



Consultation 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 draft
specimen performance bond

Publication date: 10 December 2009

Closing date for responses: 14 January 2010

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Section 1

Explanatory statement

Introduction

- 1.1 The purpose of this document is to seek views on amendments proposed 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 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 (“Code powers”).
- 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 available for use by providers of ECNs by way of a direction. Paragraph 17 of Schedule 18 to the Act deems those persons granted Code powers under the licensing regime before entry into force of the Act to have been granted Code powers by way of a direction 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, in summary, costs or expenses incurred by authorities in removing apparatus and / or making good the public highway should the Code operator cease to trade. 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 upon the occurrence of a relevant event;
 - 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 “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.
- “Relevant event” is defined in Regulation 16(10) and, in short, refers to a Code operator ceasing to trade.

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 Ofcom has emphasised, in relation to both specimen bonds it has published, that they are for illustrative purposes only and that 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.
- 1.13 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 has therefore

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

³ See http://www.ofcom.org.uk/telecoms/loi/e_c_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/

drafted a new specimen performance bond (the “new specimen bond”) which is set out in Section 2.

The new specimen bond

- 1.14 We are not proposing to alter fundamentally the content of the 2004 specimen bond. Rather, the proposed changes are intended to make the new specimen bond easier for both Code operators and financial institutions to understand and implement.
- 1.15 The key changes to the specimen bond include:
- clarifying the definition of Appropriate Authorities as beneficiaries of the bond;
 - making clear that the bond requires execution as a deed; and
 - ensuring that payments to Appropriate Authorities are available on demand under the bond.
- 1.16 We are proposing to publish the new specimen bond as part of our guidance for Code operators on the funds for liabilities section of our website. We emphasise that should the new specimen bond be published it will be provided for illustrative purposes only. Each Code operator should seek its own independent legal advice on the precise drafting of the bond to ensure that the Code operator fulfils its statutory obligations under Regulation 16.
- 1.17 A bond is not the only means of complying with Regulation 16 in ensuring that sufficient funds are available to meet specified liabilities. As suggested by Regulation 16(6), Code operators may use an insurance policy, bond, guarantee or other instrument.
- 1.18 Ofcom does not consider that the replacement of the specimen bond provided for illustrative purposes to Code operators should affect the ability of instruments based on the 2004 specimen bond to meet the requirements of Regulation 16.

Consultation

- 1.19 Ofcom is seeking comments on the proposed new specimen bond as set out in Section 2. Comments are welcome by **14 January 2010**. Subject to comments, Ofcom intends to publish the new specimen bond on the funds for liabilities section of its website.

Section 2

Draft 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; and
- (c) 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 you 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]

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document by **5pm on 14 January 2010**.
- A1.2 Please email alistair.law@ofcom.org.uk attaching your response as a Microsoft Word document. Please also include a consultation response coversheet (see **Annex 3**), to indicate whether or not your response includes information that you consider to be confidential.
- A1.3 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Ali Law
4th Floor
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.4 Responses may alternatively be faxed to 020 7783 4109, marked for the attention of Ali Law.
- A1.5 We do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses.
- A1.6 It would be helpful if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact or Ali Law on 020 7981 3118.
- A1.8 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Confidentiality

- A1.9 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.10 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish

all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/account/disclaimer/>

Next steps

- A1.12 After **14 January 2010**, subject to respondents' views, Ofcom proposes to publish a copy of the new specimen bond on the funds for liabilities section of its website along with a statement outlining its reasons for doing so.

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)