

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of EU Networks Fiber UK Limited

A Notification of this proposal was published on 31 January 2008

Whereas:

- (A) On 14 January 2008, EU Networks Fiber UK 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 31 January 2008, Ofcom published a notification of their proposal to give a direction applying the Code to EU Networks Fiber UK 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 EU Networks Fiber UK Limited for the purposes of the provision by EU Networks Fiber UK 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;

"EU Networks Fiber UK Limited " means EU Networks Fiber UK Limited (registered company number 4840874)

"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.

David Stewart
Competition Policy Director

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

26 March 2008

Explanatory Statement

1.1 On 14 January 2008, EU Networks Fiber UK Limited (“EU Networks”) 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 31 January 2008, Ofcom published a Notification and draft Direction proposing to grant Code powers to EU Networks. Representations were sought by 3 March 2008. None, however, were forthcoming. Ofcom has therefore today issued a Direction granting Code powers to EU Networks.

1.3 In considering EU Networks’ application, Ofcom acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom 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”. In this case, EU Networks has a European-wide fibre based network connecting various European cities including London. The network is used to provide direct (corporate customers) and indirect services (it allows other carriers and service providers to lease its network) to end-users.

1.4 The UK part of the network, which was originally installed by Viatel Holdings Limited, includes two submarine cables linking the UK to continental Europe and therefore will also help to increase competition in the provision of international access services.

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 In 2006, EU Networks acquired 50% of Viatel Holdings Limited’s pan-European long-haul fibre network which includes an extensive network in the London area. Additionally, the network includes two submarine cables linking the UK to continental Europe.

1.7 The network concerned is predominantly used to serve three groups of users. First, the network has been used and will continue to be used to serve corporate who have high bandwidth needs and require private fibre network solutions. The network concerned therefore helps to increase competition in this sector of the market.

1.8 Second, the network is leased to other communications providers who wish to extend their own fibre networks without needing to physically construct the networks themselves. This enables other communications providers to compete in the provision of bandwidth intensive services and increases competition at the wholesale

level. Increasing competition at the wholesale level indirectly increases competition at the retail level.

1.9 Third, EU Networks stated that it has offered services (such as DSL access) to service providers without their own networks elsewhere in Europe and the network would give it similar opportunities to innovate in the UK.

1.10 For these reasons, Ofcom considers that the public will benefit directly and indirectly and therefore it is appropriate to grant Code powers to EU Networks.

The practicability of the provision of the network without the Code

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.” The Code is therefore a means by which these networks could be deployed more quickly.

1.12 EU Networks already has access to extensive infrastructure which needs to be maintained from time-to-time in London and the UK leading to its submarine cables in Lowestoft and Polegate. In addition, EU Networks has stated that it is likely to deploy additional fibre to extend its network reach once customer contracts have been awarded.

1.13 In addition, EU Networks’ principal competitors in the market already have Code powers and therefore should it have to rely on the normal planning processes it would be placed at distinct competitive disadvantage.

1.14 For these reasons, Ofcom considers that it should grant Code powers to EU Networks to enable it to deploy its network more quickly than it otherwise could.

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

1.15 As explained in paragraphs 1.8 and 1.9, EU Networks provides Fibre to other communications providers and this enables them to extend their networks without needing to install their own additional infrastructure. This is a key part of EU Networks’ business.

1.16 Additionally, EU Networks further explained that it is aware of its obligations in relation to the Code and network construction.

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

1.17 EU Networks has already provided Ofcom with a draft bond which it intends to secure should it be granted Code powers.