

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

Proposal to give a direction applying the Electronic Communications Code to Bytel Networks 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 Bytel Networks Limited (registered company number NI50325).
2. The draft Direction and accompanying explanatory statement setting out Ofcom’s reasons for the proposal are available on Ofcom’s website. 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 **4 September 2006**.
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.

Neil Buckley
Competition Policy Director

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

3 August 2006

**[Draft] Direction under Section 106(3) of the Communications Act 2003
applying the electronic communications code in the case of Bytel Networks
Limited**

[A Notification of this proposal was published on 3 August 2006]

Whereas:

- (A) On 21 July 2006, Bytel Networks Limited (registered company number NI50325) 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 Communications Act 2003 (the 'Act') and the notification published by the Director General of Telecommunications under section 107(2) of the Act on 10 October 2003 setting out the requirements with respect to the content of an application for the electronic communications code and the manner in which such an application should be made;
- (B) By virtue of the Transitional Provisions, references to the Director in the Notification referred to in paragraph A above should be read as references to Ofcom;
- (C) On 3 August 2006, Ofcom published a notification of their proposal to give a direction applying the Code to Bytel Networks Limited in accordance with section 107 of the Act;
- (D) Ofcom have considered every representation made to them about the proposed Direction;
- (E) 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 Bytel Networks Limited for the purposes of the provision by Bytel Networks Limited of an electronic communications network to have effect in the United Kingdom.

Definitions and Interpretation

2. "Director General of Telecommunications" means the Director General of Telecommunications appointed under section 1 of the Telecommunications Act 1984; and
3. "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.
4. In this Direction, 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.

5. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.
6. This Direction shall take effect on the day it is published.

Neil Buckley
Competition Policy Director

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

[Date]

Explanatory Statement

1.1 On 21 July 2006, Bytel Networks Limited (“Bytel”) applied to Ofcom for a direction applying the electronic communications code (the “Code”). 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 the Director General of Telecommunications on 10 October 2003 under section 107(2) of the Act. Ofcom assumed its functions in relation to the Code on 29 December 2003, and by virtue of transitional provisions in the Act, references to the Director General of Telecommunications in the Notification referred to in this paragraph should be read as references to Ofcom.

1.2 In considering Bytel’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, amongst other things, Bytel intends to construct a large scale communications network which will provide broadband capabilities to areas beyond the extent and reach of some other communications providers operating in the broadband access market in Northern Ireland.

1.3 Bytel explained that it was established specifically with the objective of creating a carrier neutral and open access network throughout Northern Ireland. It already has an agreement in place with another communications provider so that it can use its system of conduits and it now wishes to install additional wholly-owned conduits. Optical fibre will be installed throughout its system of conduits (both those leased and those wholly-owned) and the company will also provide dark fibre for use by other communications providers and users. The optical fibre will be used to provide various data services (see below).

1.4 Ofcom has considered the application with regard to its duties set out in section 107(4) of the Act. Its views on the matters set out therein in relation to the application 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

1.5 Bytel already offers various data-based services (e.g. point-to-point Ethernet private circuits) via the conduit space that it has leased from another communications provider. However, the company wishes to expand the network at its disposal and therefore pass more premises and increase its potential customer-base which is presently limited to the extent of the other provider’s network. The company aims to extend its network to provide variable speed broadband services to both business and residential customers including to some that are beyond the reach of other communications providers operating in the broadband access market in Northern Ireland.

1.6 Ofcom considers, therefore, that the network will benefit the public and increase competition in the provision of communications services.

The practicability of the provision of the network without the Code

1.7 As explained in paragraph 1.5, Bytel already provides various data-based services and it clearly has not needed Code powers to provide these services. However, Bytel intends to install its own wholly-owned conduits in order to expand the network at its disposal. The current space that it leases does not extend to the last mile and does not, therefore, allow Bytel to offer services to end-users beyond the extent of the other communications provider's network.

1.8 Bytel considers that Code powers would enable it to extend its reach more rapidly because, in the absence of Code powers, it would be necessary for it to obtain a street works licence each time it wished to break up or open a street and this process is likely to delay build. Code powers, however, allow providers to carry out street works for the purposes of installing and maintaining their networks without needing a specific street works licence to do so.

1.9 Bytel believes that, in the absence of Code powers, it would be placed at a competitive disadvantage because other communications providers operating in the broadband access market in Northern Ireland already benefit from Code powers.

1.10 Ofcom accepts that Bytel would be significantly disadvantaged should it not benefit from Code powers whereas other communications providers do. For these reasons, Ofcom considers that it should grant Code powers to Bytel.

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

1.11 Bytel explained that it already has a track record of sharing infrastructure in that it hosts another communications provider's equipment in one of its points-of-presence. In addition, Bytel's application included a letter from another communications provider which showed that there has clearly been dialogue between the parties with a view to sharing infrastructure.

1.12 Bytel's application also explained that it plans to pass dark fibre through its system of conduits for use by other communications providers and service providers.

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

1.13 Bytel's application included a breakdown of the types of equipment that it will install and an explanation as to whether the equipment would be placed on public highways – and therefore require it to put in place funds to meet any potential liabilities – or private land. It then set out the methodology that it has chosen to use in order to provide for sufficient funds to meet any potential liabilities. The company also informed Ofcom of the name of the financial institution that will provide for the funds.

1.14 For these reasons, Ofcom is satisfied that Bytel will secure funds to meet any potential liabilities.

1.15 In terms of responsible use of the Code, Bytel explained that it has already contacted the Department of Regional Development in Northern Ireland – the department that co-ordinates street works – to indicate that it would wish to join the Northern Ireland Road Authority and Utilities Committee (essentially a group that considers, amongst other things, the co-ordination of street works).

How to respond

1.16 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **4 September 2006**.

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

Confidentiality

1.20 Ofcom considers that 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 (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 Subject to respondents' views, Ofcom proposes to grant the Code to Bytel and would intend to do so shortly after closure 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.

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. 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 Vicki Nash who is Ofcom's consultation champion:

Vicki Nash
Ofcom (Scotland)
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
E-mail: vicki.nash@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, 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): Michael Galvin

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)