



**Direction under Section 106(3)
of the Communications Act 2003
applying the electronic
communications code in the case
of GeneSYS Telecommunications
Limited**

A Notification of this proposal was published on 7 April 2005

Consultation

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of GeneSYS Telecommunications Limited

A Notification of this proposal was published on 7 April 2005

Whereas:

- A) On 25 February 2005, GeneSYS Telecommunications Limited made an application for the Code for the purposes of the provision by it of a system of conduits in the United Kingdom which GeneSYS Telecommunications Limited 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) GeneSYS Telecommunications Limited made the above-mentioned application 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 Code and the manner in which such an application is to be made;
- C) On 7 April 2005, Ofcom published a notification of their proposal to give a direction applying the Code to GeneSYS Telecommunications Limited in accordance with section 107 of the Act;
- D) No representations were received in relation to the proposed Direction;
- E) 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. 1. The Code shall apply to GeneSYS Telecommunications Limited for the purposes of the provision by it of a system of conduits in the United Kingdom which GeneSYS Telecommunications Limited 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.

Definitions and Interpretation

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

“Act” means the Communications Act 2003;

“Code” means the electronic communications code;

“GeneSYS Telecommunications Limited” means GeneSYS Telecommunications Limited (registered company number 05295532);

“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.

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of GeneSYS Telecommunications Limited

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.

Stephen Unger

Director of Telecoms Technology, Competition and Markets

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

12 May 2005

Explanatory Statement

- 2.1 On 25 February 2005, GeneSYS Telecommunications Limited (“GeneSYS”) applied for the electronic communications code (the “Code”) for the purposes of the provision by it of a system of conduits in the United Kingdom which GeneSYS 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. 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.
- 2.2 On 7 April 2005, Ofcom published a notification of its proposal to give a direction applying the Code to GeneSYS in accordance with section 107 of the Act. Ofcom asked for any comments on its proposal to be made by 9 May 2005. No responses were received.
- 2.3 The Notification published under section 107(2) of the Act requires providers of systems of conduits to supply written evidence showing that they are making available, or proposing to make available, their systems of conduits for use by providers of electronic communications networks. In relation to this, it is first of all necessary to explain why GeneSYS believes that it needs the Code and, second, to explain why it would wish to share its conduits. The latter point is crucial in considering any applications for the Code under section 106(4)(b) of the Act. Ofcom can only grant the Code in given the circumstances set out in section 106(4).
- 2.4 The Highways Agency currently manages a communications network that runs adjacent to the majority of England’s motorways and some other trunk roads in England. The network is used for a number of purposes and these include emergency telephones, closed circuit television, and variable message signs which are connected to police control centres. The network therefore plays a crucial part in managing traffic safely. In its application, GeneSYS explained that the Highways Agency is expanding and upgrading this network to support technological initiatives that will make a significant contribution to safe roads, reliable journeys and informed travellers.
- 2.5 In view of the need to upgrade and expand its network, the Highways Agency decided that upgrading and expansion would be best achieved via a public private partnership. GeneSYS was the preferred bidder. The main purpose of the network is therefore to support the needs of the Highways Agency.
- 2.6 The main purpose of the system of conduits and the related transmission network is to support the needs of the Highways Agency and given the need for the network, the Highways Agency cannot allow the functionality and reliability of it to be compromised. The tender made this clear. Nonetheless, GeneSYS has explained that, subject to the consent of the Highways Agency, it would be willing to lease space within its conduits and that any requests to use its conduits would be considered. GeneSYS has also stated that any spare capacity in the transmission system would also be made available (again this would be subject to the consent of the Highways Agency) as this would be in GeneSYS’ best interests. GeneSYS

explained that the agreement with the Highways Agency, amongst other things, provides GeneSYS with incentives to utilise any spare capacity within the transmission network as it would share with the Highways Agency any commercial revenue that leasing space generated.

Ofcom's duties

2.7 In considering GeneSYS' 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)(a) "to further the interests of citizens in relation to communications matters" and the third Community requirement set out in section 4(5)(b) to "promote the interests of all persons who are citizens of the European Union". In terms of section 3(1)(a), Ofcom considers that the network concerned plays an essential role in traffic management. It also allows for emergency services to be contacted in relation to traffic accidents and it enables traffic control centres to alert motorists of resultant congestion and necessary speed restrictions. In terms of section 4(5)(b), efficient transportation networks are crucial to modern economies and therefore communications infrastructure used to support them that enable access to emergency services furthers the interests of citizens in relation to communications matters. It also promotes the interests of all persons of the European Union. Transportation networks are needed to deliver goods and an efficiently run communications networks that runs alongside the transportation network can only help to ensure that the transportation network is run efficiently.

2.8 As well as the requirements set out in 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 conduit system by reference to which the Code is to be applied to the applicant

2.9 The foremost reason for the system of conduits and the transmission system concerned is to provide the Highways Agency with a reliable network that is capable of supporting its communications needs. These needs are varied and include the need to maintain basic telephony services (including emergency telephones that are located alongside motorways), closed-circuit television, and electronic displays giving details relating to, amongst other things, weather and speed restrictions. Advancements in technology are likely to increase the network's capabilities and this is likely to involve the installation of smarter devices that might help to secure safer roads and improve traffic management. For these reasons, the conduit system would therefore be of benefit to the public.

2.10 In addition, GeneSYS has explained that, subject to the consent of the Highways Agency, communications providers would be able to install their communications systems within its conduits and it would also lease any spare capacity within the network to other communications providers. This might help to increase competition in the provision of communications networks more generally and therefore indirectly this network might benefit the public.

2.11 For these reasons, Ofcom considers that the network concerned might directly (in terms of providing for securer and safer roads) and indirectly (in terms of assisting other providers rollout their networks) benefit the public.

The practicability of the provision of the conduit system without the Code

- 2.12 In the main, the network concerned is sited on or underneath land that is owned by the Highways Agency. For these parts of the network, Code powers are not needed. However, certain assets are located on land that is not owned by the Highways Agency and it is because of this that GeneSYS is seeking Code powers. At present, the Highways Agency has legal or informal rights of access to assets not directly sited on or underneath land that it owns. But the Highways Agency does not or may not have the ability in all cases to transfer rights of access to GeneSYS and it is therefore for this reason that GeneSYS needs Code powers.

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

- 2.13 1.13 The network concerned is generally located on or underneath land owned by the Highways Agency and it is therefore in its interest to ensure that the highways that it runs are not subject to uncoordinated street works. For these reasons, as part of its contract with the Highways Agency, GeneSYS is required to take account of competing requests for duct space between power, communications and other cable requirements in accordance with principles agreed with the Highways Agency. In addition, as explained in paragraph , GeneSYS has incentives to secure the most efficient use of the ducting and transmission system concerned as this would enable it to generate commercial revenues above those that it will obtain as a result of successfully winning the contract to manage the network.

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

- 2.14 The requirement to provide funds to meet specified liabilities is relevant only to the extent that any street works are undertaken. Some of the work GeneSYS is likely to undertake will involve street works. However, GeneSYS has explained that most of these works would be in relation to equipment sited near to, on or underneath the Highways Agency's network of roads and, as it will be subject to an agreement with the Highways Agency under which it will be required to put substantial insurance in place, the Highways Agency believes that GeneSYS need not put additional funds in place. The insurance or other security provided by GeneSYS would provide cover in the event of liabilities.
- 2.15 Ofcom has received a letter from the Highways Agency confirming that this is the case. The letter also refers to the amount of insurance that GeneSYS is required to put in place and this is substantial.