

SCHEDULE

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 12 November 2014.
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 21 November 2014, Ofcom published, in accordance with section 107(6) of the Act, such a notification of its proposal to give a direction applying the Code 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 22 December 2014.
6. Ofcom has considered every representation about the proposal received and duly made to it. For the reasons set out in the explanatory statement accompanying this Direction, 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 an electronic communications network and system of conduits 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;
 - (b) that application of the Code shall have effect throughout the United Kingdom.
8. In this Direction, unless the context otherwise requires and subject to paragraph 9 below, words and expressions used in this Direction shall have the same meaning as they have been ascribed in the Act.
9. In this Notification—
 - (a) “**Act**” means the Communications Act 2003;

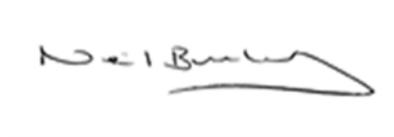
- (b) “**Applicant**” means Network Rail Infrastructure Limited, whose registered company number is 02904587;
- (c) “**Code**” means the electronic communications code;
- (d) “**Ofcom**” means the Office of Communications.

10. For the purpose of interpreting this Notification—

- (a) headings and titles shall be disregarded;
- (b) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament;
- (c) expressions cognate with those referred to in this Direction shall be construed accordingly.

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

Signed

A handwritten signature in black ink, appearing to read "Neil Buckley", with a long horizontal flourish underneath.

Neil Buckley
Director of Investigations

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

14 January 2015

Explanatory Statement

- 1.1 On 12 November 2014, Network Rail Infrastructure Limited applied for the electronic communications code (the “Code”) for the purposes of the provision by it of an electronic communications network and the provision by it of a system of conduits which it is making available, or proposing to make available, for use by providers of electronic communications networks for the purpose of the provision by them of their networks. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets 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.
- 1.2. On 21 November 2014, Ofcom published a notification, draft Direction and explanatory statement in which it explained that it proposed to grant Code powers to Network Rail Infrastructure Limited (the “Consultation”). Ofcom sought comments on its proposal by 22 December 2014 and received two responses.
- 1.3. Network Rail Infrastructure Limited operates and maintains an existing over-ground and subterranean dark fibre-optic electronic communications network, known as FTNx, which runs alongside the Network rail network. The network consists of fibre optic cables and conduits and delivers a variety of services to the Applicant’s customers, including voice, data, video and broadband services.
- 1.4 Network Rail Infrastructure Limited plans to expand its network and requires Code powers to install suitable dark fibre network, conduit and associated assets to locations outside of its existing land and infrastructure.
- 1.5 In considering Network Rail Infrastructure Limited’s application, Ofcom has:
 - a) acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty set out in section 3(1)(b) “to further the interests of consumers in relevant markets, where appropriate by promoting competition” and the first community requirement set out in section 4(3)(a) to promote competition “in relation to the provision of electronic communications networks and services”. Ofcom has also acted in accordance with its duty set out in section 3(2)(b) to secure, in the carrying out of its functions, “the availability throughout the United Kingdom of a wide range of electronic communications services”; and
 - b) had regard to the desirability of promoting competition in relevant markets, the desirability of encouraging investment and innovation in relevant markets, and the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom.
- 1.6 In addition to the requirements of sections 3 and 4 of the Act, Ofcom has also had regard to the matters set out in s.107 (4) of the Act. These are set out below.

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

- 1.7 The main purpose of Network Rail Infrastructure Limited's network and systems of conduit will be to improve mobile connectivity along the rail corridor and to offer wholesale services to other telecom operators.
- 1.8 Network Rail Infrastructure Limited has stated that its planned network expansion would enable it to deliver and operate a high speed, high capacity national electronic fibre optical network infrastructure to transmit a variety of network and IP services to new geographical areas outside of its existing network footprint.
- 1.9 Network Rail Infrastructure Limited has explained that due to the coverage of its network, this will serve to benefit the public as a whole as it is likely to increase competition in the provision of various broadband and telecom services in the future.
- 1.10 For these reason, Ofcom considers that granting Network Rail Infrastructure Limited Code powers would benefit the public.

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

- 1.11 Network Rail Infrastructure Limited has explained that obtaining separate planning permissions for the number of works required would be difficult and costly, with no guarantee that the necessary consents would be granted or, if they were granted, that such consents would be provided within a reasonable timeframe. For this reason, Network Rail Infrastructure Limited considers that the grant of Code powers is necessary for the practicable provision of its planned network expansion.
- 1.12 Network Rail Infrastructure Limited has suggested that, although it already benefits from permitted development rights in its capacity as a railway undertaker under Part 17 of the Town and Country Planning (General Permitted Development) Order 1995, it does not consider that those rights would generally extend to the works required to carry out its planned network expansion.
- 1.13 We consider, therefore, the grant of Code powers is necessary for the practicable provision of Network Rail Infrastructure Limited's network.

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

- 1.14 Network Rail Infrastructure Limited has confirmed that it is prepared to share its electronic communications apparatus to the extent it is technically feasible and commercially viable.
- 1.15 We consider that sharing of the use of apparatus may be encouraged by granting Network Rail Infrastructure Limited Code powers as a result of those stated intentions.

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

- 1.16 Network Rail Infrastructure Limited has considered its duties and responsibilities in regards to compliance with Regulation 16 (Funds for Liabilities). It has provided Ofcom with a signed letter from one of its directors certifying that funding of specified liabilities will be put in place at least two weeks prior to commencing works on public land.

Response to the Consultation

- 1.17 As noted in paragraph 1.2 above, we received two responses in relation to the Consultation.
- 1.18 The first respondent strongly supports the proposal to grant Network Rail Code powers, as it believes this will enable Network Rail to run its services more efficiently, and will subsequently be within the public's interests.
- 1.19 The second respondent also supports the proposal to apply Code powers to Network Rail, as it states that its implementation will encourage competition and enables third party network access and is a future-proof solution for digital railways.

Overall assessment

- 1.20 Ofcom has a statutory duty to consider any representations made to it about a proposal to grant and applicant Code powers.
- 1.21 Having considered the representations referred to above, Ofcom's duties in sections 3 and 4 of the Act and the matters set out in section 107(4) of the Act, we consider that it is appropriate to grant Code powers to Network Rail Infrastructure Limited. We do not consider that there is evidence to suggest that granting Code powers to Network Rail Infrastructure Limited would have an adverse effect on competition or consumer choice in the United Kingdom. Further, we consider that granting Network Rail Infrastructure Limited Code powers will assist it to deploy and maintain its electronic communications network and system of conduits and that the roll-out of its network and system of conduits will give rise to benefits to the public and that it will promote competition, for the reasons we have discussed above.