

Virgin Media O2 response to Ofcom's *Consultation on proposals for implementing revised ALFs and notice of proposal to make Regulations*

Non-confidential response, submitted on 7 April 2025

Introduction

Following its Consultation that proposes revised ALFs for 900, 1800 and 2100 MHz spectrum, Ofcom has now turned its attention to their implementation. We welcome the diligence that Ofcom has shown in developing its proposals but are concerned with its decision for the revised fees only to take effect from the next fee payment dates, and not immediately after Ofcom's final decision. This means that operators will continue to pay fees that greatly exceed market values until 31 October 2025 for 900 and 1800 MHz spectrum and until 4 January 2026 for 2100 MHz spectrum, despite Ofcom being aware of the scale of overpayment since December 2024 if not considerably earlier.

Instead, we are strongly of the view that Ofcom is required to introduce the revised, lower fees as swiftly as possible, in line with its statutory duties and previous statements to that effect. Ofcom should enact this through the implementation of a common effective date for the new Regulations prior to the next actual fee payment date (for which there is precedent by Ofcom when it introduced new fees in 2018) such that any outstanding payments are pro-rated downwards immediately.

In addition, we ask that Ofcom consider using its discretion, as provided for under legislation, to offer a refund for the overpayment that operators have made in 2025. Issuance of a refund for this period would reflect Ofcom's own findings that operators are currently significantly overpaying compared to the underlying market value of spectrum and its earlier expressed considerations that fees above market value can cause substantial harm to economic efficiency. Moreover, inflated fees can discourage operator investment compared to those set at market value thus diminishing the benefits that investment in mobile infrastructure can deliver for mobile users, businesses and the UK economy over the longer term. The latter is particularly relevant given the Government's agenda to foster growth and encourage investment, and the duty put on Ofcom to contribute to this growth objective.

Whilst we set out our views regarding when revised fees should become payable later in this submission, we first explain our broad support for Ofcom's main Consultation proposals: i.e. to allow payment through 12 instalments, to change the 2100 MHz fee payment date to 31 October and to retain annual accrual of liability.

VMO2 response to Ofcom's main consultation proposals

VMO2 welcomes the proposal to allow payments by 12 instalments

Ofcom proposes to allow operators to pay by 12 instalments rather than the 10 instalment process currently deployed. We agree that the benefits that Ofcom has identified will be delivered by this proposal. It allows operators not only to simplify their management of ALF payments through their internal systems (as payments would be monthly and not variable across months) thus reducing administrative burdens, but also to benefit from a reporting perspective as operators can spread the payment obligation through a full financial year. As the proposal does not involve material drawbacks, we support Ofcom's proposal and see no reason for it to not be implemented.

Aligning fee payment dates across bands is beneficial and can be achieved in two ways

Potential benefits arise from alignment of fee payment dates across bands – where currently different dates apply to 900 and 1800 MHz (31 October), and to 2100 MHz (4 January) – include simplification of forecasting future fee payments and more streamlined administration of bill payments. In addition, Ofcom correctly identifies that regard must be had to the cash flow impact that changing the fee payment date for one or multiple bands could have. This can involve a one-off impact (e.g. double payment for an individual month) but also recurring impacts relating to where in the year payments must be made.

Ofcom proposes to revise the fee payment date of 2100 MHz to 31 October bringing it in line with the current fee payment date for 900 and 1800 MHz ALFs. This is one of the two natural options for aligning fee payment dates (when avoiding having to change the fee payment dates of all bands) though we note that Ofcom has had limited regard to the alternative of changing the 900 and 1800 MHz fee payment date to 4 January.

Compared to the current variation in fee payment dates, we support Ofcom's proposal to revise the 2100 MHz fee payment date to 31 October.¹ It delivers the identified benefits whilst we regard cash flow impacts to be limited and manageable. Our view, however, is contingent on Ofcom allowing payment across 12 instalments. Making the proposed change in fee payment date whilst maintaining payment across only 10 instalments would involve a greater cash flow impact with increased ALF payments in the last two months of 2026.

We are, however, disappointed that Ofcom has given limited consideration to the January alternative. Ofcom gave two grounds not to review that alternative in more detail: 1) the

¹ Also, we agree that it is easier and avoids complexity to use one of the two current fee payment dates instead of picking a new date that involves changes in fee payment dates across the three bands.

difficulty for Ofcom to prepare and send invoices in December; and 2) the need to pro-rata adjust 900 and 1800 MHz ALFs from when they are due in late October until 4 January roughly two months later. The first ground has no merit as Ofcom can carry out most of the invoice preparation before the latest CPI figure is known. With respect to the second ground, it is true that a forward pro-rata adjustment for CPI would have to be made to 900 and 1800 ALFs under this proposal but this is no different to the backward CPI adjustment that Ofcom would make to 2100 MHz ALFs under its own proposal. Whilst the backward adjustment (under Ofcom's proposal) results in somewhat earlier, slightly lower payments compared to retaining the current 2100 MHz fee payment date, the forward adjustment applied to 900 and 1800 MHz ALFs (when adopting the January alternative) would result in somewhat later, slightly higher payments.

Given the need for new fees to be implemented as soon as possible, we do not want the introduction of the revised fees to be delayed by additional review of the merits of using 31 October or 4 January to align the fee payment date. This said, we believe that Ofcom should have considered the January alternative in more detail in its Consultation as there can be grounds that favour this option over Ofcom's preferred proposal.

We understand why Ofcom is minded to not change annual accrual of liability

Currently, operators become liable for the full ALF payment if they hold the relevant licence on the fee payment date, even if they subsequently trade the spectrum over that year. Ahead of this Consultation, Ofcom sought views on whether operators would prefer more frequent accrual of liability, e.g. monthly. We appreciate that Ofcom gave operators an opportunity to express their views and to reflect on their experience. Our initial view – shared with Ofcom – was that annual accrual may give rise to trading barriers and that moving to monthly accrual could be advantageous if it would lower trading barriers.

Following publication of the Consultation, we have reconsidered our position together with colleagues who have been involved in spectrum transfers and, whilst we maintain that annual accrual of liability adds some complication to negotiations, it is our experience that it can be resolved through commercial negotiation. This accords with statements made by the other operators. Given the 'significant' implementation challenges identified by Ofcom if it were to make accrual more frequent, we can therefore understand why Ofcom is minded to retain its policy of annual accrual of liability.

This said, we remain strongly of the view that operators and Ofcom must continue to identify and remove barriers to trading and that erring on the side of caution (i.e. by addressing barriers even where the practical impact seems minor in most cases) is recommended to

provide the best conditions for trades to occur where possible. This would contribute to enabling improved allocation and use of mobile spectrum benefitting UK mobile users.

We are concerned that Ofcom fails to consult on when revised fees are to take effect and has not considered options available

Ofcom sets out that revised fees would become payable from the first annual fee repayment date following publication of its Statement (planned for summer 2025)², i.e. 31 October 2025 for 900 and 1800 MHz ALFs and 4 January 2026 for 2100 MHz ALFs. Assuming the Statement is published in July 2025, this would mean that, in the case of 2100 MHz, operators would continue to overpay for another five months until revised fees take effect.

We disagree that Ofcom is bound only to implement the revised fees as from the next annual fee repayment date. It is both possible and desirable for Ofcom to introduce revised fees as swiftly as possible to minimise the adverse impacts on efficiency and investment that continued overpayment by operators gives rise to (as we discuss in more detail below). To act promptly is both in line with Ofcom's overarching regulatory principles in terms of how it operates which is *"to operate with a bias against intervention, but with a willingness to intervene **firmly, promptly and effectively** where required"*³ (which reflects Ofcom's duty to meet promptness standards set out in Section 8 of the Communications Act 2003) as well as Ofcom's previous statements to this effect. In its 2010 Statement, Ofcom noted that *"We agree that over pricing spectrum consistently over the long term will lead to inefficient and non-optimal use of spectrum as this will deny access to spectrum to those who could deliver additional benefits to society were fees at the right level. We will consider this risk as and when we review fees. For this reason, we will also be looking closely at how we might monitor the utilisation of spectrum as part of our process for post-review evaluations, as discussed under Question 6 in section 5 of this document. We would also look to **react promptly** where we have evidence that spectrum fees are either over or under priced, as discussed in more detail under Question 5 in section 5."*⁴

Rather than waiting for the next annual fee payment date, we believe that Ofcom has a duty to act promptly and introduce the new fees as soon as possible after the new Regulations come into force. Indeed, there is precedent for Ofcom having acted in this way when the current Regulations were brought into effect in December 2018 with respect to the 900 and 1800 MHz spectrum. In that case, Ofcom sought to increase the annual fees that operators

² See paragraph 4.15 of Ofcom's [Consultation: Proposals for implementing revised ALFs and notice of proposal to make Regulations](#).

³ Ofcom's Impact Assessment guidance, July 2023 - paragraph 1.3.

⁴ Ofcom's Statement "SRSP: The Revised Framework for Spectrum Pricing – Our policy and practice of setting AIP spectrum fees", 17 December 2010.

were required to pay. Rather than wait for the next actual fee payment date which would have been 31 October 2019, Ofcom imposed a “common effective date” for new fees as of 31 January 2019 (i.e. one month after the Statement was published). The licence fees payable between 31 January 2019 and 30 October 2019 were then pro-rated upwards to reflect the higher ALFs payable. Operators thus paid new, higher fees nine months before the next fee payment date.

This is more than a procedural matter. Ofcom has acknowledged that the current fees exceed market value. Accordingly, any delay in the reduction of ALFs perpetuates the problem and means that operators continue to pay fees that are proven to be too high and known to give rise to the inefficiencies that Ofcom has consistently had regard to in its ALF decisions to date. These include distorting incentives to ensure optimal allocation and use of spectrum, potentially with a bearing on utilisation of other resources, and reducing operators’ ability and incentives to invest in their networks and delivery of mobile connectivity over them. The relative impacts from inadvertently setting ALFs above or below market value were major considerations for Ofcom to adopt a conservative approach to interpreting evidence when setting ALFs.⁵

Accordingly, Ofcom must seek to introduce new fees as soon as possible via a common effective date and pro-rate any of the amounts that remain outstanding such that they reflect the new lower ALFs payable. To act in this way would be not only be proportionate to the level of excessive fees and economic inefficiencies being incurred but also consistent with the previous way in which Ofcom has behaved. Both principles are enshrined in Ofcom’s regulatory duties that Ofcom is required to act in accordance with pursuant to section 3(3) of the Communications Act 2003 and is the approach operators legitimately expected Ofcom to adopt.

Even if Ofcom introduces revised fees as swiftly as possible, it remains the case that operators will have paid too high fees up until that point. This raises the question whether Ofcom *can* and *should* refund operators for overpaid fees. We believe the answer to both questions is yes and that Ofcom should refund such sums from the date on which it became conclusively apparent to Ofcom that 900 and 1800 MHz fees were too high, which we consider to be December 2024 when Ofcom published its main ALF Consultation.⁶

We note that Ofcom has, at its discretion, an ability to refund sums paid. Section 12(3)(b) of the Wireless Telegraphy Act 2006 states that “*Regulations under this section may – (b)*

⁵ See footnote 17 of [Consultation: Review on Annual licence fees](#).

⁶ Though we consider it reasonable that Ofcom knew that fees for 900 and 1800 MHz were too high when it launched its review in July 2024 (if not earlier). This is roughly five months before Ofcom published its Consultation.

provide for sums paid to be refunded, in whole or in part, in such cases as may be specified in the regulations or in such cases as Ofcom think fit". Ofcom must now decide whether or not to exercise this discretion. As such, we consider that Ofcom is able to provide for ALFs to be refunded where it thinks fit and for this to apply especially in circumstances where fees paid materially exceed market values. In this case, where Ofcom is clear that the operators have been overpaying fees and this giving rise to economic inefficiencies contrary to the growth and network investment objectives, Ofcom should seek to refund such sums from the date on which this became apparent to Ofcom that fees were too high.

If Ofcom should choose to adopt its current proposals and implement the revised fees at the time of the next fee payment dates without issuing any form of overpayment refund, operators will overpay by £30m over 2025 (January - 31 October 2025 for 900/1800 MHz; full year for 2100 MHz) compared to the fees that Ofcom determined reflected current market values as part of its main ALF Consultation. This is significant in absolute terms and accounts for +12% of total ALF payments over that period compared to the revised fees in relation to which Ofcom is presently consulting. However, these figures more than double in £m and % if compared to the appropriate fees that we set out in our response to Ofcom's (main) ALF Consultation. Each individual operator would pay c.£15m-£20m of fees in excess of market values over 2025 until revised fees take effect.

By introducing revised fees as soon as possible and refunding overpaid fees from the beginning of 2025, Ofcom would mitigate the adverse impacts that the excessive fees will have had and continue to have on operators. We note that impact on investment is of particular importance in relation to the growth duty. Higher fees, especially when exceeding market values, means that operators have less capital available for investment and are less inclined to invest as the prospective return on investment will be lower, all else equal. Adopting our recommendations will enable and encourage operators to invest in efficient deployment of spectrum (and more broadly in mobile networks), promoting competition and growth in the UK with underpin Ofcom's regulatory duties.