

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

A Statutory Notification of this proposal was published on 8 March 2013

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 1 February 2013.
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 8 March 2013, 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 8 April 2013.
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; and
 - (b) that application of the Code shall have effect throughout the United Kingdom.

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 they have been ascribed in the Act.
9. In this Direction, unless the contrary intention appears—
 - (a) “**Act**” means the Communications Act 2003;

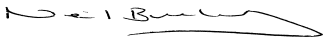
- (b) **“Applicant”** means Wifinity Limited, whose registered company number is 06341412;
- (c) **“Code”** means the electronic communications code;
- (d) **“Ofcom”** means the Office of Communications.

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



Neil Buckley
Director of Investigations

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

17 April 2013

Explanatory Statement

- 1.1. On 1 February 2013, Wifinity 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 8 March 2013, Ofcom published a notification, draft Direction and explanatory statement in which it explained that it proposed to grant Code powers to Wifinity Limited (the “Consultation”). Ofcom sought comments on its proposal by 8 April 2013 and received comments from a respondent who wishes to remain anonymous. Ofcom has summarised the response it received at the end of this explanatory statement and has considered the points it raised.
- 1.3 In considering Wifinity 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 Wifinity Limited plans to deploy a number of wireless internet ‘hotspots’ which consist of fibre optic cable which is located at a central point. An external antenna is fixed to a building which then communicates using the same kind of technology located at other sites. The external antenna is then connected to data cabinets via Ethernet cabling positioned inside the building. The Ethernet cable will then terminate to wall-mounted wireless access points. The access point will then act as both a transmitter and receiver to provide a consistent and reliable wireless internet connection to users in the vicinity.
- 1.5 In addition to the requirements of sections 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 by reference to which the Code is to be applied to the Applicant

- 1.6 Wifinity Limited’s main purpose for its network is to roll out and provide broadband services with speeds of 4Mb/s, 10Mb/s or 20Mb/s on a symmetrical connection through wireless internet “hotspots”. The Applicant already operates such “hotspots” but intends to increase their number across the UK over the coming months.
- 1.7 Wifinity Limited proposes that its network would allow it to offer broadband services without the need of a fixed landline and other equipment such as modems and routers. As a result, services would be provided instantly without installation and set up costs and without the need for a contract. The Applicant’s services would be offered in various types of high-density accommodation, such as blocks of flats and student accommodation as well as military barracks and bases, in competition to those services being offered by other operators or in some cases, as the only provider of fast broadband services in the area.

- 1.8 For these reasons, Ofcom considers that Code powers would benefit the public as the network will serve retail and ultimately wholesale customers and is likely to increase competition in the provision of various broadband services in parts of the United Kingdom in the future.

The practicability of the provision of the network without the application of the Code

- 1.9 Wifinity Limited considers that it requires access to the public highway and private land in order efficiently to build and maintain the infrastructure needed for its intended service. Code powers will enable it to carry out street works in a more coordinated fashion enabling the provision of the Applicant's services to homes and businesses more efficiently. Wifinity Limited points to various practical and resource difficulties that arise without Code powers and the implications these difficulties will have on its business.

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

- 1.10 Wifinity Limited has stated that it is willing to share its network with other responsible providers, where practicable, allowing them to offer internet services using its infrastructure.
- 1.11 We consider that the sharing of the use of apparatus would be encouraged by granting Wifinity Limited 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

- 1.12 Wifinity 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.
- 1.13 Wifinity Limited enclosed a signed letter from one of its directors confirming that provision of funding for specified liabilities will be put in place and that it will maintain this fund by way of an insurance bond.

Overall assessment

- 1.14 In addition to our consideration of the four factors discussed above, we consider that granting Wifinity 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:
- 1.14.1. contributing to the availability throughout the UK of a wider range of electronic communications services;
- 1.14.2. promoting competition in the provision of electronic communication networks and services and associated facilities, including by encouraging investment and innovation; and
- 1.14.3. encouraging a greater availability and use of high speed data transfer services throughout the United Kingdom.

Response to the Consultation

- 1.15. As noted at paragraph 1.2, we received one response to the Consultation which set out the following concerns in relation to the proposal to grant Code powers to Wifinity Limited:
- 1.15.1. Internet speeds of up to 20m/b can already be achieved using BT's copper cable lines and Virgin Media's and Smallworld's cable networks can offer even higher speeds;
- 1.15.2. Wifinity Limited would not be contributing towards rolling out superfast broadband in the UK;
- 1.15.3. Granting Code powers to Wifinity Limited may divert funds away from BT Openreach's and Virgin Media's networks for wholesale products, which would therefore impact other providers' revenue;
- 1.15.4. Since consumers would be able to obtain broadband services from Wifinity Limited without using a traditional landline, Wifinity customers might cancel any landline services provided by BT (or any other provider which uses BT's lines) which may slow down the development of BT's 21st Century Network;
- 1.15.5. Any decrease in revenue generated by BT in urban areas, due to the roll out of Wifinity Limited's wireless internet "hotspots", may result in less investment in communications services in rural areas;
- 1.15.6. Wifinity Limited's service may impact investment in rolling out 4G network technology; and
- 1.15.7. Whether Wifinity Limited would be able to meet its Funds for Liabilities and whether any refusal of planning permission by a Local Authority would result in the provision of "patchy coverage" by Wifinity Limited.
- 1.16. 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 Wifinity Limited would have an adverse effect on competition or consumer choice in the UK. We consider that granting Wifinity 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 it will promote competition, for the reasons we have discussed in paragraphs 1.6 to 1.8 above.