

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of In Focus Public Networks Limited

A Notification of this proposal was published on 12 January 2009

Whereas:

- (A) On 22 December 2008, In Focus Public Networks Limited made an application for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network in the United Kingdom in accordance with section 107(1) of the Act and the notification published by Ofcom by virtue of the Transitional Provisions under section 107(2) of the Act on 10 October 2003 setting out their requirements with respect to the content of an application for the electronic communications code and the manner in which such an application is to be made;
- (B) On 12 January 2009, Ofcom published a notification of their proposal to give a direction applying the Code to In Focus Public Networks Limited in accordance with section 107 of the Act;
- (C) Ofcom have considered every representation made to them about the proposed Direction;
- (D) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

NOW, therefore, pursuant to section 106(3) of the Act, Ofcom make the following Direction-

1. The electronic communications code shall apply to In Focus Public Networks Limited for the purposes of the provision by In Focus Public Networks Limited of an electronic communications network to have effect in the United Kingdom.

Definitions and Interpretation

2. In this Direction, unless the contrary intention appears-

"Act" means the Communications Act 2003;

"In Focus Public Networks Limited " means In Focus Public Networks Limited (registered company number 6463216);

"Ofcom" means the Office of Communications; and

"Transitional Provisions" means sections 408 and 411 of the Act, the Communications Act 2003 (Commencement No.1) Order 2003 and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003.

3. Except in so far as the context otherwise requires, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded and expressions cognate with those referred to in this Direction shall be construed accordingly.

4. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day it is published.

Gareth Davies
Competition Policy Director

**A person authorised by Ofcom under paragraph 18 of the Schedule to
the Office of Communications Act 2002**

19 February 2009

Explanatory Statement

1.1 On 22 December 2008, In Focus Public Networks Limited applied for the electronic communications code (the “Code”) for the purposes of the provision of an electronic communications network. 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 January 2009, Ofcom published a notification, draft Direction and explanatory statement in which it explained that it proposed to grant Code powers to In Focus Public Networks Limited. Ofcom sought comments on its proposal by 12 February 2009 and received comments from Nottinghamshire County Council. Ofcom has summarised Nottinghamshire County Council’s response at the end of this explanatory statement and addressed the points raised.

1.3 In considering In Focus Public 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 In Focus Public Networks Limited owns a number of public payphones acquired from another code operator and intends to install further public payphones, as well as managed payphones on private land, which will provide easy access for, amongst others, wheelchair users.

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 section 107(4) of the Act. These are set out below.

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

1.6 In Focus Public Networks Limited operates a public and managed payphone network which it intends to expand to provide public and managed payphones in urban areas in England to begin with and subsequently to other urban areas in the UK.

1.7 The payphones will therefore provide competition in the provision of public payphone services and, in this case, the design of the payphones is intended to provide easy access to wheelchair users and others who might experience difficulties with access to present payphones.

The practicability of the provision of the network without the Code

1.8 In Focus Public Networks Limited considers that it needs Code powers to enable it to install its payphones and benefit from Permitted Developments rights under the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2001 and equivalent legislation in the other UK jurisdictions. In the

absence of Code powers, In Focus Public Networks Limited would need to make individual applications for each addition to the network. Other payphone providers with Code powers are afforded these rights.

1.9 The Code also enables, amongst other things, communications providers to construct their networks and, in particular, states that they “shall, for the statutory purposes, have the right to... (a) install electronic communications apparatus, or keep electronic communications apparatus installed, under, over, [in, on] along or across... a street.” The Code would therefore benefit In Focus Public Networks Limited to the extent that it intends to install public payphones.

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

1.10 In Focus Public Networks Limited has stated that it would be prepared to share its electronic communications apparatus where practicable and where agreement can be reached on suitable commercial terms. The network, however, is targeted at retail customers and the ability to share apparatus will be limited where such apparatus is located on private land.

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

1.11 In Focus Public Networks Limited is aware of its obligations under Town and Country Planning legislation and understands that where apparatus is sited on public highways it will need to put in place sufficient funds to meet any liabilities which may arise.

1.12 The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (“the Regulations”) make it clear that Code operators who have not previously exercised any rights conferred by the Code cannot carry out any works until they have satisfied the requirements of the Regulations. Paragraphs (1)(a) and (1) (c) of the Regulations specifically state that:

“(1) A code operator must –

(a) ensure that sufficient funds are available to meet the specified liabilities which

–

- (i) arise on or before the date on which a relevant event occurs, or
- (ii) may arise at any time during the liability period

from the exercise of rights conferred upon the code operator by paragraph 9 of the electronic communications code.

(c) where he has not previously exercised any rights conferred by the electronic communications code and intends to exercise such rights for the first time, provide OFCOM with the said certificate two weeks before he exercises such rights to install any apparatus.”

Nottinghamshire County Council

1.13 As explained in paragraph 1.2, Nottinghamshire County Council responded to the consultation and set out a number of concerns that it had in relation to the proposal.

1.14 First, it explained that it had direct experience of public payphones operated by another provider being left in an inadequate state and it has previously needed to undertake works in default of the relevant provider concerned. It was suggested that this indicated that the business case for operating public payphones is fragile and this affects maintenance standards.

1.15 Second, it noted that the design of the public payphones would provide easy access to wheelchair users and that this would clearly be beneficial to wheelchair users. It stated, however, that recent examples of alternative payphone design have involved extended advertising space or the provision of ATMs and that the payphone itself was a secondary facility installed to enable the service provider to benefit from Code powers. This was not the purpose of Code powers.

1.16 Third, it stated that it had concerns in relation to the Funds for Liabilities regime and Ofcom's enforcement powers. It therefore stated that the statement needed to be supported by evidence of that funds will actually be available.

1.17 Ofcom is aware that some local highway authorities have from time to time had concerns in relation to the upkeep of street furniture such as public payphones and the ability of certain public payphone providers to maintain their networks. Ofcom understands local highway authorities' concerns about the condition of disused public payphones and the ability of certain providers to meet the requirements of the Regulations. We have previously considered whether we could take in relation to abandoned public payphones and considered that local authorities had powers in relation to such matters. We have also separately taken direct regulatory action against one provider in relation to failure to comply with the Regulations.

1.18 We must, however, judge each application for Code powers on its merits and an application cannot be prejudiced by other providers' actions. In Focus Public Networks Limited will, however, need to satisfy the requirements of the Regulations, as noted in paragraph 1.12, before it may exercise its Code powers.

1.19 Ofcom is aware that payphone design increasingly supports additional facilities such as ATMs and advertising space. Ofcom notes that paragraphs 73 and 74 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 have made changes to providers' rights in relation to advertising space.