

Draft Guidelines on how an operator might assess the cover it requires in order to satisfy the Director that sufficient funds are available to meet its liabilities under Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003.

Summary

- This consultation document concerns proposed guidelines to be issued either by the Director General of Telecommunications ('the Director') or OFCOM which will be made available to operators who have been granted the Electronic Communications Code ('the Code') ("Code Operator"). The guidelines are intended to assist the Code Operators in fulfilling their obligations under Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003¹ to ensure that sufficient funds are available to meet potential liabilities following a relevant event.
- Under the Electronic Communications Code operators exercising Code powers must put in place sufficient funds to compensate the Highway Authorities for the cost of making safe or removing apparatus laid in or above the ground in the event that the operator is no longer able to deal with such matters.
- The proposed guidelines would be non-binding. The Director proposes that they include a non-exhaustive list of methodologies which may be utilised by the Code Operators to assess liability when calculating their funds for liabilities. Other methods of assessing liability may be deployed and the operators may use any effective method they choose. When considering risk and seeking the necessary guarantees the Code Operators will be required to exercise due diligence. While compliance with the guidelines does not guarantee that the Director will be satisfied with an operator's certificate, it is hoped that the guidelines will prove to be of assistance to the industry in complying with Regulation 16.
- The suggested methodologies for assessing quantum of liability are:
 - the acquisition costs of the infrastructure;
 - the book value of the infrastructure assets, adjusted for depreciation;
 - the annual maintenance cost of the infrastructure assets;
 - the depreciated replacement costs of the infrastructure; and
 - the rateable value of the infrastructure assets as determined by the District Valuer
- Arranging appropriate cover will be a matter for negotiation between the Code Operator and the financial institution providing the cover where a number of inter-related factors may be relevant.

¹ The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 SI 2003\2553 <http://www.hms0.gov.uk/si/si2003/20032553.htm>

- When assessing liability, not all types of apparatus need be treated the same. Operators should consider factors such as, for example, the ease of removing communications apparatus the likelihood that another operator which has also been granted the electronic communications code might take over the infrastructure in the event that the first operator lost its code powers or ceased to trade.
- Code Operators bear the risk of part completed works and should consider carefully all the factors relating to the nature of the works in order to include provision for this in their funds for liabilities arrangements.
- Oftel welcomes comments on the draft Guidelines by 8 December 2003.

Introduction

1. This consultation document concerns proposed guidelines to be issued either by the Director or OFCOM (if they have assumed their duties under the Communications Act 2003 by the time of publication), which are for Code Operators who have been granted the Electronic Communications Code. The guidelines are intended to assist them in fulfilling their duty under Regulation 16 of the Regulations to ensure that sufficient funds are available to meet potential liabilities following a relevant event (“the primary duty”). Further information regarding the Regulations, the changes in the regulatory regime regarding the Code and the nature of the primary duty in Regulation 16 are contained in the Director’s Statement “Funds for Liabilities” dated 15 October 2003 <http://www.ofcom.gov.uk/publications/licensing/2003/funds1003.pdf> (“the Funds for Liabilities Statement”).
2. In the Funds for Liabilities Statement which was issued following two public consultations in June 2001 and June 2002, the Director set out the revised scheme for funds for liabilities, as set out in Regulation 16 of the Regulations. The revised scheme is now a system of self-certification, whereby Code Operators must submit a certificate to the Director/OFCOM which states that in the reasonable opinion of, for example the Board in the case of a company, the Code Operator has fulfilled the primary duty. In the case of a company the certificate must be approved by a resolution of the Board, and before making the statement in the certificate the Board must first have made appropriate enquiries into whether the Code Operator has fulfilled the primary duty. The certificate must also state the amount of funds which have been provided for, and the systems and processes which have enabled the Board to form its reasonable opinion referred to above.
3. The scheme enables the Code Operators themselves to make a judgement on what the appropriate arrangements are. However, the industry has asked for some guidance giving an indication of the methodologies which might be used in assessing liability, in order to satisfy the Director/OFCOM that they have fulfilled their primary duty in Regulation 16. The proposed guidelines would be non-binding. The Director proposes that they would include a non-exhaustive list of methodologies which may be used by the Code Operators to assess liability when calculating their funds for liabilities and fulfilling their primary duty. Other methods of assessing liability may be deployed and the operators may use an effective method they choose. While compliance with the guidelines does not guarantee that the Director/OFCOM will be satisfied with an operator’s certificate, generally where the guidelines have been followed the Director/OFCOM would not expect to exercise their power in Regulation 16(7) to direct the Code Operator to take further steps to fulfil the primary duty.

Proposed Guidelines on assessing funds for liabilities

4. In accordance with the requirements of Regulation 16 and the system of self-certification, Code Operators are responsible for making their assessment of potential liabilities that may arise in exercising their code powers in relation to land which forms part of the highway and associated land such as verges and

pavements (“the Streets”) and for arranging sufficient cover for communications infrastructure which they construct. Code Operators must submit a certificate to the Director/OFCOM which states that in the reasonable opinion of the Board (in the case of a company) the Code Operator has fulfilled its duty to ensure that sufficient funds for liabilities are available (“the primary duty”). In the case of a company the certificate must be approved by a resolution of the Board, and before making the statement in the certificate the Board must have first made appropriate enquiries exercising due diligence into whether the Code Operator has fulfilled the primary duty. The certificate must also state the amount of funds which have been provided for, and the systems and processes which have enabled the Board to form its reasonable opinion referred to above. The director or company secretary, in the case of a company, signs the certificate, and it must be approved by the Board. It must then be provided to the Director/OFCOM as set out in Regulation 16(1)(b). A short statement describing the methodology used to assess liability may also be supplied but detailed calculations are not required. The statement could either be in the certificate itself or it could accompany it.

5. The Director/OFCOM will no longer look in detail at the instruments provided in order to check compliance. As set out in the Funds for Liabilities Statement, he/they will only query a certificate if it is qualified or appears to him/them to be a breach of the requirements.
6. As set out in the Funds for Liabilities Statement, the Director may, however, seek independent specialist advice if he is not satisfied that the methodology employed to calculate the potential liability is reasonable, or the certificate is qualified in some way, and consequently he does not believe that sufficient funds are in place to meet any potential liabilities. Code Operators should therefore seek to use a properly reasoned methodology to ensure that the figures that they produce can be justified on scrutiny and present a realistic estimate of potential liability.

The process

7. Set out below are some of the possible ways in which the amount of liability might be calculated. The list is by no means exhaustive and Code Operators may wish to use other methods of assessing liability. Provided that the method used is sufficiently robust and transparent and that the amount of liability has been assessed using proper systems and with due diligence there is no inherent reason why it could not satisfy the Director that the necessary provision has been made. While compliance with the guidelines does not guarantee that the Director/OFCOM will be satisfied with a Code Operator’s certificate, generally where the guidelines have been followed the Director/OFCOM would not expect to exercise his/their power in Regulation 16(7) of the Regulations to direct the Code Operator to take further steps to fulfil the primary duty.
8. It is a matter for the individual Code Operator to decide the level of risk both from incomplete works and from apparatus which may need to be removed from the Street. In all cases it must be shown that a proper system is in place which can be evaluated if necessary by the Director.

Arranging the appropriate level of cover

9. The Director does not have a preference as to the type of security instrument used. Code Operators may use bonds, insurance policies, guarantees or other instruments at their discretion.
10. The terms of the cover will be a matter for negotiation between the Code Operator and the relevant financial institution. There will again be a number of variable factors which anyone providing such cover will wish to take into account. These may include the financial status of the company, its track record, the perceived risk of a relevant event and how likely it is considered to be that following a relevant event the assets will be taken over by another Code Operator. Other considerations may well also be relevant.
11. Applicants applying to the Director for Code powers will not have to have their funds for liabilities in place before powers under the Code are granted to them. They will however be expected to produce evidence that they have made the necessary enquiries and have a reasonable expectation that they will be able to obtain the necessary guarantees. Such evidence may take the form of letters from potential guarantors indicating a willingness to support the applicant in making the necessary arrangements to put funds for liabilities in place and letters signed on behalf of the Board certifying that they are in the process of putting funds in place. As soon as the code powers are granted the operator must make immediate arrangements to implement the appropriate cover and send the certificate to the Director.

Assessing the quantum of possible liability

12. While this is a matter for the Code Operator to decide upon, the following non-exhaustive list of methods may be appropriate:
 - the acquisition costs of the infrastructure;
 - the book value of the infrastructure assets, adjusted for depreciation;
 - the annual maintenance cost of the infrastructure assets;
 - the depreciated replacement costs of the infrastructure; and
 - the rateable value of the infrastructure assets as determined by the District Valuer.
13. The Director does not have a preference as to which method is used and Code Operators may find that one method is better suited to their circumstances than another.
14. Acquisition costs seek to relate the liability to the original acquisition cost of the infrastructure. This is a capital cost, which is not depreciated for age but obsolescence may require indexation for time. While such a method may produce a rather crude result, any method used will carry with it a degree of judgement and assessment of future circumstances and for some Code Operators this method may well be the most suitable. Certainly it could work well for new or more recently formed operators, but may be less suitable for

long established operators who are not likely to have the details of acquisition costs easily available.

15. Book value is defined as the value of an asset of a business according to its books. This figure will be dependent on the particular accounting practice adopted by the Code Operator and allowance previously made for depreciation and obsolescence. Obsolescence includes physical, technological and functional obsolescence and is a matter of judgment for the Board of the Code Operator, if a company for example, and of policy.
16. Annual maintenance relies on the annual cost of maintenance of the infrastructure as a basis for calculating liability. For accuracy, this method would work best where the Code Operator has been in business for a few years and has several years' accounts to rely on. For this reason the method would probably not be suitable for new entrants to the market.
17. Depreciated replacement costs are defined as an estimate of the market value of an asset for the existing use of the land or wayleave, plus the current gross replacement cost of the apparatus less allowances for physical deterioration and all relevant forms of obsolescence and optimisation. Obsolescence is a matter of judgment for the Code Operator, with the benefit of advice from specialist advisors as necessary.
18. Rateable value represents an estimate of the annual rental value of the property as at an antecedent date and is calculated by the District Valuer. One of the methods of assessing this is by determining the estimated replacement cost of the facility, similar to the calculation for depreciated replacement cost. Rateable value is an annual figure rather than a capital cost so that the depreciated replacement costs figure would need to be converted to an annual figure. The operator will also have to make a judgement regarding how the rateable value relates to potential liability. However, since rates are based on rent and this has a relationship with capital value, using rateable value can be a suitable method provided the relationships are based on proper percentages and different types of apparatus are dealt with using properly assessed percentage relationships. This method has the advantage that the base figures of rateable value are assessed by the District Valuer and therefore have a degree of independence. They will also usually be in the public domain. A further advantage is that all assessments of the District Valuer are open to challenge under a statutory procedure which provides a good verification method for the assessment.

Types of infrastructure assets

19. Code Operators need to assess their overall liability in relation to the particular infrastructure they have in place and the types of equipment they are using.
20. For the purposes of assessing liability, not all types of equipment need to be treated in the same way. Some infrastructure may be simple to remove or render safe and unobtrusive. Some apparatus may be more or less likely to be of value to another operator. For some apparatus, it may be necessary to remove it altogether if it is not taken over by another Code Operator, in other

cases, such as for ducts, it may be sufficient to render it safe and leave it in place. The categories of apparatus have been discussed with both the industry and the Highway Authorities and a list of what might be included has been published in the Funds for Liabilities Statement. Assessments of individual classes of apparatus and where appropriate attributing assessments of liability to those categories is a matter for the Code Operator to consider as part of the process of ensuring that sufficient funds are available.

21. All public call boxes, including those installed under the Universal Service Obligation, are covered by the requirement to provide adequate funds for liabilities.

Part Completed Works

22. For the purpose of assessing liabilities, Code Operators should consider the nature of any part completed works and the risk of action which may need to be taken in the event that a relevant event occurs. The Director would expect the Highway Authority to undertake whatever work is required to make the works safe for the public, in the form of lighting, signing and guarding, and to recover the cost from the Code Operator's fund for liabilities. Code Operators should consider any safety issues arising from the part completed work which may necessitate the Highway Authority stepping in and taking urgent action.
23. On the occurrence of a relevant event, the part completed work may be taken over by another Code Operator but if not, arrangements will be needed for reinstatement. This is the responsibility of the Code Operator who constructed the works in the first place and adequate arrangements must be made to cover such events.

Access to funds

24. The arrangements for the control of the funds held under the security instrument or by way of cash deposit must be set up in a manner which protects those funds from the consequences of insolvency events or issues relating to the Code Operator and which permits the funds to be accessed readily by Highway Authorities needing to carry out remedial works to communications infrastructure following the happening of a relevant event. This can be achieved, for example, by issuing the security instrument in favour of the Highway Authority having control of the area within which the remedial works are needed and in terms which permit any one or all of the Highway Authorities so affected to call upon the fund to the value of the remedial works for which each respective Highway Authority is responsible. Cash deposits will need to be placed in trust under the control of independent trustees operating under similar instructions.

Consultation process and timetable

How to make comments on the guidelines contained in this consultation document

1. Oftel is publishing this consultation document so that interested parties may comment on the issues which it addresses. The closing date for submitting comments is 8 December 2003.
2. During the period of this consultation Oftel staff are moving to new offices at Riverside House in preparation for the transfer of the Director's functions to the new regulator OFCOM. Interested parties making comments should therefore send them to the new office and to the e-mail address provided.
3. Where possible, comments should be made in writing and sent by e-mail to oliver.holland@oftel.gov.uk. However, copies may also be posted or faxed to the address below. If any interested parties are unable to respond in one of these ways, they should discuss alternatives with:

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Further copies of this document

4. This document can be viewed in the *Publications* section of Oftel's web site (www.oftel.gov.uk), under classification *Licensing & Enforcement Actions*. Paper copies and more accessible formats such as large print, Braille, disc and audiocassette can be made available on request. Please contact Oftel's Research and Information Unit by phoning 020 7634 8761 or by sending an e-mail to infocent@oftel.gov.uk.

Publication of comments

5. In the interests of transparency, comments will be published, except where respondents indicate that a response, or part of it, is confidential. Respondents are therefore asked to separate out any confidential material into a **confidential annex which is clearly identified** as containing confidential material. Oftel will take steps to protect the confidentiality of all such material from the moment that it is received at Oftel's offices. However, in the interests of transparency, respondents should avoid applying confidential markings wherever possible.

6. Non confidential responses can be viewed on Oftel's web site in the *Publications* section under *Responses to Oftel consultations*. Comments can also be viewed at Oftel's Research and Information Unit. Appointments must be made in advance by phoning 020 7634 8761 or sending an e-mail to infocent@oftel.gov.uk.

e-mail notifications

7. Oftel has a free e-mail based mailing list to help people stay informed about the work that Oftel is doing. Each time an Oftel document is published and placed on Oftel's web site at www.oftel.gov.uk, subscribers to the list receive an e-mail alert. To register, please go to the *What's New* section of the web site and access the electronic form.

The consultation criteria

8. Oftel considers that this document meets the Cabinet Office code of practice on written consultation documents. The code is reproduced below for convenience. If you have any comments or complaints about this consultation process please contact:

9. Oftel Co-ordinator for the code of practice:

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10. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
11. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
12. A consultation document should be as simple and concise as possible. It should include a summary, in two main pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
13. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.

14. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for consultation.
15. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
16. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure that all the lessons are disseminated.
17. It is difficult to predict the timetable for dealing with this consultation. However, in view of the subject matter of this consultation and the urgent need to bring this consultation to a satisfactory conclusion Oftel anticipates that a Statement will be published towards the end of 2003.