

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

Proposal to give a direction applying the Electronic Communications Code to VTL Wavenet 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 VTL Wavenet 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 Michael Galvin on 020 7783 4158 or by sending an email to michael.galvin@ofcom.org.uk.
3. Representations on the proposal may be made to: Michael Galvin, Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA by not later than 5pm on **8 December 2008**.
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, “VTL Wavenet Limited” means VTL Wavenet Limited (registered company number 05836930).

Neil Buckley
Director of Investigations

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

6 November 2008

[Draft] 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 have considered 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 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.

Neil Buckley
Director of Investigations

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

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 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”.

1.3 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.

1.4 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.

1.5 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

1.6 As explained in paragraph 1.3, 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.

1.7 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.

1.8 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

1.9 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.

1.10 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.”

1.11 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.

1.12 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

1.13 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

1.14 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”.

How to respond

1.15 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **8 December 2008**. 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.

1.16 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.

1.17 Please can you send your response to michael.galvin@ofcom.org.uk.

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

Michael Galvin
Competition and Markets
4th Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7783 4158
Fax: 020 7783 4109

Confidentiality

1.19 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.

1.20 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.

1.21 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

1.22 At the end of the consultation, subject to respondents' views, Ofcom intends to grant Code powers to VTL Wavenet Limited shortly thereafter.

Further information

1.23 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 Michael Galvin 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)

