

Notification under Section 107(6) of the Communications Act 2003

Proposal to give a direction applying the Electronic Communications Code to Independent Fibre Networks Limited

1. The Office of Communications (“Ofcom”) propose to give a direction under section 106(3) of the Communications Act 2003 (the “Act”) applying the electronic communications code (the “Code”) to Independent Fibre Networks Limited.
2. The draft Direction and accompanying explanatory statement setting out Ofcom’s reasons for the proposal are available on Ofcom’s website <http://www.ofcom.org.uk>. Hard copies of the draft Direction and the explanatory statement will be made available on request. For hard copies, please contact Neil Nasralla on 020 7783 4155 or by sending an email to neil.nasralla@ofcom.org.uk.
3. Representations on the proposal may be made to: Neil Nasralla, Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA by not later than 5pm on **20 March 2009**.
4. All confidential information should be clearly marked as such and separated out into a confidential annex. All representations received will be published, unless it is clearly marked that the response is confidential, and made available in Ofcom’s Knowledge Centre. Please contact Jan Kacperek (jan.kacperek@ofcom.org.uk) for further information with respect to public inspection or, for responses to the draft Direction, visit Ofcom’s website (www.ofcom.org.uk).
5. In this Notification, unless the contrary intention appears, words and phrases shall have the same meaning as in the Act.
6. In this Notification, “Independent Fibre Networks Limited” means Independent Fibre Networks Limited (registered company number 5910724).

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

**[Draft] Direction under Section 106(3) of the Communications Act 2003
applying the electronic communications code in the case of Independent Fibre
Networks Limited**

[A Notification of this proposal was published on 19 February 2009]

Whereas:

- (A) On 12 January 2009, Independent Fibre 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 19 February 2009, Ofcom published a notification of their proposal to give a direction applying the Code to Independent Fibre Networks Limited in accordance with section 107 of the Act;
- (C) Ofcom have consider 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 Independent Fibre Networks Limited for the purposes of the provision by Independent Fibre 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;

"Independent Fibre Networks Limited " means Independent Fibre Networks Limited (registered company number 5910724);

"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

Explanatory Statement

1.1 On 12 January 2009, Independent Fibre Networks Limited (“IFNL”) applied for the electronic communications code (the “Code”) for the purposes of the provision by it 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 In considering IFNL’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 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”.

1.3 IFNL is building a Next Generation Access Network which will ultimately extend to new-build town and urban developments approved by the UK Government and local planning authorities. The network will provide ‘open access’ wholesale capacity to communications providers who wish to provide high speed broadband connections to business and residential end-users. The high speed broadband network would therefore further the interests of consumers and support retail competition.

1.4 In addition to the requirements of sections 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

1.5 As explained in paragraph 1.3, IFNL’s application explains that the network concerned will provide wholesale ‘open access’ Network Generation Access Network high speed broadband to communications providers who wish to serve end-users. IFNL explained that the network will be provided on a carrier-neutral basis and therefore any communications providers would be able to purchase wholesale capacity from IFNL and deliver end-user services. IFNL also explained that a core principle of its basic business model is to provide active line access (‘ALA’)-based services and these will take the form of low level, high quality Ethernet based services.

1.6 Wholesale ALA-based services give much of the control to the interconnecting communications provider and therefore in the absence of competing infrastructure are the most likely alternative to readily support retail competition and differentiation.

1.7 The types of retail applications that IFNL’s network will support include high quality voice telephony and sustained high speed broadband Internet services. The network will also support high definition TV signals to the customer premises.

1.8 For these reasons, Ofcom considers that IFNL’s network will benefit the public and support retail competition in the provision of high speed broadband services.

The practicability of the provision of the network without the Code

1.9 The Code enables, amongst other things, operators 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 is therefore a means by which these networks could be deployed quickly. The alternative would be to seek specific licences under the New Road and Street Works Act 1991 as amended by the Traffic Management Act 2004 and this could serve to delay deployment.

1.10 IFNL explained that its network will serve predominantly new housing developments and therefore there will be co-ordination with the developer in deploying the network. Nonetheless, it explained that there will be an amount of build that will need to take place on public land and also after initial deployment require maintenance. In the absence of Code powers, IFNL considered that network would be hampered. Code powers would, it explained, facilitate build more quickly and efficiently. IFNL further noted that it would be placed at a competitive disadvantage in the absence of Code powers.

1.11 For these reasons, Ofcom considers that it should grant Code powers to IFNL and that, in doing so, IFNL would be better placed to deploy and maintain its broadband network.

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

1.12 As explained in paragraph 1.5, IFNL will provide wholesale ALA access to communications providers wishing to provide high speed retail broadband services to end-users. Its network will therefore offer opportunities for retail communications providers to enter into an interconnect agreement to serve end-users in areas in which in the absence of wholesale ALA access they would not choose to provide services. The network will serve to substitute for direct provision of other infrastructure.

1.13 IFNL further explained that it recognised that where its network would be the sole means of direct infrastructure to end-users it would have specific responsibilities in relation to its availability.

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 IFNL is a subsidiary company of Inexus Group Holdings Ltd which already owns and runs a number of utility provision companies specialising in the design, build and maintenance of distribution networks. IFNL considers therefore that the group is fully aware of its obligations in carrying out street works and would seek to minimise use of Code powers wherever possible by co-ordinating with relevant local highways authorities. It also understands its obligations under the Traffic Management Act 2004 and would aim to strictly adhere to these. IFNL further stated that the Inexus Group has been accredited by the British Standards Institute in relation to quality,

environment and Health and Safety parameters and IFNL would work to these standards.

1.15 IFNL also 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 ('the Regulations') which require Code operators to ensure funds are available to meet any liabilities should they arise.

1.16 Ofcom is satisfied that IFNL would use the Code responsibly and be able to put in place sufficient securities to meet its obligations under the Regulations specifically those relating to potential liabilities.

How to respond

1.17 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **20 March 2009**. In this case, Ofcom considers that it need not consult for ten weeks because this would delay provision of the services described which, as explained, are intended to benefit the public.

1.18 Ofcom prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

1.19 Please can you send your response to neil.nasralla@ofcom.org.uk.

1.20 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Neil Nasralla
Competition Group
4th Floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7783 4155

Confidentiality

1.21 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential and specify why. Please also place such parts in a separate annex.

1.22 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those which are marked as confidential, in order to meet legal obligations.

1.23 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

1.24 At the end of the consultation, subject to respondents' views, Ofcom intends to grant Code powers to IFNL shortly thereafter.

Further information

1.25 If you have any wish to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Neil Nasralla using the contact details given above.

Annex 1

Ofcom's consultation principles

Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

1 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. 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

2 We will be clear about who we are consulting, why, on what questions and for how long.

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 to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

4 We will normally allow ten weeks for responses to consultations on issues of general interest.

5 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

6 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

7 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 2

Consultation response cover sheet

2.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, unless we are asked not to.

2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.

2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to confirm on the response cover sheet that Ofcom can publish their responses upon receipt.

2.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.

2.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

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 to be confidential, 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)?

Yes

No

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and all intellectual property rights in the response vest with Ofcom. If I have sent my response by email, Ofcom can disregard any standard email text about not disclosing email contents and attachments.

Ofcom can publish my response: on receipt once the consultation ends

Name

Signed (if hard copy)

