

Consultation 2/2025: Adjudicator's Position on the Scope of the Adjudicator's Powers in Relation to Amendments to Existing Contracts

1. INTRODUCTION TO THE CONSULTATION

- 1.1 The aim of this consultation is to explain how the Adjudicator reads the Undertakings as they relate to the powers of the Adjudicator during the life of a contract (as opposed to when an agreement is first being negotiated or renewed). In discussions with stakeholders, the Adjudicator believes some have misunderstood the Undertakings and that, therefore, clarification will be helpful.
- 1.2 The Adjudicator invites submissions on the position set out in this consultation document. This consultation aims to ensure, for transparency and fairness, that all stakeholders are aware of the Adjudicator's position on the Undertakings and have the chance to make submissions if they believe this reading is flawed.
- 1.3 The Adjudicator has no power to change the Undertakings. That power lies only with the Competition and Markets Authority (the "**CMA**").¹
- 1.4 The Adjudicator believes the consultation and any position or guidance issued following the consultation will help deliver transparency and accountability in how the Adjudicator reads and will apply the Undertakings.
- 1.5 Submissions should be in answer to the question "Do you agree or disagree with the Adjudicator's reading of the Undertakings set out in sections two to six of this this consultation document?". Please provide reasons for your answer based on the Undertakings.
- 1.6 The deadline for any submission is Thursday 29 May 2025 and the full details of the consultation process are set out below in section seven of this consultation document.

2. SUMMARY

- 2.1 The Adjudicator's view is that, with only a handful of exceptions, any guidance, directions or adjudications made under the Undertakings² would not affect the terms of an existing contract between Arqiva and a customer.
- 2.2 Purely by way of example, if the WACC (Weighted Average Cost of Capital) or the inflationary mechanism is updated by the Adjudicator, these would not apply to existing contracts but would only apply to contracts agreed, variations or renewals made **after** the new WACC or inflationary mechanism was issued (in line with the position outlined below).

¹ The Adjudicator notes that the CMA's power to vary or release undertakings is restricted to situations where there has been an evidenced change in circumstances that might make such a variation appropriate.

² Save for where defined elsewhere in this note, defined terms are those referenced in the document "*Undertakings to the Competition Commission by Macquarie UK Broadcast Holdings Limited, Macquarie MCG International Limited, Macquarie European Infrastructure Fund II, Macquarie European Infrastructure Fund III and Macquarie Capital Funds (Europe) Limited*".

- 2.3 The exceptions referred to in 2.1 include the following:
- (a) Where an existing contract is subject to a variation or renewal in accordance with the relevant and applicable provisions of the Undertakings;
 - (b) Where a contract for Transmission Services contained terms which conflict with the Undertakings (or with guidance or directions which applied at the time the agreement was executed);
 - (c) Where a contract for Transmission Services contained a provision agreed between the parties that specifically incorporated any new Adjudicator-issued guidance or directions.
- 2.4 The Adjudicator recognises that it is not possible to predict or consider every possible scenario which could occur in the future. Therefore, there could be other exceptions that have not been identified at this stage; these would be considered and determined based on the Undertakings.
- 2.5 The Adjudicator does not have a wider, general, freestanding 'mid-contract' modification role for existing agreements. The Adjudicator's view is that any guidance or directions³ are limited to prospective application, i.e. are applicable at the next point at which the contract is varied or where a new agreement is offered or entered into.
- 2.6 In considering this position, the Adjudicator has considered in detail the Undertakings and has taken independent legal advice. The Adjudicator has also considered the Competition Commission's Final Report (Macquarie UK Broadcast Ventures Limited/ National Grid Wireless Group Completed Acquisition Final Report 11 March 2008) and has briefed the CMA and Ofcom.
- 2.7 The next two sections set out in more detail the position in relations to two categories of contracts as they are defined in the Undertakings.

3. THE POSITION IN RELATION TO EXISTING TRANSMISSION AGREEMENTS

- 3.1 Part A of the Undertakings (paragraphs 2-8) includes Undertakings made in relation to Existing Transmission Agreements (i.e. relevant contracts which were in force at the time the Commencement Date of the Undertakings in 2008).
- 3.2 Paragraph 3 of the Undertakings relates to contract variations for this type of agreement.
- (a) **Paragraph 3.1 of the Undertakings:** This applies to Existing Transmission Agreements which are not listed in Appendix 7. If a customer were to request changes to their agreement, this would engage the obligation in paragraph 3.1 for Arqiva to promptly enter into good faith negotiations in relation to the requested change.
 - (b) **Paragraph 3.2 of the Undertakings:** This applies to Existing Transmission Agreements which are listed in Appendix 7. The frequency of renegotiation and amendment, and the pricing of any revision, is governed (only) by the terms of those agreements.

³ Directions that are issued as the result of a Dispute are subject to the position outlined in section 6 on Disputes.

- 3.3 The Adjudicator's view is that any guidance or directions⁴ issued by the Adjudicator will apply only prospectively, i.e. at the next point at which an Existing Transmission Agreement is varied or renewed. Outside the circumstances in 2.3 above, the Adjudicator does not consider that they have any more general power to amend Existing Transmission Agreements through guidance or directions.⁵

4. THE POSITION IN RELATION TO NEW TRANSMISSION AGREEMENTS

- 4.1 Part B (paragraphs 9-10) of the Undertakings provides a regime for New Transmission Agreements (i.e. those which have been entered into after the Commencement Date of the Undertakings in 2008).
- 4.2 The Adjudicator's view is that any new guidance or directions from the Adjudicator will only apply prospectively, i.e. at the next point at which the existing New Transmission Agreement is varied or renewed. Outside the circumstances in 2.3 above, the Adjudicator does not consider that they have any more general power to amend existing New Transmission Agreements through guidance or directions.⁶

5. UNDERTAKINGS WHICH APPLY TO ALL TELEVISION AND RADIO TRANSMISSION SERVICES

- 5.1 The Adjudicator does not consider that other provisions of the Undertakings affect the conclusions set out above. The Adjudicator has specifically considered paragraph 13.4 of the Undertakings and the Adjudication Scheme set out at Appendix 1 to the Undertakings (including in particular paragraphs 7-12 of the Adjudication Scheme).
- 5.2 In particular on paragraph 13.4 of the Undertakings, the Adjudicator does not consider that paragraph 13.4 grants them any additional power (i.e. a power over and above those contained elsewhere in the Undertakings). The Adjudicator's position is that this paragraph is an anti-avoidance provision intended to mean that Arqiva's contractual obligations outside arrangements governed by the Undertakings cannot prevent Arqiva from complying with the Adjudicator's guidance or directions.⁷ The Adjudicator notes in particular that this paragraph refers to "a contract" rather than using either of the defined terms covering the types of transmission agreement.

6. DISPUTES

- 6.1 Paragraph 7 of the Adjudication Scheme provides that the Adjudicator has the function of determining any dispute between Arqiva and a customer arising out of the interpretation or exercise of the rights given to, or obligations upon, customers in relation to the matters set out in paragraph 13.6 of the Undertakings. The Adjudicator's view is that, with only a handful of exceptions, any adjudication made under the Undertakings would not affect the terms of an existing contract between Arqiva and a customer. The exceptions would depend on the specific circumstances of a dispute and how the Undertakings apply to them.

⁴ See footnote 3 above.

⁵ See footnote 3 above.

⁶ See footnote 3 above.

⁷ For example: (i) citing a confidentiality clause in a third party contract as a means of withholding information from the Adjudicator; or (ii) relying on a clause in a third party contract to challenge the effectiveness of a decision or written direction issued by the Adjudicator (using, for example, an exclusive dispute resolution clause in a third party contract). See also footnote 3 above.

7. CONSULTATION QUESTION AND DEADLINE FOR SUBMISSIONS

- 7.1 Please make your submission in writing to the address below or by emailing a PDF or Microsoft Word document to contact@ota-bts.org.uk marking the response with the reference Consultation 2/2025. Please also complete and attach the Consultation Coversheet in the Appendix below.
- 7.2 The response should be in answer to the question “Do you agree or disagree with the Adjudicator’s reading of the Undertakings set out in sections two to six of this this consultation document?”. Please provide reasons for your answer based on the Undertakings.
- 7.3 The deadline for any submissions from stakeholders on this draft position is 5.00 pm on Thursday 29 May 2025. The intention is to publish submissions on the OTA-BTS website on 6 June 2025 with an indication of when the Adjudicator’s conclusions and any guidance would be published.
- 7.4 At the end of 2024, OTA-BTS developed Consultation Principles which can be found at <https://ota-bts.org.uk/wp-content/uploads/2025/02/Consultation-Principles.pdf>

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