

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

A Statutory Notification of this proposal was published on 28 February 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 28 October 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 28 February 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 **31 March 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 which the Applicant is making available, or 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;

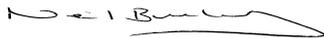
- (b) “**Applicant**” means Hyperoptic Ltd, whose registered company number is 07222543;
- (c) “**Code**” means the electronic communications code;
- (d) “**Ofcom**” means the Office of Communications.

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

3 April 2014

Explanatory Statement

- 1.1. On 28 October 2013, Hyperoptic Ltd 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 28 February 2014, Ofcom published a notification, draft Direction and explanatory statement in which it explained that it proposed to grant Code powers to Hyperoptic Ltd (the “Consultation”). Ofcom sought comments on its proposal by 31 March 2014 and received one response.
- 1.3. In considering Hyperoptic Ltd’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. Hyperoptic Ltd is a fibre broadband Internet network and service provider, focusing on multi-dwelling units in high density areas and multi-tenanted office blocks. It has active sites in London and is planning a phased roll out of its services in urban areas across the UK, aiming to install its electronic communications network in 500,000 homes by 2017. Furthermore it can provide its customer sites with exceptionally high broadband speed access, including symmetrical data rates of 1 Gbit/s, 100 Mbit/s and 20 Mbit/s, as well as VoIP based phone lines and full call packages.

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 Hyperoptic Ltd’s network is to provide broadband services to multi-dwelling units in high density areas and to multi-tenanted office blocks. Hyperoptic Ltd states that it can provide its customers with exceptionally high broadband access speeds, including symmetrical data rates of 1 Gbit/s, 100 Mbit/s and 20 Mbit/s.
- 1.6. Hyperoptic Ltd asserts that the delivery and design of its network will enable its customers to access broadband speeds which are up to 80 times faster than the UK average of 12Mbit/s. It also states that other services offered will include full HD TV, Video on demand, Sky Player and VOIP based phone lines.
- 1.7. Hyperoptic Ltd contends that its services are very competitive in terms of quality and price. As such, it considers that they are likely to lead to increased competition in the provision of broadband services in parts of the UK. It also states that it doesn’t apply internet traffic shaping or management of any kind and, as it takes steps to upgrade its core network whenever necessary, it is able to provide a more reliable level of service than its competitors.
- 1.8. For all these reasons, Ofcom considers that granting Hyperoptic Ltd 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 or conduit system without the application of the Code

- 1.9 Hyperoptic Ltd states that it requires access to private land in order efficiently to build and maintain the infrastructure needed for its intended services. The application explains that Code powers will enable it to carry out installation of its in-building network in a more coordinated fashion, enabling the provision of the its services to homes and businesses more efficiently. Hyperoptic Ltd points to various practical and resource difficulties that would arise without Code powers and the implications that these difficulties will have for its business.
- 1.10 Hyperoptic Ltd also states that it would be placed at a competitive disadvantage if it is not granted Code powers, as it would be unable to benefit from the same advantages available to its competitors and would not be able to provide its network as efficiently and effectively as would otherwise be possible.

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

- 1.11 Hyperoptic Ltd has confirmed that it is willing to consider sharing its network with other responsible providers, where practicable.
- 1.12 We consider that sharing of the use of apparatus may be encouraged by granting Hyperoptic Ltd 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

- 1.13 Hyperoptic Ltd has considered its duties and responsibilities with regard to its compliance with Regulation 16 (Funds for Liabilities). It has assessed its asset base and future network deployment and has confirmed that it is not required to provide relevant information for funds for liabilities at this stage in line with Ofcom's published guidance. Hyperoptic Ltd has confirmed, however, that it will make arrangements to put the requisite funds in place if the exercise of relevant rights gives rise to specified liabilities under Regulation 16.

Overall assessment

- 1.14 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.
- 1.14.1. 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 in paragraph 1.2 above, we received one response in relation to the Consultation. That response did not relate to the substance of our proposal and we have therefore not taken it into account in coming to our decision to grant Code powers to Hyperoptic Ltd.
- 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 Hyperoptic Ltd would have an adverse effect on competition or consumer choice in the UK. We consider that granting Hyperoptic Ltd 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 above.