

**Guidelines on Assessing Funds for Liabilities  
under Regulation 16 of the Electronic  
Communications Code (Conditions and  
Restrictions) Regulations 2003**

18<sup>th</sup> December 2003

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## Chapter 1. Introduction

1. This statement follows the Of tel consultation published on 23<sup>rd</sup> October 2003 ([http://www.of tel.gov.uk/publications/licensing/2003/funds\\_guide1003.pdf](http://www.of tel.gov.uk/publications/licensing/2003/funds_guide1003.pdf)) (the “Consultation Document”) on 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 (the “Regulations”).
  2. The Electronic Communications Code (the “Code”) introduced by the Communications Act 2003 (the “Act”), is substantially the same as the previous Telecommunications Code which was amended by the Act to bring its terminology in line with the new EU regulatory regime which came into force on 25<sup>th</sup> July 2003. The Code gives operators which have been granted the Code (“Code Operators”) rights in relation to the installation of infrastructure on public land. The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 places certain duties on Code Operators. One of these duties, contained in Regulation 16, is to have in place funds for liabilities within the meaning of that Regulation.
  3. On 15<sup>th</sup> October 2003 Of tel published a statement *Funds for Liabilities* (<http://www.of tel.gov.uk/publications/licensing/2003/funds1003.pdf>) (the “October Statement”) in which Of tel agreed to produce non-binding guidelines on how an operator might assess the cover it requires in order to satisfy Regulation 16. Following the Consultation Document, this statement contains a final version of such guidelines as well as responding to the points made by respondents to the Consultation Document.
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## Chapter 2: Responses to the Consultation Document

### Introduction

1. Oftel received 12 responses to the Consultation Document. Below is a summary of the main points and the Director General of Telecommunications (the “Director”) response to them.

### Methodologies

2. A large number of the responses critically evaluated the suggested methodologies for assessing quantum of liability. A number of operators highlighted the problems of the specific methodologies or detailed why, in their case, certain methodologies were inappropriate to them.
3. Vodafone stated that they accepted the methodologies as a valid starting point for the construction of an appropriate methodology, but that each one would need adjustment. BT too confirmed that they viewed the guidelines as an endorsement of the flexibility in relation to the determination of quantum of liability.
4. Viatel stated that in discussing the relevant methodologies Oftel should make clear reference to the list of apparatus contained in the Funds for liabilities statement dated 15 October 2003, so that it refers only to ‘relevant infrastructure’ and not to a Code Operator’s entire assets.
5. Scottish and Southern Energy Plc asked for an amendment of the wording in relation to the methodologies, to emphasise the fact that it is costs for ‘reinstatement’ that are relevant.
6. The UK Competitive Telecommunications Association (UKCTA) and BT highlighted the point that in the case of a relevant event (as defined in Regulation 16), a substantial amount of infrastructure may be acquired by another Code Operator thus avoiding the need for any Highway Authority to claim funds.
7. The National Street Works Highways Group expressed concern that the operators were receiving too much discretion – deciding both on the methodology and the amount of the fund.

### Director’s Response

8. In relation to the critical evaluation of the different methodologies, such evaluation will be wholly appropriate for each Code Operator when deciding on what methodology will be suitable to them. The Director is in agreement with Vodafone and BT that these may be used as a starting point for the construction of a relevant methodology. If a specific methodology is used, in
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exercising its duty under Regulation 16 each Code Operator will have to adjust the methodology taking into account all the relevant circumstances. The Director does not contend that each methodology will be appropriate, or that no further adjustments will have to be made, simply that these may be important factors in the calculation of quantum. Appropriate wording has been added to the guidelines to clarify this point.

9. In relation to SSE's suggestion, the definition of 'specified liabilities' in Regulation 16 does not solely deal with reinstatement and so it would be erroneous to state that this was the aim of the securing of funds for liabilities.
10. In response to Viatel's point, the Director agrees that the list of apparatus in the October Statement is relevant; however, that list is subject to periodic review. Regulation 16 refers to 'electronic communications apparatus', and the October Statement was defining what apparatus was currently relevant to funds for liabilities. The Director considers that it would be inappropriate to specifically refer to the list in the October statement, when this list may well be subject to future amendment.
11. The Director accepts UKCTA and BT's submission that following a relevant event some infrastructure may well be taken over by other Code Operators. As stated in the Consultation Document, this will be a further consideration for Code Operators in the exercise of their duties under Regulation 16. This will be a relevant factor in considering the methodology and quantum of their funds for liabilities.
12. The Director accepts NSWHG's point that Code Operators have a large amount of discretion in fulfilling their duties. However, the Director believes that this is appropriate and indeed the intention of the Regulations. The Director/ Ofcom's power to check each methodology will be an effective control in ensuring that discretion is properly exercised.

#### **Difficulty in obtaining relevant financial instrument**

13. BT and UKCTA both expressed their concern that in many cases Code Operators have been unable to obtain a financial instrument, emphasising the lack of appetite in the insurance market to provide such a product. In addition, the fact that there would be multiple beneficiaries was also cited as an obstacle in the path of securing a bond or other financial instrument.

#### **Director's response**

14. The Director is aware of the problems that some Code Operators have experienced in trying to secure an appropriate financial instrument in compliance with Regulation 16. The Director appreciates that in some
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cases substantial enquiries have been made in this regard but with no success.

15. The Director is encouraged by the fact that a varying range of Code Operators, both currently and in the past have been able to secure appropriate funds for liabilities. The Director intends to have discussions with these operators and attempt to share useful information on how such instruments were negotiated and put in place.
16. In addition, the Director draws Code Operators' attention to the fact that there is nothing in Regulation 16 that precludes a group of operators obtaining an instrument which would provide sufficient cover for liabilities that may arise with any of the companies in such a group. The Director intends to have discussions with organisations in the financial industry about the availability of such a product. The Director hopes that the above steps may help those companies who to date have been unable to put in place funds for liabilities to secure an appropriate financial instrument.

#### **Cover 'unnecessary' in certain situations**

17. A number of respondents believed that in some instances cover was unnecessary due to their particular circumstances or the circumstances of their industry and hence the duty under Regulation 16 should not apply to them in its entirety.
18. CSS Spectrum Management Services Ltd propose that for organisations within the water industry it should be sufficient for the company secretary to confirm that they have substantial public liability insurance in place. They contend that this should be adequate protection in terms of funds for liabilities.
19. Interphone Public Networks Ltd claim that they already pay appropriate rates relating to their equipment on the street. They therefore propose that their overall liability is cut by 50% to reflect the monies being paid to Local Authorities.
20. UKCTA submit that in relation to public call boxes covered by the Universal Service Obligation, if a 'relevant event' were to occur the government would be obliged to support their continued operation and as such funds for liabilities are unnecessary.

#### **Director's response**

21. The Director considers that the above points are more relevant to the overall policy on funds for liabilities, as set out in the October Statement. However, in relation to CSS's submission, the level of protection provided by public liability insurance is not to the same level as that demanded by
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the Regulations. There is no carve-out to cover this situation in the Regulations and hence the Director is unable to discriminate in favour of members of the water industry.

22. The rates Interphone Public Networks Ltd refers to are business rates that directly contribute towards the costs of local authority services. Regulation 16 on the other hand, ensures that sufficient funds are available to meet specified liabilities following a 'Relevant Event'. These are separate circumstances and as such the Director cannot accept their proposed 50% discount.
23. The Director accepts UKCTA's point that the Government would have to intervene in some capacity if following a 'relevant event' public call boxes covered by the Universal Service Obligation ("USO") ceased to be operated. However, there is no specific definition of a Universal Service call box, and as such it would be highly problematic to decide whether a call box had been erected purely as a commercial decision or whether it was required to comply with the USO. It is anticipated that there will be a USO review in 2004, however before that review the Director does not intend to remove public call boxes from the list of apparatus relevant to Regulation 16.

#### **Legality of Regulation 16**

24. UKCTA questioned whether Regulation 16 is compliant both with Article 8 paragraph 3 of the Framework Directive in that it is an obstacle to the provision of electronic communications networks which Ofcom has a duty to remove.
25. In addition UKCTA questioned whether Regulation 16 could be imposed in such a way as to symmetrically and proportionately spread the burden highlighting a possible challenge on the grounds of anti-competitive effect and potentially state aid.

#### **Director's response**

26. The Director has reviewed his policy in relation to funds for liabilities and believes it to be fully compliant with national and European law.

#### **Status of Guidelines**

27. UKCTA proposed that compliance with the Guidelines should guarantee the Director's approval of the certificate in line with Regulation 16.

#### **Director's response**

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28. The guidelines cannot fetter the future discretion of the Director. The Regulations make it clear that the duty is on the Code Operator to satisfy itself that sufficient funds are in place. The Director encourages Code Operators to take into account all relevant circumstances and expects a wide range of appropriate methodologies to be adopted. It would not be practicable or in the spirit of the Regulations to give a specific methodology that would in all cases satisfy the Director. As such it is appropriate that each Code Operator should establish a suitable methodology for them, subject to verification by the Director/ Ofcom.

### **Accessibility of Funds**

29. Both the UKCTA and the NSWHG expressed concern about the accessibility of funds. UKCTA highlighted the very high administration costs that would result from a large number of Highway Authorities claiming under a fund. They submitted that these costs may significantly deplete the fund prior to any legitimate claims being honoured.

30. The NSWHG's concern was that while it was important that all authorities should have access to the fund, there remained some obstacles in the path of authorities that should be removed. In particular, it is concerned that there are restrictions contained in the Specimen Bond in the annex to the October Statement. They submitted that paragraph 3, which provides that the provisions expire after one year and the holders of the bond must receive any demand within 30 days of the bonds expiry, is wholly unacceptable and ask that this limitation be removed. They also expressed concern that Code Operators would fail to ensure that any reinstatement conforms to the NRSWA specifications and that extensive testing would be necessary to enable an Operator to demonstrate full compliance.

### **Director's response**

31. The Director recognises that the needs of the Highway Authorities must be balanced against the duties of the Code Operators. For the scheme to fulfil its objectives it must be accessible by all Highway Authorities. The Director accepts UKCTA's point that the administration of a fund may be a substantial cost where a Code Operator has a national network. This would therefore need to be a consideration of Code Operators in the construction of a methodology in the exercise of their primary duty to have in place sufficient funds to meet liabilities.

32. In relation to the NSWHG's concern, the details of the October Statement are not the subject of this consultation. The Director would however, emphasise the fact that it will be the duty of each Code Operator to renew the bond or other financial instrument from year to year.

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33. In relation to the Specimen Bond in the October Statement, the Director emphasises that Code Operators should not feel constrained by this, it is for example purposes only and it is for Code Operators to ensure that they have a financial instrument in place which will provide sufficient cover.

#### **Report to Highway Authorities**

34. Durham County Council asked that due to the fact that Highway Authorities will be unable to influence the process or satisfy themselves of the adequacy of the provision of funds for liabilities, they should receive a periodic report detailing Oftel's considerations and approvals of certificates.

#### **Director's Response**

35. The Director and subsequently Ofcom will provide information on Ofcom's website on Funds for Liabilities including details of which Code Operators have provided certificates in compliance with Regulation 16. However, the Director will not be at liberty to provide confidential information as to the methods and quantum that a Code Operator has negotiated with a financial organisation to provide funds for liabilities.

#### **Expansion of Guidelines**

36. Some Code Operators asked for expansion of the Guidelines to cover in detail the situations of existing and future networks and part-completed works.

#### **Director's Response**

37. The Director regrets that Oftel is not able to produce exhaustive guidelines on assessing funds for liabilities. However, Oftel and subsequently Ofcom will be happy to provide further general advice about concerns Code Operators may have in calculating a relevant quantum for funds for liabilities.

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## Chapter 3: Guidelines on assessing funds for liabilities

**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

- These guidelines are intended to assist operators which have been granted the Electronic Communications Code (“the Code”) (“Code Operators”) in fulfilling their obligations under Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (“the Regulations”)<sup>1</sup> to ensure that sufficient funds are available to meet potential liabilities following a relevant event.
- Under Regulation 16 of the Regulations, Code Operators 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.
- These guidelines are non-binding. 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. The Director understands that in using the methodologies below in most cases other factors will have to be taken into account to reflect the particular circumstances of each Code Operator. The Director believes however, that the methodologies will provide a useful starting point in the progression towards a suitable formula. Other methods of assessing liability may be deployed and Code 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 can 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 guidelines are not intended to be a definitive statement of the law relating to funds for liabilities and Code Operators should seek their own legal advice.
- 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;

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

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- the depreciated replacement costs of the infrastructure; and
  - the rateable value of the infrastructure assets as determined by the District Valuer
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- It is not suggested that each of the methodologies will be appropriate to every Code Operator, it will be for the operator to assess whether any of them and in what regard they would be appropriate to their circumstances.
  - 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.
  - When assessing liability, not all types of apparatus need to be treated the same. Operators should consider factors such as, for example, the ease of removing communications apparatus and the likelihood that another operator which has also been granted the 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.
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## The Guidelines

1. 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 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 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.
2. The Director will no longer usually look in detail at the instruments provided in order to check compliance. As set out in the statement entitled *Funds for Liabilities* dated 15<sup>th</sup> October (the “October Statement”), he will only query a certificate if it is qualified or appears to him to be a breach of the requirements. For example, if a Code Operator’s quantum of liability seems comparatively very low, this may result in the Director investigating the methodology further to ensure there are appropriate reasons for arriving at such a figure.
3. As set out in the October 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 they produce can be justified on scrutiny and present a realistic estimate of potential liability.

### The process

4. Set out below are some of the possible ways in which the amount of liability might be calculated. These methods are by no means self contained, and it
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may often be necessary to adjust the figures taking account of the specific infrastructure and situation of each operator. The list is also not 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 will be satisfied with a Code Operator's certificate, generally where the guidelines have been followed the Director would not expect to have to exercise his power in Regulation 16(7) of the Regulations to direct the Code Operator to take further steps to fulfil the primary duty.

5. 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**

6. The Director does not have a preference as to the type of security instrument used. Code Operators may use bonds, insurance policies, guarantees or any other instruments at their discretion. However, Code Operators must ensure that funds are 'ring-fenced' for the purpose, for example a general parent company guarantee would not be sufficient.
  7. 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.
  8. 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 in the case of a company, letters signed on behalf of the Directors certifying that they will put funds for liabilities in place before exercising their Code powers. 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.
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**Assessing the quantum of possible liability**

9. While this is a matter for the Code Operator to decide upon, the following non-exhaustive, non self-contained, 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.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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.
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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**

16. 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.
17. 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 October 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.
18. 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**

19. 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
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recover the cost from the Code Operator's fund for liabilities. Code Operators should consider any safety issues arising from the part completed works which may necessitate the Highway Authority stepping in and taking urgent action.

20. On the occurrence of a relevant event, the part completed works 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

21. 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 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.
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## Chapter 4: Conclusions

1. It is hoped that the Guidelines contained in this statement will aid Code Operators to ensure compliance with Regulation 16. While some operators have indicated that they have had problems securing financial instruments, others have been able to put in place an appropriate financial instrument. It is hoped that through discussions with compliant operators and financial institutions, the Director will be able to provide further information to Code Operators to assist them in securing an appropriate instrument.
  2. The Director is also willing to have discussions with financial organisations to help secure the availability of suitable products.
  3. In addition, the Director would like to emphasise that individual methodologies can be discussed with Oftel, and appropriate advice and assistance provided. The objective is to ensure that as far as practicable, acceptable instruments can be put in place for all Code Operators. Code Operators will of course need to seek their own legal advice.
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