

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

Proposal to give a direction applying the Electronic Communications Code to Spyder Facilities 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 Spyder Facilities Limited.
2. The draft Direction and accompanying explanatory statement setting out Ofcom’s reasons for the proposal are available at <http://www.ofcom.org.uk/consultations/current/spyder/>. 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 **14 February 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) 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, “Spyder Facilities Limited” means Spyder Facilities Limited (registered company number 03636773).

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

13 January 2005

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

[A Notification of this proposal was published on 13 January 2005]

Whereas:

- (A) On 5 December 2004 Spyder Facilities Limited made an application for the electronic communications code (the "Code") for the purposes of the provision by it of a system of conduits in the United Kingdom which Spyder Facilities Limited is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks;
- (B) Spyder Facilities Limited made the above-mentioned application 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;
- (C) On 13 January 2005 Ofcom published a notification of their proposal to give a direction applying the Code to Spyder Facilities 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 Spyder Facilities Limited for the purposes of the provision by it of a system of conduits in the United Kingdom which Spyder Facilities Limited is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

Definitions and Interpretation

2. In this Direction, unless the contrary intention appears-

"Act" means the Communications Act 2003;

"Spyder Facilities Limited" means Spyder Facilities Limited (registered company number 03636773)

"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.

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

[Date]

Explanatory Statement

1.1 On 5 December 2004 Spyder Facilities Limited (“Spyder”) applied for the electronic communications code (the “Code”) for the purposes of the provision by it of a system of conduits in the United Kingdom which Spyder Facilities Limited is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks. 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 The Notification published under section 107(2) of the Act requires providers of systems of conduits to supply written evidence showing that they are making available, or proposing to make available, their systems of conduits for use by providers of electronic communications networks. Spyder has confirmed that its system of masts would be dedicated to mobile operators and would be used to house their antennae. Spyder’s website (www.spydersites.co.uk) sets out a list of locations where electronic communications network providers may site their antennae. In addition, Spyder has provided written evidence showing that it already has established agreements with providers of electronic communications networks relating to the provision of sites for mobile antennae.

1.3 In considering Spyder’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)(a) “to further the interests of citizens in relation to communications matters” and the first Community requirement set out in section 4(3)(b) to promote competition “in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services”. In this case, Ofcom believes that the proposed direction might help to further the interests of citizens, as Spyder plans to lease space on its masts to one or (preferably) more mobile operators. This might reduce the need for multiple new masts.

1.4 In terms of section 4(3)(b), Spyder’s system might help to facilitate competition in the provision of mobile communications, as its network of masts and associated facilities might enable mobile operators to roll out third generation mobile services more rapidly. Spyder explained that mobile operators would be able to use its masts and would not, as a result, need to erect such masts themselves. This could lessen the costs associated with installing third generation networks.

1.5 Ofcom has also considered its duties under section 4(6)(b) of the Act. This section requires Ofcom to carry its duties “in a manner which, so far as practicable, does not favour...one means of providing or making available such a network...over another”. In light of this duty, Ofcom should not favour subterranean conduits for fixed communications over vertical conduits used for radio communications.

1.6 As well as the requirements set out in section 3 and of the Act, Ofcom has also had regard to its duties set out in section 107(4) of the Act, as set out below.

The benefit to the public of the conduit system by reference to which the Code is to be applied to the applicant

1.7 Spyder's installations are designed to enable multiple operators to house their antennae on the one mast. Mobile operators might, therefore, choose to use Spyder's facilities rather than erect their own masts. Any decision would need to be based on the costs that they would otherwise incur in installing their own masts measured against Spyder's charges. It is therefore conceivable that Spyder's network of masts might alleviate the need for multiple masts in the one area. In addition, Spyder believes that its system of masts might allow for third generation mobile services to be rolled out more rapidly than would otherwise be the case. This is because mobile operators would not need to install masts themselves.

1.8 For these reasons, Ofcom believes that Spyder's system of masts might directly (in terms of facilitating 3G rollout) and indirectly (in terms of housing mobile operators' antennae) benefit the public.

The practicability of the provision of the conduit system without the Code

1.9 Spyder has already installed approximately 250 installations involving masts or antennae across the United Kingdom. It has achieved the installation of its current system of masts on the basis of agreements secured with private landowners. Spyder believes, however, that it could only achieve rollout of its system on a national basis with the benefit of Code powers. In its application, Spyder explained that it had considered whether or not mobile operators could exercise their own Code powers to install masts when it was necessary to site these on public land. In this case, Spyder would have run the system of conduits located on private land. However, as Spyder wishes to allow multiple operator access to its masts, it believes that it needs to own and install the masts to achieve this.

1.10 Spyder has also stated that it would ensure that its actions were in line with the Office of the Deputy Prime Minister's *Code of Best Practice on Mobile Phone Network Development*.

1.11 For these reasons, Ofcom believes that it would not be practicable for Spyder to install its masts in a prompt and efficient manner on a national basis without Code powers.

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

1.12 Ofcom considers that the evidence supplied by Spyder regarding the intended use of its conduit system indicates that Spyder is likely to enable multiple operators to use its network. Indeed, it is likely to be in Spyder's best interests to do so, as it would produce more income.

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 Spyder has confirmed that relevant funds to meet any liabilities would be put in place and acknowledges that such funds need to be put in place at least two weeks prior to the commencement of any works undertaken (if granted) under Code powers. A letter executed by Spyder's board of directors accompanied its application and, in this letter, its directors confirmed that funds would be put in place in a manner agreeable to Ofcom. In addition, Spyder explained that it only seeks to install infrastructure where there is a clear demand that that infrastructure is required. It does not install masts speculatively and therefore it does not expect that any masts that it installed would not be used.

1.14 Ofcom is therefore satisfied that Spyder would be in a position to put in place funds should it be granted Code powers.

How to respond

1.15 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **14 February 2005**.

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 (when respondents confirm on their response cover sheet that this is acceptable).

1.20 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.

1.21 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.

1.22 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

1.23 Following the end of the consultation period, depending on responses to the consultation, Ofcom intends to publish the final direction and explanatory statement applying the Code to Spyder Facilities Limited.

Ofcom's consultation processes

1.24 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.

1.25 This consultation is shorter than Ofcom's standard 10 week period because Ofcom believes that it is important that Code operators should be able to utilise these powers where appropriate as early as possible.

1.26 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.

1.27 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

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)

