

Funds for liabilities

A Statement issued by the Director General of
Telecommunications

15 October 2003

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Summary

1. This Statement is issued following the formal consultation of 24th June 2002 on Oftel's proposals for modifications to the current funds for liabilities regime in the UK. The June 2002 Consultation Document: *Funds for liabilities: the way forward* (available at: <http://www.oftel.gov.uk/publications/licensing/2002/funds0602.htm>) ('the June 2002 Consultation Document'), followed a consultation document, *Funds for liabilities*, published by Oftel in June 2001 (available at: <http://www.oftel.gov.uk/publications/licensing/2001/funds0601.htm>).
 2. In the interim period between the consultation in June 2002 and the date of this statement there has been a major overhaul in the regulation of telecommunications. This has included the abolition of licensing, the repeal of the majority of the Telecommunications Act 1984 and the coming into force of the Communications Act 2003 (the 'Act'). In addition, the Telecommunications Code has been replaced by the Electronic Communications Code (the 'Code'), which is an amended form of the previous Code. The abolition of licensing has meant that operators will now be granted the Code by a direction under section 106 of the Act. Those persons who had powers under the old Telecommunications Code on 25th July 2003 are deemed to be granted powers under the Code. All persons to whom the Code applies, whether under transitional provisions or by way of direction granted after 25th July 2003, are referred to collectively in this Statement as 'Code Operators'.
 3. The abolition of licensing also meant the abolition of the previous Condition 16 of Schedule 4 to the individual licences (subject to a transitional period pending the coming into force of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (the 'Regulations') (see below)). Condition 16 contained obligations in relation to funds for liabilities which have been reviewed by the Director during this consultation. Schedule 4 has been replaced with restrictions and conditions contained in the Regulations which will come into force in late October. This Statement details the Director-General of Telecommunications (the 'Director')'s proposals as set out in the June 2002 Consultation Document and the responses made to that consultation, and sets out the Director's conclusions. Those conclusions are reflected in Regulation 16 of the Regulations. Further information about the new regulatory regime, in particular in relation to the Code, is contained in the Director's Statement '*The Granting of the Electronic Communications Code by the Director General of Telecommunications*' dated 10th October 2003. It was felt that it would be more appropriate to leave implementation of the new Funds for Liabilities policy until the implementation of the new regulatory regime, hence the time lag between the end of the June 2002 Consultation Document and the publication of this Statement.
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4. The obligation to have in place funds for liabilities proved difficult to implement effectively under the old Condition 16. The Director has put in place what he believes will be a new, more effective, scheme.
 5. Taking into consideration the responses to the consultation, the Director has decided that the new scheme will operate as follows-
 - As set out in Regulation 16 of the Regulations, Code Operators have a duty (referred to below as ‘the primary duty’) to ensure that sufficient funds are available to meet potential liabilities which may arise from the exercise of the Code Operator’s Code powers. They must submit, on 1st April each year:
 - a certificate which states that, in the reasonable opinion of the Board (in the case of a company, or other stated person in the case of other entities), sufficient funds are available to meet potential liabilities; and
 - a copy of the relevant instrument(s) which will provide the funds.
 6. For Code Operators who have not exercised Code powers previously, they must first provide the certificate two weeks before exercising those powers.
 - The certificate must state:
 - the amount of the funds which have been provided for; and
 - the systems and processes which enabled the Board (in the case of a company) to form the opinion referred to above.
 7. The Director considers that the drafting of the certificate, which has been updated to reflect the new obligations in Regulation 16 of the Regulations, is satisfactory (Annex B). It will of course need to be adapted in the case of persons other than companies who hold Code powers.
 8. Code Operators have discretion as to the type of instrument(s) that they choose. This will give Code Operators some control over the arrangements they make.
 9. In response to requests for guidance on the calculation of liability, the Director intends, following consultation, to publish non-binding guidelines to assist Code Operators to assess their potential liability and which will set out methodologies that could be employed.
 10. The Director has concluded that in the majority of circumstances the existence of the certificate and the relevant instrument will give him sufficient certainty that the Code Operator has fulfilled the primary duty. Therefore, the Director does not intend to pursue the requirement for Code Operators to submit a certificate supported by an auditor's report.
 11. However, Regulation 16 gives the Director the power, where he is not satisfied that a particular Code Operator has discharged the primary duty, to direct that Operator to take such steps as he considers appropriate for the purpose of securing that sufficient funds are available to meet the specified liabilities. The
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Director could therefore require the Code Operator to provide verification of the amount of liability, if this is considered to be necessary in any particular case, with a fallback power of ex post facto audit.

12. Without fettering the Director's discretion, the power to verify can be expected to be exercised:

- if the certificate is qualified in some way;
- where there are valid grounds to suspect a breach of the primary duty; or
- where the funds provided for in the certificate bear no relationship to what has been submitted on previous occasions and there is no clear or reasoned justification for the change.

13. Moreover, the Director may seek independent specialist advice, the cost of which will be funded by Oftel or in the future Ofcom, regarding the proposed arrangements for and compliance with the new system for Funds for Liabilities.

14. Without fettering the Director's discretion, such advice may be sought, if:

- the certificate is qualified in some way; or
- the Director is not satisfied that the methodology employed to calculate the potential liability is reasonable, and consequently believes that there may be a breach of the primary duty.

15. For the purposes of assessing and calculating liability, a list of apparatus is set out in this Statement in Chapter 3 paragraph 28. It is important that Code Operators ensure that construction of infrastructure complies with the specifications of the New Roads and Street Works Act 1991 (the "NRSWA") and that appropriate records are kept.

16. The list of apparatus will be kept under review on a periodic basis following consultation.

17. Oftel believes that, after the occurrence of a Relevant Event (as defined in the Regulations), the procedure followed for part completed works should ensure that such works are immediately made safe for the public. Oftel will expect that Highway Authorities will be able to recover the cost of such works reasonably carried out. Oftel has concluded that there is no good reason to impose an initial period immediately following a Relevant Event, during which infrastructure would be left untouched by Highway Authorities. However, the Code Operator or, for instance, the administrator (as the statutory successor to the Code Operator) should within three working days of a Relevant Event take all reasonable steps to contact the Department of Trade and Industry and Oftel to confirm the occurrence of a Relevant Event.

18. Oftel intends to establish a web site page dedicated to the issue of funds for liabilities in order to provide useful information both to the industry and to the Highway Authorities. The information that will be included in the web site is set out in this Statement.
 19. Oftel has annexed to this Statement the new Regulation 16 of the Regulations (Annex A) and a specimen certificate required by Regulation 16(1)(b) of the Regulations. (Annex B). It has also included a specimen bond at Annex C, for illustration purposes only. All persons obtaining instruments for the purpose of fulfilling their duty under Regulation 16 of the Regulations should seek independent advice on the drafting of any such instrument.
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Chapter 1

Introduction

A new regulatory regime

- 1.1 A new regulatory framework for electronic communications networks and services entered into force in the United Kingdom on 25 July 2003. The basis for the new regulatory framework is five new EU Communications Directives as follows:
 - the Framework Directive (Directive 2002/21/EC);
 - the Access Directive (Directive 2002/19/EC);
 - the Authorisation Directive (Directive 2002/20/EC);
 - the Universal Service Directive (Directive 2002/22/EC); and
 - the Privacy Directive (Directive 2002/58/EC).
 - 1.2 The new regulatory framework is designed to create harmonised regulation across the Member States of the European Union and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.
 - 1.3 The Framework Directive provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives which read across all the new directives. As its name suggests, it is the directive which establishes the new framework. Article 8 of the Framework Directive sets out three key policy objectives which have been implemented by section 4 of the Communications Act 2003 (the 'Act').
 - 1.4 The Authorisation Directive establishes a new regulatory process whereby any person is authorised generally to provide electronic communications services and/or networks without the need to obtain prior approval. The general authorisation replaces the existing licensing regime. The first four Directives listed above were implemented by the Act. The Privacy Directive will be implemented slightly later as it had a later adoption date than the first four.
 - 1.5 Prior to the major changes to communications regulation which took place following the enactment of the Act, the Director-General of Telecommunications (the 'Director') consulted on proposals for a new scheme to replace the existing arrangements for funds for liabilities. The Director issued an initial consultation in June 2001 seeking views on the sort of scheme which might be introduced (http://www.oftel.gov.uk/publications/responses/2001/ffl_0601/index.htm), and a second consultation in June 2002 (<http://www.oftel.gov.uk/publications/licensing/2002/funds0602.htm>) which took into account the responses to the initial consultation and which proposed a clearly defined proposal for a new scheme. Those proposals were not
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implemented immediately due to the pending changes in legislation and in particular the recognition that further changes would need to be made.

- 1.6 Separately the Secretary of State for Trade and Industry has carried out a consultation on new regulations to replace the conditions in Schedule 4 of the now revoked telecommunications licences. He has now made the Electronic Communications Code (Restrictions and Conditions) Regulations 2003 (the 'Regulations') which give statutory effect to the new scheme on Funds for Liabilities. This is set out in Regulation 16 of the Regulations.

The end of the individual licensing regime

- 1.7 Changes to the regulatory framework flow directly from the requirements of the new Directives. The principal change in the United Kingdom is the ending of the licensing regime under the Telecommunications Act 1984 ('the 1984 Act'). Some of the obligations attached previously to telecommunications licences have been replaced by Conditions of Entitlement ('the General Conditions'), which may be set under section 45 of the Act.

Applicability to Funds for Liabilities

- 1.8 Under the old regime funds for liabilities was governed by Condition 16 of Schedule 4 to licences with Code powers which placed an obligation on Code Operators to satisfy the Director that sufficient funds were available to Highway Authorities to meet any liabilities, should the operator cease to trade or have its licence revoked.
 - 1.9 As individual licences were revoked following implementation of the new EC Directives referred to above, the conditions in Schedule 4 relating to funds for liabilities ceased to have effect, subject to a transitional period pending the coming into force of the Regulations. During this transitional period, as provided for in the Communications Act 2003 (Commencement No 1) Order 2003, until the Regulations are in force the restrictions and conditions referred to in the Act are to be treated as references to the exceptions and conditions in Schedule 4 to the old licences giving code powers. This only applies to persons deemed to have the Code as at 25th July 2003 under the Act.
 - 1.10 Following the end of the transitional period, the restrictions and conditions to which the Code is subject will be contained in the Regulations made by the Secretary of State under section 109 of the Act. Regulation 16 of those Regulations imposes the primary duty i.e. the duty to ensure that sufficient funds are available to meet the specified liabilities and to supply Oftel with a certificate stating that in the reasonable opinion of the Board (in the case of a company) the Code Operator has fulfilled that duty.
 - 1.11 The responsibility for enforcing the obligations in Regulation 16 of the Regulations rests with the Director, and under sections 112 and 113 of the Act
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the Director may impose a penalty of up to £10,000 and, in serious cases the suspension of the application of the Code where operators do not comply with Regulation 16.

- 1.12 The aim of a funds for liabilities regime is to ensure that those operators who make use of Code powers have made adequate arrangements to deal with redundant apparatus on the highway in the event that they cease to trade or have their licences revoked.
- 1.13 The obligation to put in place funds for liabilities proved difficult to implement effectively under the previous regulatory regime. As such the Director decided to review the previous arrangements with the intention of introducing a scheme which might prove to be more effective yet would not place any unnecessary burdens on Code Operators. In making any such changes he was keen to pursue as far as possible Oftel's goal of self and co-regulation.
- 1.14 Summaries of the responses to the June 2002 Consultation Document are set out below. Where appropriate the Statement says where any changes were made to the proposals as a result of these responses.
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Chapter 2

Background

1. As referred to above in paragraph 1.11, the previous funds for liabilities regime was difficult to implement. To date only a small number of operators have made arrangements to put in place funds for liabilities and the two previous consultations were part of a process to create a scheme which would be transparent, non-discriminatory and enforceable. The scheme is intended also to place the responsibility for making such arrangements with the Boards of the operators and thus avoid intrusive intervention by the Director. Implementation of the new regime will be assisted by the Director's new enforcement powers referred to in paragraph 1.12 above.
 2. Extensive discussions have been carried out with the industry and the Highway Authorities. The first public consultation set out a number of alternative proposals. Following consideration of the responses to the first consultation, the proposals for a revised scheme were set out in the June 2002 Consultation Document.
 3. This Statement is intended to set out the Director's conclusions on the new funds for liabilities scheme taking account of both consultations and the responses to them.
 4. The Director considers that the scheme which has emerged, the details of which are set out below, provides an appropriate balance between the interests of the Highway Authorities, who need proper assurances in relation to abandoned infrastructure, and the minimum regulation which it is necessary to place on telecommunications operators.
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Chapter 3

Summary of responses to the June 2002 consultation document and conclusions

- 1 This chapter reviews the responses to the second consultation and considers the arguments raised in respect of the main issues. Based on the responses to the consultation Oftel's main conclusions are set out below.

Do consultees agree with the proposal that operators should submit a certificate approved by the operator's board of directors? If not, why not?

- 2 Most of the responses from the industry did not contain objections in principle to the proposal that operators should submit a certificate approved by the operator's board of directors. They did however suggest that Oftel should publish some form of guidance on how operators should calculate their potential liability. In addition, some of the responses asked if it would be necessary for the certification process to be conducted annually. One respondent did not see the extra benefit that a certificate approved by an operator's board of directors would provide. It did not believe therefore that a certificate should be required.
- 3 Nine responses from Highway Authorities supported the proposal provided that their interests are adequately protected.
- 4 Oxfordshire County Council did not agree with the proposal, referring to perceived problems with reliability and attitude of operators to compliance with the NRSWA. The National Street Works and Highways Group (NSWHG) and Nottinghamshire County Council had concerns that the self-certification process could be open to abuse and that there is no requirement for an independent audit. They did not therefore agree with the proposal.
- 5 The Director's view is that the requirement for an operator to submit a certificate as set out in the Regulations is reasonable and that directors should be required to make appropriate enquiries and exercise due diligence before stating that, in the Board's reasonable opinion, sufficient funds are available. The Director intends to publish guidelines on the calculation on funds for liabilities in the near future. It is important that the certification process meets the concerns of the Highway Authorities. The certification process will therefore be subject to review annually.
- 6 The enforcement and management of the NRSWA is the subject of separate legislation and is outside the scope of this Statement.

Should there be any amendments to the proposals for a certificate? If yes, what amendments are proposed and why?

- 7 One operator suggested that the certificate would need to be amended to refer to the guidance on how operators should calculate their potential liability. However, the purpose of the guidance on which the Director will be consulting shortly is to indicate to code operators how they might calculate liability and the methodologies they might utilise. These methodologies are not intended to be proscriptive and other methodologies may be utilised provided that they conform to the requirements of Regulation 16. Oftel considers that there is no need therefore to refer to the guidance on the face of the certificate.
- 8 Individual Highway Authorities suggested a number of amendments to the proposals for a certificate, namely:
- a) A “Schedule of liabilities” annexed to the certificate;
 - b) geographical maps annexed to the certificate;
 - c) the word “reasonable” should be deleted from the draft certificate;
 - d) penalties should be imposed on operators who submit their certificate and instrument late;
 - e) an independent audit requirement; and
 - f) all certificates and figures should be available to Highway Authorities for checking and verification prior to approval by Oftel.
- 9 In relation to the suggestions a), b) and f) above, the Director considered these but decided that the amount of work involved in producing, providing and retaining this information would be disproportionate to any benefit which it may create. The Director rejected suggestion c) as he believed that a reasonableness test in relation to the board (or other relevant person or group where the operator is not a company) was appropriate. This is also a requirement of Regulation 16. In relation to d), the Director has new powers to impose penalties under the Act as referred to in paragraph 1.11 above. Lastly, the position with regards to audits is discussed below in paragraphs 17 –20.
- 10 Gateshead Council and Hampshire and Somerset County Councils were all content with the proposals for a certificate.
- 11 The Director has made some amendments to the certificate to reflect the requirements of the new Regulation 16, other than this he is content with the drafting of the certificate.
- 12 One operator suggested that Boards should be able to delegate the process of submitting a certificate, including completing and signing the certificate. It was also suggested that this would make it unnecessary to specify a meeting date in the certificate.
- 13 The Director has explained in previous consultation documents, the reasons why there is a need for the certificate to be approved by the resolution of the Board, in the case of a company. The Director remains of this view.
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Oftel would welcome the views of the industry, Highway Authorities and any other interested parties on the suggestion that guidance could be issued on how to calculate the potential liability.

14 The general view of the industry and Highway Authorities was that there would be merit in the provision by the Director of guidelines as to the types of methodology which may be acceptable to Oftel in assessing the potential liability and quantifying possible reinstatement costs.

15 Essex County Council, Neos Networks and Orange all agreed that the issue as to how to calculate the potential liability is a matter for individual operators.

16 The Director intends to publish shortly, for consultation, such guidelines.

Do consultees consider that there is any merit in pursuing the requirement for operators to submit a certificate supported by an auditor's report? Please give reasons.

17 The industry was unanimous in its view that there is no merit in the requirement for operators to submit a certificate supported by an auditor's report. It considered that such a requirement would not provide any additional assurance and that it would merely add a significant extra cost burden on operators.

18 Most Highway Authorities indicated their support for the requirement for operators to submit a certificate supported by an auditor's report. Hampshire County Council however acknowledged that there could be practical difficulties in auditing the amount of the potential liability. Gloucestershire and Oxfordshire County Councils also expressed their doubts regarding the quality and reliability of such reports and the confidence which they might provide.

19 From the advice he has received the Director's view is that there is limited experience in the UK of auditors providing audit reports outside the field of financial information. The certificate that would be audited would only relate to the systems and processes that an operator has in place for the Board to comply with Regulation 16. That would not in itself provide any assurance to the Board, or the Director, about the level of cover needed.

20 For these reasons the Director does not intend to pursue the requirement for an auditor's report. However, the Director would be able to direct, under Regulation 16(7) of the Regulations, that a code operator takes such steps as he considers appropriate for the purpose of securing that sufficient funds are available to meet the specified liabilities. Such a direction could include the requirement to obtain an auditor's report if in the circumstances it was deemed that this would be of assistance.

In what circumstances would consultees envisage the Director exercising his fallback power of ex post facto audit? Please give reasons.

- 21 The general view of the industry was that the Director should exercise his fallback power of ex post facto audit in rare circumstances. For instance, if the certificate is qualified in some way or where there are reasonable grounds to suspect a breach of requirements under Regulation 16, or where the funds provided for in the certificate bear no relationship to the funds which have been submitted on previous occasions and there is no clear or reasoned justification for the change.
- 22 The NSWHG and Nottinghamshire County Council stated that they would envisage the Director exercising his fallback power of ex post facto audit on each and every occasion that a certificate is submitted. The majority of Highway Authorities suggested however that the Director should exercise his power if he were to consider it to be necessary in any particular case, for instance if the certificate gave cause for concern.
- 23 The Director has concluded that he should only exercise his fallback power of ex post facto audit in rare circumstances. Without fettering his discretion, the Director would expect to exercise his power:
- a) If the certificate is qualified in some way;
 - b) where there are reasonable grounds to suspect a breach of Regulation 16; or
 - c) where the funds provided for in the certificate bear no relationship to the funds which have been submitted on previous occasions and there is no clear or reasoned justification for the change.

Should there be any amendments to the list of apparatus in paragraph 6.21? If yes, what amendments are proposed and why?

- 24 The industry did not suggest any amendments to the list of apparatus.
- 25 East Sussex County Council and Kirklees Metropolitan Council suggested that all apparatus as defined in section 105 of the NRSWA should be included in the list of apparatus.
- 26 The NSWHG and Hampshire and Nottinghamshire County Councils suggested that all cable buried directly in the ground or in duct in the ground should be included whether or not the trench or duct is closed and the surface reinstated according to the specifications of the NRSWA.
- 27 Oxfordshire County Council recommended that the list should allow for the inclusion of new types of apparatus and should therefore be all-inclusive. The Highways Agency suggested that the list should include foundations.
- 28 Telecommunications is a dynamic market where operators are offering new and innovative services. With technological advances the apparatus needed to support these services is changing constantly. Ofcom has considered a generic
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definition for 'apparatus' as an alternative to a closed list. Oftel's view however is that a generic definition would be difficult to use in practice.

29 From the advice the Director has received and following responses to the two consultations on funds for liabilities, the Director has concluded that in calculating the potential liability it will be assumed that the networks installed by most operators, and which would create a potential liability, will comprise combinations of the following types of apparatus:

- a) Aerial cable and dropwires;
- b) Aerials;
- c) Boxes;
- d) Cabinets;
- e) Cable buried directly in the ground and cable run up poles, masts and towers;
- f) Chambers;
- g) Covers and their associated frames;
- h) Housings for public call boxes;
- i) Manholes, jointing chambers and footway boxes;
- j) Masts and towers
- k) Microcells;
- l) Poles; and
- m) Tunnels.

30 Cable buried directly in the ground or in duct in the ground will be included except where the trench or duct is closed and the surface reinstated according to specifications of the NRSWA. It is important therefore that operators ensure that construction of infrastructure complies with specifications of the NRSWA and appropriate records are kept.

31 The Director's view is that in terms of providing adequately for funds for liabilities it would not be practicable to differentiate between public call boxes installed as a result of a commercial decision and those installed under any Universal Service Obligation. Public call boxes installed under the Universal Service Obligation will be covered by Regulation 16.

32 The Director needs to ensure that the list of apparatus reflects accurately the type of apparatus being installed at a particular point in time. It is for this reason that Oftel, and in the future Ofcom, will review and update the list on a periodic basis following consultation.

Do consultees agree that operators should have the freedom to be able to implement individual insurance policies, bonds, guarantees or other instruments to cover their potential liabilities under Condition 16? If not, why not?

- 33 The majority view of the industry is that it is vital that operators should have the freedom to be able to implement individual insurance policies, bonds, guarantees or other instruments to cover their potential liability.
- 34 Infolines Public Network Limited suggested in its response that a fairer way of implementing the proposals would be for a central fund or bond to be put in place with operators' contributions to the cost of the fund or bond based on, for instance, their size and ability to pay.
- 35 Highway Authorities suggested in their response to the first consultation that a Telecommunications Industry Fund had merit and was worth exploring. The industry however considered that such a fund would be complex to structure, could be discriminatory and might increase the administrative and financial burden on the industry. Such a fund could only operate effectively with the full co-operation of the whole industry. It is for these reasons that the Director does not intend to pursue the suggestion of a central fund or bond.
- 36 Under the Director's policy Code Operators will have the freedom to be able to obtain individual insurance policies, bonds, guarantees or other instruments to cover their potential liability. Individual Code Operators will therefore have control over the arrangements they make. They will be able to organise their finances in a way which best suits their business plans and which will ensure that these arrangements reflect accurately their particular risk.

What minimum criteria should operators comply with? Please give reasons.

- 37 The Director received a number of useful suggestions from the industry and Highway Authorities for the minimum criteria with which operators should comply . The suggestions mirrored the examples included in the consultation with a few additions, namely the name and address of the issuing bank or financial institution and the methodology applied by operators to calculate their potential liability.
- 38 The Director's view in taking into account these comments is reflected in Regulation 16 of the Regulations. This states, at paragraph 5, that the certificate must state the amount of the funds that have been provided and the systems and processes which enables the board (or appropriate person or body if not a company) to form the opinion that the Code Operator has fulfilled the primary duty in compliance with Regulation 16.

In what circumstances would consultees consider it reasonable for the Director to seek independent specialist advice regarding the proposed arrangements? Please give reasons.

- 39 Orange identified two distinct situations where the Director might wish to seek independent specialist advice regarding the proposed arrangements, namely:
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- a) Where he is not satisfied that the methodology employed to calculate the potential liability has produced a satisfactory figure, and consequently insufficient funds are in place to meet any potential liabilities; and
 - b) the certificate is qualified in some way, which has not been justified.
- 40 Other operators believe that it would be reasonable for the Director to seek independent specialist advice only if there was prima facie evidence of a breach of Condition 16 or reasonable grounds to suspect a breach.
- 41 Neos Networks suggest that it would be reasonable for the Director to seek independent specialist advice if there was genuine concern regarding the operator's viability but that the cost of such specialist advice should be borne by Oftel if it is shown that there are sufficient funds in place.
- 42 Nottinghamshire and Oxfordshire County Councils would like the Director to seek independent specialist advice each and every time an operator submits its proposed arrangements to Oftel. Kent County Council however suggests that such advice should not be necessary.
- 43 The majority of Highway Authorities agree with the proposal in the consultation that independent specialist advice might be sought, for instance, if the certificate was qualified in some way or the Director was not satisfied that the arrangements complied with Regulation 16.
- 44 The Director has concluded that in the overwhelming majority of circumstances the provision of the certificate and the instrument will give sufficient certainty to the Director that the primary duty in Regulation 16 is being fulfilled and there will be no necessity for any regular ongoing case-by-case scrutiny.
- 45 The Director may however take independent specialist advice and could appoint third parties to advise him in making decisions regarding the proposed arrangements and compliance with Regulation 16. Without fettering his discretion, such advice might be sought if:
- a) the certificate is qualified in some way;
 - b) the Director is not satisfied that the methodology employed to calculate the potential liability is reasonable, and consequently that there may have been a breach of Regulation 16 ;

**Should there be any amendments to the procedure for part completed works?
If yes, what amendments are proposed and why?**

- 46 Two operators suggested that there is a need for some sort of co-ordinating mechanism on the part of the Highway Authorities who would be claiming under the terms of the insurance, bond or other instrument. One operator believed that the responsibility for investigatory work is already covered in the NRSWA and it would therefore not be appropriate for Highway Authorities to claim these costs
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from the fund set up under the scheme. Another operator pointed out correctly that with part completed works reinstatement has not yet taken place and, therefore, the proposal for recovering costs for investigatory work is not relevant.

- 47 Highway Authorities are concerned that the procedure for part completed works does not undermine powers already established under the NRSWA. In addition, Highway Authorities find it unacceptable that they should bear the cost of investigatory work if no defect is identified following an inspection. Some Highway Authorities believed that the proposals would only allow them to carry out emergency work after three working days, commencing with the date they contacted the administrator of the company.
- 48 The Director believes that any procedure for part completed works should ensure that such works are immediately made safe for the public. This could for instance take the form of lighting, signing and guarding together with visits to the site(s) to maintain the same. It should include dealing with any environmental issues, for instance vandalised public call boxes. Under the terms of the instrument, the Director would expect that Highway Authorities could recover the cost of all such works reasonably carried out.
- 49 If a Relevant Event occurs, for instance if the operator goes into administration, the Director would expect that the administrator would take all reasonable steps to contact Highway Authorities. This should include each Highway Authority whose jurisdiction has been traversed. The administrator would need to confirm his details and to ensure that no unreasonable and/or unnecessary work is carried out by the Highway Authority prior to the final outcome of the administration.
- 50 The Director would expect Highway Authorities to take all reasonable steps to contact the administrator of the company prior to any emergency work being carried out and, if that is not possible, to contact the administrator within a reasonable period after the commencement of the work. Oftel's view is that three working days is a reasonable period in which the administrator should be contacted.
- 51 If the works are transferred to an alternative operator with code powers, who will be required to make any necessary arrangements regarding any subsequent liability, there will be no action for the Director except to be satisfied that arrangements have been made to deal with future liabilities.
- 52 If the works are not transferred to an alternative operator with code powers, any arrangements needed for the reinstatement of the works will need to be made as soon as possible after the Relevant Event.

Do consultees consider that three years is a reasonable time in which it would be possible to complete an assessment of the infrastructure following a Relevant Event? If not, why not?

- 53 The majority of operators suggested that a period of three years is sufficient to complete an assessment of the infrastructure following a Relevant Event. Orange however does not consider that such a period can be justified and suggests that Highway Authorities should, from a safety perspective alone, complete their assessment within probably six months of the occurrence of a Relevant Event and certainly within 12 months.
- 54 Orange suggested an initial period of six months immediately following a Relevant Event during which infrastructure that is in a safe condition would be left untouched by Highway Authorities. This would they suggest provide an opportunity to find a buyer for the infrastructure or an organisation prepared to take on responsibility for maintaining the infrastructure until a buyer is found.
- 55 The responses from Highway Authorities take a different view. Oxfordshire County Council considers that any period less than 20 years is inadequate to complete an assessment. Somerset County Council suggests that the period should not be less than 10-15 years. Gloucestershire County Council believes that it is unreasonable to expect Highway Authorities to complete an assessment in three years and suggest that 10 years would be more appropriate.
- 56 The NSWHG suggests that three years may be an insufficient period in which to carry out a full assessment. Nottinghamshire County Council states that three years is an insufficient period whilst Gateshead Council considers it impossible to assess the required timescale.
- 57 The Metropolitan Borough of Bury, East Sussex County Council, Essex County Council and Hampshire County Council all agreed, subject to adequate resources, that three years is a reasonable time in which to complete an assessment of the infrastructure following a Relevant Event.
- 58 From the advice he has received, the Director has concluded that there is no basis on which to impose an initial period immediately following a Relevant Event during which infrastructure that is in a safe condition would be left untouched by Highway Authorities.

What additional information, if any, should be included on Ofstel's web site, and why?

- 59 The industry suggested that Ofstel should include on its web site the guidance on the types of methodology which may be acceptable to the Director in assessing the potential liability and quantifying possible reinstatement costs. One operator suggested that Ofstel should also include a statement on how an individual operator's fund is being managed following a Relevant Event.
- 60 Highway Authorities made a number of suggestions regarding additional information which should be included on Ofstel's web site, namely:
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- a) Department for Transport SWA_ORG_REF (the code given by the Department to all undertakers which have authority to dig up the highway);
- b) list of Highway Authority areas traversed by individual operators;
- c) electronic record maps (link from Oftel's web site);
- d) the geographical area that individual operators work in;
- e) an emergency operational contact;
- f) comments on the stability of the industry and the likelihood of a Relevant Event;
- g) dates on which individual operators complied with relevant conditions;
- h) renewal and expiry dates for instruments;
- i) dates on which the information was last updated;
- j) the amount of the bond and how the figure was calculated;
- k) an alert procedure to inform Highway Authorities of a Relevant Event; and
- l) a cascade system (e-mail/fax) to nominated contacts in the Highway Authorities.

61 The Director, and in the future Ofcom, would like to include as much information on his web site as possible which will be useful to Highway Authorities. He needs to ensure that that information is as up to date as possible. Some of the information which has been requested by Highway Authorities may be commercially sensitive, for instance the amount of the cover. Such information can not be included. The Director also considers that it is not practicable to include other types of information such as a list of Highway Authority areas traversed by individual operators or the geographical area that individual operators work in.

62 Oftel will establish a web site page dedicated to the issue of Funds for Liabilities. The web site will include the following information:

- a) Links to documents relevant to Funds for Liabilities;
- b) copy specimen certificate;
- c) name of the Code operator and the length of time that the instrument they have used to provide cover for funds for liabilities lasts for.
- d) date of Relevant Event, if applicable; and
- e) insolvency practitioner's contact details, if applicable.

63 Highway Authorities will be able to receive notification of changes to information on the web site by joining Oftel's e-mail notification service. Such information will for instance include notification of a Relevant Event.

64 The operator or, for instance, the administrator should take all reasonable steps to contact the Department of Trade and Industry and Oftel to confirm the occurrence of a Relevant Event. The Director's view is that three working days is a reasonable period in which such contact should be made.

Chapter 4

Funds for Liabilities – Moving Forward under the New Regime

1. The Director invites all operators who currently have powers under the Code to submit a certificate in compliance with Regulation 16. Such certificates should be provided to the Director as soon as possible.
 2. For those operators intending to apply for powers under the Code, a Notification under section 107(2) of the Act published on 23rd September 2003 stated a number of requirements for an application for a direction applying the Code. One of these requirements is to show evidence of the applicant's ability to put in place funds for meeting liabilities.
 3. Regulation 16 of the Regulations states that where a Code operator has not exercised any Code powers previously, that operator must provide the Director with a certificate, meeting the requirements of Regulation 16, two weeks before that operator exercises any rights under the Code.
 4. All Code operators must provide OFCOM with a certificate on 1st April each year.
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Annex A

Electronic Communications Code (Conditions & Restrictions) Regulations 2003 Regulation 16 Funds for meeting liabilities

- 1.—(1) A code operator must—
 - (a) ensure that sufficient funds are available to meet the specified liabilities which—
 - (i) arise on or before the date on which a relevant event occurs, or
 - (ii) may arise at any time during the liability period,from the exercise of rights conferred upon the code operator by paragraph 9 of the electronic communications code;
 - (b) on 1st April each year, provide OFCOM with the certificate the requirements of which are set out in paragraphs (2) to (6) inclusive unless he has not previously exercised any rights conferred by the electronic communications code; and
 - (c) where he has not previously exercised any rights conferred by the electronic communications code and intends to exercise such rights for the first time, provide OFCOM with the said certificate two weeks before he exercises such rights to install any apparatus.
 - (2) The certificate shall be signed by—
 - (a) the director or the company secretary, in the case of a company;
 - (b) a member, in the case of a body corporate the conduct of the management of which is vested in its members;
 - (c) a member of the management committee, in the case of a body (whether or not incorporated) not falling within subparagraph (a), (b) or (d);
 - (d) one of the partners, in the case of a partnership;
 - (e) the code operator himself, in the case of an individual;and, in a case falling within subparagraph (a), (b) or (c), shall be approved by a resolution of the board, the body corporate or the management committee, as the case may be.
 - (3) The certificate shall state that in the reasonable opinion of—
 - (a) the board, in the case of a company;
 - (b) the body corporate, in the case of a body corporate the conduct of the management of which is vested in its members;
 - (c) the management committee, in the case of a body (whether or not incorporated) not falling within subparagraph (a), (b) or (d);
 - (d) the partner signing the certificate, in the case of a partnership; or
 - (e) the code operator himself, in the case of an individual;
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- the code operator has fulfilled his duty under paragraph (1).
- (4) In a case falling within subparagraph (a), (b) or (c) of paragraph (3), the board, the body corporate or the management committee, as the case may be, shall not make the statement in paragraph (3) unless it has first made appropriate enquiries into whether the code operator has fulfilled its duty under paragraph (1).
- (5) The certificate shall state—
- (a) the amount of the funds which have been provided for, and
 - (b) the systems and processes which enabled the board, the body corporate, the management committee, the partner or the code operator himself as the case may be, to form the opinion referred to in paragraph (3).
- (6) The certificate shall be accompanied by copies of any insurance policy, bond, guarantee or other instrument which will provide the funds in paragraph (1)(a).
- (7) Where OFCOM are not satisfied that a code operator has discharged his duty under paragraph (1) they may—
- (a) direct that code operator to take such steps as they consider appropriate for the purpose of securing that sufficient funds are available to meet the specified liabilities; and
 - (b) publish details of any direction under subparagraph (a).
- (8) Where OFCOM give a direction under paragraph (7)(a), the code operator shall comply with it.
- (9) A code operator shall inform OFCOM in writing immediately if he becomes aware of any circumstance which causes him to be unable to fulfil his duty under paragraph (1).
- (10) In this regulation—
- “board” means the board of directors of a company;
- “liability period” means the period commencing on the occurrence of a relevant event and ending on the third anniversary thereof;
- “management committee” means the group of individuals in which the conduct of the management of a body of persons, other than a company, a partnership or a body corporate the conduct of the management of which is vested in its members, is vested;
- a “relevant event” occurs if—
- (a) a code operator becomes subject to a direction under the Act by virtue of which he is prohibited from providing the electronic communications network for the purposes of the provision of which the electronic communications code was applied to him by a direction under section 106(3)(a) of the Act;
 - (b) a code operator ceases to provide an electronic communications network;
 - (c) a code operator is deemed to be unable to pay his debts;
 - (d) a code operator enters into administration, receivership or liquidation;
 - (e) any person takes action for the voluntary winding-up, dissolution, bankruptcy or sequestration of a code operator;
-

- (f) an administrator, receiver, trustee or similar officer of a code operator, or of all or any material part of the revenues and assets of that operator, is appointed;
- (g) any order is made for the compulsory winding-up, dissolution, bankruptcy or sequestration of a code operator;

“specified liabilities” are—

- (a) liabilities, including liabilities for the payment of indemnities in respect of costs or expenses incurred, arising under the New Roads and Street Works Act 1991⁽¹⁾ or, in Northern Ireland, the Street Works (Northern Ireland) Order 1995⁽²⁾ towards—
 - (i) any appropriate authority, traffic authority or responsible authority;
 - (ii) any other person having the authority to execute works in, or having apparatus in, a street or, in Scotland, a road;
 - (iii) any concessionaire within the meaning of section 1 of that Act of 1991 or, in the case of Northern Ireland, within the meaning of article 23(1) of the Roads (Northern Ireland) Order 1993⁽³⁾;
 - (b) any other costs or expenses reasonably incurred by any appropriate authority or responsible authority in making good any damage caused by the installation or removal of electronic communications apparatus, whether such damage occurs before or after a relevant event;
 - (c) any other costs or expenses reasonably incurred by any appropriate authority or responsible authority after a relevant event occurs in removing any electronic communications apparatus—
 - (i) which is installed under, over, along or across a street;
 - (ii) which is not, or is no longer, used for the purposes of any electronic communications network and in relation to which there is no reasonable likelihood that it will be so used; and
 - (iii) the removal of which is desirable having regard to any harm it may cause to other persons or property or to the visual amenity of land or buildings in proximity to which the apparatus is installed.
- (11) A code operator shall, for the purposes of this regulation, be deemed to be unable to pay its debts if—
- (a) where it is a company registered under the enactments relating to companies for the time being in force in the United Kingdom, it satisfies any of the requirements in section 123 of the Insolvency Act 1986⁽⁴⁾, except that, for the purposes of this regulation, the figure of “£750” in section 123 of that Act, or such other sum as may be specified from time to time pursuant to section 416 of that Act, shall be replaced by “£250 000”;
 - (b) where it is a company which is not so registered, it satisfies any of the requirements in section 222, 223 or 224 of the Insolvency Act 1986, except

⁽¹⁾ 1991 c.22.

⁽²⁾ S.I. 1995/3210 (N.I. 19).

⁽³⁾ S.I. 1993/3160 (N.I. 15).

⁽⁴⁾ 1986 c.45.

that, for the purposes of this regulation, the figure of “£750” in section 222 of that Act, or such other sum as may be specified from time to time pursuant to section 417 of that Act, shall be replaced by “£250 000”;

(c) where it is a partnership—

- (i) it satisfies any of the requirements in section 222, 223 or 224 of the Insolvency Act 1986 (as modified by paragraphs 4 and 5 of Part I of Schedule 3 to the Insolvent Partnerships Order 1994⁽⁵⁾), except that for the purposes of this regulation the figure of “£750” in section 222 of that Act, or such other sum as may be specified from time to time pursuant to section 417 of that Act, shall be replaced by “£250 000”;
- (ii) it is apparently insolvent within the meaning of section 7 of the Bankruptcy (Scotland) Act 1985⁽⁶⁾, except that for the purposes of this regulation the figure of “£750” in section 7 of that Act, or such other sum as may be specified from time to time by any enactment which amends section 7, shall be replaced by “£250 000” ; or
- (iii) it satisfies any of the requirements in article 186, 187 or 188 of the Insolvency (Northern Ireland) Order 1989⁽⁷⁾ (as modified by paragraphs 4, 5 and 6 of Part I of Schedule 3 to the Insolvent Partnerships Order (Northern Ireland) 1995⁽⁸⁾), except that for the purposes of this regulation the figure of “£750” in article 186 of the Order of 1989, or such other sum as may be specified from time to time pursuant to article 362(1)(a) of that Order, shall be replaced by “£250 000”;

(d) where he is an individual—

- (i) he satisfies either of the requirements in section 268(1) of the Insolvency Act 1986 and the debt, or the aggregate amount of the debts, that he owes is equal to or more than £250,000;
- (ii) he is apparently insolvent within the meaning of section 7 of the Bankruptcy (Scotland) Act 1985, except that for the purposes of this regulation the figure of “£750” in section 7 of that Act, or such other sum as may be specified from time to time by any enactment amending section 7, shall be replaced by “£250 000”; or
- (iii) he satisfies either of the requirements in article 242(1) of the Insolvency (Northern Ireland) Order 1989 and the debt, or the aggregate amount of the debts, that he owes is equal to or more than £250,000.

(12) In the definition of “relevant event” in paragraph (10), the reference to a code operator’s becoming subject to a direction by virtue of which he is prohibited from

⁽⁵⁾ S.I. 1194/2421.

⁽⁶⁾ 1985 c.66; section 7 was amended by paragraph 10 of Schedule 1 to the Drug Trafficking Act 1994 (c.37), paragraph 185 of Part II of Schedule 6 to the Criminal Justice (Scotland) Act 1995 (c.20), paragraph 58 of Schedule 4 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c. 40), paragraph 15 of Schedule 11 to the Proceeds of Crime Act 2002 (c. 29) and paragraph 15 of Schedule 3 to the Debt Arrangement and Attachment Act 2002 (asp. 17).

⁽⁷⁾ S.I. 1989/2405 (N.I. 19).

⁽⁸⁾ S.R. (NI) 1995 No 225.

providing the electronic communications network for the purposes of the provision of which the electronic communications code was applied to him—

- (a) does not include a reference to his becoming subject to a direction which will have to be revoked if not confirmed, but
 - (b) does include a reference to the confirmation of a direction which would otherwise have had to be revoked.
-

Annex B

Certificate

Compliance with Regulation 16 paragraphs (2) to (6) inclusive of the Regulations

Whereas this certificate, which must be submitted pursuant to Regulation 16(1)(b) of the Regulations, has been approved by a resolution of the Board of Directors *[or appropriate body if not a company]* of *[insert name of Code Operator]* (“the Board”) *[or appropriate if not a company]* at its meeting on *[insert date]*. [This section to be adapted if not a company, body corporate or management committee].

I hereby certify that-

- (a) in [the Board’s – only suitable for a company] reasonable opinion, *[insert name of Code Operator]* has fulfilled its duty as set out in paragraph 1(1)(a) of the Regulations to ensure that sufficient funds are available to meet the Specified Liabilities which (i) arise on or before the date on which a Relevant Event occurs, or (ii) may arise at any time during the Liability Period, from the exercise of rights conferred upon *[insert name of Code Operator]* by paragraph 9 of the Electronic Communications Code.
- (b) the amount of the funds which have been provided for is *[insert figure]*.
- (c) the systems and processes which have enabled the Board to form the opinion referred to in paragraph (a) above are- *[insert]*
- (d) [for a company, body corporate or management committee only] The Board/Body Corporate/Management Committee has made appropriate enquiries into whether the Code Operator has fulfilled its duty under Regulation 1(1)(a) of the Regulations.
- (e) [for a company, body corporate or management committee only] This certificate has been approved by a resolution of the Board/Body Corporate/Management Committee.
- (f) In this Certificate “the Regulations” means the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. “Electronic Communications Code” shall have the same meaning as in section 106(1) of the Communications Act 2003. Otherwise, words and phrases in this Certificate shall have the same meaning as in the Regulations.

[To be signed by a director or company secretary in the case of a company/a member, in the case of a body corporate the conduct of the management of which is vested in its members/a member of the management committee, in the case of a body (whether or not incorporated) which is not a company, a body corporate the

conduct of the management of which is vested in its members or a partner/one of the partners in the case of a partnership or the Code Operator himself in the case of an individual.]

[signature]

[printed name]

[position]

[date]

Annex C

Specimen bond

To: The Appropriate Authorities

Performance Guarantee

We (*insert name of financial institution*) of (*insert address*) are informed by (*insert name of Code Operator*) whose [*registered – only appropriate for a company*] office is at (*insert address of [registered] office*) that under Regulation 16 of the Regulations [*insert name of Code Operator*] is under a duty to ensure that sufficient funds are available to meet the Specified Liabilities which arise on or before the date on which a Relevant Event occurs or may arise at any time during the Liability Period from the exercise of rights conferred upon (*insert name of Code Operator*) by paragraph 9 of the Electronic Communications Code and we have been requested to issue a Performance Guarantee as contained in this document.

We, (*insert name of counter-party*) irrevocably undertake that if (*insert name of Code Operator*) fails to meet some, any, or all of its liabilities under Regulation 16 of the Regulations we will pay to the Appropriate Authorities all payments that the Appropriate Authorities shall be entitled to recover by reason of (*insert name of Code Operator*) default to the extent to which they are unable to recover them from (*insert name of Code Operator*).

ALWAYS PROVIDED THAT: -

1. Our liability under this Guarantee is limited to an amount or amounts, including all previous claims made under this Guarantee, not exceeding in aggregate (*insert figure*).
 2. This Guarantee will come into force on (*insert date*).
 3. This Guarantee will expire on one year after it was entered into and will extend to the acts and defaults of (*insert name of Code Operator*) as specified herein during that period and any demand hereunder must be received by us at this office on or before 30 days after the expiry date, after which this Guarantee will become of no effect whatsoever.
 4. Without prejudice to any right or remedy to which any Appropriate Authority may be entitled under this Guarantee and which may arise at any time during which the Guarantee is valid and subsisting, this Guarantee is personal to you and is not transferable or assignable.
 5. Any demand made by any Appropriate Authority under this Guarantee must be accompanied by or incorporate the following declaration:
-

“We certify that we are an Appropriate Authority as described hereunder and that the amount claimed is due by reason of *(insert name of Code Operator)* having failed to fulfil its duty under Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003”

and must be submitted in the following manner:

- (i) by letter, with a signature(s) on the demand authenticated by the bankers of the Appropriate Authority; or
- (ii) by the Appropriate Authority’s bankers’ TESTED TELEX/SWIFT, or other recognised authenticated means of transmission.

A demand submitted by facsimile transmission will not be accepted.

6. For the purpose of this Guarantee-

- a) “the Regulations” means the Electronic Communications Code (Conditions and Restrictions) Regulations 2003
- b) “the Electronic Communications Code” shall have the same meaning as in section 106 of the Communications Act 2003;
- c) “Appropriate Authority” means—
 - a) in relation to England and Wales, a relevant authority within the meaning of section 49(6) of the New Roads and Street Works Act 1991¹;
 - (b) in relation to Scotland, a person to whom notice would be required to be given by section 108(6) of the New Roads and Street Works Act 1991²; and
 - (c) in relation to Northern Ireland, a relevant authority within the meaning of article 7(5) of the Street Works (Northern Ireland) Order 1995³;
- (d) “Relevant Event” occurs if
 - (a) a code operator becomes subject to a direction under the Act by virtue of which he is prohibited from providing the electronic communications network for the purposes of the provision of which the electronic communications code was applied to him by a direction under section 106(3)(a) of the Act;
 - (b) a code operator ceases to provide an electronic communications network;
 - (c) a code operator is deemed to be unable to pay his debts;
 - (d) a code operator enters into administration, receivership or liquidation;

¹ 1991 c.22

² Section 108(6) was amended by section 180 of, and paragraph 168 of Schedule 13 to, the Local Government etc. (Scotland) Act 1994 (c.39)

³ S.I. 1995/3210 (N.I.19)

- (e) any person takes action for the voluntary winding-up, dissolution, bankruptcy or sequestration of a code operator;
 - (f) an administrator, receiver, trustee or similar officer of a code operator, or of all or any material part of the revenues and assets of that operator, is appointed;
 - (g) any order is made for the compulsory winding-up, dissolution, bankruptcy or sequestration of a code operator;
- (e) Otherwise, all words and phrases in this Guarantee shall have the same meaning as in the Regulations.
- (f) This Guarantee shall be governed by and construed in accordance with the Laws of England and Wales and shall be subject to the exclusive jurisdiction of the English Courts.
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Glossary

Appropriate Authority means a public authority of a type described in subsection 49(6) or, in Scotland, subsection 108(6) of the New Roads and Street Works Act 1991 or, in Northern Ireland, Article 7(5) of the Street Works (Northern Ireland) Order 1995.

It includes the Highway Authority, the street managers, the sewer authority, a transport authority and a bridge authority.

Relevant Event has the meaning given to it in paragraph 10 of Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003.

Street Works Defined in section 48(3) of the New Roads and Street Works Act 1991 as:

works of any of the following kinds (other than works for road purposes) executed in a street in pursuance of a statutory right or a street works licence -

- a) placing apparatus, or
- b) inspecting, maintaining, adjusting, repairing, altering or renewing apparatus, changing the position of apparatus or removing it

or works required for or incidental to any such works (including, in particular, breaking up or opening the street, or any sewer, drain or tunnel under it, or tunnelling or boring under the street).
