
Proposal to apply Code powers to Lothian Broadband Networks Limited

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

CONSULTATION:

Publication date: 12 April 2019

Closing date for responses: 13 May 2019

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1. Overview

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

- construct and maintain infrastructure on public land (streets) without needing to obtain a specific street works licence to do so;
- benefit from certain immunities from the Town and Country Planning legislation; and
- in the event that agreement cannot be reached with the owner or occupier of 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.

Ofcom considers 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 Lothian Broadband Networks Limited, whose registered company number is SC494551, for the purposes of: providing the operator's network; and providing an infrastructure system.

We invite comments on our proposal by 13 May 2019.

We will consider any responses to this consultation before deciding whether to confirm our proposal.

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

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.¹ 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.²

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).³
- 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.⁴
- 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.⁵

¹ “Electronic communications network” for the purposes of the Code has the same meaning as in section 32 of the Act.

² 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).

³ Section 106(3)(b) of the Act.

⁴ Section 106(4) of the Act.

⁵ 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.⁶
- 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.⁷

Time limit for making a decision on application

- 2.8 Regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011⁸ 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.⁹
- 2.10 Such a notification must contain the following¹⁰:
- a) a statement of Ofcom's proposal;¹¹
 - 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 one month after the day of the publication of the notification¹²).

⁶ Section 107(1) of the Act.

⁷ 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

⁸ SI 2011 No. 1210.

⁹ Section 107(6) of the Act.

¹⁰ Section 107(7) of the Act.

¹¹ 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.

¹² Section 107(9) of the Act.

- 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.¹³
- 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 matters¹⁴:
- 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.¹⁵ 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 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.

¹³ Section 107(10) of the Act.

¹⁴ Section 107(4) of the Act.

¹⁵ Section 107(5) of the Act.

- 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;
 - 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 for fulfilling Community obligations

- 2.20 The function of giving a direction to apply the Code would involve us exercising functions falling under the EU regulatory framework. As such, section 4 of the Act requires us to act in accordance with the six European Community requirements for regulation.
- 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 contribute to the development of the European internal market;
 - c) to promote the interests of all persons who are citizens of the European Union;
 - d) 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;
 - e) to encourage, to such extent as Ofcom considers appropriate for certain prescribed purposes, the provision of network access and service interoperability, namely securing efficient and sustainable competition, efficient investment and innovation and the maximum benefit for customers of communications providers;
 - f) to encourage compliance with certain standards to facilitate service interoperability and secure freedom of choice for the customers of communications providers.
- 2.22 We consider that the first and fifth 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 we have identified above as particularly relevant in this context.

Impact assessment and equality 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
- 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.
- 2.27 In carrying out our functions (which includes giving a direction to apply the Code), we are also under a general duty under the Equality Act 2010 to have due regard to the need to:
- a) eliminate unlawful discrimination, harassment and victimisation;
 - b) advance equality of opportunity between different groups; and
 - c) foster good relations between different groups,
 - d) In relation to the following protected characteristics: age; disability; gender re-assignment; pregnancy and maternity; race; religion or belief; sex and sexual orientation.
- 2.28 Such equality impact assessments ("EIAs") also assist us in making sure that we are meeting our principal duty under section 3 of the Act.
- 2.29 We have therefore considered what (if any) impact the proposal in this consultation may have on equality. We do not, however, consider the impact of the proposal in this consultation to be to the detriment of any group within society. We have therefore not carried out separate EIAs in relation to race or gender equality, or equality schemes under the Northern Ireland and Disability Equality Schemes.
- 2.30 This Section contains our reasons for proposing to apply the Code to the Applicant.

3. Reasons for proposal

3.1 This Section contains our reasons for proposing to apply the Code to the Applicant.

Factual matters

The applicant and the Code powers applied for

3.2 On 22 November 2018 we received an application that meets the statutory requirements.¹⁶

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

- Company name: Lothian Broadband Networks Limited
- Registered company number: SC494551
- Registered office: Exchange Tower, 19 Canning Street, Edinburgh, Midlothian, EH3 8EH.

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 of a system of infrastructure which the Applicant is 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 or system of infrastructure for Code powers

3.5 The Applicant currently operates a Fixed Wireless Access (FWA) Network predominantly in rural locations in East Lothian and Mid Lothian. The Applicant seeks Code powers to facilitate the expansion of its FWA network and to deploy a Fibre to the Premises (FTTP) network.

3.6 The Applicant also proposes to make its infrastructure available for other operators to deploy their networks.

Analysis of the four factors

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

3.7 The Applicant is a telecoms provider who provides superfast broadband services to customers in rural locations where availability of such services may otherwise be poor. The Applicant has approximately 1,000 business and residential customers.

¹⁶ 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.

- 3.8 The Applicant notes that the introduction of superfast broadband services has brought significant economic benefits to the rural communities it serves. Lothian Broadband employees 15 local people and its services have created business opportunities and have enabled remote working.
- 3.9 The applicant seeks Code powers to facilitate the expansion of its FWA network and the deployment of an FTTP network which would be used to supply superfast and ultrafast broadband services to new customers.
- 3.10 We expect that the network expansion proposed by the Applicant would increase the availability and quality of broadband services in rural areas in Scotland and help meet the growing needs of consumers and businesses for connectivity. The Applicant's use of FWA technologies is likely to facilitate the delivery of services to customers in isolated locations that are particularly difficult to serve with traditional cabled networks. Where networks are deployed by new providers, we expect competition to fuel innovation and customer choice.
- 3.11 We consider that the network planned by the Applicant would benefit the public.

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

- 3.12 The Applicant states that its growth is being constrained by the need to apply for planning consents from local councils on a case by case basis, in part because it is making greater use of public highways for its network which has hitherto been deployed principally on private land. It has found this process to be extremely time consuming and labour intensive.
- 3.13 The Applicant states that Code powers would enable it to speed up the deployment of its wireless network by allowing it to take advantage of the relaxation of planning requirements to:
- mount radios on properties in conservation areas without Listed building consent;
 - erect poles and small masts to expand of network;
 - erect small cabins, etc., to serve the network; and
 - mount multiple radios on both Private and Commercial properties without Planning Consent.
- 3.14 In relation to its FTTP network, the Applicant also states that it would use the Code powers to:
- carry out emergency repair, replacement or maintenance works to the existing duct network;
 - build a new network of ducts for fibre optic cables, in part on public highways;
 - install new associated street furniture and street chambers;
 - where appropriate build pole networks and add additional poles to existing networks to further the build of superfast broadband networks; and
 - install fibre optic cables in ducts and to mount fibre optic cables on poles.

- 3.15 The Applicant intends to use Openreach's PIA product to deploy its network in BT's ducts where financially beneficial, and that Openreach require users to have Code powers.
- 3.16 We consider that the business case for a broadband network is generally dependent upon the level of costs of building the network 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.
- 3.17 We also consider that, regardless of the merits of the conditions set by Openreach for use of its PIA (Duct and Pole Access) services, without Code powers, it would be considerably more difficult for the Applicant to make use of Openreach's Ducts and Poles, and this difficulty could reduce the financial viability of the Applicant's plans.
- 3.18 We consider that the network planned by the Applicant would not be practical 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 is willing to make its infrastructure available for other operators to deploy their networks. However, in view of its small size, it expects little take-up at present.
- 3.20 The Applicant has stated that it is willing to share its communications apparatus on a wholesale or resale basis. It already has one such arrangement with another provider but expects little further take-up at present due to its small size.
- 3.21 Whilst we acknowledge that the Applicant's small size may limit take-up, we consider the Applicant's willingness to share its communications apparatus would help to minimise the unnecessary proliferation of electronic communications apparatus, bringing environmental benefits aligned with long standing Government objectives in the public interest. This has been specifically 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.
- 3.22 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

- 3.23 The Applicant has provided us information along with its application that confirms that it understands its obligations to provide funds for liabilities. The Applicant has also provided a letter from its Managing Director, indicating the Applicant's willingness to place the

relevant funds in an appropriate bank bond, escrow account or other financial instrument when this becomes necessary.¹⁷

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

Overall assessment

- 3.25 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.
- 3.26 In particular, we consider that our proposal would encourage investment and innovation by facilitating the provision of FWA and FTTP broadband network by the Applicant. The provision of such a network would encourage the availability of a wide range of communications services and the availability of high-speed data transfer services. The Applicant plans to deploy its network in rural locations in Scotland where the availability of such services is currently poor. In our view this would also help support the future development, growth and availability of modern communications services in the public interest.
- 3.27 We also consider that the Applicant's intended network could also enhance competition and customer choice as the Applicant offers retail services in competition with existing operators and also provides wholesale/resale services to other operators.
- 3.28 The impact 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 impact of our proposal is not likely to be to the detriment of any protected group within society.

Proposal

- 3.29 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 in Scotland.
- 3.30 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.

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

- 3.31 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.

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 13 May 2019
- A1.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-3/code-powers-lothian-broadband-networks>. You can return this by email or post 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, 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 Responses may alternatively be posted to the address below, marked with the title of the consultation:
- ECC Team
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.5 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.
- A1.6 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A1.7 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.
- A1.8 It would help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.9 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

Confidentiality

- A1.10 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 our website, www.ofcom.org.uk, as soon as we receive them.
- A1.11 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.
- A1.12 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.
- A1.13 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 at <https://www.ofcom.org.uk/about-ofcom/website/terms-of-use>.

Next steps

- A1.14 Following this consultation period, Ofcom plans to publish a statement in spring 2019.
- A1.15 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details please see <https://www.ofcom.org.uk/about-ofcom/latest/email-updates>

Ofcom's consultation processes

- A1.16 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.17 If you have any comments or suggestions on how we manage our consultations, please email us at 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.
- A1.18 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:

Corporation Secretary
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA
Email: 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):

Address (if not received by email):

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? _____

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

Signed (if hard copy)

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 to: ECC Team, Ofcom, 1st floor, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, by no later than 5pm on **13 May 2019**.

Interpretation

6. In this Notification—
 - (a) “**Act**” means the Communications Act 2003;
 - (b) “**Applicant**” means Lothian Broadband Networks Limited, whose registered company number is; SC494551;
 - (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 'Brian Potterill', written in a cursive style.

Brian Potterill

Competition Policy Director

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

12 April 2019

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 22 November 2018.
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 12 April 2019, 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 13 May 2019.
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 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:
 - i. the provision by the Applicant of 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 Scotland.
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 Lothian Broadband Networks Limited, whose registered company number is SC494551;
- (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