

DIRECTION under 106(3) of the Communications Act 2003 applying the Electronic Communications Code in the case of Cityspace Limited

A Notification of this proposal was published on 12 August 2004

Whereas:

(A) On 4 May 2004 Cityspace made an application for the electronic communications code (the “Code”) for the purposes of the provision of an electronic communications network in accordance with section 107(1) of the Act and the notification published by Ofcom 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 12 August 2004 Ofcom published a notification of their proposal to give a direction applying the Code to Cityspace in accordance with section 107 of the Act;

(C) No representations were made to Ofcom about the proposed Direction; and

(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 Cityspace for the purposes of the provision by Cityspace of an electronic communications network to have effect in relation to the United Kingdom.

Definitions and Interpretation

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

“Act” means the Communications Act 2003; and

“Cityspace” means Cityspace Limited (registered company number 03169833)

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.

Sean Williams

Partner, Competition and Markets

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

21 September 2004

Explanatory Statement

1.1 On 4 May 2004 Cityspace Limited (“Cityspace”) applied for the electronic communications code (the “Code”), as it believes that the Code would help it in rolling out its electronic communications network. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”). Cityspace’s application also met the requirements of 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 on 10 October 2003 under section 107(2) of the Act.

1.2 On 12 August 2004 Ofcom published a notification of its proposal to give a Direction applying the Code to Cityspace in accordance with section 107 of the Act. Ofcom asked for any comments on its proposal to be made by 13 September 2004. Ofcom did not receive any representations.

1.3 In considering Cityspace'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". The Direction applying the code helps to promote competition by assisting Cityspace in its endeavours to build infrastructure which will increase competition in the provision of electronic communications networks and services. In considering Cityspace's application, 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 electronic communications network by reference to which the Code is to be applied to Cityspace

1.4 Cityspace proposes to install a wireless local access network (WLAN) or 'Wi-Fi' network which would allow users to access the Internet and send emails at specific locations without needing to plug into a network (i.e. they could access services in transit). Cityspace's network potentially will allow wider network coverage than current so-called "hotspots" which are generally located in airports and railway stations. Cityspace already provides broadband services in conjunction with some local authorities in areas which might not otherwise have had access to broadband technology.

1.5 Cityspace also believes that the coverage of its network in comparison to hotspots would be attractive to businesses with employees who are regularly in transit and its network might encourage inward investment in areas in which it is sited.

1.6 Ofcom is therefore of the view that Cityspace's Wi-Fi network could potentially benefit the public and that its wireless access service might increase broadband penetration.

The practicability of the provision of the network without the Code

1.7 Although Cityspace already provides its Wi-Fi network in some areas in agreement with the relevant local authorities, it has found that planning applications can take 12 months to process. This therefore delays the installation of its network. Ofcom is of the view that the Code would assist Cityspace in rolling out its Wi-Fi infrastructure and, given the potential benefits of it, this would be in consumers' interests.

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

1.8 In its application, Cityspace explained that it already has an agreement with a major mobile operator under which the operator covers some of Cityspace's costs in erecting its cabinets and, in return, the mobile operator stores some of its apparatus within those cabinets. Furthermore, Cityspace believes that it might be able to extend such agreements should it be able to install its infrastructure in shorter timescales.

1.9 Cityspace has also shown that it is willing to ensure that the location and design of its infrastructure fit in with the local environment. It has also established service level agreements under which it maintains its infrastructure. Although these agreements might well have been fundamental in Cityspace's applications for planning permission, they show a willingness and commitment to the maintenance of its sites.

Whether Cityspace will be able to meet liabilities as a consequence of:

- 1. the application of the Code; and**
- 2. any conduct in relation to the application of the Code**

1.10 Cityspace has confirmed that sufficient funds for liabilities would be in place should it be granted Code powers. It also confirmed that it would submit the necessary certificate and instrument to Ofcom two weeks before it would choose to exercise its Code rights for the first time. This accords with the requirements of Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003.