

Explanatory Statement accompanying a  
direction under section 106(3) of the  
Communications Act 2003 applying Code  
powers to Airband Community Internet  
Limited

# About this document

This document sets out Ofcom's considerations of the responses received to our proposal, published on 2 June 2017, to grant Code powers in favour of Airband Community Internet Limited. It also sets out Ofcom's decision, taking into account those considerations, to adopt the proposed direction, under section 106(3) of the Communications Act 2003, to apply the Code to Airband Community Internet Limited.

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# Explanatory statement

## Proposal to apply the Code to Airband Community Internet Limited

- 1.1 On 2 June 2017, we published a consultation on the notification of our proposal to apply the electronic communications code set out in Schedule 2 to the Telecommunications Act 1984 as amended (“Code”) to Airband Community Internet Limited (“Applicant”),<sup>1</sup> by direction on the terms proposed in the consultation (“Consultation”).<sup>2</sup>
- 1.2 As set out in the Consultation, in accordance with section 106(4) of the Act, the only purposes for which the Code may be applied in a person’s case are:
- the purposes of the provision of an electronic communications network; or
  - the purposes of the provision of a system of conduits 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.
- 1.3 Having considered the Applicant’s application for Code powers, we proposed that the Code should have effect in its case for the provision by the Applicant of its electronic communications network in the United Kingdom.
- 1.4 We considered that the proposal was appropriate having regard to the matters set out in section 107(4) of the Communications Act 2003 (the “Act”):
- On the basis of our analysis of the benefit to the public of the electronic communications network by reference to which the Code is to be applied to the Applicant, we considered that granting the Applicant Code powers would benefit the public;<sup>3</sup>
  - On the basis of our analysis of the practicability of the network without the application of the Code, we considered that the grant of the Code was necessary for the practical provision of the Applicant’s electronic communications network;<sup>4</sup>
  - On the basis of our analysis of the need to encourage the sharing of the use of the electronic communications apparatus, we considered that sharing of the use of apparatus would be encouraged by granting the Applicant Code powers as a result of its stated intentions;<sup>5</sup>
  - Regarding whether the Applicant will be able to meet the liabilities as a consequence of (i) the application of the Code; and (ii) any conduct in relation to the application of the Code, we noted that:

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<sup>1</sup> Registered company number 07114545.

<sup>2</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0014/102506/Code-Powers-to-Airband-Community-Internet-Limited.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0014/102506/Code-Powers-to-Airband-Community-Internet-Limited.pdf)

<sup>3</sup> See paragraphs 3.8 to 3.11.

<sup>4</sup> See paragraphs 3.12 to 3.15.

<sup>5</sup> See paragraphs 3.16 to 3.18.

- the Applicant had considered its duties and responsibilities with regard to compliance with Regulation 16 (Funds for Liabilities) of the Electronic Communications Code Regulations;<sup>6</sup>
  - the Applicant had assessed its asset base and future network deployment and has confirmed that it will make arrangements to put the requisite funds in place in the event that Code powers are granted by Ofcom. In particular, that it had provided Ofcom with a signed letter from its managing director certifying that the Applicant will put sufficient funds for liabilities in place, initially by way of an escrow account, before exercising Code powers.
  - the Applicant had also explained that it will pursue separately discussions with appropriate insurance providers with a view to obtaining a suitable bond or insurance policy.<sup>7</sup>
- 1.5 We also considered that the performance of our statutory duties in sections 3 and 4 of that Act would be secured and furthered in relation to the proposal.<sup>8</sup>
- 1.6 We said we would consider any responses we may receive by the closing date of 3 July 2017 before making our decision as to whether we should give a direction applying the Code to the Applicant.<sup>9</sup>

## Ofcom's considerations of responses received

- 1.7 In accordance with the procedure for directions applying the Code, before giving a direction under section 106 of the Act, Ofcom must consider any representations about the proposal.<sup>10</sup> We received two representations from individuals. The first did not object to the proposal to apply Code powers to the Applicant. But it did comment that there should be planning limitations within national parks, “especially where any objects have adverse effects on conservation villages and their environs and views”.
- 1.8 In consideration of this response, we note that in giving a direction applying the Code to the Applicant, section 109(1) of the Act states that “that code is to have effect in that person’s case subject to such restrictions and conditions as may be contained in regulations made by the Secretary of State”. The relevant regulations are the Electronic Communications Code Regulations,<sup>11</sup> which amongst other things, impose obligations on Code operators when seeking to install, alter or replace electronic communications apparatus in conservation areas<sup>12</sup> and protected areas.<sup>13</sup> These obligations include, where applicable, providing the relevant planning authority with notice in writing and the power for that planning authority to give the Code operator written notice of conditions with which the planning authority wishes the Code operator to comply in respect of the installation, alteration or replacement.

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<sup>6</sup> Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2003 No. 2553) (as amended).

<sup>7</sup> See paragraphs 3.19 and 3.20.

<sup>8</sup> See paragraphs 3.21 to 3.23.

<sup>9</sup> The draft direction applying the Code to the Applicant was set out in Annex 4 to the Consultation.

<sup>10</sup> See section 107(6) of the Act.

<sup>11</sup> Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2003 No. 2553) (as amended).

<sup>12</sup> See Regulations 6 and 6A.

<sup>13</sup> See Regulations 8 and 8A.

- 1.9 The second representation objected to the proposal to apply Code powers to the Applicant. The individual referred us to what it described as examples, and to third parties, that, in its view, we should investigate and/or contact and which would substantiate its objection.
- 1.10 We consider it is the responsibility of the respondent to provide the evidence to support the reasons for which it objects. In this regard, we consider that in providing references and requesting that we investigated and/or contacted them on the grounds that, in its view, they would substantiate its objection, the respondent has not fulfilled this responsibility.
- 1.11 Consequently, having considered the representation, in our view the reasons we set out in the Consultation<sup>14</sup> for proposing to apply the Code to the Applicant remain valid.

### **Ofcom's decision**

- 1.12 We have considered the representations received and, for the reasons set out above, we have decided to adopt our proposal in the Consultation to give a direction applying the Code to the Applicant.
- 1.13 The direction is attached as an annex to this Explanatory statement.

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<sup>14</sup> See, in particular, paragraphs 3.8 to 3.23.

# Annex

## 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 April 2017.
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 2 June 2017, Ofcom published, in accordance with section 107(6) of the Act, 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 **3 July 2017**.
6. 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 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
  - (b) that application of the Code shall have effect throughout the United Kingdom.
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 Airband Community Internet Limited, whose registered company number is 07114545;

- (c) “**Code**” means the electronic communications code set out in Schedule 2 to the Telecommunications Act 1984 (as amended);
- (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

**31 August 2017**