

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

### **Proposal to give a direction applying the Electronic Communications Code to VSNL Telecommunications (UK) Ltd**

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 VSNL Telecommunications (UK) Ltd.
2. The draft Direction and accompanying explanatory statement setting out Ofcom’s reasons for the proposal are available at <http://www.ofcom.org.uk/consult/condocs/vsnl/>  
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 **9 May 2005**.
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](mailto: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](http://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, “VSNL Telecommunications (UK) Ltd” means VSNL Telecommunications (UK) Ltd (registered company number 05272339).

**Philip Rutnam**  
**Partner, Competition and Markets**

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

**4 April 2005**

**[Draft] 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 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 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) Ofcom have consider 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 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;

"VSNL Telecommunications (UK) Ltd" means VSNL Telecommunications (UK) Ltd (registered company number 05272339)

"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.

**Philip Rutnam**  
**Partner, Competition and Markets**

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

**[Date]**

# 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 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.

1.3 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.

1.4 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.

1.5 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 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.

1.7 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.

1.8 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**

1.9 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.

1.10 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.

1.11 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**

1.12 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.

1.13 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**

1.14 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.

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

## **How to respond**

1.16 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **9 May 2005**.

1.17 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.

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

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

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

## **Confidentiality**

1.20 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](http://www.ofcom.org.uk), ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

1.21 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

1.22 Ofcom reserves its power to disclose certain confidential information where this is necessary to fulfil its functions, although in practice it would do so only in limited circumstances.

1.23 Please also note that copyright and all other intellectual property in responses will be assumed to be assigned to Ofcom unless specifically retained.

## **Next steps**

1.24 Unless there are any reasoned objections to Ofcom's proposals, it intends to grant Code powers to VSNL shortly after the end of the consultation period.

## **Ofcom's consultation processes**

1.25 Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow, including on the length of consultations.

1.26 This consultation is shorter than Ofcom's standard 10 week period because - for guidance on valid reasons see Ofcom's published consultation guidelines, available at [http://www.ofcom.org.uk/consultations/consult\\_method/consult\\_guide.pdf](http://www.ofcom.org.uk/consultations/consult_method/consult_guide.pdf).

1.27 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

1.28 If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion:

Philip Rutnam  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
Tel: 020 7981 3585  
Fax: 020 7981 3333  
E-mail: [philip.rutnam@ofcom.org.uk](mailto:philip.rutnam@ofcom.org.uk)

## 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](http://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)