

# **Proposal to modify the terms on which the Code is applied to Fibrus Networks Ltd**

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

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**CONSULTATION:**

Publication Date: 22 July 2022

Closing Date for Responses: 22 August 2022

# Contents

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## Section

1. Overview	1
2. Background	2
3. Reasons for proposal	7

## Annex

A1. Responding to this consultation	11
A2. Ofcom's consultation principles	13
A3. Consultation coversheet	14
A4. Consultation questions	15
A5. Statutory notification	16

# 1. Overview

The electronic communications code (the 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 communications networks and infrastructure (such as ducts, cabinets and poles) on the public highway without the need to obtain a street works licence to undertake such works;
- construct communications infrastructure which is classified as ‘permitted developments’ under Town and Country Planning legislation (such as certain types of masts, poles and cabinets) without the need to apply for planning permission; and
- in the event that agreement cannot be reached with the owner or occupier of private land concerning the deployment of communications networks or infrastructure on private land, 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.

We consider operators’ applications for the grant of Code powers, and any modifications to such Code powers, with reference to the matters set out in sections 107(4) and section 115(4A) of the Communications Act 2003, respectively.

## **What we are proposing – in brief**

In June 2018, Ofcom gave a direction applying the Electronic Communications Code set out in Schedule 3A to the Communications Act 2003 to Fibrus Networks Ltd (formerly B4B Networks Ltd), whose registered company number is NI612703, for the purposes of the provision by it of an electronic communications network. This direction stated that the application of the Code would have effect throughout the United Kingdom, with the condition that those powers would not extend to the installation of any Infrastructure on, under or over the public highway.

We are proposing to give a further direction modifying the terms on which the Electronic Communications Code applies to Fibrus Networks Ltd to remove this condition. This would mean that the Electronic Communications Code would apply to Fibrus Networks Ltd for the purposes of the provision of an electronic communications network throughout the United Kingdom.

We invite comments on our proposal by 22 August 2022.

We will consider any responses to this consultation before reaching a final decision on whether to confirm our proposal.

## 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.<sup>1</sup> 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.<sup>2</sup>

### Modifying the terms on which the Code applies to a person

- 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).<sup>3</sup>
- 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.<sup>4</sup>
- 2.5 By virtue of section 106(5) of the Act, 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;
  - 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.
- 2.6 Ofcom may at any time modify the terms on which, by virtue of section 106(5), the Code is applied in a person's case.<sup>5</sup> Such a modification shall be by a further direction

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<sup>1</sup> "Electronic communications network" for the purposes of the Code has the same meaning as in section 32 of the Act.

<sup>2</sup> 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).

<sup>3</sup> Section 106(3)(b) of the Act.

<sup>4</sup> Section 106(4) of the Act.

<sup>5</sup> section 115(1) of the Act

under section 106 to the person in whose case the electronic communications code has been applied by the direction being modified.<sup>6</sup>

## Statutory consultation process on proposal

- 2.7 Before giving a further direction modifying the terms on which the Code is applied to a person, 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.<sup>7</sup>
- 2.8 Such a notification must contain the following<sup>8</sup>:
- a) a statement of Ofcom's proposal;
  - 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 30 days after the day of the publication of the notification<sup>9</sup>).
- 2.9 In accordance with section 115(5) of the Act, the statement of Ofcom's proposal must contain a statement of Ofcom's proposal to modify terms imposed under section 106(5).
- 2.10 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.<sup>10</sup>
- 2.11 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

- 2.12 In considering whether to apply the Code in any person's case, Ofcom must have regard, in particular, to each of the following four factors<sup>11</sup>:
- 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;

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<sup>6</sup> Section 115(4) of the Act

<sup>7</sup> Section 107(6) of the Act.

<sup>8</sup> Section 107(7) of the Act.

<sup>9</sup> Section 107(9) of the Act.

<sup>10</sup> Section 107(10) of the Act.

<sup>13</sup> Section 115(4A) of the Act.

- 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.
- 2.13 For the purposes of this process, the above four factors rank equally with Ofcom's statutory duties under sections 3 and 4 of the Act.<sup>12</sup>
- 2.14 In considering whether to modify the terms on which the Code is applied in a person's case, the modification may not be made unless it is:
- a) objectively justifiable; and
  - b) proportionate to what it is intended to achieve.<sup>13</sup>
- 2.15 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 case.

## Statutory duties

### General duties

- 2.16 In carrying out its functions under the Act (which includes giving a direction to apply the Code or to modify the terms on which the Code is applied to a person), 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.
- 2.17 In so 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.
- 2.18 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.
- 2.19 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.

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<sup>13</sup> Section 115(4A) of the Act.

<sup>13</sup> Section 115(4A) of the Act.

2.20 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 in relation to certain regulatory functions**

2.21 When carrying out certain functions such as giving a direction to apply the Code or to modify the terms on which the Code is applied to a person, section 4 of the Act requires us to act in accordance with the six requirements set out in that section.

2.22 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 promote the interests of all members of the public in the United Kingdom;
- c) 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;
- d) to encourage, to such extent as Ofcom considers appropriate for certain prescribed purposes, the provision of network access and service interoperability, namely securing efficiency and sustainable competition, efficient investment and innovation and the maximum benefit for customers of communications providers and of persons who make associated facilities available;
- e) to encourage compliance with certain standards as is necessary to facilitate service interoperability; facilitate end-to-end connectivity; facilitate the changing by end-users of their communications provider; facilitate the retention by end-users of their telephone numbers after a change of communications provider; and secure freedom of choice for the customers of communications providers.
- f) to promote connectivity and access to very high capacity networks by members of the public and businesses in the United Kingdom.

2.23 We consider that the first, second, fourth and sixth 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 which we have identified above as particularly relevant in this context.

### **Impact assessment**

2.24 The analysis presented in the entirety of this consultation represents an impact assessment, as defined in section 7 of the Act.

2.25 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:

2.26 [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)

2.27 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.

2.28 There are two options for this consultation:

- a) give a further direction modifying the terms on which the Code applies to Fibrus Network Ltd; or
- b) not to give such a direction.

## Equality impact assessment

2.29 Section 149 of the Equality Act 2010 (the 2010 Act) imposes a duty on Ofcom, when carrying out its functions (which includes giving a direction to apply the Code), to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. The 2010 Act also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.

2.30 Section 75 of the Northern Ireland Act 1998 (the 1998 Act) also imposes a duty on Ofcom, when carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations across a range of categories outlined in the 1998 Act. Ofcom's Revised Northern Ireland Equality Scheme explains how we comply with our statutory duties under the 1998 Act.

2.31 To help us comply with our duties under the 2010 Act and the 1998 Act, we assess the impact of our proposals on persons sharing protected characteristics and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations.

2.32 We do not consider that our proposals have equality implications under the 2010 Act or the 1998 Act.

## 3. Reasons for proposal

3.1 This section contains our reasons for proposing to modify the terms on which the Code is applied to Fibrus Networks Ltd.

### Background

3.2 The person whose Code powers we are proposing to modify is:

- Company name: Fibrus Networks Ltd (“Fibrus”)
- Registered company number: NI612703
- Registered office: Lanyon Plaza West Tower, 8 Lanyon Place, Belfast, Northern Ireland, BT1 3LP

3.3 Fibrus currently operates a fibre to the premises (FTTP) access network providing ultrafast broadband services to homes, businesses, business parks, public sector organisations and educational establishments. Fibrus provides its FTTP services in underserved rural areas, county & market towns, in Northern Ireland. Fibrus mainly uses/owns its infrastructure, but it also uses technology and infrastructure from other suppliers.

3.4 As set out in paragraph 2.12 above, Ofcom must have regard to four factors when considering whether to apply the Code in any person’s case. On 11 May 2018, we published a consultation for our proposal to apply the Code to Fibrus and set out, in section 3 of that consultation, our analysis of the four factors in relation to Fibrus’s application.<sup>14</sup>

3.5 On 20 June 2018, Ofcom gave a direction applying the Code to Fibrus pursuant to section 106(3) of the Act (the Direction)<sup>15</sup>. This Direction states that the Code applies to Fibrus for the purposes of the provision by it of an electronic communications network throughout the United Kingdom, with the condition that those powers do not extend to the installation of any Infrastructure on, under or over the public highway.<sup>16</sup>

3.6 Following a recent review of our policy, we contacted operators whose Code powers were subject to this condition and explained that we no longer considered it necessary on a forward-looking basis. Therefore, and in order to maintain a consistent approach to how Code powers are applied, we proposed to modify the terms on which the Code applies to remove the condition. Fibrus confirmed that it wished for us to proceed with the modification.

3.7 We are therefore proposing to give a further direction under section 106 of the Act to modify the terms on which, by virtue of section 106(5) of the Act, the Code applies to Fibrus to remove the condition relating to the public highway. By removing this condition,

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<sup>14</sup> [Proposal to apply Code Powers to B4B Networks Ltd \(ofcom.org.uk\)](#)

<sup>15</sup> [Direction under section 106\(3\) of the Communications Act 2003 applying the electronic communications code \(ofcom.org.uk\)](#)

<sup>16</sup> Pursuant to sections 106(4)(a) and 106(5) of the Act.

Fibrus will be able to exercise Code rights<sup>17</sup> to deploy and maintain its FTTP network in the UK on or over the public highway.

## **Whether the proposal to modify the terms is objectively justifiable and proportionate to what it is intended to achieve.**

- 3.8 As set out in paragraph 2.14 above, we may not make a modification unless this modification is
- a) objectively justifiable; and
  - b) proportionate to what it is intended to achieve.
- 3.9 We consider that our proposal to modify the terms on which the Code applies to Fibrus is objectively justified for the reasons below.
- 3.10 We consider that our proposal is also consistent with the four factors, set out at paragraph 2.12 above, which Ofcom must have regard to when applying the Code in any person's case. In particular;
- a. Fibrus delivers Fibre to the Premise (FTTP) connections to residents and businesses principally across Northern Ireland. We consider that Code powers simplify the process of deployment, enabling networks to be built and delivered to the public at a faster pace. We also consider that the provision of such networks improve the quality of services available to the public and help meet the growing needs of people and business for connectivity.
  - b. Without Code powers to deploy communications apparatus on or over the public highway, an operator would require licences under section 50 of the New Roads and Street Works Act 1991 and would also not benefit from certain exemptions from Town and Country Planning legislation. This would likely increase the costs associated with the deployment of an FTTP network and the time taken to then provide services. We therefore consider that Fibrus is at a competitive disadvantage, compared to other Code operators, whose Code powers are not subject to the same condition.
  - c. Fibrus has explained that it provides wholesale services and products to providers. We therefore consider that sharing of the use of apparatus would be encouraged by the proposed modification of its Code powers.
  - d. We have received information from Fibrus's Chief Executive Officer that it has considered its duties to provide funds for liabilities under Regulation 16<sup>18</sup> and confirmation that it has set aside sufficient funds for these liabilities. Therefore, on the basis of the information received from Fibrus, we consider that Fibrus would be able to meet its

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<sup>17</sup> Code rights are set out in Paragraph 3 of Schedule 3A to the Act

<sup>18</sup> Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2003 No. 2553) (as amended).

liabilities as a consequence of the application of the Code and any conduct in relation to the application of the Code.

- e. Additionally, we consider that our proposal is consistent with our approach that Code powers should be limited only when there is a clear need for such a limitation. Having considered the nature of the network Fibrus provides, and the factors mentioned at paragraph 2.12 above, we do not consider there is a clear need for the limitation in Fibrus's case.

3.11 We consider that our proposal is proportionate in what it is intended to achieve because of the reasons stated at paragraph 3.10 above.

## Overall assessment

3.12 In addition to our consideration of the factors discussed above in paragraphs 3.8 to 3.10, we consider that our proposal would secure or further the performance of our statutory duties under sections 3 and 4 of the Act.

3.13 In particular, we consider that our proposal to modify the terms on which the Code applies would help encourage investment and innovation by facilitating the deployment and maintenance of Fibrus's FTTP broadband network principally throughout Northern Ireland. The provision of such a network would promote access to very high capacity networks and encourage the availability of a wide range of communications services, including high-speed data transfer services. In our view this would also help support the future development, growth and availability of modern communications services in the public interest.

3.14 We also consider that the extension of Fibrus's Code powers to the public highway could also enhance competition and customer choice as it will facilitate the expansion of Fibrus's network and the provision of wholesale services to other providers.

3.15 The effect of implementing the proposal is likely to be low. Any costs to those affected by Fibrus's use of Code powers are likely to be outweighed by the benefits. On the other hand, a decision not to modify Fibrus's Code powers could affect its ability to compete effectively with other operators.

3.16 We are also of the view that the effect of our proposal is not likely to be to the detriment of any protected group within society.

## Proposal

3.17 We propose to modify the terms on which the Code applies to Fibrus so that the Code applies to it for the purposes of the provision by it of an electronic communications network throughout the United Kingdom, without the condition that those powers do not extend to the installation of any infrastructure on, under or over the public highway.

3.18 We consider that our proposal is appropriate having regard to the considerations set out in sections 115(4A) 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.

- 3.19 We will consider any responses we may receive by the closing date before making our decision as to whether we should give a further direction modifying the terms on which the Code is applied to Fibrus.

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

# 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 22 August 2022.
- A1.2 You can [download a response form](#) from the Ofcom website. You can return this by email 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](mailto: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 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.
- A1.5 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A1.6 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.
- A1.7 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.8 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](mailto:ECCcodepowers@ofcom.org.uk)

## Confidentiality

- A1.9 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 [the Ofcom website](#) as soon as we receive them.
- A1.10 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.

- A1.11 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.
- A1.12 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 in our [Terms of Use](#).

## Next steps

- A1.13 Following this consultation period, Ofcom plans to publish a statement in Summer 2022.
- A1.14 If you wish, you can [register to receive mail updates](#) alerting you to new Ofcom publications.

## Ofcom's consultation processes

- A1.15 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.16 If you have any comments or suggestions on how we manage our consultations, please email us at [consult@ofcom.org.uk](mailto: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.
- A1.17 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:

Corporation Secretary

Email: [corporationsecretary@ofcom.org.uk](mailto: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):

### 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? \_\_\_\_\_

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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

## A4. Consultation questions

Question 1: Do you have any comments on our proposal to modify the terms on which the Code applies to Fibrus?

## A5. Statutory notification

### Notification under section 107(6) of the Communications Act 2003

#### Proposal to give a further 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, by virtue of section 115(4) of the Act, to modify the terms on which the Code applies to Fibrus.
2. The proposed direction to modify the terms on which the Code applies to Fibrus 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 considered and acted in accordance with section 115(4A) of the Act, its general duties in section 3 of the Act, and the six requirements in section 4 of the Act.

##### Making representations

5. Representations on this proposal may be made by email to [ECCcodepowers@ofcom.org.uk](mailto:ECCcodepowers@ofcom.org.uk), by no later than 5pm on **22 August 2022**.

##### Interpretation

6. In this Notification—
  - (a) “**Act**” means the Communications Act 2003;
  - (b) “**Fibrus**” means Fibrus Networks Limited, whose registered company number is NI612703;
  - (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 'BP', is positioned to the left of a vertical line.

**Brian Potterill**

**Competition Policy Director**

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

22 July 2022

## SCHEDULE

### **[Proposed] Direction under section 106(3) of the Communications Act 2003 applying the electronic communications code**

#### **Background**

1. Fibrus Network Ltd (Fibrus) was granted Code powers, under a direction given by Ofcom on 20 June 2018, for the purposes of the provision by Fibrus of an electronic communications network throughout the United Kingdom but with the condition that those powers do not extend to the installation of any Infrastructure on, under or over the public highway (the Condition)<sup>19</sup>.
2. Pursuant to section 115(1) and (4) of the Act, Ofcom may at any time modify the terms on which, by virtue of section 106(5), the code is applied in a person's case by giving a further direction under section 106 to the person in whose case the electronic communications code has been applied by the direction being modified.
3. Prior to giving a further direction to modify the terms on which, by virtue of section 106(5) of the Act, the Code applies to the person, 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 22 July 2022, Ofcom published a notification in accordance with section 107(6) of the Act of a proposal to give a further direction modifying the terms on which the Code applies to Fibrus to remove the Condition. That notification invited representations to Ofcom by no later than 5pm on 22 August 2022.
5. For the reasons set out in the explanatory statement accompanying the above mentioned notification, Ofcom has considered and acted in accordance with section 115(4A) of the Act, its general duties in section 3 of the Act and the six requirements in section 4 of the Act.

#### **Decision**

8. Ofcom hereby directs, in accordance with section 106 of the Act, that the terms on which the Code applies to Fibrus by virtue of section 106(5) of the Act under its existing direction given by Ofcom on 20 June 2018, shall be modified as follows—
  - (a) the Code shall continue to apply to Fibrus for the purposes of the provision by Fibrus of an electronic communications network ;
  - (b) the condition specifying that the Code powers do not extend to the installation of any infrastructure on or over the public highway shall be removed; and
  - (c) the application of the Code shall continue to have effect throughout the United Kingdom.
9. This Direction shall take effect on the day it is published.

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<sup>19</sup> [Direction under section 106\(3\) of the Communications Act 2003 applying the electronic communications code \(ofcom.org.uk\)](https://www.ofcom.gov.uk/consult/condocs/1063/1063.pdf)

## Interpretation

**10.** In this Direction—

- (a) “**Act**” means the Communications Act 2003;
- (b) “**Fibrus**” means Fibrus Networks Limited, whose registered company number is NI612703;
- (c) “**Code**” means the electronic communications code set out in Schedule 3A to the Communications Act 2003;
- (d) “**Ofcom**” means the Office of Communications.

**11.** 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

[date]