

Modification to 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 modification of the direction dated 21 July 2005 applying the Code to the Applicant (formerly Crown Castle UK Limited).
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 8 January 2018.
3. Prior to giving a decision under section 106(3) of the Act to modify the terms on which, by virtue of section 106(5), the Code is applied 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
4. On 7 June 2018, Ofcom published, in accordance with section 107(6) of the Act, a notification of its proposal to give a direction to modify the terms on which the Code applies to the Applicant for the reasons set out in the consultation document accompanying that notification. That notification invited representations to Ofcom by no later than 5pm on 6 July 2018.
5. Ofcom has considered every representation about the proposal made to it. For the reasons set out in the explanatory statement accompanying this Direction, 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. In accordance with section 115(4A) of the Act Ofcom considers the modification is objectively justifiable and proportionate to what it is intended to achieve.

Decision

6. Ofcom hereby directs, in accordance with section 106 of the Act, that the terms on which the Code applies to the Applicant by virtue of section 106(5) under its existing direction from Ofcom, dated 21 July 2005, shall be modified so that-
 - (a) in addition to the Code applying under section 106(4)(a) for the purposes of the provision by the Applicant of an electronic communications network;
 - (b) the Code shall also apply for the purposes set out in section 106(4)(b), namely for the purposes of the provision by the Applicant 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.

7. This Direction shall take effect on the day it is published.

Interpretation

8. In this Direction —

- (a) **“Act”** means the Communications Act 2003;
- (b) **“Applicant”** means Arqiva Services Limited, whose registered company number is 3196207;
- (c) **“Code”** means the electronic communications code set out in Schedule 3A to the Communications Act 2003;
- (d) **“Ofcom”** means the Office of Communications.

9. 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

25 September 2018

Explanatory Statement

Application and consultation

- 1.1 On 8 January 2018, Arqiva Services Limited (“Arqiva”) applied for a modification to the terms on which the electronic communications code (the “Code”) currently applies to it by virtue of an existing direction from Ofcom under section 106(5) of the Communications Act 2003 (“the Act”), dated 21 July 2005.
- 1.2 The terms on which Ofcom has applied the Code under Arqiva’s existing direction is for the purposes of the provision of an electronic communications network in accordance with section 106(4)(a). Arqiva is seeking a modification to those terms to apply the Code to additionally include the statutory purposes in section 106(4)(b). This is for the provision of a system of infrastructure which Arqiva 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.
- 1.3 Section 115(1) of the Act provides that Ofcom may at any time modify the terms upon which, by virtue of section 106(5), the Code is applied in a person’s case. Section 115(4) provides that a modification shall be by a further direction under section 106 to the person in whose case the electronic communications code has been applied by the direction being modified.
- 1.4 Arqiva’s application for a modification to its existing direction was made to Ofcom in accordance with section 107(4) of the Communications Act 2003 (the “Act”), meeting the requirements for any such application for a Direction applying the Code, and the manner in which such an application has to be made, as set out in the notification published by Ofcom (by virtue of the Transitional Provisions in the Act) on 10 October 2003 under section 107(2) of the Act.
- 1.5 On 7 June 2018 Ofcom published a notification, draft Direction and explanatory consultation in which it explained that it proposed to modify the existing direction applying Code powers to Arqiva (the “Consultation”). Ofcom sought comments on its proposal and received two responses by 06 July 2018.

Consultation responses

- 1.6 Ofcom received responses from an individual and from a communications provider who provides wireless internet access to end users within defined geographical areas of the UK.
- 1.7 The individual respondent did not raise any substantive issues relating directly to Ofcom’s proposal.
- 1.8 The respondent CP expressed concerns regarding what it regarded as potentially unfair competition and the possible domination of the market by large entities such as Arqiva. It felt that its business model, which it had heavily invested in, could be jeopardised by a possible ‘land grab’ by such operators, causing local authorities and land owners to breach the terms of their agreements with it. The respondent explained that these gave it exclusive rights to install equipment on assets, such as street lighting, posts and other street furniture. It submitted that the effect of Ofcom’s proposal would be to squeeze out smaller enterprises such as itself and lead to a reduction in innovation and investment in the market.

- 1.9 Ofcom met with the respondent to gain a fuller understand of its concerns. The respondent elaborated on the points it had raised in its written response, explaining in particular that it was starting to see ‘notices’ being served on contracts reaching their renewal dates and that it feared the larger operators would ‘cherry pick’ the best sites. It also submitted that such giving companies an extra set of rights would provide them with a further mechanism whereby they can knock out smaller players.
- 1.10 Ofcom has carefully considered the issues raised by the respondent CP.

Ofcom’s assessment of the application

Background

- 1.11 Ofcom must determine an application for a direction applying the Code in any person's case in accordance with the Act. In this case, Arqiva has applied for a direction under section 106(4)(b) applying the Code in their case for the purposes of the provision of a system of infrastructure which is made available, or proposed to be made available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks. Ofcom understands that section 106(4)(b) of the Communications Act was amended to replace “system of conduits” with “system of infrastructure” to make infrastructure as widely available as possible and to help clarify a grey area under the existing provision relating to the ability of network operators to provide infrastructure to other network operators.
- 1.12 The Act requires that in considering such an application, Ofcom must have regard, in particular, to each of the following matters:
- the benefit to the public of the electronic communications network or conduit system by reference to which the code is to be applied to that person;
 - the practicability of the provision of that network or system without the application of the code;
 - the need to encourage the sharing of the use of electronic communications apparatus;
 - whether the person in whose case it is proposed to apply the code will be able to meet liabilities arising as a consequence of—
 - (a) the application of the code in his case; and
 - (b) any conduct of his in relation to the matters with which the code deals.
- 1.13 Having considered Arqiva’s application for a modification to its Code powers in accordance with this framework and the responses we have received to Ofcom’s proposal to grant the requested modification, Ofcom has decided that the Code should have effect in its case for the provision by Arqiva:
- of its electronic communications network within the United Kingdom, and;
 - the provision by Arqiva of a system of infrastructure.

- 1.14 In reaching our decision we have had regard in particular to each of the matters set out in paragraphs 1.15 to 1.32 below, where we set out our corresponding analysis.

The benefit to the public of the electronic communications network or infrastructure system by reference to which the Code is to be applied to the applicant

- 1.15 Ofcom is satisfied that there are public benefits that flow from Arqiva's network of sites. The sites provide infrastructure systems that support the MNO network, transmission of terrestrial television and radio broadcast services, smart metering and internet of things networks, and site share for a wide range of other communications users and providers, including emergency services, public authorities and commercial radio. Ofcom understands that the sites are critical to MNOs enabling them to meet current and future network coverage targets.
- 1.16 Ofcom is satisfied that, by providing a network of sites available for other operators, the applicant supports the future development and growth of modern communications networks in the public interest as coverage and capacity demands are expected to increase significantly. We are also satisfied that the network of sites and infrastructure provided by Arqiva facilitates competition by enabling network operators to roll out new technology, such as 4G, 5G and future technologies and systems. It facilitates the deployment of new services that might otherwise be uneconomic if a new operator were faced with the very high cost of new network infrastructure deployment, particularly in rural areas, since economic feasibility and restrictive planning rules may make it economically unattractive for competition to enter the market.
- 1.17 Ofcom considers that Arqiva's provision of its network of sites and infrastructure helps to minimise the unnecessary proliferation of electronic communications sites, bringing environmental benefits aligned with long standing Government objectives in the public interest, as acknowledged in the reforms of the Code and in the express recognition of the provision of infrastructure systems as a statutory purpose in section 106(4)(b) of the Act.
- 1.18 Ofcom's view is that in granting a modification to Arqiva Code powers would benefit the public for the reasons put forward by Arqiva.
- 1.19 To the extent that the respondent CP is arguing that there is no benefit to the public of granting this application, we do not accept that this is the case. We have not seen any evidence to substantiate the respondent's concerns that our proposal to modify Arqiva's existing direction would have an adverse effect on competition, in particular by causing other providers, such as the respondent, to exit the market and leave Arqiva in a position where it faces no competition.

The practicability of the provision of the network or system without the application of the Code

- 1.20 The Applicant has explained that around 90% of its sites are located on land that it leases and that it already benefits from the application of the Code, which is necessary to support its significant estate management activities which include:
- protecting sites and infrastructure on the expiry of existing occupational agreements, so that Arqiva remains lawfully in occupation and that electronic communications services are maintained for the public while a new agreement is

sought, or alternative provision is found (where the land owner is entitled to an order for removal);

- enabling successful negotiations for acquiring new rights to facilitate rollout by providing a backstop of court intervention where reasonable terms cannot be agreed with landowners.

1.21 Ofcom is satisfied that without the further code powers Arqiva has applied for, there exist potential difficulties with regard to the practicability of the provision of Arqiva's network for use by providers of electronic communications networks for the purposes of provision by them of their networks and the services to the public that will be supported by Arqiva's Infrastructure Systems.

1.22 Taking these considerations into account, Ofcom's view is that a modification to the grant of Code powers is necessary for the practicability of the provision of Arqiva's Infrastructure Systems and to protect the provision of services to the public that are supported by Arqiva's Infrastructure Systems.

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

1.23 The Applicant has stated that the prime purpose of its network and infrastructure is to provide the site sharing facilities for other operators and communications providers. The Applicant has contracts providing access to its sites and infrastructure with the four UK MNOs and their joint venture companies and a broad base of non-MNO customers.

1.24 Ofcom understands that the sites are made available by Arqiva through active promotion to operators and other communications providers to ensure best utilisation of Arqiva's infrastructure and to provide a broad range of services to the public from its sites.

1.25 The Applicant is part of a group which operates approximately 16,700 marketable sites (including those already licensed to customers), of which approximately 5000 are provided by the company. The average occupancy rate on the 3,200-company's active licensed sites is approximately 2.5 MNOs per site and approximately 3 customers in total per site. The Applicant has explained that the scale and breadth of the network of sites and infrastructure across the United Kingdom offers a key opportunity to roll out future network services and technologies, including 5G and the internet of things.

1.26 Ofcom is satisfied that in this case there is a need to encourage the sharing of the use of the electronic communications apparatus. In particular, granting the modification to include the statutory purposes of provision of a system of infrastructure alongside the statutory purposes of provision of an electronic communications network will enable Arqiva to protect and develop infrastructure that can be shared with multiple operators in line with the aspirations of the EU Telecommunications Directive and the planned European Electronic Communications Code to promote inter alia, facilities sharing.

1.27 Taking these considerations into account, Ofcom's view is that sharing of the use of apparatus would be encouraged by granting Arqiva the modification to its Code powers.

1.28 The respondent CP submitted that it failed to see why an operator with rights under the Code would elect to share Arqiva's infrastructure and considered that Arqiva's strategy was to acquire land in an anti-competitive manner which would squeeze out smaller enterprises from the communications sector; ultimately leading to a reduction in innovation and

investment and the potential stagnation of the market with only the largest operators able to compete. We are satisfied that there is a need to encourage the sharing of the use of electronic communications apparatus in this case and do not consider that granting the application will lead to Arqiva acting in a anti-competitive manner. If anything, the availability of Arqiva's infrastructure ought to increase competition and give third party network operators greater infrastructure sharing opportunities.

Whether the applicant will be able to meet liabilities arising as a consequence of (i) the application of the Code in the applicant's case; and (ii) any conduct in relation to the matters with which the Code deals

- 1.29 Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 requires Code operators to ensure that sufficient funds are available to meet the specified liabilities which (i) arise on or before the date on which a relevant event occurs, or (ii) may arise at any time during the liability period, from the exercise of rights conferred under the Code;
- 1.30 Under its existing Code direction, as far as we are aware Arqiva has complied with its obligations and responsibilities with regard to compliance with Regulation 16.
- 1.31 Ofcom is satisfied that Arqiva has assessed its potential liabilities and that it will have arrangements in place to lodge appropriate funds in accordance with its obligations under Regulation 16, based on the costs of decommissioning and reinstating the relevant infrastructure in the event of liabilities specified under Regulation 16 arising.
- 1.32 The respondent CP submitted that since the proposed variation is likely to lead to a land acquisition strategy by Arqiva which will squeeze enterprises out of the market, we should take account of the potential consequential liabilities arising from breach of contract claims (compensable under the Code) which could be very significant. The liabilities referred to by the respondent CP are not within the scope of specified liabilities falling under Regulation 16 and therefore, we do not consider these to be relevant to the assessment of this matter. To the extent that they are relevant, Arqiva is a large commercial entity and we would expect it to have access to the relevant resources to meet liabilities of the type referred to by the respondent CP.
- 1.33 We consider that our proposal would secure or further the performance of our statutory duties under sections 3 and 4 of the Act. As we have explained above, we have seen no evidence to change the views we set out in our proposal that, if Arqiva's intended infrastructure plans through the use of Code powers are realised, it will contribute to the availability throughout the United Kingdom of a wider range of electronic communications services. In the absence of any evidence to the contrary, we also believe that our proposal will encourage competition in the provision of electronic communications networks and service and associated facilities as well as encouraging investment and innovation.

Objectively justifiable and proportionate to what the modification is intended to achieve

- 1.34 In accordance with section 115(4A) of the Act, and for all the reasons given above, we consider that the modification is objectively justifiable and proportionate to what it is intended to achieve.

Ofcom's decision

- 1.35 For all the reasons set out in this Explanatory Statement Ofcom has decided to modify the terms of Arqiva's direction to include the statutory purposes in section 106(4)(b).
- 1.36 By virtue of Ofcom's decision, the Code shall additionally apply to Arqiva for the purposes of the provision of a system of infrastructure which it is making available, or is proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.