

Direction under section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of Sea Fibre Networks Limited

A Statutory Notification of this proposal was published on 12 October 2012

1. 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 11 June 2012.
2. 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.
3. 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.
4. On 12 October 2012 Ofcom published, in accordance with section 107(6) of the Act, such a notification of its proposal to give a direction applying the Code to the Applicant for the reasons set out in the consultation document accompanying that notification. That notification invited representations to Ofcom by no later than 5pm on 12 November 2012.
5. Ofcom has considered every representation about the proposed Direction received by it.
6. 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

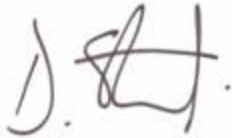
7. Ofcom hereby directs, in accordance with section 106 of the Act, as follows—
 - (a) the Code shall apply to the Applicant for the purposes of the provision by the Applicant of an electronic communications network;
 - (b) that application of the Code shall have effect in relation to the electronic communications network installed by the Applicant in Wales and Staffordshire.

Definitions and Interpretation

8. In this Direction, unless the context otherwise requires and subject to paragraph 9 below, words and expressions used in this Direction shall have the same meaning as in the Act.

9. In this Direction, unless the contrary intention appears—
- (a) “**Act**” means the Communications Act 2003;
 - (b) “**Applicant**” means Sea Fibre Networks Limited, whose registered company number is 471320;
 - (c) “**Code**” means the electronic communications code;
 - (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 Direction were an Act of Parliament;
 - (c) expressions cognate with those referred to in this Direction shall be construed accordingly.
11. This Direction shall take effect on the day it is published.

Signed

A handwritten signature in black ink, appearing to read 'D. Stewart', with a stylized flourish at the end.

David Stewart
Competition Policy Director

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

11 December 2012

Explanatory Statement

- 1.1. On 11 June 2012, Sea Fibre Networks Limited applied for the electronic communications code (the “Code”) for the purposes of the provision of an electronic communications network in Wales and Staffordshire. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets the requirements for any such application for a Direction applying the Code, and the manner in which such an application has to be made, as set out in the notification published by Ofcom (by virtue of the Transitional Provisions in the Act) on 10 October 2003 under section 107 (2) of the Act.
- 1.2. On 12 October 2012, Ofcom published a notification, draft Direction and explanatory statement in which it explained that it proposed to grant Code powers to Sea Fibre Networks Limited (the “Consultation”). Ofcom sought comments on its proposal by 12 November 2012 and received comments from a respondent who wishes to remain anonymous. Ofcom has summarised the response received at the end of this explanatory statement and has considered the points raised.
- 1.3. In considering Sea Fibre Networks Limited’s application, Ofcom has acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty set out in section 3(1)(b) “to further the interests of consumers in relevant markets, where appropriate by promoting competition” and the first community requirement set out in section 4(3)(a) to promote competition “in relation to the provision of electronic communications networks and services”.
- 1.4. Sea Fibre Networks Limited’s main electronic communications apparatus is a multi-fibre telecommunications cable known as CeltixConnect, which is linked via dark fibre sub-sea cable, presently from Dublin to Holyhead in Wales. Sea Fibre Networks Limited will lease dark fibre to other carriers and large corporate customers, enabling both urban and rural areas to gain access to dark fibre cabling providing connectivity between Ireland, Wales and the rest of the UK and international networks.
- 1.5. In addition to the requirements of section 3 and 4 of the Act, Ofcom has also had regard to its duties set out in 107(4) of the Act. These are set out below.

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

- 1.6. Sea Fibre Networks Limited will lease fibre from other providers across the UK and will lease dark fibre to other telecommunications carriers and large corporate customers, enabling both urban and rural areas to gain access to dark fibre cabling providing connectivity between Ireland, Wales and the rest of the UK and international networks.
- 1.7. In addition to the provision of the dark fibre cabling, it is Sea Fibre Networks Limited’s intention to also provide bandwidth along the route. This type of carrier neutral service will enhance competition and enable more secluded parts of the country to be provisioned, including, initially, north Wales. This will not only be beneficial to local communities, but also to other telecommunications carriers.
- 1.8. For these reasons, Ofcom considers that Code powers would benefit the public as it would service residential and wholesale customers, as well as having the potential to link different parts of the United Kingdom as a whole.

The practicability of the provision of the electronic communications network and system of conduits without the application of the Code

- 1.9. Sea Fibre Networks Limited notes that its electronic communications network has been installed under street works licences under section 50 of the New Road and Street Works Act 1991 granted by the Isle of Anglesey County Council and Staffordshire County Council. However, Sea Fibre Networks Limited has said that the local authorities require it to obtain Code powers to ensure that the network can be maintained.
- 1.10. Sea Fibre Networks Limited considers that obtaining street works licences for all dig operations would be very time consuming and onerous, and that it therefore would not be practical to try and deliver its fibre network service without Code powers. It also considers that telecommunications carriers and corporate customers are likely to be deterred from utilising the dark fibre network if it does not have Code powers.
- 1.11. Having Code powers will allow Sea Fibre Networks Limited to be better placed to deploy and maintain its network.

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

- 1.12. Sea Fibre Networks Limited will lease its dark fibre network to other operators which will also enable these operators to extend their own networks without needing to install their own infrastructure.
- 1.13. We therefore consider that sharing of the use of apparatus would be encouraged by granting Sea Fibre Networks 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

- 1.14. Sea Fibre Networks Limited has provided Ofcom with details in relation to the provisions that it would put in place to meet the requirements of the Electronic Communications (Conditions and Restrictions) Regulations 2003 which require Code operators to ensure funds are available to meet specified liabilities should they arise.
- 1.15. Sea Fibre Networks Limited has considered what needs to be covered by the fund for liabilities and has provided Ofcom with details of the methods it has used for estimating the cost of such liabilities. Sea Fibre Networks Limited provided Ofcom with a signed letter from its directors confirming a fund for specified liabilities will be put in place once Code powers have been granted and proposes that it maintains this fund by way of an escrow account.
- 1.16. Ofcom is therefore satisfied that Sea Fibre Networks Limited will be able to put in place funds for meeting liabilities arising as a consequence of the application of the Code and any conduct in relation to the application of the Code.

Overall assessment

- 1.17. In addition to our consideration of the four factors discussed above, we consider that granting Sea Fibre Networks Limited Code powers will secure or further the performance of our statutory duties under sections 3 and 4 of the Act, in particular in terms of:

- 1.17.1. contributing to the availability throughout the UK of a wider range of electronic communications services;
- 1.17.2. promoting competition in the provision of electronic communications networks and services and associated facilities, including by encouraging investment and innovation; and
- 1.17.3. encouraging a greater availability and use of high speed data transfer services throughout the United Kingdom.

Response to the Consultation

- 1.18. As noted at paragraph 1.2, we received one response to the Consultation, which set out some concerns in relation to the proposal to grant Code powers to Sea Fibre Networks Limited.
- 1.19. The respondent highlighted the fact that fibre and sub-marine cabling linking the UK with Ireland and Isle of Man is already implemented by other providers. The respondent noted that the intention of Sea Fibre Networks Limited is to provide fibre broadband and telecommunication services in North Wales, and the respondent submits that most of this area is remote and that other providers have not found it easy to roll-out fibre and superfast broadband in this part of the UK.
- 1.20. The respondent raised a concern that granting Code powers to Sea Fibre Networks Limited would have an impact on other communication providers' revenue and would delay the roll-out of superfast broadband, fibre and essential upgrades to telephone exchanges in rural parts of Wales. The respondent considered that any such delay would result in less competition in terms of accessibility of infrastructure to other communications providers, which could adversely affect the ability of residential consumers and businesses in North Wales to access those communication providers' digital TV, Pay-TV and broadband services and limit consumer choice.
- 1.21. Ofcom has a statutory duty to consider any representations made to it about a proposal to grant an applicant Code powers. We do not consider that there is evidence to suggest that granting Code powers to Sea Fibre Networks Limited would have an adverse effect on competition or consumer choice in North Wales. We consider that granting Sea Fibre Networks Limited Code powers will assist it to deploy and maintain its electronic communications network and that the roll-out of its network will give rise to benefits to the public and that will promote competition, for the reasons we have discussed in paragraphs 1.6 to 1.8 above.