

# Proposal to apply Code powers to Ark Data Centres Limited

Statutory notification under section 107(6) of the  
Communications Act 2003

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**CONSULTATION:**

Publication Date: 26 May 2021

Closing Date for Responses: 26 June 2021

# Contents

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## Section

1. Overview	1
2. Background	2
3. Reasons for proposal	8

## Annex

A1. Responding to this consultation	12
A2. Ofcom's consultation principles	14
A3. Consultation coversheet	15
A4. Consultation questions	16
A5. Statutory notification	17

# 1. Overview

The electronic communications code is a set of rights that are intended to assist providers of communications networks and/or systems of infrastructure. Operators to whom Ofcom applies the Code may:

- construct and maintain communications networks and infrastructure (such as ducts, cabinets and poles) on public highways without the need to obtain a street works licence to undertake such works;
- construct communications infrastructure which is classified as ‘permitted developments’ under Town and Country Planning legislation (such as certain types of masts, poles and cabinets) without the need to apply for planning permission; and
- in the event that agreement cannot be reached with the owner or occupier of private land, concerning the deployment of communications networks or infrastructure on private land to apply to the Court to impose an agreement which confers the Code right being sought by the operator or provides for the Code right to bind the landowner or occupier.

We consider applications for the grant of Code powers from providers of electronic communications networks and providers of systems of infrastructure (or both) with reference to the matters set out in section 107(4) of the Communications Act 2003.

## **What we are proposing – in brief**

We are proposing to apply the electronic communications code set out in Schedule 3A to the Communications Act 2003 to Ark Data Centres Limited, whose registered company number is 05656968, for the purposes of the provision by it of an electronic communications network and the provision of a system of infrastructure.

We invite comments on our proposal by 26 June 2021.

We will consider any responses to this consultation before reaching a final decision on whether to grant Code powers to Ark Data Centres Limited.

## 2. Background

- 2.1 The electronic communications code (the Code) is set out in Schedule 3A to the Communications Act 2003 (the Act). It is designed to facilitate the installation and maintenance of electronic communications networks.<sup>1</sup> It confers rights on providers of such networks and on providers of systems of infrastructure to install and maintain apparatus on, under and over land and results in considerably simplified planning procedures.
- 2.2 Where the Code is applied in any person's case, it may be subject to restrictions and conditions set out in other legislation from time to time.<sup>2</sup>

### The application of the Code

- 2.3 The Code only has effect in the case of a person to whom it is applied by a direction given by Ofcom (or, in the case of the Secretary of State or any Northern Ireland department, where the Secretary of State or that department is providing or proposing to provide an electronic communications network).<sup>3</sup>
- 2.4 The only purposes for which the Code may be applied in a person's case by a direction are:
- a) the purposes of the provision of an electronic communications network; or
  - b) the purposes of the provision of a system of infrastructure which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.<sup>4</sup>
- 2.5 A direction applying the Code to a person may take effect:
- a) in relation only to such places or localities as may be specified or described in the direction;
  - b) for the purposes only of the provision of such electronic communications network, or part of an electronic communications network, as may be so specified or described; or
  - c) for the purposes only of the provision of such system of infrastructure, or part of a system of infrastructure, as may be so specified or described.<sup>5</sup>

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<sup>1</sup> "Electronic communications network" for the purposes of the Code has the same meaning as in section 32 of the Act.

<sup>2</sup> Section 109 of the Act – see the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2003 No. 2553), as amended by the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2009 (SI 2009 No. 584), the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2013 (SI 2013 No. 1403) and the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2017 (SI 2017/753).

<sup>3</sup> Section 106(3)(b) of the Act.

<sup>4</sup> Section 106(4) of the Act.

<sup>5</sup> Section 106(5) of the Act.

## Application process for applying the Code

- 2.6 Ofcom must not give a direction applying the Code in any person's case except on an application made for the purpose by that person.<sup>6</sup>
- 2.7 Any such application must be made in accordance with the requirements for the time being in force with respect to the content of an application for a direction applying the Code and the manner in which such an application is to be made.<sup>7</sup>

## Time limit for making a decision on applications for the Code

- 2.8 Regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011<sup>8</sup> provides that, except in cases of expropriation, Ofcom must make its decision within 6 months of receiving the completed application. In other words, that time limit applies from the moment Ofcom receives an application that fully complies with the requirements described above.

## Statutory consultation process on proposal

- 2.9 Before giving a direction applying the Code to the applicant in question, Ofcom must publish a notification of its proposal to give the direction and consider any representations about that proposal that are made to Ofcom within the period specified in the notification.<sup>9</sup>
- 2.10 Such a notification must contain the following<sup>10</sup>:
- a) a statement of Ofcom's proposal;<sup>11</sup>
  - b) a statement of Ofcom's reasons for that proposal;
  - c) a statement of the period within which representations may be made to Ofcom about the proposal (which period must end no less than 30 days after the day of the publication of the notification<sup>12</sup>).
- 2.11 Ofcom must publish a notification in such manner as Ofcom considers appropriate for bringing the notification to the attention of the persons who, in Ofcom's opinion, are likely to be affected by it.<sup>13</sup>

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<sup>6</sup> Section 107(1) of the Act.

<sup>7</sup> Section 107(2) of the Act. For the current requirements, see the Notification under section 107(2) of the Communications Act 2003, dated 6 October 2003, at Annex B to the statement entitled 'The Granting of the Electronic Communications Code by the Director General of Telecommunications – A Statement issued by the Director General of Telecommunications', published on 10 October 2003

<sup>8</sup> SI 2011 No. 1210.

<sup>9</sup> Section 107(6) of the Act.

<sup>10</sup> Section 107(7) of the Act.

<sup>11</sup> Subject to sections 113(7) and 115(5) of the Act, the statement of Ofcom's proposal must contain a statement that Ofcom proposes to apply the code in the case of the person in question and set out any proposals of Ofcom to impose terms under section 106(5): see section 107(8) of the Act.

<sup>12</sup> Section 107(9) of the Act.

<sup>13</sup> Section 107(10) of the Act.

2.12 The notification published at Annex 5 to this document is a notification for such purposes and should be read in conjunction with the entirety of this document, including the reasons set out in Section 3.

## Relevant considerations in making a decision (four factors)

2.13 In considering whether to apply the Code in any person's case, Ofcom must have regard, in particular, to each of the following matters<sup>14</sup>:

- a) the benefit to the public of the electronic communications network or system of infrastructure by reference to which the Code is to be applied to that person;
- b) the practicability of the provision of that network or system without the application of the Code;
- c) the need to encourage the sharing of the use of electronic communications apparatus;
- d) whether the person in whose case it is proposed to apply the Code will be able to meet liabilities arising as a consequence of the application of the Code in that person's case and any conduct of that person in relation to the matters with which the Code deals.

2.14 For the purposes of this process, those four factors rank equally with Ofcom's statutory duties under sections 3 and 4 of the Act.<sup>15</sup> Where appropriate, outside of those statutory considerations, we will also have regard to any additional factors that, in our opinion, are relevant to the particular application.

## Statutory duties

### General duties

2.15 In carrying out its functions under the Act (which includes giving a direction to apply the Code), Ofcom's principal duty as set out in section 3 of the Act is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

2.16 In so doing, we are required to secure a number of specific objectives and to have regard to a number of matters set out in section 3. As to the prescribed specific statutory objectives in section 3(2), we consider that the objective of securing the availability throughout the UK of a wide range of electronic communications services is particularly relevant to this consultation.

2.17 In performing its duties, Ofcom is also required to have regard to a range of other considerations, which appear to us to be relevant in the circumstances. In this context, we consider that a number of such considerations are relevant, particularly:

- a) the desirability of promoting competition in relevant markets;

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<sup>14</sup> Section 107(4) of the Act.

<sup>15</sup> Section 107(5) of the Act.

- b) the desirability of encouraging investment and innovation in relevant markets; and
  - c) the desirability of encouraging the availability and use of high-speed data transfer services throughout the United Kingdom.
- 2.18 We have also had regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed, as well as the interest of consumers in respect of choice, price, quality of service and value for money.
- 2.19 Ofcom has a wide measure of discretion in balancing its statutory duties and objectives. In so doing, we will take account of all relevant considerations, including any responses received during this consultation process, in reaching our conclusions.

### **Specific duties in relation to certain regulatory functions**

- 2.20 When carrying out certain functions such as giving a direction to apply the Code, section 4 of the Act requires us to act in accordance with the six requirements set out in that section.
- 2.21 In summary, these six requirements are:
- a) to promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;
  - b) to promote the interests of all members of the public in the United Kingdom;
  - c) to take account of the desirability of Ofcom's carrying out of its functions in a manner which, so far as practicable, does not favour one form of or means of providing electronic communications networks, services or associated facilities over another, i.e. to be technologically neutral;
  - d) to encourage, to such extent as Ofcom considers appropriate for certain prescribed purposes, the provision of network access and service interoperability, namely securing efficiency and sustainable competition, efficient investment and innovation and the maximum benefit for customers of communication providers and of persons who make associated facilities available;
  - e) to encourage compliance with certain standards as is necessary to facilitate service interoperability; facilitate end-to-end connectivity; facilitate the changing by end-users of their communication provider; facilitate the retention by end-users of their telephone numbers after a change of communication provider; and secure freedom of choice for the customers of communication providers; and
  - f) to promote connectivity and access to very high capacity networks by members of the public and businesses in the United Kingdom.
- 2.22 We consider that the first, second, fourth and sixth of those requirements are of particular relevance to our proposal in this consultation and that no conflict arises in this regard with the specific objectives in section 3 which we have identified above as particularly relevant in this context.

## Impact assessment

- 2.23 The analysis presented in the entirety of this consultation represents an impact assessment, as defined in section 7 of the Act.
- 2.24 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally Ofcom has to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the vast majority of its policy decisions. For further information about Ofcom's approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on the Ofcom website:
- [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)
- 2.25 Specifically, pursuant to section 7, an impact assessment must set out how, in our opinion, the performance of our general duties (within the meaning of section 3 of the Act) is secured or furthered by or in relation to what we propose.
- 2.26 There are two main options for this consultation:
- a) give a direction to apply the Code to the Applicant; or
  - b) not to give such a direction.

## Equality impact assessment

- 2.27 Section 149 of the Equality Act 2010 (the 2010 Act) imposes a duty on Ofcom, when carrying out its functions (which includes giving a direction to apply the Code), to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. The 2010 Act also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.
- 2.28 Section 75 of the Northern Ireland Act 1998 (the 1998 Act) also imposes a duty on Ofcom, when carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations across a range of categories outlined in the 1998 Act. Ofcom's Revised Northern Ireland Equality Scheme explains how we comply with our statutory duties under the 1998 Act.
- 2.29 To help us comply with our duties under the 2010 Act and the 1998 Act, we assess the impact of our proposals on persons sharing protected characteristics and in particular



whether they may discriminate against such persons or impact on equality of opportunity or good relations.

2.30 We do not consider that our proposals have equality implications under the 2010 Act or the 1998 Act.

## 3. Reasons for proposal

3.1 This section contains our reasons for proposing to apply the Code to Ark Data Centres Limited.

### Factual matters

#### The Applicant and the Code powers applied for

3.2 On 25 March 2021 we received an application that meets the statutory requirements.<sup>16</sup>

3.3 The person seeking Code powers (the Applicant) is:

- Company name: Ark Data Centres Limited
- Registered company number: 05656968
- Registered office: Spring Park, Westwells Road, Corsham, Wiltshire, SN13 9GB

3.4 The Applicant has applied to Ofcom for a direction applying Code powers under section 106(4)(a) and (b) of the Act. Namely, for the purposes of the provision by the Applicant of an electronic communications network; and for the purposes of the provision by the Applicant of a system of infrastructure which it is making available, or proposing to make available for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

#### Description and location of the network and system of infrastructure for Code powers

3.5 The Applicant is an operator of data centres currently operating in England. However, it intends to continue identifying and investing in new data centres across the United Kingdom.

3.6 It serves a range of customers, including public sector bodies, technology providers and financial institutions. It operates a 'carrier-neutral' business model, meaning that its customers are able to purchase electronic communications services from a range of telecoms providers.

3.7 The Applicant operates a fibre network which it uses to provide its customers with electronic communications services between its data centres. It also operates a duct network, serving its data centres, which is used by telecoms providers who offer electronic communications services to the Applicant's customers (users of the data centres).

3.8 The Applicant is seeking code powers to support the expansion of these facilities, including to serve additional data centres which it is currently building, and which it intends to build in future.

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<sup>16</sup> Notification under Section 107(2) of the Communications Act 2003. Annex B to the statement entitled 'The Granting of the Electronic Communications Code by the Director General of Telecommunications – A Statement issued by the Director General of Telecommunications', published on 10 October 2003.

- 3.9 The Applicant is seeking the Electronic Communications Network statutory purpose because it operates an electronic communications network, and the System of Infrastructure statutory purpose because parts of its duct network are used solely to provide duct access services.
- 3.10 The Applicant intends to construct its fibre and duct networks primarily on private land.

## Analysis of the four factors

- 3.11 As set out in paragraph 2.13 above, Ofcom must have regard to four factors when considering whether to apply the Code in any person's case.

### **The benefit to the public of the electronic communications network and system of infrastructure by reference to which the Code is to be applied to the Applicant**

- 3.12 The Applicant has stated that the network that it is intending to deploy would support its data centres with good quality, low-latency connectivity. In addition, the carrier-neutral nature of the Applicant's data centres means that its customers would be able to access services of diverse providers. The Applicant considers that these services benefit its customers and people who use the services they provide. It also considers that the network could benefit its neighbours, because the Applicant's duct network would enable telecoms providers to serve the localities surrounding the Applicant's data centres.
- 3.13 Data centres are used to house computing and telecoms equipment which provides a wide range of electronic communications services to people and businesses, including cloud storage services. Therefore, we expect the deployment of new fibre networks and infrastructure systems serving these data centres to improve the quality of services available and help meet the growing needs of people and businesses for connectivity. Where providers expand their network coverage, we expect competition to fuel innovation and customer choice.
- 3.14 We consider that the network planned by the Applicant would have the potential to benefit the public.

### **The practicability of the provision of the network and infrastructure system without the application of the Code**

- 3.15 To date, the Applicant has used other telecoms providers with Code powers to install and maintain its ducts. Some of these operators have enjoyed wayleave agreements with private landowners and tenants. However, they have not been able to exercise their rights under Part 3 of the Code to assign those rights because the applicant does not have Code powers.
- 3.16 The Applicant considers that Code powers are necessary for it to deploy its network and infrastructure system efficiently. In particular, the Applicant notes that having Code powers would:

- enable it to carry out street works to install and maintain its network more efficiently without the need to rely on other operators with Code powers to undertake such works on its behalf and at greater expense;
- help it secure agreement from landowners and tenants to install apparatus on private land and provide it with protections available to Code powers operators (for instance, to obtain and maintain a reasonable price for continued access to equipment installed on private land, and to apply to the Court to impose an agreement); and
- allow it to construct communications infrastructure which is classified as 'permitted developments' under Town and Country Planning legislation, without the need to apply for planning permission.

3.17 We consider that the business case for a fibre network and an infrastructure system is generally dependent upon the level of costs of building the network and infrastructure system, and the timely provision and take-up of services. Without the application of the Code, the Applicant's costs would likely be higher, and the time taken to then provide services, longer. We consider that, together, these effects could impair the Applicant's business case for expanding its network and infrastructure system.

3.18 We consider that the network and infrastructure system planned by the Applicant would not be practicable without the application of the Code.

### **The need to encourage the sharing of the use of electronic communications apparatus**

3.19 The Applicant has stated that it already provides wholesale electronic communications services and wholesale duct access to other telecoms providers and that it intends to continue to do so.

3.20 Network sharing will help to minimise the unnecessary proliferation of electronic communications apparatus, bringing environmental benefits aligned with long standing Government objectives in the public interest.

3.21 We consider that sharing of the use of apparatus would be encouraged by granting the Applicant Code powers.

### **Whether the Applicant will be able to meet liabilities as a consequence of (i) the application of the Code; and (ii) any conduct in relation to the application of the Code**

3.22 The Applicant has provided us with information, along with its application, that confirms that it understands its obligations to provide funds for liabilities under Regulation 16<sup>17</sup>, and confirmation by a director of the Company that it will ensure that sufficient funds for these liabilities are in place (and will provide Ofcom with a certificate to this effect) if, and when this becomes necessary.

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<sup>17</sup> Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2003 No. 2553) (as amended).

3.23 We consider that, based on this information, the Applicant would be able to meet its liabilities.

## Overall assessment

3.24 In addition to our consideration of the four factors discussed above in paragraph 2.13, we consider that our proposal would secure or further the performance of our statutory duties under sections 3 and 4 of the Act.

3.25 In particular, we consider that our proposal would encourage investment and innovation by facilitating the provision of an electronic communications network and an infrastructure system by the Applicant. The provision of such a network and infrastructure system would encourage the availability of a wide range of communications services and the availability of high-speed data transfer services. In our view this would also help support the future development, growth and availability of modern communications services in the public interest.

3.26 We also consider that the Applicant's intended network and infrastructure system could also enhance competition and customer choice as the Applicant proposes to offer retail services in competition with existing telecoms providers and to provide wholesale services to other telecoms providers.

3.27 The effect of implementing the proposal is likely to be low. Any costs to those affected by the Applicant's use of Code powers are likely to be outweighed by the benefits. On the other hand, the detrimental effect on the Applicant of a refusal to grant such powers (including to the practicability of its network roll-out) is likely to be significant. We are also of the view that the effect of our proposal is not likely to be to the detriment of any protected group within society.

## Proposal

3.28 Having considered the Applicant's application for Code powers, we propose that the Code should have effect in its case for the provision by the Applicant of an electronic communications network, and for the provision of a system of infrastructure which the Applicant is making available, or proposing to make available, for use by providers of electronic communications for the purposes of the provision by them of their network in England, Scotland and Wales.

3.29 We consider that our proposal is appropriate having regard to the considerations set out in section 107(4) of the Act. We consider that the performance of our statutory duties in sections 3 and 4 of the Act would be secured and furthered in relation to this proposal.

3.30 We will consider any responses we may receive by the closing date before making our decision as to whether we should give a direction applying the Code to the Applicant.

The overview section in this document is a simplified high-level summary only. The proposals we are consulting on and our reasoning are set out in the full document.

# A1. Responding to this consultation

## How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document, by 5pm on 26 June 2021.
- A1.2 You can [download a response form](#) from the Ofcom website. You can return this by email to the address provided in the response form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to [ECCcodepowers@ofcom.org.uk](mailto:ECCcodepowers@ofcom.org.uk), as an attachment in Microsoft Word format, together with the cover sheet (<https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet>).
- A1.4 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- Send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files. Or
  - Upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A1.5 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A1.6 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.7 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.8 If you want to discuss the issues and questions raised in this consultation, please contact ECC Team on 020 7981 3000, or by email to: [ECCcodepowers@ofcom.org.uk](mailto:ECCcodepowers@ofcom.org.uk)

## Confidentiality

- A1.9 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on [the Ofcom website](#) as soon as we receive them.
- A1.10 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If

you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.

- A1.11 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.12 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our [Terms of Use](#).

## Next steps

- A1.13 Following this consultation period, Ofcom plans to publish a statement in Summer 2021.
- A1.14 If you wish, you can [register to receive mail updates](#) alerting you to new Ofcom publications.

## Ofcom's consultation processes

- A1.15 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.16 If you have any comments or suggestions on how we manage our consultations, please email us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.17 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:

Corporation Secretary

Email: [corporationsecretary@ofcom.org.uk](mailto:corporationsecretary@ofcom.org.uk)

## A2. Ofcom's consultation principles

### Ofcom has seven principles that it follows for every public written consultation:

#### Before the consultation

- A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

#### During the consultation

- A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A2.6 If we are not able to follow any of these seven principles, we will explain why.

#### After the consultation

- A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.



## A3. Consultation coversheet

### BASIC DETAILS

Consultation title:

To (Ofcom contact): ECC Team

Name of respondent:

Representing (self or organisation/s):

### CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts? \_\_\_\_\_

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If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

## A4. Consultation questions

Question 1: Do you have any comments on our proposal to apply Code powers to the Applicant?

## A5. Statutory notification

### Notification under section 107(6) of the Communications Act 2003

#### Proposal to give a direction applying the electronic communications code

##### Proposal in this Notification

1. Ofcom hereby proposes, in accordance with section 107(6) of the Act, to give a direction under section 106(3) of the Act applying the Code to the Applicant.
2. The proposed direction applying the Code to the Applicant on the terms proposed is set out in the Schedule to this Notification.
3. Ofcom's reasons for giving the proposed direction are set out in the accompanying consultation document.

##### Ofcom's duties

4. In making this proposal, Ofcom has had regard, in particular, to each of the matters set out in section 107(4) of the Act. Furthermore, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.

##### Making representations

5. Representations on this proposal may be made by email to [ECCcodepowers@ofcom.org.uk](mailto:ECCcodepowers@ofcom.org.uk), by no later than 5pm on **26 June 2021**.

##### Interpretation

6. In this Notification—
  - (a) “**Act**” means the Communications Act 2003;
  - (b) “**Applicant**” means Ark Data Centres Limited, whose registered company number is 05656968;
  - (c) “**Code**” means the electronic communications code set out in Schedule 3A to the Communications Act 2003; and
  - (d) “**Ofcom**” means the Office of Communications.
7. For the purpose of interpreting this Notification—
  - (a) headings and titles shall be disregarded; and
  - (b) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
8. The attached Schedule forms part of this Notification.

##### Signed

A handwritten signature in black ink, appearing to read 'BP', is positioned to the left of a vertical line.

**Brian Potterill**

**Competition Policy Director**

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

26 May 2021

## SCHEDULE

### **[Proposed] Direction under section 106(3) of the Communications Act 2003 applying the electronic communications code**

#### **Background**

1. The Applicant has applied to Ofcom for a direction applying the Code to the Applicant.
2. The date on which Ofcom received a completed application that meets the statutory requirements with respect to the content of an application for a direction applying the Code and the manner in which such an application is to be made was 25 March 2021.
3. By virtue of regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011 No. 1210), except in cases of expropriation, Ofcom must make its decision within 6 months of receiving the completed application.
4. Prior to giving a decision under section 106(3) of the Act to apply the Code to the Applicant, Ofcom must publish a notification of its proposal to give the direction and consider any representations about that proposal that are made to Ofcom within the period specified in the notification.
5. On 26 May 2021, Ofcom published a notification of its proposal to give a direction applying the Code to the Applicant. That notification invited representations to Ofcom by no later than 5pm on 26 June 2021.
6. *[Ofcom has considered every representation about the proposal made to it/Ofcom did not receive any representations about the proposal]*. For the reasons set out in the explanatory statement accompanying Ofcom's consultation, Ofcom has had regard, in particular, to each of the matters set out in section 107(4) of the Act. Furthermore, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.

#### **Decision**

7. Ofcom hereby directs, in accordance with section 106 of the Act, as follows—
  - (a) the Code shall apply to the Applicant for the purposes of the provision by the Applicant of:
    - i. an electronic communications network; and
    - ii. a system of infrastructure which the Applicant is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks; and
  - (b) that application of the Code shall have effect throughout England, Scotland and Wales.
8. This Direction shall take effect on the day it is published.

#### **Interpretation**

9. In this Direction—
  - (a) “**Act**” means the Communications Act 2003;

- (b) **“Applicant”** means Ark Data Centres Limited, whose registered company number is 05656968;
- (c) **“Code”** means the electronic communications code set out in Schedule 3A to the Communications Act 2003;
- (d) **“Ofcom”** means the Office of Communications.

**10.** For the purpose of interpreting this Direction—

- (a) headings and titles shall be disregarded;
- (b) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.

**Signed**

**Brian Potterill**

**Competition Policy Director**

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

[date]