



Statement on a new specimen
performance bond for the
purposes of Regulation 16 of the
Electronic Communications Code
(Conditions and Restrictions)
Regulations 2003

Explanatory statement and specimen
performance bond

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Section 1

Explanatory statement

Introduction

- 1.1 The purpose of this document is to publish amendments to the specimen bond provided by Ofcom in relation to the funds that Code operators should have in place to meet specified liabilities arising from their exercise of Code powers.

The Electronic Communications Code

- 1.2 The Electronic Communications Code (“the Code”) is set out in Schedule 2 to the Telecommunications Act 1984 (the “1984 Act”) as amended by Schedule 3 to the Communications Act 2003 (the “Act”). It sets out the powers (“Code powers”) that can be given to providers of electronic communications networks (“ECNs”) and providers of conduit systems available for use by providers of ECNs to enable them to install and maintain electronic communications apparatus.
- 1.3 Operators that have Code powers applied to them (“Code operators”):
- have the power to install apparatus in, under or over streets without needing a specific licence to do so under the New Road and Street Works Act 1991 or, in Northern Ireland, the Street Works (Northern Ireland) Order 1995 (together “the NRSWA 1991”);
 - benefit from important exemptions under Town and Country Planning legislation in the form of Permitted Development; and
 - have the right to apply to the Court for an order conferring a right, where agreement cannot be reached, to execute works on private land.
- 1.4 Section 106 of the Act allows Ofcom to apply the Code to providers of ECNs and providers of conduit systems by way of a direction. Under paragraph 17 of Schedule 18 to the Act, those persons granted Code powers prior to the Act coming into force are deemed to have been granted Code powers by way of a direction given by Ofcom under section 106.
- 1.5 Code powers are subject to such conditions and restrictions as may be contained in regulations made by the Secretary of State under section 109 of the Act. In an exercise of powers under section 109(1) of the Act, on 2 October 2003 the Secretary of State made the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (the “Regulations”).¹

Funds for Liabilities

- 1.6 Streets, or in Scotland, roads (“public highways”), are run by authorities who are responsible for, among other things, ensuring that they are kept in a good state of repair and accessible. In general it is necessary for anyone wishing to place anything on public highways or to break up public highways to obtain a specific licence to do so under the NRSWA 1991. This allows the authorities to control who is permitted to place apparatus on public highways and who can break up or open public highways.

¹ Statutory Instrument 2003 No. 2553. The Regulations can be found at: www.opsi.gov.uk/si/si2003/20032553.htm

- 1.7 Code operators, however, are permitted to install and maintain apparatus that are on, under or over public highways without needing a licence to do so under the NRSWA 1991. Regulation 16 of the Regulations requires a Code operator to put in place sufficient funds to cover 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 Code operator's exercise of Code powers. This is known as the "funds for liabilities regime".
- 1.8 Regulation 16 contains a number of specific requirements to ensure that Code operators meet their obligations under the funds for liabilities regime:
- Regulation 16(1)(a) requires Code operators to ensure that sufficient funds are available to meet specified liabilities arising from the exercise of rights conferred upon them by paragraph 9 of the Code;
 - Regulation 16(1)(b) requires Code operators to provide Ofcom with a certificate on 1 April each year stating that they have fulfilled their duty under Regulation 16(1); and
 - Regulation 16(6) states that the certificate shall be accompanied by a copy of any insurance policy, bond, guarantee or other instrument which will provide the funds.
- 1.9 "Liability period" is defined as the period commencing on the occurrence of a relevant event and ending on the third anniversary thereof.
- "Relevant event" is defined in Regulation 16(10) and, in short, refers to a Code operator ceasing to trade.
- "Specified liabilities" are defined in Regulation 16(10) as, among other things, costs or expenses reasonably incurred by an authority in removing electronic communications apparatus and making good any damage caused by the installation or removal of such apparatus.

Ofcom's specimen bond

- 1.10 On 15 October 2003, the Director General of Telecommunications issued a statement (the "October 2003 statement") providing information on the funds for liabilities regime to both the industry and authorities who run public highways.² The October 2003 statement included a specimen bond as an example of an instrument which might provide the funds in Regulation 16(1)(a).
- 1.11 In 2004, Ofcom noted that certain improvements could be made to the original specimen bond included in the October 2003 statement and published a revised version on its website³ (the "2004 specimen bond").
- 1.12 During the course of 2009 Ofcom conducted two separate investigations into compliance with the requirements of Regulation 16.⁴ As part of this work, Ofcom noted that the 2004 specimen bond could be further improved. Ofcom therefore drafted a new specimen performance bond (the "new specimen bond") which it published for consultation on 10 December 2009.⁵

² See <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/funds1003.pdf>

³ See http://www.ofcom.org.uk/telecoms/ioi/e_c/ffi/spec_bond.pdf

⁴ See http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_01016/ and http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_01026/

⁵ See http://www.ofcom.org.uk/consult/condocs/specimen_performance_bond/

Summary of Consultation

1.13 Ofcom received responses to the consultation on the new specimen bond from the following (the “respondents”):

- Cable & Wireless (“C&W”)
- Scottish and Southern Energy plc (“SSE”); and
- Bank of Ireland (“BoI”).

1.14 The key issues raised by the respondents are:

- (a) The execution of the bond as a deed;
- (b) Authentication of the signature on the Demand;
- (c) Requirement to seek recourse from the Code operator first;
- (d) The Issuer’s inability to dispute the amount claimed; and
- (e) Specified Liabilities which pre-exist the Arrangement Date and liability after the Expiry Date.

1.15 We consider each of these issues in turn below and set out the finalised specimen bond in Section 2.

(a) Execution of the Bond as a Deed

1.16 Two of the three respondents (C&W and BoI) objected to the requirement that the bond be executed as a deed. C&W and BoI raised concerns that it would increase the time required to set up a bond and would preclude the transaction from being carried out electronically. They also suggested that it was not consistent with market practice.

1.17 C&W asked if a bank had ever queried the enforcement of a performance bond and suggested that if this was not the case then the requirement to execute the bond as a deed would create an unnecessary layer of bureaucracy.

Ofcom’s response

1.18 We have carefully considered the points raised by C&W and BoI but remain of the view that the bond should be executed as a deed.

1.19 Ofcom has sought independent legal advice as to the enforceability of any instrument based on the specimen bond. Ofcom has been advised that, in the absence of consideration being provided by an authority, it may not be possible for that authority to enforce the bond unless it is executed as a deed. Ofcom therefore considers it appropriate to maintain the wording in the specimen bond relating to execution as a deed.

1.20 Although this may increase the length of time that it takes to put in place the bond or make it more difficult to carry out the transaction electronically, we believe that these drawbacks are outweighed by need to ensure that the authorities that need to make a claim against the bond are able to do so.

(b) Authentication of signature on the Demand

- 1.21 C&W and Bol consider that paragraph 6 of the specimen bond should be amended to include a requirement that the signature on a Demand should be authenticated. C&W thought the signature required should be that of the professional advisers of the “Appropriate Authority”, whereas as Bol suggested it should be by the “bankers of the Appropriate Authority”.

Ofcom’s response

- 1.22 Having considered the comments by respondents, we have concluded that it is unnecessary to require that a professional adviser or banker be required to authenticate the signature on a Demand since it is unclear to us what the purpose of such a requirement would be. We have not, therefore, made any amendment to the specimen bond in this regard.

(c) Requirement to seek recourse from the Code operator first

- 1.23 SSE raised objections to Ofcom’s proposal to remove from the specimen bond the requirement that Appropriate Authorities first seek recourse from the Code operator before claiming against the bond.

Ofcom’s response

- 1.24 Having considered the point made by SSE we have decided to include a requirement that Appropriate Authorities first seek recourse from the Code operator before claiming against the bond. We have therefore added a new point (c) to the demand set out in paragraph 6 of the specimen bond as follows: “...we have requested payment from the Code operator but they have failed to pay to us the amount claimed within a period of 30 days of our written request.”
- 1.25 The Demand therefore certifies that prior to seeking payment from the Issuer, the Appropriate Authority has made a written request to and not received payment from the Code operator directly.

(d) The Issuer’s inability to dispute the amount claimed

- 1.26 SSE raised concern regarding the bond issuer’s ability to dispute the amount claimed. They identified that one of the main effects of moving from a performance guarantee to an “on demand” bond was that the party providing the bond lost the ability to satisfy itself that the authority making the claim was entitled to the specific payment requested.
- 1.27 SSE also noted that the use of the word “you”, rather than “Appropriate Authority”, in paragraph 7 of the specimen bond reads oddly.

Ofcom’s response

- 1.28 We have considered the comments made by SSE. We remain of the view that the specimen bond should require only that the Appropriate Authority make the Demand on the Issuer and that the Issuer should not be able to decline payment unless it obtains a court order, for example in the case of a fraudulent demand. The specimen bond is drafted in this way so that, having incurred costs or expenses in removing apparatus and / or making good the public highway, an Appropriate Authority can secure payment quickly.

- 1.29 We therefore do not believe that it is necessary to amend the specimen bond in this respect other than to replace the word “you” with “Appropriate Authority”, as suggested by SSE.

(e) Specified Liabilities which pre-exist the Arrangement Date and liability after the Expiry Date

- 1.30 Two of the respondents (C&W and Bol) considered that the specimen bond should be amended to remove the provision that the Issuer shall be liable in respect of Specified Liabilities arising prior to the Arrangement Date, and shall remain liable in respect of Specified Liabilities arising at any time during the Liability Period provided that the Relevant Event occurs prior to the Expiry Date.

- 1.31 C&W commented that all operators must have a bond in place when they are given Code powers and that retrospective application is therefore unnecessary.

Ofcom’s response

- 1.32 We have considered the comments made by C&W and Bol. Regulation 16(1)(a) provides that a Code operator must ensure that sufficient funds are available to meet 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. The specimen bond is drafted to meet this requirement and we do not believe that any amendment is necessary.

- 1.33 Code operators are required by Regulation 16(1)(c) to provide Ofcom with a certificate stating that they have fulfilled their duty under Regulation 16(1) two weeks before they exercise Code powers for the first time rather than when they are granted Code powers (applicants for Code powers must provide Ofcom with evidence of their ability to put in place funds for liabilities). In considering whether they have sufficient funds available to meet Specified Liabilities which arise prior to the Arrangement Date of any bond, Code operators can take into account the terms of the bonds or other instruments they have put in place in previous years.

Impact if any on the specimen bond

- 1.34 The changes that we have made to the specimen bond consulted on in December 2009, as a result of comments made by the respondents summarised above, are as follows:

- New point (c) added to paragraph 6 of specimen bond.
- Paragraph 7 – “you” has changed to “Appropriate Authority”.

- 1.35 We have reflected any minor changes above in the finalised new specimen bond set out in Section 2 below.

- 1.36 We would emphasise that the specimen bond is for illustrative purposes and is just one means by which a Code operator can fulfil its obligations under Regulation 16. Code operators should seek their own independent legal advice on the precise drafting of the bond (or other instrument that they provide to comply with Regulation 16) to ensure that they fulfil their statutory obligations under Regulation 16.

Section 2

Specimen Performance Bond

To: The Appropriate Authorities (as defined below)

[date]

Performance Bond

The obligations set out in this Performance Bond are given by us in favour of and for the benefit of any and all Appropriate Authorities.

We, (*insert name of financial institution*) of (*insert address*) (the “**Issuer**”), are informed by (*insert name of Code operator*) whose [*registered - only appropriate for a company*] office is at (*insert address of [registered] office*) [*and whose registered company number is - only if a company*] (the “**Code operator**”) that under Regulation 16 of the Regulations the 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 the Code operator by paragraph 9 of the Electronic Communications Code.

We have been requested by the Code operator to issue a Performance Bond in favour of the Appropriate Authorities as contained in this document.

On (*insert date*) (the “**Arrangement Date**”), the Issuer issued this Performance Bond as a means of payment to the Appropriate Authority of the Specified Liabilities of the Code operator.

We irrevocably and unconditionally undertake that, if we receive a first written demand from an Appropriate Authority which is in accordance with the provisions of this Performance Bond (the “**Demand**”) we shall, subject as provided below, forthwith pay to the Appropriate Authority making the Demand the amount set out in the Demand in accordance with the payment instructions also set out in the Demand.

PROVIDED ALWAYS THAT: -

1. The Issuer's liability under this Performance Bond is limited to an amount or amounts, including all previous claims made under this Performance Bond, not exceeding in aggregate (*insert figure*).
2. The Issuer's liability under this Performance Bond shall apply to any and all of the Code operator's Specified Liabilities arising on or before the date on which a Relevant Event occurs or at any time during the Liability Period (including prior to the Arrangement Date) provided that the Relevant Event occurs prior to the Expiry Date.
3. This Performance Bond will expire, subject to paragraph 4 below, on (*insert date*) [*must be at least one year after the Arrangement Date*] (the “**Expiry Date**”) but the Issuer shall remain liable in respect of the Specified Liabilities of the Code operator in accordance with the provisions of paragraph 2 above after the Expiry Date.

4. Any Demand hereunder must be received by the Issuer at the address specified in paragraph 5 below on or before 30 days after the Expiry Date or, as the case may be, on or before 30 days after the end of the Liability Period, after which this Performance Bond will become of no effect whatsoever.
5. The relevant office address for the purposes of paragraph 4 above is (*insert address*).
6. Any Demand made by any Appropriate Authority under this Performance Bond must be sent by letter to the address specified in paragraph 5 above, signed by a person(s) authorised on behalf of the Appropriate Authority to make the Demand which shall include the following statement (with the applicable details completed):

“In accordance with the Performance Bond dated [] from [name of bank, address] we, [name of Appropriate Authority] hereby certify that:

- (a) we are an Appropriate Authority as defined and referred to in the Performance Bond;
- (b) the Code operator has failed to meet its Specified Liabilities as required in accordance with Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003;
- (c) we have requested payment from the Code operator but they have failed to pay us the amount claimed within a period of 30 days of our written request; and
- (d) the amount required to meet the Specified Liabilities is £[] (“**Demand Amount**”).

We hereby demand that you make payment of the Demand Amount in accordance with the provisions of the Performance Bond within [seven] days after the date of the receipt of this Demand.

Please make payment to the following account [details of bank account of the Appropriate Authority].”

7. We shall accept such Demand as evidence, for the purposes of this Performance Bond alone, that the amount claimed is due to the Appropriate Authority under this Performance Bond.
8. Without prejudice to any right or remedy to which any Appropriate Authority may be entitled under this Performance Bond and which may arise at any time during which the Performance Bond is valid and subsisting, this Performance Bond is personal to the Appropriate Authorities and is not transferable or assignable.
9. In this Performance Bond:
 - (a) “**Act**” means the Communications Act 2003 (c. 21);
 - (b) “**Appropriate Authority**” means any appropriate authority, traffic authority, responsible authority or other person referred to in Regulation 16 of the Regulations, which may incur any of the Specified Liabilities;

- (c) **“Electronic Communications Code”** shall have the same meaning as it has in section 106 of the Act;
 - (d) **“Liability Period”** means the period commencing on the occurrence of a Relevant Event and ending on the third anniversary thereof;
 - (e) **“Regulations”** means the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (S.I. 2003 No. 2553), as amended from time to time;
 - (f) **“Relevant Event”** occurs if:
 - (i) 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 (as shall be interpreted in accordance with Regulation 16(12) of the Regulations);
 - (ii) a code operator ceases to provide an electronic communications network;
 - (iii) a code operator is deemed to be unable to pay his debts (as shall be determined in accordance with Regulation 16(11) of the Regulations);
 - (iv) a code operator enters into administration, receivership or liquidation;
 - (v) any person takes action for the voluntary winding-up, dissolution, bankruptcy or sequestration of a code operator;
 - (vi) 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;
 - (vii) any order is made for the compulsory winding-up, dissolution, bankruptcy or sequestration of a code operator; and
 - (g) **“Specified Liabilities”** are defined in regulation 16(10) of the Regulations.
10. Except in so far as the context otherwise requires, words or expressions in this Performance Bond shall have the meaning ascribed to them in this Performance Bond and otherwise any word or expression shall have the meaning it has in the Regulations.
11. This Performance Bond 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.

Executed as a Deed [in the appropriate manner]