



Direction under section 106 of
the Communications Act 2003
suspending the application of the
Electronic Communications Code
in the case of Infolines Public
Networks Ltd due to repeated and
serious contraventions of
Regulation 16 of the Electronic
Communications Code
(Conditions and Restrictions)
Regulations 2003

Direction and explanatory statement

Issue date: 5 November 2009

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Section 1

Direction under section 106(3) of the Communications Act 2003 suspending the application of the Electronic Communications Code in the case of Infolines Public Networks Ltd (“Infolines”)

A notification of this proposal was published on 22 September 2009

Whereas:

- A. On 1 September 2000, the Secretary of State granted Infolines a licence under section 7 of the Telecommunications Act 1984 (the “1984 Act”) authorising Infolines to run a telecommunications system and applying the telecommunications code (as set out in Schedule 2 to the 1984 Act) (the “Code”) to Infolines;
- B. The Code was subsequently amended by Schedule 3 to the Communications Act 2003 (the “Act”);
- C. By virtue of paragraph 17 of Schedule 18 to the Act, Infolines is treated after 25 July 2003 as a person in whose case the Code applies by virtue of a direction under section 106(3) of the Act;
- D. On 22 September 2009, Ofcom published a notification of their proposal to suspend the application of the Code under section 113(4) to the extent permitted by section 113(5) by way of a further Direction under section 106 in accordance with sections 107 and 113 of the Act;
- E. Ofcom have considered every representation made to them about this Direction;

NOW, therefore, pursuant to section 106 of the Act, Ofcom make the following Direction:

The application of the Code to Infolines for the purposes of the provision by Infolines of an electronic communications network in the United Kingdom is suspended under section 113(4) of the Act to the extent permitted by section 113(5) until such time as Ofcom may revoke this Direction.

Definitions and interpretation

1. In this Direction, unless the contrary intention appears:

“Act” means the Communications Act 2003;

“Infolines” means Infolines Public Networks Ltd (registered company number 02979944);
and

“Ofcom” means the Office of Communications.

2. In this Direction, unless the contrary intention appears, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded and expressions which relate to those referred to in this Direction shall be construed accordingly.
3. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.
4. This Direction shall take effect on the day it is published.

Neil Buckley
Director of investigations

**A person authorised by Ofcom under paragraph 18 of the Schedule to the
Office of Communications Act 2002**

5 November 2009

Section 2

Explanatory statement

The Electronic Communications Code

- 2.1 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”).
- 2.2 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.
- 2.3 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 under section 106(3) of the Act. 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 from Ofcom under section 106.
- 2.4 On 1 September 2000, Infolines Public Networks Limited (“Infolines”), company number 02979944, was granted a licence by the Secretary of State under section 7 of the 1984 Act authorising Infolines to run a telecommunications system and applying the Code to Infolines. As set out above, following the entry into force of the Act, Infolines is treated as person in whose case the Code applies by virtue of a direction under section 106 of the Act.

Regulation 16

- 2.5 Under section 109(1) of the Act, the Secretary of State may make the effect of the Code subject to such conditions and restrictions as may be contained in regulations. In the exercise of her powers under section 109(1) of the 2003 Act, on 2 October 2003 the Secretary of State made the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (the “Regulations”).¹ The Regulations came into force on 23 October 2003.
- 2.6 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

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

upon them by paragraph 9 of the Code upon the occurrence of a relevant event. This is known as the “funds for liabilities regime”.

- 2.7 “Relevant event” is defined in Regulation 16(10) and, in short, refers to a Code operator ceasing to trade.² Paragraph 9 is the part of the Code that allows Code operators to carry out street works without needing a specific licence to do so under the NRSWA 1991 (see paragraph 2.1 above).
- 2.8 Streets, or in Scotland roads, (“public highways”) are run by appropriate authorities and traffic authorities (“authorities”) and these authorities are responsible for, among other things, ensuring that public highways are kept in a good state of repair and accessible. In general, therefore, it is necessary for anyone wishing to place anything on public highways or wishing 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 of any description on public highways and who can break up or open public highways.
- 2.9 However, Code operators do not have to obtain a specific licence to access public highways and they are permitted, among other things, to install and maintain apparatus that are on, under, over or across public highways. A primary aim of the funds for liabilities regime is to ensure that authorities do not incur the cost of removing apparatus should a Code operator cease to operate, by requiring Code operators to put in place a fund sufficient to meet the costs and expenses of removal.
- 2.10 The specified liabilities referred to in paragraph 2.6 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.
- 2.11 Regulation 16 contains a number of specific requirements to ensure that Code operators meet their obligations under the funds for liabilities regime:
- 16(1)(a) of the Regulations contains the general provision requiring Code operators to ensure that sufficient funds are available to meet specified liabilities;
 - 16(1)(b) of the Regulations requires Code operators to provide Ofcom with a certificate on 1 April each year;
 - 16(2)(a) of the Regulations states that, in the case of a company, the certificate must be signed by the director or a company secretary;
 - 16(3) of the Regulations states that the certificate shall include a statement that in the reasonable opinion of the board, in the case of a company, the Code

² “Relevant event” is defined in Regulation 16(10) as follows: 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.

operator has fulfilled his duty to put in place sufficient funds to meet the specified liabilities;

- 16(5)(a) of the Regulations requires Code operators to state on the certificate the amount of the funds which have been provided for;
- 16(5)(b) of the Regulations requires that the certificate states the systems and processes which enabled the board to form the opinion referred to in Regulation 16(3); and
- 16(6) of the Regulations states that the certificate shall be accompanied by a copy of any insurance policy, bond, guarantee or other instrument which will provide the funds.

Infolines

- 2.12 Ofcom understands that Infolines' primary business includes the provision of managed payphones, which are likely to be located on public highways or at transport hubs. In terms of the Regulations, payphones located on public highways are relevant and should be covered by the funds for liabilities regime.
- 2.13 Infolines, as a Code operator, is required to comply with the conditions and restrictions set out in the Regulations. As the Regulations came into force on 23 October 2003, Ofcom should have received a certificate from Infolines on 1 April of each of the years 2004, 2005, 2006, 2007, 2008 and 2009. It has not received any one of these certificates or any accompanying documentation.

The 2006 Notification

- 2.14 On 24 August 2006 Ofcom issued a notification under section 110 of the Act to Infolines (the "2006 Notification")³ determining that Infolines had failed to provide Ofcom with a certificate attesting that it had fulfilled its duty under Regulation 16(1)(a), in contravention of Regulation 16(1)(b), for the years to 1 April 2004, 1 April 2005 and 1 April 2006, and had failed to provide Ofcom with copies of any insurance policy, bond or guarantee or other instruments which will provide the funds referred to in Regulation 16(6), in contravention of Regulation 16(6) (the "Notified Contraventions").
- 2.15 The 2006 Notification required Infolines to take action to comply with Regulation 16 and to remedy any consequences of its contravention by 25 September 2006. Infolines did not take the action required by the 2006 Notification by 25 September 2006 or at all.

The 2007 Enforcement and Penalty Notification

- 2.16 On 20 February 2007 Ofcom issued a notification to Infolines under sections 111 and 112 of the Act ("the 2007 Enforcement and Penalty Notification").⁴ This required Infolines, by 22 March 2007, to:
- a. obtain an insurance policy, bond, guarantee or other instrument from an appropriate financial institution to meet the specified liabilities that might arise should a relevant event occur;

³ See: http://www.ofcom.org.uk/telecoms/loi/e_c_c/ffl/infolines.pdf

⁴ http://www.ofcom.org.uk/telecoms/loi/e_c_c/ffl/enforcement.pdf

- b. provide Ofcom with a copy of such insurance policy, bond, guarantee or other instrument that provides for the funds; and
 - c. provide Ofcom with a certificate that shall confirm that Infolines has, in the reasonable opinion of its board, put in place sufficient funds to meet the specified liabilities.
- 2.17 The 2007 Enforcement and Penalty Notification also imposed a financial penalty of £7,500 on Infolines in respect of the Notified Contraventions, to be paid no later than 30 days after the date of giving the notification.
- 2.18 Infolines failed to comply with the 2007 Enforcement and Penalty Notification.

The July 2009 Notification

- 2.19 Following receipt of concerns that Infolines was applying to local authorities to install further payphones⁵ despite its failure to put in place an instrument to provide funds in compliance with Regulation 16, on 15 April 2009 Ofcom wrote to Infolines asking for confirmation of the arrangements it had in place to meet its Regulation 16 obligations.
- 2.20 On 1 May 2009 Phil Pearson, Director of Infolines, responded to Ofcom's letter of 15 April 2009. The response failed to provide the requested confirmation of Infolines' arrangements for meeting its obligations, instead stating that Infolines was "not installing or maintaining any new electronic communications apparatus on the highway".⁶
- 2.21 On 5 May 2009 Ofcom opened an investigation to confirm whether or not Infolines was compliant with Regulation 16.⁷
- 2.22 On 22 May 2009 Ofcom issued a formal notice to Infolines under section 135 of the Act requiring Infolines to provide to Ofcom, by no later than 1 June 2009, confirmation of whether or not it had ensured that sufficient funds are available to meet any specified liabilities as defined in Regulation 16 and evidence that those funds are available. Ofcom did not receive a response to this section 135 notice.
- 2.23 On 10 July 2009 Ofcom issued a further notification to Infolines under section 110 of the Act (the "July 2009 Notification") determining that there were reasonable grounds for believing that that Infolines has contravened and is contravening Regulation 16.⁸ Specifically, Ofcom determined that Infolines failed to comply with Regulation 16(1) as required by the 2006 Notification and further failed to provide Ofcom with a certificate as required by Regulation 16(1)(b) on 1 April 2007, 1 April 2008 and 1 April 2009, and that Infolines also failed to provide Ofcom with copies of any insurance

⁵ In addition to information received directly from the Royal Borough of Kensington and Chelsea in February 2009, the media has reported on the expansion of Infolines' public payphone network. See Media Week article *Infolines Rolls Out New Payphone Ad Panels* 10 July 2008 (<http://www.mediaweek.co.uk/news/search/830997/Infolines-rolls-new-payphone-ad-panels/>) and a comment in Media Week of 18 August 2008 from "Phil Pearson, Director, Infolines" (<http://www.mediaweek.co.uk/news/search/840111/Inbox---19-August-2008/>)

⁶ See Annex 3 of the July 2009 Notification

http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_01016/Infolines_s110_16070_9.pdf

⁷ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_01016/

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http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_01016/Infolines_s110_16070_9.pdf

policy, bond or guarantee or other instrument which will provide the funds referred to in Regulation 16(1)(a) in contravention of Regulation 16(6).

- 2.24 The July 2009 Notification required Infolines to comply with Regulation 16(1) by:
- a. ensuring that sufficient funds are available to meet the specified liabilities which may arise from the exercise of rights conferred upon it by paragraph 9 of the Code as required by 16(1)(a) of the Regulations;
 - b. providing Ofcom with a certificate confirming that it has put in place sufficient funds and ensuring that it does so in the manner specified by 16(2) to 16(6) of the Regulations; and
 - c. remedying any consequences of its breach of Regulation 16(1).
- 2.25 In the July 2009 Notification, Ofcom stated that should Infolines fail to comply with Regulation 16(1) by taking the steps set out at paragraph 2.24 above Ofcom would consider further action including, if appropriate, suspension of Infolines' Code powers under section 113(4) of the Act.
- 2.26 In accordance with the statutory period set out in section 110(4) of the Act, Infolines had until 14 August 2009 by which to comply with the July 2009 Notification and/or to make representations to Ofcom about matters contained in it.
- 2.27 Infolines did not comply with the July 2009 Notification and Ofcom received no representations from Infolines about matters contained in it.

Application for striking off

- 2.28 On 14 August 2009 Infolines submitted an application to Companies House to be struck off the register of companies. In applying to be struck off the Director of Infolines confirmed that in the past three months the company has not, among other things, traded or otherwise carried on business.
- 2.29 On 1 September 2009 the Registrar of Companies gave notice in the London Gazette that, unless cause is shown to the contrary, at the expiration of three months from 1 September 2009 Infolines will be struck off the register and the company will be dissolved.
- 2.30 On 14 October 2009 the action to strike Infolines off the register of companies was temporarily suspended as an objection had been received by the Registrar.

Suspension of the Code

- 2.31 Section 113(4) of the Act provides that Ofcom may, to the extent specified in section 113(5), suspend the application of the Code in any person's case if:
- a. the Code has been applied by a direction under section 106 in that person's case; and
 - b. that person is a person in whose case there have been repeated and serious contraventions of requirements imposed by virtue of restrictions or conditions under section 109.

- 2.32 Section 113(5) provides that the extent of a suspension under section 113(4) must not go beyond:
- a. its application for the purposes of ECNs, or parts of such a network, which are not yet in existence at the time of the suspension;
 - b. its application for the purposes of conduit systems, or parts of such systems, which are not yet in existence or not yet used for the purposes of ECNs; and
 - c. its applications for other purposes in circumstances in which the provision of an ECN, or part of such a network, would not have to cease if its application for those purposes were suspended.
- 2.33 Section 113(11) provides that the suspension, in a person's case, of the application of the Code does not, except so far as otherwise provided by a scheme contained in an order under section 117:
- a. affect (as between the original parties to it) any agreement entered into for the purposes of the Code or any agreement having effect in accordance with it;
 - b. affect anything done under the Code before the suspension of its application; or
 - c. require the removal of, or prohibit the use of, any apparatus lawfully installed on, in or over any premises before that suspension.

The September 2009 Notification

- 2.34 Following Infolines' failure to comply with the July 2009 Notification, on 22 September 2009 Ofcom issued a formal notification under section 107(6) of the Act (the "September 2009 Notification"), in which it proposed to suspend the application of the Code in Infolines' case under section 113(4) of the Act, to the extent permitted by section 113(5), by way of a further direction under section 106 of the Act.
- 2.35 In the September 2009 Notification, Ofcom set out its consideration that there had been repeated and serious contraventions of requirements imposed by virtue of restrictions or conditions under section 109 of the Act in the case of Infolines.

"Repeated"

- 2.36 Ofcom considers that Infolines' contraventions of the Regulations are repeated for the following reasons:
- a. Infolines has failed to provide Ofcom with a certificate on 1 April attesting that it has fulfilled its duty under Regulation 16(1)(a), in contravention of Regulation 16(1)(b), for the years 2004, 2005, 2006, 2007, 2008 and 2009. As such, Infolines has repeatedly contravened Regulation 16(1);
 - b. Infolines has also failed to provide Ofcom with copies of any insurance policy, bond or guarantee or other instrument which will provide the funds referred to in Regulation 16(1)(a) for each of the years 2004, 2005, 2006, 2007, 2008 and 2009. As such, Infolines has repeatedly contravened Regulation 16(6); and
 - c. Infolines has repeatedly failed to comply with notifications relating to its obligations under Regulation 16(1) and Regulation 16(6) (the 2006 Notification, the 2007 Enforcement and Penalty Notification and the July 2009 Notification).

“Serious”

- 2.37 Ofcom considers that Infolines’ contraventions of requirements imposed by virtue of any restrictions or conditions under section 109 of the Act are serious for the following reasons:
- a. Infolines has contravened and is continuing to contravene Regulation 16 by failing to provide Ofcom with a certificate attesting that it has fulfilled its duty under Regulation 16(1)(a), and failing to provide Ofcom with copies of any insurance policy, bond or guarantee or other instrument which will provide the funds referred to in Regulation 16(1)(a) for each of the six years since Regulation 16 came into force in October 2003;
 - b. Infolines has not taken steps to end its contravention despite enforcement action by Ofcom in the form of the 2006 Notification, the 2007 Enforcement and Penalty Notification and the July 2009 Notification;
 - c. As set out in paragraph 2.28, Infolines has submitted an application to Companies House to be struck off the register. In making this application, the Director of Infolines has confirmed that Infolines has not traded or otherwise carried on business in the past three months. A relevant event occurs if a Code operator ceases to provide an ECN. Infolines’ contravention of Regulation 16 may result in authorities incurring costs or expenses in removing electronic communications apparatus and making good damage caused by its removal which they may be unable to recover from Infolines.
- 2.38 Ofcom stated that it did not propose to make an order under section 117 in the case of Infolines.
- 2.39 Written views and comments on the issues raised in the September 2009 Notification were invited by 26 October 2009.
- 2.40 In accordance with section 114(1) of the Act, on 22 September 2009 Ofcom also gave notice to Infolines of its intention to suspend the application of the Code in the case of Infolines and provided Infolines with an opportunity of making representations about the proposal and of proposing steps for remedying the situation that had given rise to the proposed suspension. Infolines had until 26 October to make representations and proposals to Ofcom, as required by section 114(2) of the Act.
- 2.41 Ofcom has received no representations or proposals from Infolines regarding the matters raised in the September 2009 Notification.
- 2.42 Ofcom received two responses from other parties to the September 2009 Notification. The full responses can be viewed on Ofcom’s website⁹.

Summary of comments received

- 2.43 Both respondents were authorities responsible for, among other things, ensuring that public highways are kept in a good state of repair and accessible. Both stated that Infolines had installed payphones on public highways in areas they administered.
- 2.44 The respondents noted that Infolines had failed to abide by relevant planning processes and obligations when installing payphones.

⁹ See http://www.ofcom.org.uk/consult/condocs/draft_direction_infolines/responses1/

- Transport for London (“TfL”) said that Infolines did not comply with its requirements under the NRSWA 1991.
 - Royal Borough of Kensington and Chelsea (“RBKC”) highlighted that two payphones in RBKC were installed despite prior notification applications made to it by Infolines having been rejected due to inadequate information.
- 2.45 RBKC noted that a number of Infolines payphone sites in RBKC did not contain operating telephones, and suggested that this demonstrated Infolines’ “lack of commitment to providing a telephone service”.
- 2.46 TfL noted that some payphones were regarded as dangerous and/or unsightly and that several did not contain working telephones. The response supported Ofcom’s proposal to suspend the application of the Code in Infolines’ case, suggesting that Infolines possessed a “track record of flagrant and persistent failure to comply with its legal obligations”. It expressed concern at Infolines’ contravention of Regulation 16, particularly given Infolines’ application to be struck off the register of companies.

Ofcom’s response to the comments

- 2.47 Ofcom notes the support of both respondents for the suspension of the application of the Code in the case of Infolines, and their concern about the status and maintenance of Infolines payphones.
- 2.48 Ofcom acknowledges the respondents’ comments about Infolines’ failure to comply with relevant planning rules in its applications to install payphones. This Direction relates to contraventions by Infolines of Regulation 16. Ofcom will consider whether it is appropriate to take any other action under the Act in respect of the issues raised by these comments.

Conclusion

- 2.49 Ofcom considers that there have been repeated and serious contraventions of requirements imposed by virtue of restrictions or conditions under section 109 of the Act in the case of Infolines. Ofcom has considered all representations made to it in response to the September 2009 Notification.
- 2.50 Ofcom considers that it is appropriate to suspend the application of the Code in the case of Infolines under section 113(4) of the Act to the extent specified in section 113(5) because of the aforementioned contraventions.