

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

A Notification of this proposal was published on 6 November 2008

Whereas:

- (A) On 24 October 2008, VTL Wavenet 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 6 November 2008, Ofcom published a notification of their proposal to give a direction applying the Code to VTL Wavenet Limited in accordance with section 107 of the Act;
- (C) Ofcom did not receive any representations 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 VTL Wavenet Limited for the purposes of the provision by VTL Wavenet 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;

"VTL Wavenet Limited" means VTL Wavenet Limited (registered company number 05836930);

"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**

12 January 2009

Explanatory Statement

1.1 On 24 October 2008, VTL Wavenet 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 6 November 2008, Ofcom published a draft Direction in which it stated that it proposed to grant Code powers to VTL Wavenet Limited and explained why it proposed to do so. Ofcom did not receive any representations about its proposal. Ofcom has therefore granted Code powers to VTL Wavenet Limited.

1.3 In considering VTL Wavenet 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 In this case, the Viatel Group is undergoing a reorganisation under which a significant portion of the UK network assets will be transferred to VTL Wavenet Limited and much of these assets are located on public highways.

1.5 The network is predominantly used to supply wholesale services to carriers or ISPs and therefore benefits consumers in that retail service providers can purchase capacity from VTL Wavenet Limited and avoid the capital expenditure involved in rolling out a network.

1.6 In addition to the requirements of 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 electronic communications network by reference to which the Code is to be applied to the applicant

1.7 As explained in paragraph 1.4, the Viatel Group is undergoing a reorganisation and as part of this VTL Wavenet Limited will manage a significant portion of the UK network assets. These assets include fibre between two submarine cables landing in Lowestoft in Suffolk and Polegate in East Sussex which link the UK to mainland Europe (The Netherlands and France). The network also includes two network rings which cover parts of Berkshire and Surrey and the other is in London Docklands.

1.8 The network is predominantly used to provide various wholesale services to other communications providers who may utilise these to supply capacity to other service providers and/or provide services to retail customers. VTL Wavenet Limited also supplies capacity to large corporate customers and enables them to effectively design and operate their own networks.

1.9 For these reasons, Ofcom considers that Code powers would benefit the public given that choice would be increased via both an increase in retail (directly) and wholesale (indirectly) competition.

The practicability of the provision of the network without the Code

1.10 The vast majority of the network concerned is deployed on public highways and was installed and maintained by VTL (UK) Limited which has Code powers. VTL Wavenet Limited considers that, with the transfer of the network assets, it needs Code powers to enable it to carry out street works without needing a specific street-works licence under section 50 of the New Road and Street Works Act 1991 (“NRSWA 1991”) (as amended by the Traffic Management Act 2004). This is a principal benefit of Code powers.

1.11 The Code enables, amongst other things, communications providers 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.”

1.12 VTL Wavenet Limited also explained its principal competitors already possess Code powers and therefore it would be placed at a distinct competitive disadvantage should it need to carry out street works on a case-by-case basis and require street works licences under the NRSWA 1991.

1.13 For these reasons, Ofcom considers that it should grant Code powers to VTL Wavenet Limited to enable it to deploy its network as soon as it considers commercially viable.

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

1.14 VTL Wavenet Limited explained in its application that it has previously entered into apparatus sharing agreements. Also, its network is used by other communications providers to extend their own networks without needing to install additional infrastructure.

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 VTL Wavenet Limited explained that it intends to put in place a third party performance guarantee to ensure that sufficient funds for liabilities are available. Paragraph 16(1)(c) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 states that: “where he [the Code operators] has not previously exercised any rights conferred by the electronic communications code and intends to exercise such rights for the first time, provide OFCOM with the said certificate two weeks before he exercises such rights to install any apparatus”.