



Digital Dividend Review: band manager award

British Entertainment Industry Radio Group (BEIRG)

Response to 2nd consultation on detailed award design

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1. **Question 1. Do you agree with our proposal that we should review our approach to FRND obligations at the same time that we initiate our first review of AIP levels, three years after the band manager starts operating?**
 - a. BEIRG recognises that, despite Ofcom's clear efforts on this, for which they should be applauded, there is a risk that the FRND obligations imposed on the band manager will not provide sufficient protection to the PMSE sector once the band manager begins operating and that the review of AIP is likely to create further tensions. Therefore, we agree that the FRND obligations should be kept under review, with the objectives of protecting the PMSE sector from excessive prices and guaranteeing continued spectrum access for PMSE in mind. We also agree that it makes sense to review the FRND obligations at the same time as AIP. Should other difficulties arise, the various forms of dispute resolution should be used in the first instance, but Ofcom should be the final arbiter.

2. **Question 2. Do you agree with the objectives that we are seeking to achieve through our application of FRND to the band manager?**
 - a. We strongly agree that the principal objective is to ensure that fees set to end users will not be excessive in light of how much the band manager itself is charged for its licence and the costs that it incurs to run this business.
 - b. We broadly agree that there should be no discrimination toward specific users. However, we are aware from speaking to professional end-users that there can be conflicts between those responsible for the production of the actual event and other users in the same location, particularly if there is no mechanism by which licensing information may be shared between them.
 - c. One of Ofcom's objectives is that prices should be similar to those which should be expected in a competitive market. Whilst we understand that Ofcom may see this as relating to their spectrum efficiency duties, they must be aware that the PMSE sector is fairly unique in the way that it accesses spectrum and so the 'competitive market' analogy may not be applicable in this case, especially for certain productions. For large-scale PMSE productions such as musicals for example, there will generally only be one production in any given location, hence (especially indoors), there would be no competition between different PMSE users for the spectrum in that location. It is therefore difficult to see how it can be regarded as a 'competitive market'.
 - d. Whilst we do not oppose incentives for the band manager to make efficiency gains in running its operation and managing spectrum per se, these must not come at the expense of service levels to PMSE users, including interference management, spectrum access and fair prices.

3. **Question 3. Do you agree with our proposal that under the benchmark approach excess PMSE demand for spectrum should be dealt with by the band manager using non-pricing methods?**
 - a. Yes, particularly as Ofcom are proposing to assess whether there is an opportunity cost to the spectrum based on competing PMSE use. Ad hoc price increases are totally unacceptable as a method of dealing with excess PMSE demand.

4. **Question 4. Do you have any views on how best to deal with excess PMSE demand using non-pricing methods**
 - a. A deep understanding of the industry, operational expertise, detailed planning and cooperation between the band manager and end-users and amongst end-users will be required to deal with PMSE demand using non-pricing methods.

5. **Question 5. Do you agree with our benchmark approach to assessing whether the band manager is pricing in a discriminatory way?**

- a. We strongly agree that price differences should be driven only by cost factors and/or by cost causation. We also agree that the band manager must have an objective justification for setting different prices if it is not to be in breach of its FRND obligations. Such objective justifications may include, as Ofcom say:
 - i. geographical
 - ii. temporal
 - iii. different durations of access
 - iv. indoor or outdoor access; and/or
 - v. automated or manual handling of requests.

6. **Question 6. Do you agree with our benchmark approach to ensuring that service levels are met in an FRND way?**

- a. We agree that, under the benchmark approach to FRND, the service levels that the band manager offers to PMSE users should be similar to – and certainly no worse overall – than those set out in the current JFMG contract. We consequently agree that it would be necessary for applicants to refer to existing service levels. We also agree that applicants must offer commitments that show an appreciation of particular features of how PMSE users currently operate.

7. **Question 7. Do you agree with our proposed approach that any proposal by the band manager to allow non-PMSE use of the spectrum in this award should be first approved by us?**

- a. We strongly agree that any non-PMSE use of the spectrum in this award must be first approved by Ofcom, whether the alternative use fits with the TLCs or not. This protection to PMSE users is absolutely essential. The burden must be on the band manager to demonstrate beyond reasonable doubt that any alternative use will not undermine its ability to meet its obligations to PMSE. Ofcom must bear in mind the importance of PMSE spectrum access, especially at short-notice, when considering such applications, along with the objective of avoiding disruption to PMSE users. Ofcom must also consider that a lack of historical demand for PMSE use of spectrum e.g. at a particular location doesn't necessarily mean that it will not be required at any time in the future.
- b. Whilst Ofcom would make the decision as to whether the band manager can allow non-PMSE use of the spectrum, any such application must also be subject to scrutiny and comment by the PMSE sector, particularly the end-users it may affect. Ofcom should have regard to the PMSE sector's views before making any final decisions because it is they who will be in the best position to judge whether any alternative use will disrupt their operations.

8. **Question 8. Do you have any comments on how efficient sharing and coordination between Games and non-Games use of spectrum to be awarded to the band manager can best be achieved?**

- a. It is difficult to comment on how efficient sharing and coordination between Games and non-Games use of the spectrum can be best achieved in absence of more detailed plans of spectrum requirements for the Games by application and location and how these will impact on surrounding locations in terms of interference potential. It is certain that coordination will be required between Ofcom, the band manager and those who typically undertake PMSE productions in or near the Olympic venues. We would also suggest that the band manager should encourage early planning of productions due to take place at or near the Olympic venues during the Games.

9. **Question 9. Does our FRND benchmark approach provide sufficient information for applicant band managers to make commitments to PMSE users based on our FRND principles and objectives?**
- a. BEIRG has no comment on this question.
10. **Question 10. Does our FRND benchmark approach strike an appropriate balance between giving applicant band managers sufficient certainty to plan their business and giving sufficient flexibility to determine whether FRND obligations have been breached?**
- a. Please see answers to questions above.
- b. Whilst the first part is a question for potential band managers, we cannot see how any model can provide more certainty to applicants than cost-recovery plus reasonable rate of return on investment.
- c. Ofcom needs to retain as much flexibility as possible in determining when FRND obligations have been breached.
11. **Question 11. Do you agree it may be appropriate for us to review the FRND benchmark approach?**
- a. Yes; please see answer to question 1.
12. **Question 12. Do you agree with our proposal to hold an initial review of the FRND benchmark approach in parallel with the initial AIP review, three years after the band manager starts operating?**
- a. Yes; please see answer to question 1. Whilst it makes sense for the formal review of FRND to be undertaken in parallel with the initial AIP review, this should not preclude (a) addressing any issues affecting PMSE stakeholders beforehand as they relate to the FRND obligations and (b) leaving the door open for a revision of the timescale in case of unforeseen developments. We also believe that Ofcom should not pre-judge how their objectives may be revised before the band manager begins operating. The principle issue is protecting PMSE users.
13. **Question 13. Do you have any suggestions as to how the band manager can transparently and proportionately allocate its fixed costs across bands and authorisations?**
- a. This question is difficult to answer as it is not clear whether 'fixed' costs mean 'common' costs or not. We would welcome further clarity and discussions with Ofcom on this.
14. **Question 14. Do you agree that ROS is most appropriate measure of profitability? Do you agree the indicative ROS figures set out are reasonable? Are there any more appropriate benchmarks?**
- a. We believe that any measure of profitability should be chosen on the basis that it is least likely to undermine the objective of protecting the PMSE sector from inflated prices.
15. **Question 15. Does securing continuity with existing arrangements for spectrum access but adjusting in response to changing conditions and PMSE needs provide the best trade-off between avoiding disruption to PMSE users and promoting efficient use of spectrum?**
- a. We agree that the band manager should provide spectrum to PMSE users in a way that secures continuity with existing arrangements, but adjusts in response to changing conditions and PMSE needs. However, it should not be assumed that existing

arrangements for assignments etc are the best arrangements for PMSE users. So early changes should not be ruled out, provided that they are objectively justifiable and there is sufficient time allowed for PMSE to plan for the changes (the proposed new arrangements for channel 38 licensing are a good example).

16. Question 16. What are the key types and categories of PMSE spectrum access that should be kept to secure continuity? What types and categories would you be interested in seeing emerging?

- a. As there are so many different types and categories of PMSE spectrum access, which suit different users in different ways, it would be inappropriate for BEIRG to comment on this question; it should be answered by those with specific needs.

17. Question 17. Does our interpretation of how the band manager should meet PMSE demand on FRND conditions provide adequate protection for PMSE users?

- a. **Broadly, from what we can judge at this stage (prior to implementation). We strongly agree that the band manager must prioritise PMSE users' demands for the spectrum to be awarded at FRND prices above those of non-PMSE users in order to provide protection.**
- b. We agree that the band manager should not withhold spectrum access from PMSE users who are prepared to pay FRND prices for it, as determined by the cost-recovery model.
- c. We agree that no PMSE user or group of PMSE users should be discriminated against in their ability to access spectrum under FRND terms and conditions.
- d. We believe that it is difficult to see any objectively justifiable reason for allowing certain types of access to a given frequency in one area and not in another if the frequency in question was available.
- e. We agree that there may be legitimate reasons for offering access which differs in some respect to the details of the request from the PMSE user such as excess demand that must be dealt with in a fair way. We believe that in such cases the band manager should endeavour to offer alternative suitable access to the user as far as possible. The user's equipment specifications should be taken into account when considering alternative access (i.e. alternative frequencies would not be suitable if the user had no access to equipment that operated on those frequencies).
- f. We believe that if there is excess PMSE demand at FRND prices, the band manager will need to rely on non-pricing rationing mechanisms in a manner that enables as many PMSE users as possible to deliver their high quality services in order to have met its reasonable supply obligations.

18. Question 18. Do you agree that service levels are an inherent part of the terms and conditions for PMSE spectrum access and should be subject to FRND obligations?

- a. Yes, strongly. The benchmark approach should be informed by the existing JFMG contract and applicants should be encouraged to do whatever they can to improve upon these to meet the aims and objectives of PMSE protection.

19. Question 19. Do you agree with our overarching approach to enforcing FRND obligations?

- a. Broadly, yes. We agree that a case by case approach to determining whether FRND obligations have been breached would be more effective than an *ex ante* approach because it is not clear at this time what the exact nature of disputes will be and in what precise circumstances they will arise. It therefore seems more sensible to enshrine the commitments that applicants make in the licence awarded and to investigate the band manager based on these commitments where there is a dispute with a PMSE user. This will also be able to take into account any circumstances specific to the PMSE user in question. If there is uncertainty as to whether the commitments have been met, Ofcom

must always turn to the objective of protecting PMSE users from excessive prices and disruption when making the decision.

20. Question 20. Do you agree that a minimum set of information needs to be published by the band manager in order to ensure that PMSE users can seek spectrum access in a manner that meets their needs and the reassurance that their request will be dealt with on FRND terms and conditions?

a. Yes.

21. Question 21. What minimum set of information should the band manager publish? What additional information would PMSE users benefit from seeing it publish?

- a. We agree that based on the FRND provisions as related to cost-recovery, it is critical that applicants provide a forecast of both overall and band-by-band costs and their methodology for assigning costs to a band level in their applications.
- b. We believe that applicants should demonstrate as far as possible how individual fees will be determined. Indeed, it would be ideal for PMSE users to know what fees might be.
- c. We agree that the band manager should state the service levels that it will commit to in the application and refer to Key Performance Indicators.
- d. We agree that the band manager should provide a set of independently audited annual accounts of its business, including details of accounting, attribution, valuation and how this fits with its cost allocation methodologies.
- e. We agree that the band manager should provide details of how it is performing against its KPIs.
- f. We agree that the band manager should keep PMSE users updated on developments in its own business and within the market generally, such as those currently published on the JFMG website.

22. Question 22. Do you think that it is reasonable to expect the band manager to provide this information at the time of a dispute?

- a. Yes. However, as disputes will vary, the information required to resolve them will also vary. The information suggested by Ofcom should therefore be considered a minimum.

23. Question 23. Do you agree that the provision of information by the band manager as proposed is an integral part of assessing the extent to which the terms and conditions it offers to PMSE users are FRND?

- a. Yes. It is essential for the band manager to provide this information as it will allow Ofcom to judge whether and to what extent applicants will meet the selection criteria and the obligations to PMSE.

24. Question 24. Do you agree with our objectives and approach in applying AIP principles to the licence fee payable by the band manager?

- a. We recognise that Ofcom believe that proposing to apply AIP to the licence fee payable by the band manager will further their spectrum efficiency duties and objectives. However, we strongly believe that the PMSE sector should not suffer as a consequence; AIP must not be imposed at the expense of ongoing PMSE access to sufficient quality and quantity of spectrum that is the essential raw material for this sector, with all the employment, social, cultural and economic activities that it supports.
- b. We therefore agree with the objective of avoiding disruption to PMSE users; if AIP was set at too high a level then it would cause major disruption to PMSE users to the extent that they could be priced out of the spectrum altogether.
- c. We believe that, if AIP is to be imposed at all, initial baseline levels (at least in the 1st year) should be no more than current JFMG license receipts in order to avoid more

disruption at a time of significant volatility for the sector (including the need to replace equipment). It should then be phased-in on a conservative basis.

- d. If AIP is to be set with reference to opportunity cost of the spectrum, we believe that it should be set with reference to the lower-end estimate.
- e. Ofcom's objective of avoiding disruption to PMSE users is essential but it should be elaborated; Ofcom's objective should be to ensure that the PMSE sector has ongoing access to sufficient quality and quantity of spectrum so that it can continue to offer its wide range of products and services to the citizens and consumers of the UK.

25. Question 25. Do you agree with our proposal to assess viability of alternative use of spectrum based on the secondary nature of PMSE access where applicable?

- a. It would certainly not be right to assess the viability of alternative use of the spectrum based on anything but secondary access to that spectrum if PMSE was granted no more than secondary access to that spectrum. However, we hold the view that PMSE should have primary access to certain key bands in order to ensure that the sector has some security.

26. Question 26. Do you agree with our approach to assessing whether there is an opportunity cost of spectrum based on competing PMSE use?

- a. Broadly, yes. We agree that the most important measure of opportunity cost is represented by the additional costs – primarily equipment costs – which PMSE users would incur if they lost access to the decrement of spectrum concerned. It is worth noting that the more spectrally agile PMSE equipment is, the less the opportunity cost based on own use excess demand for any given frequency would be. As per our response to the PMSE funding consultation document, this is another reason why funding should be calculated based on the full cost of replacing existing equipment with like-for-like alternatives that are more spectrally efficient than that which equipment owners would be able to afford if they were only entitled to funding based on the residual value of existing equipment.

27. Question 27. Do you agree with our estimate, based on Analysys Mason's report, of the opportunity costs of UHF 1 and UHF 2?

- a. BEIRG has no comment on this question.

28. Question 28. Do you agree with our estimate, based on Analysys Mason's report, of the opportunity cost of interleaved spectrum?

- a. Yes

29. Question 29. Do you agree with our estimate, based on Analysys Mason's report, of the opportunity costs of channel 69 and channel 38?

- a. BEIRG has no comment on this question.

30. Question 30. Do you agree with our estimate, based on Analysys Mason's report, of the opportunity cost of spectrum at 2-3 GHz?

- a. BEIRG has no comment on this question.

31. Question 31. Do you agree with our estimate, based on Analysys Mason's report, of the opportunity cost of spectrum at 7 GHz?

- a. BEIRG has no comment on this question.

32. Question 32. Do you agree with our proposal to phase in AIP on a band-by-band basis?

- a. Yes. If AIP is to be applied then we strongly agree that it should be phased in on a band-by-band basis. It is critical that AIP is phased in a manner that ensures spectrum pricing is affordable to all PMSE users, irrespective of which bands they operate in. If AIP is not phased in on a band-by-band basis (i.e. AIP charges all 'bundled together' without distinction) then this could lead to more aggressive and unaffordable rates of increase for certain bands because other bands have a relatively low opportunity cost. Phasing AIP on a band-by-band basis recognises that different users in different bands will be facing different fee changes and will have different abilities to respond to these changes.

33. Question 33. Do you agree with our proposal to phase in the band manager's AIP based licence fee such that no band increases by more than 40% in the first year that it is operating compared to 2008/09 licensing receipts?

- a. No, we believe that the band manager's AIP based licence fee, which will be reflected in the charges passed on to PMSE users, should be no more than either current JFMG licence receipts in the first year. At a time of significant disruption and cost for PMSE users (associated with the migration enforced by DSO), it would be unreasonable to impose licensing price hikes at the same time, especially in the current economic climate. Indeed, Ofcom have recognised that 'even the most conservative approach to phasing – option 1, with a 40% maximum increase over current receipts in the first year – would constitute a significant challenge to the band manager and PMSE users. The PMSE sector needs time to adapt to the new arrangements, particularly as many end-users will not be aware of the changes to their spectrum administration. An initial year of 'bedding in time' will also allow the band manager to communicate with PMSE users and inform the sector of upcoming changes.

34. Question 34. Do you have any comments on any other aspects of our proposals to introduce AIP for the spectrum to be awarded to the band manager?

- a. Yes. Ofcom are proposing to phase in AIP on the basis that it will force PMSE users to pay the full conservative-level estimate of opportunity cost for all bands included in the award to facilitate spectrum access via full market mechanisms by 2018, at which point all protections to the PMSE sector will fall away. We strongly believe that, under these proposals, the removal of protections could result in market failure for the PMSE sector at any point from 2018 onwards irrespective of how efficiently it uses the spectrum awarded.
- b. The PMSE sector is defined by the applications and technologies it uses. These technologies are wireless devices and therefore require spectrum in order to operate; this will not change. Ofcom have said that by 2018 they expect the PMSE sector will be able to compete via full market mechanisms for the spectrum they use. BEIRG has consistently asked for support data from Ofcom as to how this conclusion was reached, and so far no information has been forthcoming.
- c. We cannot see how it is possible to compare PMSE spectrum use to other potential users. PMSE users license spectrum on a temporary basis in very small geographic locations. There are hundreds of thousands of PMSE users across the UK, all of whom need to access the spectrum in this way. It would not be efficient or possible for one user to buy the rights to frequencies in a particular location because of the transient nature of PMSE use and the fact that the PMSE sector is such a disparate and diverse community of users with different needs. As such, PMSE is very different to other spectrum users like mobile network operators.
- d. With these points in mind, there is a considerable risk of market failure for PMSE if protections fall away in 2018. Even if the PMSE sector uses the spectrum 'more efficiently' (as Ofcom perceive it) and is paying the full opportunity cost of the spectrum awarded to the band manager by 2018, there is nothing to prevent PMSE being evicted from the spectrum it uses (and in which its equipment operates) from 2018 and replaced with an alternative use. Opportunity costs are estimates; no-one knows what

technologies might emerge or what someone might be prepared to pay for the spectrum used by PMSE. Under current proposals therefore, there are absolutely no guarantees that the PMSE sector will exist beyond 2018. This is an unacceptable situation and must be remedied.

- e. There are, as we see it, three potential solutions to this situation
 - i. Ofcom or the Government allocate the key PMSE bands (as per the 1st band manager consultation) for primary and not secondary PMSE use
 - ii. Ofcom extends PMSE protected access to 2026 in line with the broadcasters (as the PMSE Pro User Group stated in response to the original DDR consultation). However, we are concerned that, with this option, there would still be a cliff-edge for PMSE users in 2026. The burden of proof should always lie with the regulator to demonstrate that the PMSE sector will not face market failure if protections are restricted and not the PMSE sector to demonstrate that it will.
- f. For further views on this issue, please see BEIRG's response to the 1st band manager consultation.
- g. In addition, if 2018 is set as the cut off date for PMSE protection then this raises the potential that the industry would have to completely re-equip itself all over again. Such arbitrary and frequent wholesale change to an industry's tooling every six years makes no economic or environmental sense.

35. Question 35. Do you agree with our estimates of the opportunity cost of temporary PMSE access to cleared spectrum?

- a. We strongly agree that the PMSE sector should not face any AIP charges for temporary access to the spectrum from which it is being evicted.

36. Question 36. Do you have any views as to whether the aggregated or disaggregated approach to setting the band manager's licence fee is the best one?

- a. We believe that the disaggregated approach is better as it ensures that costs are allocated more transparently across bands and licence fees more accurately reflect the costs associated with administering those bands.

37. Question 37. In light of our further proposals, do you agree that we should first review the AIP charged to the band manager after three years?

- a. If AIP is to be imposed at all, then we believe that PMSE users would suffer unacceptable disruption if the basis of their licensing fees were changed any more frequently than every three years.