, according to the interviewee, is still unclear and needs to be considered further.

9 Conclusions

9.1 Regulatory guidance

In general, lack of interpretation of EU legislation by the courts in individual Member States means that limited guidance is available for national policy makers and legislators on how to reconcile the criteria from EU Directives, requirements from the EU Treaty and national policy goals (see Section 1.2). There is also little guidance on what constitutes an “appropriate duration” for the assignment of radio frequencies in practice, and how this affects the options for extension. As a result of this lack of guidance, to some extent the relevant authorities in the countries researched for this study seem to believe that they have freedom to define licensing and extension policies. To date, these authorities have not reported experiencing any tension between EU criteria or requirements, and their existing national policies on extension. However, in the UK Ofcom has indicated that the award of automatic licence extensions, for which the national licence holders are lobbying, could conflict with EU regulations on matters such as state aid.

In the countries researched, licences are generally assigned on the basis of objective, transparent and non-discriminatory criteria, and there are usually clear circumstances that motivated extensions (see Section 9.2). It should also be noted that EU legislation may allow Member States to offer exceptional extensions in pursuit of ‘general interest objectives’¹⁴.

9.2 Extension policies

Figure 9.1 on the following two pages summarises our main findings regarding the extension policy in each country we have researched. The table provides an overview of the dates of licence awards/expirations and legislation, summarises the duration of licences and extensions, and provides information on the motivations for licence extension.

¹⁴

Article 5.2 of the Authorisation Directive states: "Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law, such rights of use shall be granted through open, transparent and non-discriminatory procedures."

	<i>Key dates in radio licensing</i>	<i>Licence duration, extensions and their timing</i>	<i>Motivations for extensions and other remarks</i>
Belgium (Flanders)	<p>2001: national analogue licences awarded</p> <p>2002–7: local analogue licences awarded</p> <p>2003: regional analogue licences awarded</p> <p>2005: basic regulatory framework</p> <p>2008: complement to regulatory framework on digital radio licensing</p> <p>2009: beauty contest for digital broadcasting multiplex</p> <p>2010: first analogue licence due for extension</p> <p>2016: new frequency allocation plan</p>	<p><i>Analogue licences</i>: 9-year original duration + one 9-year extension</p> <p><i>Digital licences</i>: 15-year original duration + one 15-year extension</p> <p>The government of Flanders has no practical experience of licence extension, because the first licences will not expire until 2010</p>	<p>When licences were originally awarded legislation already provided for a 9-year extension</p> <p>The extension period for analogue licences may now be shortened to facilitate spectrum re-planning; new draft legislation foresees an annual renewal process</p>
Denmark	<p>1988: first local analogue licences awarded</p> <p>2002: basic regulatory framework on programme licences</p> <p>2003: two national analogue licences awarded</p> <p>2004: basic regulatory framework for radio spectrum</p> <p>2005: policy framework reflecting the ambition to free up spectrum for commercial radio and replan spectrum</p> <p>2005: start of digital simulcast by national licensees</p> <p>2006: one national analogue licence re-assigned after original licensee handed back its licence</p> <p>2007: consolidation of regulatory framework on content broadcasting</p> <p>2010: expiration of local licences to allow for spectrum re-planning</p>	<p><i>Existing national programme licences</i>: 8-year duration, no extensions</p> <p><i>New national programme licences</i>: duration to be determined on a case-by-case basis</p> <p><i>Existing local programme licences</i>: until the start of 2006, licences had a 5-year duration and no provision for extension. In 2004/5, extensions were allowed. Since 2007, all existing licences have been extended until the end of 2010</p> <p><i>New local programme licences</i>: new licenses that are issued will expire by December 2010</p> <p>Frequency licences require applicants to have programme licences, and so have the same duration</p> <p>Digital licences have not yet been awarded. National broadcasters have the right and obligation to broadcast on public broadcaster's digital transmission network for the duration of their analogue licence</p>	<p>The extension of existing local analogue licences until end of 2010 was motivated by the need to facilitate spectrum re-planning</p> <p>The 2004/5 extensions were only allowed if they concerned uncontested licences, i.e. licences for which there was no competing demand</p>
France	<p>1986: basic regulatory framework</p> <p>1991: first analogue licences awarded</p> <p>1994: renewal process introduced by law</p> <p>1996: renewal of analogue licences</p> <p>2001: exceptional extension of analogue licences</p> <p>2004: amendment to regulatory framework for digital radio licensing</p> <p>2006: exceptional extension of some analogue licences</p> <p>2006–8: calls for interest in re-assignment of analogue licences</p> <p>2010: award of digital licences in some parts of France</p>	<p><i>Analogue licences</i>: 5-year original duration + two 5-year extensions</p> <p>Such 5-year extensions resulting from the law are usually granted, but licence holders have to fulfil certain conditions</p> <p>In 2006, legislation exceptionally further extended some analogue licences until 2007 and 2008</p> <p><i>Digital licences</i>: 10-year original duration + two 5-year extensions</p> <p>Again, such 5-year extensions are likely to be granted, but licence holders have to fulfil certain conditions</p> <p>When an extended licence expires, it is re-assigned by means of a beauty contest</p>	<p>The possibility to extend analogue licences by 2x5 years was provided by legislation in 1994, after the first analogue licences had been awarded but before EU legislation that culminated in the Authorisation Directive fully matured. The extension option was motivated by a desire to give commercial broadcasters more legal certainty</p> <p>The 2006 exceptional extensions were motivated by the need to facilitate spectrum re-planning</p> <p>The possibility to extend digital licences (to be awarded in 2010) was established by 2004 legislation and so will be known when the licences are awarded</p> <p>The 2004 legislation also gave parties who are awarded a digital licence an <i>automatic</i> 5-year extension to their analogue licence. This automatic extension is intended to stimulate investment in digital radio</p>

	<i>Key dates in radio licensing</i>	<i>Licence duration, extensions and their timing</i>	<i>Motivations for extensions and other remarks</i>
Germany	<p>1980s: first analogue content licences awarded</p> <p>1987: basic regulatory framework for content licensing</p> <p>1996: basic regulatory framework for spectrum licensing</p> <p>1998: first digital spectrum licences awarded</p> <p>2004: amendment to regulatory framework for spectrum licensing</p> <p>2008: binding guidelines on maximum duration of spectrum licences</p> <p>2013: first expiration of spectrum licences</p> <p>2015: formal date for digital switch-over (unlikely to be maintained)</p>	<p>Spectrum licences were originally assigned for a limited period, with the possibility of extension. Binding guidelines in 2008 introduced maximum durations:</p> <ul style="list-style-type: none"> <i>Analogue spectrum licences:</i> no longer than 10 years, and not beyond 2015 <i>Digital spectrum licences:</i> no longer than 10 years, and not beyond 2025 <p><i>Content licences:</i> typical duration of 7–10 years, depending on federal State. When a licence expires, the State regulator investigates whether there is interest from other potential licensees. If so, it holds a beauty contest; otherwise the licence is re-assigned to the incumbent (which happens in most cases)</p>	<p>The possibility to extend spectrum licences was provided by law that predated award of the affected licences. Also, the binding guidelines that specify a maximum duration predated the affected licences</p> <p>The regulator has no experience of re-assigning spectrum licences, but it appears that extensions are unlikely, as the regulator expects significant interest from competing parties</p> <p>Content licences are typically only extended if there is no competing interest, or if the incumbent wins the beauty contest (and has its licence re-assigned)</p> <p>Some federal States are considering extending all analogue content licences to align them with the 2015 expiry date for analogue spectrum assignments. Other States have stopped issuing new analogue content licences</p>
Ireland	<p>1988: basic regulatory framework</p> <p>1989: first (local/regional) analogue licence awarded</p> <p>1996: re-assignment of national analogue licence due to failure of initial licensee</p> <p>2001: call for interest in re-assignment of commercial analogue licences</p> <p>2001: updated regulatory framework</p> <p>2003: expiration of first analogue licence</p> <p>2006–8: re-assignment of national analogue licences</p> <p>2007: amended regulatory framework</p> <p>2009: amendment to regulatory framework</p>	<p><i>Analogue content licences:</i> 7-year original duration + one 7-year extension</p> <p><i>Spectrum licences:</i> because these are coupled to content licences they have the same duration</p> <p>Following expiry, licences are re-assigned (and have usually been won by the existing licensee)</p> <p>The 2008 Broadcasting Bill is likely to grant an additional 4-year extension to existing analogue licences for analogue incumbents that win a sound broadcasting multiplex licence for simulcast purposes</p>	<p>The 7-year extension possibility was specified in the licence itself</p> <p>The 4-year extension allowed by the 2008 Bill provides an additional incentive to invest in digital radio</p>
UK	<p>1970s: local/regional radio licences awarded</p> <p>1990: basic regulatory framework</p> <p>1992: first national licence awarded</p> <p>1995: second and third national licences awarded</p> <p>1996: amended regulatory framework (renewal option + digital radio)</p> <p>2003: amended regulatory framework (4-year extension for analogue licences)</p> <p>2009: policy document on digital switchover</p> <p>2011: expiration of first national licence</p> <p>2012: expiration of second and third national licences</p>	<p><i>Analogue licences (first assignments):</i> 8-year original duration + 8-year renewal (provided by 1996 legislation, if simulcasting on digital) + 4-year extension (provided by 2003 legislation)</p> <p><i>Analogue licences (re-advertised):</i> 5-year duration or until 2015 (whichever is longer)</p> <p><i>Digital spectrum licences (awarded until 2009):</i> 12-year duration</p> <p><i>Digital spectrum licences (awarded after 2009):</i> 8-year duration</p> <p><i>Digital content licences:</i> until surrendered by holder</p>	<p>Over the past decades, broadcasters have retained the right to broadcast much longer than specified in their original licence conditions. This was possible for various reasons:</p> <ul style="list-style-type: none"> The 8-year renewal option (1996) was introduced to stimulate investment in digital radio The 4-year extension option (2003) was introduced to align the duration of analogue and digital licences Incumbents have often had their licences re-assigned, either through a fast-track procedure following a lack of interest from other parties, or because they have won a beauty contest <p>In response to lobbying from national licence holders for further extension in 2011/12, policy makers and legislators are considering this. However, Ofcom notes that this could conflict with EU regulations on e.g. state aid</p>

Figure 9.1: Summary of licensing situation in the countries researched, focusing on commercial licences and the extension policy [Source: *Analysys Mason, 2009*]

In the countries we have researched, where licence extensions have been granted, these either happened because there was insufficient interest from other parties, and/or they were granted because of the following particular circumstances:

- *The original licence conditions included a provision for extension.* In Ireland, for example, the licences that were awarded between 1989 and 1991 specified their basic and extended duration as part of the licence terms. In Belgium, licences awarded between 2001 and 2007 had a duration of nine years, with the possibility of a further nine-year extension. These durations were specified in legislation that pre-dated the licence awards.
- *There was a wider policy of changing the expiry date of licences in order to align them with other licences.* In France and Denmark, for example, some licensees received a one- or two-year exceptional extension in order to align the expiry date of the licences, and give the regulator sufficient time to re-engineer the frequency plans in analogue bands.
- *There was a wider policy of extending existing licences in return for investment in digital radio.* In the UK, for example, legislation introduced in 1996 allows an incumbent to have its licence extended for eight years if the station simulcasts on the digital terrestrial platform, otherwise the licence can be revoked (which, however, proved difficult in practice). In general, such extensions either:
 - had been provided by legislation introduced at a very early stage (1996 in the UK) relative to the take-up of digital radio and the maturing of EU legislation on radio licensing, or
 - were in fact already part of previous legislation, in which case investment in digital radio merely allowed the incumbent to bypass a fairly straightforward compliance check (2004 in France) to qualify for the extension, or
 - are part of legislation that is currently being prepared, with exact qualification conditions still to be defined and aligned with EU regulations and requirements (2008 in Ireland).

Alternatively, some regulators are relaxing certain content requirements of existing licences (Ireland), or in a beauty contest favour applicants that demonstrate a commitment to invest in digital technology (some German federal states). It should be noted that in the countries researched, every case of extension was either a one-off or a double extension. Serial extensions are not offered, although in Flanders, in the event that the government has not yet made a decision on licence re-assignment, a licence is automatically extended up to the moment when the government does make its decision.

All of the countries we have researched are finding it difficult to encourage the take-up of digital radio. For example, in relation to the linkage between assigning licences and stimulating digitalisation, Ofcom has indicated that the right to withdraw a licence if the licensee does not meet the renewal condition requiring provision of a digital simulcast service is (politically) difficult to enforce in practice, as such a withdrawal would lead to protests from listeners.

On the basis of just six case studies, and without also conducting a thorough assessment of public radio policies, it is difficult to draw any overall conclusions on the relationship between a country's digital radio policy (particularly its linkage with analogue radio licensing) and the take-up of digital radio. However, it is clear that those countries in which digital radio has been (relatively) successful are also the countries where there are strong incentives (UK) or even obligations (Denmark) relating to investment in digital commercial radio. In contrast, digital radio is less popular in countries with little (France and Ireland) or no (Belgium) facilitating legislation. The exception to this seems to be Germany, where legislation generally seems quite facilitating, but digital radio has still not been very successful. The case for any causal relationship between *commercial* radio legislation and digital radio take-up is however further weakened by the belief that digital radio take-up is mainly driven by *public* broadcasters instead of commercial broadcasters, as was stated by some of the interviewees.

9.3 Assignment process

Most of the countries we have researched use a beauty contest as the award mechanism for radio broadcast licences. In the UK and Denmark, however, *national* licences are awarded through an auction process while *local* licences are awarded through a beauty contest process. The 2008 Broadcasting Bill in Ireland will include a financial bid in its beauty contest procedure for both national and local licences, as an additional criterion.

Where a licence has been re-assigned after the end of its regular duration (and after any extension or renewal period, where applicable), the general procedure in most countries we have researched seems to be to:

- advertise the licence to gauge the level of interest from other potential licensees
- re-assign the licence to the incumbent if there is insufficient interest from other parties, often using some sort of fast-track procedure
- if more parties are interested in the licence, use a competitive procedure.

In practice, this procedure often results in licences being re-assigned to the incumbent, either due to lack of competition or because the incumbent's track record and starting position put it in a stronger position to win a competitive procedure. Nevertheless, in principle a competitive procedure is followed in cases where the demand for licences exceeds supply (i.e. in case of scarcity).