

Direction under Section 106(3) of
the Communications Act 2003
applying the electronic
communications code in the case of
VSNL Telecommunications (UK) Ltd

A Notification of this proposal was published on 4
April 2005

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Section 1

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of VSNL Telecommunications (UK) Ltd

A Notification of this proposal was published on 4 April 2005

Whereas:

- A) On 25 February 2005, VSNL Telecommunications (UK) Ltd made an application for 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 4 April 2005, Ofcom published a notification of their proposal to give a direction applying the Code to VSNL Telecommunications (UK) Ltd in accordance with section 107 of the Act;
- C) No representations were received in relation to 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 Code shall apply to VSNL Telecommunications (UK) Ltd for the purposes of the provision by VSNL Telecommunications (UK) Ltd 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;

“**Code**” means the electronic communications code;

“**Ofcom**” means the Office of Communications;

“**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;
and

“VSNL Telecommunications (UK) Ltd“ means VSNL Telecommunications (UK) Ltd
(registered company number 05272339).

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

- 1.1 On 25 February 2005, VSNL Telecommunications (UK) Ltd (“VSNL”) applied for the electronic communications code (the “Code”) for the purposes of the provision by it 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 4 April 2005, Ofcom published a notification of its proposal to give a direction applying the Code to VSNL 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.**
- 1.3 In considering VSNL’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 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”. In this case, VSNL has recently finalised an agreement to purchase the network of Tyco Global Network including Tyco Networks (UK) Limited (“Tyco”) and its network within the UK which consists of backhaul links between its UK landing stations and exchange facilities. In order to maintain the current network, Tyco has needed to utilise its Code powers and VSNL believes that it will also need to utilise Code powers from time-to-time.
- 1.4 Tyco does not provide services directly to end-users. However, the proposed direction would help to promote competition, as the network concerned has enabled other communications providers to purchase wholesale capacity from Tyco in order to compete in retail markets. This capacity is both UK-based – hence the need for Code powers – and internationally widespread. The present network, therefore, enables Tyco to offer end-to-end wholesale capacity to providers who compete in retail markets and provide services directly to end-users. As a result of its acquisition, VSNL has stated that it also intends to compete in the markets for wholesale end-to-end capacity. In addition to this, unlike Tyco, VSNL has stated that it also expects to compete in retail markets.
- 1.5 In terms of VSNL’s application for Code powers, it is the UK-based part of its network – that is, that from cable landing stations to inland exchanges – which is strictly relevant. But in terms of the benefits to the public, Ofcom has also considered the importance of VSNL’s international 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 network concerned is used to provide wholesale international capacity to communications providers who wish to be able to purchase

wholesale end-to-end international services from the one carrier. In its application, VSNL explained that many UK-based communications providers presently lease international capacity from Tyco and VSNL would hope to maintain these relationships as well as seek to enter into new relationships. In order to encourage communications providers to lease capacity from it, Tyco has provided space for providers to co-locate their equipment at its cable stations and exchanges. VSNL intends to continue to enable the co-location of facilities.

- 1.8 VSNL would, therefore, be able to use its network to compete in the markets for wholesale international end-to-end capacity. Increasing competition in wholesale markets, such as markets for wholesale international end-to-end capacity, is likely to indirectly increase competition in retail markets and therefore the public would benefit from the increased level of competition at the wholesale level.
- 1.9 For these reasons, Ofcom considers that it is appropriate to grant Code powers to VSNL.

The practicability of the provision of the network without the Code

- 1.10 Code powers enable code operators to benefit from, amongst other things, the ability to install or maintain infrastructure sited beneath public highways without the need to apply for a specific licence to do so under the New Road and Street Works Act 1991. These powers enable Code operators to install infrastructure or maintain it more rapidly than would otherwise be the case. Tyco has needed to use its Code powers to maintain and improve its network where necessary to ensure continuity of service. In the absence of Code powers, Tyco might have experienced interruptions in the provision of the services that it provides to its wholesale customers and this would have placed it at a competitive disadvantage.
- 1.11 As VSNL is likely to compete in the same markets as Tyco, VSNL is also likely to benefit from Code powers and, therefore, in the absence of Code powers it would be placed at a competitive disadvantage.
- 1.12 For these reasons, Ofcom considers that it should grant Code powers to VSNL in order to enable VSNL to compete on an equal footing in the markets in which it chooses to compete.

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

- 1.13 VSNL has explained that it is aware of the requirements associated with the operation of the Code and that Ofcom wishes to see in such applications evidence that the applicant is willing to share infrastructure where possible. In this case, VSNL has pointed to Tyco's previous willingness to share trenches in that it established agreements – at least on a one-off basis – with three other communications providers. VSNL has confirmed that it would be willing to consider trench-sharing agreements where this suited it and other parties.
- 1.14 In terms of compliance with the Code and associated obligations more generally, VSNL has stated that staff will have specific responsibilities in relation to the Code and compliance with it.

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 VSNL confirmed in its application that it would put in place funds to meet any liabilities if its application was successful and that these would cover any potential liabilities that already exist in respect of Tyco's network. A letter to this effect was signed on behalf of VSNL's board.

1.16 For these reasons, Ofcom is satisfied that VSNL would put in place sufficient securities to meet its Code obligations relating to potential liabilities.