

Spectrum Clearance Finance Committee Guidelines

Clearing programme-making and special events from channel 69

Introduction

1. The Ofcom Board has delegated authority to the Spectrum Clearance Finance Committee (the Committee) to authorise payments made under Ofcom's powers under Section 1(5) of the Wireless Telegraphy Act 2006 (WTA). The following guidelines set out the specific policy objectives for the programme-making and special events (PMSE) clearance programme and other relevant considerations to be taken into account by the Committee.
2. The Committee's Terms of Reference specify duties:
 - i. To consider proposals for and determine spectrum clearance payments, taking account of relevant Ofcom guidelines on such payments.
 - ii. To ensure appropriate financial controls are in place and oversee the financial administration for the relevant spectrum clearance expenditure.
3. The Digital Britain final report¹ stated that the Government supported Ofcom in taking practical measures to expedite the clearance of the 800 MHz band. It confirmed Government would meet the extra costs incurred by PMSE users as a result of being required to vacate channel 69 early.
4. Ofcom intends to publish a statement on funding policy for PMSE (the Statement) which follows a consultation² and discussions with Government about our proposed approach and the availability of funding. This statement will form the basis for a scheme which will encompass the majority of grants it expects to be made to PMSE users (the Scheme). We understand a statement by the Government will precede our own, recognising and supporting Ofcom's direction of travel.
5. The Committee will be asked to approve the details of the Scheme. Any Scheme must be consistent with the eligibility criteria and funding principles set out in the Statement.
6. The Committee will also be expected in exceptional cases to consider applications from PMSE users falling outside the Scheme but which are otherwise consistent with Ofcom's duties when making spectrum efficiency grants.

Background

7. The PMSE sector makes a major contribution to the UK's social, cultural and economic wellbeing. It comprises a wide variety of organisations and individuals using spectrum for an equally wide variety of different uses. There are thousands of business and

¹ Digital Britain final report, Jun 2009: <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf> (page 78).

² Clearing the 800 MHz band: finding for programme-making and special events , 14 August 2009, http://www.ofcom.org.uk/consult/condocs/pmse_funding/

professional users in broadcasting, entertainment and events, and many more among charities and other community organisations.

8. Channel 69 is particularly important to PMSE users because it is the only spectrum widely used for audio links (primarily wireless microphones) available to them UK-wide, which means they can use the same equipment across the country. Channel 69 has been the default home for roaming PMSE users for many years, although it is also home to many users making use of equipment in a single location. The view of channel 69 as the home of PMSE was reinforced in 2007, when Ofcom stated it would be available for PMSE use on reasonable terms until 2018³.
9. When channel 69 is cleared, channel 69 equipment will need to be replaced or modified so it can use channel 38 (the latter may not be possible or cost effective in many cases).
10. Lawful use of channel 69 requires a WTA licence and operating without one is a criminal offence. There are approximately 2000 licensed PMSE users in channel 69. In 1997, the Secretary of State contracted out the licensing of spectrum for PMSE use to a third party, JFMG⁴. Since its formation, Ofcom has managed this contract. Ofcom considers licensed users were entitled to rely on its statements regarding future availability of channel 69.
11. There are a smaller number of organisations owning, but not actually using, channel 69 PMSE equipment. In particular, these are hiring businesses who do not use equipment but whose customers do. Ofcom considers these users were also entitled to rely on its statements regarding future availability of channel 69. However, generally unlicensed users were not entitled to rely on any regulatory statements, and it would be inappropriate to provide funding in these cases.
12. In the context of Ofcom's wider duties and objectives in relation to spectrum management, and the importance of releasing the 800 MHz band for new uses as soon as possible, our approach to clearing PMSE users from channel 69 is intended to minimise the disruption this would cause to their ability to provide a wide range of services to citizens, consumers and business customers.
13. In order to meet this aim, Ofcom has taken two key decisions:
 - i. To make available replacement spectrum – channel 38 – that closely mirrors the utility of channel 69.
 - ii. To make available funding to minimise the disruption of having to replace or modify their channel 69 equipment in order to move to replacement spectrum.
14. The Government's Digital Britain report confirmed its decision in principle to fund the second element of this.
15. Ofcom's Statement will form the basis for the large majority of grants it expects to be made to PMSE users under a Scheme approved by the Committee. However, it does not preclude other grants in relation to PMSE where the Committee considers it appropriate in the light of Ofcom's duties and advice provided to the Committee.

³ Digital Dividend Review; a statement on our approach to awarding the digital dividend, December 2007, <http://www.ofcom.org.uk/consult/condocs/ddr/statement/statement.pdf>

⁴ JFMG Limited, wholly owned by Arqiva, see www.jfmq.co.uk

16. Ofcom's Statement will be consistent with the Board's view of Ofcom's statutory duties when making spectrum efficiency grants, state aid law and efficient use of public money. It will reflect discussions with Government and HM Treasury's in-principle approval of eligibility and funding principles.

Approving the Scheme

17. Ofcom's Statement will propose implementing a Scheme providing funding to a defined class of PMSE users according to a rate card based on defined funding principles. The Committee will be asked to approve this Scheme, and in particular a rate card against which applications for funding will be assessed, and will be expected to ensure that the Scheme is consistent with Ofcom's Statement.

18. HM Treasury has indicated that it is content to interpret section 1(5) of the WTA as allowing it to consent to funding for a *class* of recipients, thus enabling approval of the Scheme as a whole without specific approval of each payment under the Scheme individually.

19. Ofcom's Statement will be made available to the Committee when published, but in relation to eligibility it will include the following requirements:

a. Eligible claimants under the Scheme will be limited to:

- i. applicants which held a WTA licence to use channel 69 valid between 2 February 2008 and 2 February 2009; or
- ii. applicants which are rental companies which have demonstrated that their operations are based on equipment hire as opposed to equipment use that requires a licence.

b. Equipment held by eligible claimants will only be eligible for funding if:

- i. it is capable of tuning to channel 69 but not channel 38; and
- ii. it was purchased by the eligible claimant before 30 June 2009.

20. Ofcom's Statement will also set out the principles that must be adhered to in developing the rate card, including the underlying economic methodology on which it is based. This will determine the amount payable in relation to items of equipment. This will include reference to the principle that payment will be based on the economic loss of bringing forward the cost of channel 38 replacement equipment to 2012, or where possible and cheaper the cost of modifying the equipment. The applicant will be able to choose whether they want to replace or modify their equipment.

21. When approving the Scheme, the Committee should consider the need to balance the following objectives:

- i. providing funding which is as accurate as possible for each claim;
- ii. minimising administration and compliance costs;
- iii. providing incentives for timely and orderly migration;
- iv. dealing with claims quickly; and
- v. ensuring a simple, transparent and predictable process.

Approving applications outside the Scheme

22. The Scheme is intended to deal with the majority of applications. A procurement process is underway which is expected to lead to the appointment of a Scheme

Administrator to process claims including verification of paperwork, collection and identification of equipment and payment according to a rate card (Ofcom has, however, reserved the right to deal with this work in-house if appropriate tenders are not received).

23. The Scheme Administrator cannot exercise discretion on behalf of Ofcom as Ofcom cannot delegate its discretion under section 1(5) to anyone else. Approval of the Scheme relates to the administration of grants to a defined class of person falling squarely within the principles set out above and any other application can still be considered by Committee on a case by case basis.
24. The Committee should consider whether to exercise discretion on a case by case basis outside the Scheme where there are new and exceptional circumstances not envisaged by the Scheme.
25. Any applications outside the Scheme may be small in number and scale but could be of significant importance to individuals involved.
26. In deciding whether to approve applications outside the Scheme, the Committee should take into account the following key principles which also form the basis for Ofcom's decision to implement the Scheme:

Power to make spectrum efficiency grants

27. Ofcom is empowered to fund spectrum clearance by section 1(5) of the WTA, which enables it to make spectrum efficiency grants where this promotes the efficient use of spectrum or the efficient management of that use. The power is strictly linked to promoting spectrum efficiency and, while Ofcom must as ever consider its general duties in making grants, the underlying purpose must always be spectrum efficiency as set out in the WTA. All grants and the terms of those grants are subject to the consent of HM Treasury.
28. Ofcom can make these grants to any organisation or person provided the grant meets the statutory criteria, hence recipients of grants are not limited to WTA licensees.
29. The purpose of providing funding for PMSE users clearing channel 69 is to promote the efficient use of channel 69 in the context of clearing the 800 MHz band as a whole and thereby unlocking the benefits outlined in the 800 MHz statement. Of particular relevance to PMSE clearance is the requirement on us to secure the optimal use of spectrum having regard to the desirability of encouraging investment and innovation in relevant markets (which would include services for PMSE), the different needs and interests of spectrum users (including PMSE users), and the interests of citizens and consumers. The relevant sections of the WTA and Communications Act 2003 are reproduced in Annex 1 to this document.

Legitimate expectations

30. The grants in this programme are to be given to legitimate PMSE users in channel 69 who had expected as a result of Ofcom statements to have access to channel 69 until 2018. The grants should ensure that PMSE users are in no worse, but also in no better, a position than they would have been had their legitimate expectations not been frustrated.
31. Legitimate expectations may be procedural or substantive, although there is significant overlap between these two concepts. The former is an expectation about the process that will be followed prior to a change of policy. The latter, which is more significant in the

present case, is a right to continued enjoyment of the policy (which in this case may be time-limited).

State aid

32. Payments must be consistent with state aid law. In this case, the majority of spectrum clearance payments to PMSE users will be below the *de minimis* threshold for state aid purposes. However, some (particularly to larger rental companies and PMSE users) may exceed that level so this cannot be relied upon in all cases.
33. Payment of sums to which individuals or groups are entitled (their reasonable or legitimate expectation) do not confer gratuitous benefits and therefore cannot reasonably be characterised as unlawful state aid. Payments beyond entitlement could be said to constitute unlawful state aid.

Efficient use of public money

34. The Committee should also take into account where appropriate whether the grants provide efficient use of public money. In some cases, this consideration may not apply as payments will be simply a straightforward compensation that claimants are entitled to given their substantial legitimate expectations.
35. Payments to PMSE users will be based on the expectations of those users in relation to channel 69, so those users are in no worse, but also no better, a position than they would have been had those expectations as to the continued availability of spectrum not been frustrated. This approach is likely to represent efficient use of public money as it is the most cost effective method of clearing the spectrum in the required timescales.
36. Payments above this level would put recipients in a better position than they could properly have expected to be in absent clearance, and raise possible state aid concerns. It may also encourage future spectrum users to make investment decisions based on false assumptions about continued availability of spectrum and funding should it be withdrawn. Payments below this level would risk litigation and increase the risk of clearance not being achieved in a timely manner.

Authorisations and procedural arrangements

37. The Board has delegated to the Committee the authority to make spectrum efficiency grants, within a budget set by the Board and approved by HM Treasury.
38. The Committee will adopt any other procedures it judges necessary to perform its duties, including, if appropriate, engaging with third parties such as the National Audit Office.
39. The Committee (subject as noted above to HM Treasury consent) will determine the terms and conditions on which each spectrum clearance payment is made. These terms and conditions will be in a 'standard form' in relation to applications within the Scheme and it is anticipated the standard form is also likely to be appropriate in most cases outside the Scheme although the Committee will determine, in relation to each spectrum clearance payment, whether the standard form terms and conditions are appropriate, and if not, what changes should be made.

Financial controls and administration

40. The Committee will provide a regular quarterly report to the Board on relevant spectrum clearance payments, forecasts, risks and performance against the budget set by the Board. The Clearance Steering Group should provide assistance in this.

41. The Committee will report to the Board, extraordinarily, where it expects a significant deviation from the budget.

Review of the guidelines

42. The Board may review these guidelines, at the request of the Committee or at the Board's initiative, from time to time.

Annex 1

Extracts from legislation

Section 1 of the Wireless Telegraphy Act 2006

(5) OFCOM may make a grant to any person if, in their opinion, the making of the grant is likely to promote—

- (a) the efficient use in the United Kingdom of the electromagnetic spectrum for wireless telegraphy; or
- (b) the efficient management of that use.

(6) A grant—

- (a) may be made to a person holding a wireless telegraphy licence or a grant of recognised spectrum access or to any other person; and
- (b) is to be made on such terms and conditions as OFCOM consider appropriate;

and the terms and conditions may include terms requiring the repayment of the grant in specified circumstances.

(7) The consent of the Treasury is required—

- (a) for the making of a grant under subsection (5); and
- (b) for the terms and conditions on which such a grant is made.

Section 3 of the Communications Act 2003

General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

(2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following—

- (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
- (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
- (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
- (d) the maintenance of a sufficient plurality of providers of different television and radio services;
- (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
- (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—

- (i) unfair treatment in programmes included in such services; and
- (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principles appearing to OFCOM to represent the best regulatory practice.

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

- (a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
- (b) the desirability of promoting competition in relevant markets;
- (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
- (d) the desirability of encouraging investment and innovation in relevant markets;
- (e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
- (f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- (g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;
- (h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
- (i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- (j) the desirability of preventing crime and disorder;
- (k) the opinions of consumers in relevant markets and of members of the public generally;
- (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

(5) In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

(6) Where it appears to OFCOM, in relation to the carrying out of any of the functions mentioned in section 4(1), that any of their general duties conflict with one or more of their duties under sections 4, 24 and 25, priority must be given to their duties under those sections.

(7) Where it appears to OFCOM that any of their general duties conflict with each other in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances.

(8) Where OFCOM resolve a conflict in an important case between their duties under paragraphs (a) and (b) of subsection (1), they must publish a statement setting out—

- (a) the nature of the conflict;
- (b) the manner in which they have decided to resolve it; and
- (c) the reasons for their decision to resolve it in that manner.

(9) Where OFCOM are required to publish a statement under subsection (8), they must—

- (a) publish it as soon as possible after making their decision but not while they would (apart from a statutory requirement to publish) be subject to an obligation not to publish a matter that needs to be included in the statement; and
- (b) so publish it in such manner as they consider appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the matters to which the decision relates.

(10) Every report under paragraph 12 of the Schedule to the Office of Communications Act 2002 (c. 11) (OFCEM's annual report) for a financial year must contain a summary of the manner in which, in that year, OFCEM resolved conflicts arising in important cases between their general duties.

(11) A case is an important case for the purposes of subsection (8) or (10) only if—

- (a) it involved one or more of the matters mentioned in subsection (12); or
- (b) it otherwise appears to OFCEM to have been of unusual importance.

(12) Those matters are—

- (a) a major change in the activities carried on by OFCEM;
- (b) matters likely to have a significant impact on persons carrying on businesses in any of the relevant markets; or
- (c) matters likely to have a significant impact on the general public in the United Kingdom or in a part of the United Kingdom.

(13) This section is subject to sections 370(11) and 371(11) of this Act and to section 119A(4) of the Enterprise Act 2002 (c. 40) (which applies to functions conferred on OFCEM by Chapter 2 of Part 5 of this Act).

(14) In this section—

“citizens” means all members of the public in the United Kingdom;
“communications matters” means the matters in relation to which OFCEM have functions;
“general duties”, in relation to OFCEM, means—

- (a) their duties under subsections (1) to (5); and
- (b) the duty which, under section 107(5), is to rank equally for the purposes of subsections (6) and (7) with their duties under this section;

“relevant markets” means markets for any of the services, facilities, apparatus or directories in relation to which OFCEM have functions.

Section 4 of the Communications Act 2003

(1) This section applies to the following functions of OFCEM—

- (a) their functions under Chapter 1 of Part 2;
- (b) their functions under the enactments relating to the management of the radio spectrum;
- (c) their functions under Chapter 3 of Part 2 in relation to disputes referred to them under section 185;
- (d) their functions under sections 24 and 25 so far as they relate to information required for purposes connected with matters in relation to which functions specified in this subsection are conferred on OFCEM; and

(e) their functions under section 26 so far as they are carried out for the purpose of making information available to persons mentioned in subsection (2)(a) to (c) of that section.

(2) It shall be the duty of OFCOM, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly).

(3) The first Community requirement is a requirement to promote competition—

- (a) in relation to the provision of electronic communications networks and electronic communications services;
- (b) in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services; and
- (c) in relation to the supply of directories capable of being used in connection with the use of electronic communications networks or electronic communications services.

(4) The second Community requirement is a requirement to secure that OFCOM's activities contribute to the development of the European internal market.

(5) The third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 17 of the Treaty establishing the European Community).

(6) The fourth Community requirement is a requirement to take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour—

- (a) one form of electronic communications network, electronic communications service or associated facility; or
- (b) one means of providing or making available such a network, service or facility,

over another.

(7) The fifth Community requirement is a requirement to encourage, to such extent as OFCOM consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability.

(8) That purpose is the purpose of securing—

- (a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities; and
- (b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available.

(9) The sixth Community requirement is a requirement to encourage such compliance with the standards mentioned in subsection (10) as is necessary for—

- (a) facilitating service interoperability; and
- (b) securing freedom of choice for the customers of communications providers.

(10) Those standards are—

- (a) standards or specifications from time to time drawn up and published in accordance with Article 17 of the Framework Directive;

(b) the standards and specifications from time to time adopted by—

- (i) the European Committee for Standardisation;
- (ii) the European Committee for Electrotechnical Standardisation; or
- (iii) the European Telecommunications Standards Institute; and

(c) the international standards and recommendations from time to time adopted by—

- (i) the International Telecommunication Union;
- (ii) the International Organisation for Standardisation; or
- (iii) the International Electrotechnical Committee.

(11) Where it appears to OFCOM that any of the Community requirements conflict with each other, they must secure that the conflict is resolved in the manner they think best in the circumstances.

(12) In this section—

“the Framework Directive” means Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services;
“network access” and “service interoperability” each has the same meaning as in Chapter 1 of Part 2.