

Direction under section 106(3) of the Communications Act 2003 applying the electronic communications code

A Statutory Notification of this proposal was published on 23 May 2014.

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 15 November 2013.
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 23 May 2014, 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 23 June 2014.
6. Ofcom has considered every representation about the proposal received and duly made to it. For the reasons set out in the explanatory statement accompanying this proposed Direction, Ofcom has had regard, in particular, to each of the matters set out in section 107(4) of the Act. Furthermore, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.

Decision

7. Ofcom hereby directs, in accordance with section 106 of the Act, as follows—
 - (a) the Code shall apply to the Applicant for the purposes of the provision by the Applicant of an electronic communications network and system of conduits 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;
 - (b) that application of the Code shall have effect throughout the United Kingdom.
8. In this proposed Direction, unless the context otherwise requires and subject to paragraph 9 below, words and expressions used in this proposed Direction shall have the same meaning as they have been ascribed in the Act.
9. In this Notification—
 - (a) “**Act**” means the Communications Act 2003;

- (b) “**Applicant**” means TIBUS (trading as The Internet Business Limited), whose registered company number is NI31235;
- (c) “**Code**” means the electronic communications code;
- (d) “**Ofcom**” means the Office of Communications.

10. For the purpose of interpreting this Notification—

- (a) headings and titles shall be disregarded;
- (b) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament;
- (c) expressions cognate with those referred to in this Direction shall be construed accordingly.

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

Signed



Neil Buckley
Director of Investigations

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

25 June 2014

Explanatory Statement

- 1.1. On 15 November 2013, TIBUS (Trading as The Internet Business 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 23 May 2014, Ofcom published a notification, draft Direction and explanatory statement in which it explained that it proposed to grant Code powers to TIBUS (the “Consultation”). Ofcom sought comments on its proposal by 23 June 2014 and received one response.
- 1.3. In considering TIBUS’ 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. TIBUS is a recognised supplier of the Department of Culture and Media & Sports Superconnected Cities Voucher Scheme run by Belfast City Council and, therefore, has secured voucher funding to provide a fibre-based Ultrafast Network which can offer connection speeds of up to 10Gbps. It plans to install its Ultrafast Network in Belfast and considers that this will provide businesses in Belfast with the fastest connectivity speeds at competitive rates..

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

- 1.5 The main purpose of TIBUS’ network is to provide a fibre-based Ultrafast Network to businesses in Belfast with speeds of up to 10Gbps at the most competitive rates.
- 1.6 TIBUS says that its Ultrafast Network will provide Belfast based businesses with faster, affordable and significantly more reliable internet connectivity. TIBUS also believe that Belfast businesses will benefit from the national and international connections of its core infrastructure.
- 1.7 TIBUS also believes that without the delivery of its proposed level of connectivity and managed services, a number of businesses will move to other areas, resulting in a loss employment and a halt to future inward investment in that part of Belfast.
- 1.8 For these reasons, Ofcom considers that granting TIBUS code powers would benefit the public.

The practicability of the provision of the network or conduit system without the application of the Code

- 1.9 TIBUS states that utilising third party wholesale services, instead of installing its own network, is unfeasible since, in so doing, the Applicant would incur significant costs which would then need to be passed on to the proposed beneficiaries of the scheme.
- 1.10 TIBUS has considered alternative arrangements but has found that many third party wholesalers do not have the appropriate physical capacity and therefore would not be able to provide the requisite levels of connectivity.
- 1.11 Additionally, TIBUS believes that, without Code Powers it would be unable to provide the type of fibre network proposed in the areas of Belfast it has selected.
- 1.12 We consider, therefore, that the grant of Code powers is necessary for the practicable provision of the Applicant's network.

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

- 1.13 TIBUS has confirmed that it proposes to wholesale its network and conduits to third party telecommunications providers. It explained that it already shares ECC apparatus with multiple third party vendors as part of its core network.
- 1.14 We consider that sharing of the use of apparatus may be encouraged by granting TIBUS Code powers as a result of those stated intentions.

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

- 1.15 TIBUS has considered the quantum of its potential liabilities and has reviewed the possible methodologies for funding these liabilities. It has provided a signed letter from one of its directors confirming that funding of specified liabilities will be put in place once Code powers are granted. TIBUS has confirmed that it will maintain this fund by way of an insurance bond.

Overall assessment

- 1.16 In addition to our consideration of the four factors discussed above we consider that our proposal would secure or further the performance of our statutory duties under sections 3 and 4 of the Communications Act 2003.
- 1.16.1. contributing to the availability throughout the UK of a wider range of electronic communications services;
- 1.16.2 promoting competition in the provision of electronic communication networks and services and associated facilities, including by encouraging investment and innovation; and
- 1.16.3. encouraging a greater availability and use of high speed data transfer services throughout the United Kingdom.

Response to the Consultation

- 1.17 As noted in paragraph 1.2 above, we received one response in relation to the Consultation. A number of the points raised in the response did not relate to the substance of our proposal and we have therefore not taken these into account.
- 1.18 The response did, however, question the long term financial viability of TIBUS' proposal. Ofcom is not in a position to take a view on the financial viability of operators' proposals when considering applications for Code powers; however we do require that appropriate funds are ring-fenced to cover specified liabilities in accordance with Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. TIBUS has considered the quantum of its potential liabilities in accordance with Regulation 16 and has confirmed to Ofcom that funding of these specified liabilities will be put in place. We have been assured, therefore, that sufficient funds will be available to meet any specified liabilities which may arise from the exercise of TIBUS' Code powers..
- 1.19 Finally, the response states that the potential impact on businesses in the Cathedral Quarter of Belfast is not sufficient to justify a grant of Code powers to TIBUS. Ofcom would point out, however, that this is only one of the reasons which it took into account when considering whether to grant TIBUS Code powers. Ofcom's full reasoning can be found in section 3 of the consultation document which was published on 23 May 2014.
- 1.20 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 TIBUS would have an adverse effect on competition or consumer choice in the UK. We consider that granting TIBUS Code powers will assist it to deploy and maintain its electronic communications network and that the provision of its Ultrafast Network will give rise to benefits to the public and that it will promote competition, for the reasons we have discussed above.