



Enforcement and penalty notifications under sections 111 and 112 of the Communications Act 2003

A notification given to Infolines Public Networks Limited (“Infolines”) by the Office of Communications (“Ofcom”) in relation to a contravention of Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003

Notice and
Explanatory
Statement
20 February 2007

ENFORCEMENT NOTIFICATION UNDER SECTION 111 OF THE COMMUNICATIONS ACT 2003 (“THE ACT”) AND PENALTY IMPOSED UNDER SECTION 112 OF THE ACT ON INFOLINES PUBLIC NETWORKS LIMITED (“INFOLINES”) IN RELATION TO A CONTRAVENTION OF REGULATION 16 OF THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

Ofcom’s determination

1. On 24 August 2006, Ofcom issued a Notification to Infolines Public Networks Limited¹ under section 110 of the Act (“the Section 110 Notification”). The Section 110 Notification stated that Ofcom had reasonable grounds for believing that Infolines had contravened and was continuing to contravene Regulation 16 of The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (“the Regulations”). Specifically:
 - a. Infolines is a Code operator for the purposes of the Regulations as defined therein and has ∞ public payphones (the “Relevant Infrastructure”) installed on public highways in the UK.
 - b. Infolines has an obligation under Regulation 16(1)(a) 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 as defined in the Regulations, from the exercise of rights conferred upon the Code operator by paragraph 9 of the electronic communications code.
 - c. Liabilities may arise under the New Roads and Street Works Act 1991 in relation to all or part of the Relevant Infrastructure.
 - d. Infolines has an obligation under Regulation 16(1)(b) and 16(6) to provide Ofcom on 1st April each year with a certificate, attesting that it has fulfilled its duty under Regulation 16(1)(a), accompanied by copies of any insurance policy, bond, guarantee or other instrument which will provide the funds referred to in Regulation 16(1)(a).
 - e. Infolines has failed to provide Ofcom with a certificate attesting that it has fulfilled its duty under Regulation 16(1)(a) to ensure that sufficient funds are available to meet the specified liabilities (in contravention of Regulation 16(1)(b)) for any of the years commencing 1st April 2004, 1st April 2005 and 1st April 2006.
 - f. Infolines has failed to provide Ofcom with copies of any insurance policy, bond, guarantee or other instrument which will provide the funds referred to under Regulation 16(1)(a) (in contravention of Regulation 16(6)).
2. The Section 110 Notification provided Infolines with an opportunity of doing the following things:
 - a. making representations about the matters notified;
 - b. coming into compliance with the requirements to which the Section 110 Notification related and which it was contravening; and
 - c. remedying the consequences of the notified contraventions.
3. Pursuant to section 110(4) of the Act, Ofcom specified a period of one month (until 25 September 2006) during which Infolines had the opportunity of doing things (a), (b) and (c).

¹ Registered company number 02979944

4. The Section 110 Notification explained that if Infolines failed to comply with the requirements notified to it, Ofcom may issue an enforcement notification under section 111 of the Act and/or impose a penalty under section 112 of the Act.
5. Infolines responded on 25 September 2006. In its representations, Infolines did not dispute that it was contravening the Regulations. During the period from September 2006 to January 2007, Ofcom met with and had numerous contacts with Infolines as noted in the accompanying Explanatory Statement.
6. Despite repeated assurances, as referred to above, Infolines has failed to secure a bond and remains in contravention of the notified requirements. Further, it has been unable to explain to Ofcom's satisfaction the reasons for the protracted delay and why it still has not been able to secure a bond from its bond holder of choice or, failing that, from an alternative financial institution.
7. Ofcom, having taken account of the representations made to it by Infolines, and having carefully considered the available evidence (including information provided to Ofcom since the date of the Section 110 Notification and following expiry of the Opportunity Period), now decides that it is satisfied that Infolines:
 - a. has been in contravention, in one or more of the respects notified, of its obligations under Regulation 16(1)(a) and (b) and Regulation 16(6) (which obligations were specified in the Section 110 Notification); and
 - b. has not, during the period allowed under section 110, taken all such steps as Ofcom considers appropriate –
 - (i) for complying with that requirement; and
 - (ii) for remedying the consequences of the notified contravention of that requirement.
8. Specifically, Infolines has:
 - a. failed to ensure that sufficient funds are available to meet its specified liabilities in accordance with its duty under Regulation 16(1)(a); and
 - b. failed to provide Ofcom with a certificate in accordance with the requirement under Regulation 16(1)(b) attesting that it has fulfilled its duty under Regulation 16(1)(a) and accompanied, as required under Regulation 16(6), by copies of any insurance policy, bond, guarantee or other instrument which would provide the funds referred to in Regulation 16(1)(a).
9. Therefore, and pursuant to section 111(3) of the Act, Infolines is required, 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;
 - 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.

10. In addition, Ofcom has decided to impose a financial penalty of £7,500 on Infolines under section 112 of the Act in respect of its contravention of Regulation 16.
11. Payment of that penalty must be made no later than 30 days after the date of the giving of this Notification.
12. The reasons for Ofcom's conclusions are set out in the Explanatory Statement accompanying this Notification. Supporting correspondence is set out at Annex 1.

Statutory provisions

13. Section 109 of the Act grants the Secretary of State the power to make the application of the electronic communications code in any person's case subject to restrictions and conditions.
14. On 3 October 2003, the Secretary of State laid the Regulations before Parliament making the application of the electronic communications code in any person's case subject to conditions and restrictions. The Regulations came into force on 23 October 2003.
15. Regulation 16(1) requires that:
 - (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.*
16. Regulation 16(6) requires the certificate to be accompanied by copies of any insurance policy, bond, guarantee or other instrument which will provide the funds in paragraph (1)(a) of regulation 16. Regulation 16(9) requires a code operator to inform Ofcom in writing immediately if he becomes aware of any circumstance which causes him to be unable to fulfil his duty.
17. Section 110 of the Act allows Ofcom to issue a notification to a person where Ofcom has reasonable grounds for believing that that person is contravening, or has contravened, a requirement imposed by virtue of any restriction or conditions set under section 109 of the Act.

18. Section 111 of the Act allows Ofcom to issue an enforcement notification to the notified provider if Ofcom is satisfied –
- a. that he has been in contravention, in one or more of the respects notified, of a requirement specified in the notification under section 110; and
 - b. that he has not, during the period allowed under section 110, taken all such steps as Ofcom considers appropriate –
 - (i) for complying with that requirement; and
 - (ii) for remedying the consequences of the notified contravention of that requirement.
19. Section 112 of the Act allows Ofcom to impose a penalty on the notified provider if he –
- a. has been in contravention, in any of the respects notified, of a requirement specified in the notification under section 110; and
 - b. has not, during the period allowed under that section, taken all such steps as Ofcom considers appropriate –
 - (i) for complying with the notified requirement; and
 - (ii) for remedying the consequences of the notified contravention of that requirement.
20. The amount of a penalty imposed under section 112(6) of the Act is to be such amount not exceeding £10,000 as Ofcom determine to be –
- a. appropriate; and
 - b. proportionate to the contravention in respect of which it is imposed.

Interpretation

21. Words or expressions used in this Notification have the same meaning as in the Regulations and the Act except as otherwise stated in this Notification.

David Stewart

Director of Investigations

Being a person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

20 February 2007

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Section 1

Summary

- 1.1 The Electronic Communications Code (“the Code”) grants Code operators various powers to install and maintain electronic communications networks. Amongst other things, Code operators:
 - have the power to install apparatus under, over, in, on, along or across streets without needing a specific licence to do so under the NRSWA 1991² (paragraph 9 of the Code);
 - benefit from important exemptions under The Town and Country Planning (General Permitted Development) Order 1995 as amended; and
 - have the right to apply to the Court conferring a right, where agreement cannot be reached, to execute works on private land (paragraph 5 of the Code).
- 1.2 Operators using Code powers are required by the Regulations³ to have in place sufficient funds to meet specified liabilities and provide Ofcom with a certificate or an insurance policy, bond, guarantee or other instrument (for ease of reference, a “bond”) (as required by the Regulations).
- 1.3 Infolines is a licensee under the former regime and has Code powers granted to it. Since 2 October 2003, when the Regulations took effect, Infolines, as a Code operator, has been required to provide a bond. Ofcom should therefore have received a certificate from Infolines on 1 April 2004, 1 April 2005 and 1 April 2006⁴.
- 1.4 Infolines has not provided Ofcom with a bond as required by the Regulations. Infolines has repeatedly stated that it intends to put in place funds to meet any specified liabilities (that is, a bond), but it has not done so.
- 1.5 At this time, therefore, relevant authorities have no protection should a Relevant Event, as defined in the Regulations, occur, significantly undermining the protection afforded relevant public authorities under the Regulations.
- 1.6 On 24 August 2006, Ofcom issued a notification under section 110 of the Act requiring Infolines to:
 - a) ensure that it put in place sufficient funds 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; and
 - b) provide Ofcom with a certificate confirming that it had put in place sufficient funds and to ensure that it had done so in the manner specified by 16(2) to 16(6) of the Regulations (that is, to provide a bond); and
 - c) remedy any consequences of its breach of Regulation 16.

² New Roads and Street Works Act 1991

³ The Electronic Communications Code (Conditions and Restrictions) Regulations 2003

⁴ The instrument used to provide for funds may cover a period longer than one year and, if it did, it need not be resubmitted annually.

- 1.7 During the period from receiving the section 110 notification until the date of this Notification, Infolines:
- (a) has not disputed that it is in contravention of the requirement to have a bond in place;
 - (b) has given numerous assurances to Ofcom that a bond would be put in place; and
 - (c) has not obtained a bond.
- 1.8 Ofcom has issued Infolines with an enforcement notification requiring it to obtain a bond.
- 1.9 Ofcom has also fined Infolines £7,500 (the statutory maximum is £10,000).

Section 2

Background

Summary

- 2.1 The Electronic Communications Code (the “Code”) 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 apparatus⁵. Powers granted under the Code (“Code powers”) allow operators to benefit from certain exemptions under Town and Country Planning legislation and also entitle them to carry out street works under the New Roads and Street Works Act 1991 or, in Northern Ireland, the Street Works (Northern Ireland) Order 1995 (together “the NRSWA 1991”) without needing to apply for a licence to do so.
- 2.2 Ofcom is permitted to grant Code powers by way of a direction under section 106 of the Act to providers of ECNs and providers of conduit systems available for use by providers of ECNs. Those granted Code powers when the licensing regime was still in force retained those powers under the Act as paragraph 17 of Schedule 18 to the Act deems those persons to have been granted Code powers by way of a direction made by Ofcom under section 106 of the Act.
- 2.3 On 1 September 2000, the Secretary of State granted Infolines Public Networks Limited (“Infolines”) a licence under section 7 of the Telecommunications Act 1984 (the “1984 Act”) authorising Infolines to run a telecommunications system (as defined in the 1984 Act) and applying the Code to Infolines. As set out above, following the entry into force of the Act, Infolines is treated as a person in whose case the Code applies by virtue of a direction under section 106 of the Act (“Code operator”).

The Code

- 2.4 As set out above, Code operators benefit from certain rights and exemptions under planning legislation. These include the right to install apparatus for the purposes of running their ECN on, under or over public highways without needing to apply for a licence to do so under the NRSWA 1991. However, as a quid pro quo for the ability to carry out street works, Code operators are required to put in place funds to meet any specified liabilities.

Funds to meet liabilities

- 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 and, in that case, the Code would have effect in a person’s case under section 106 of the Act subject to any such conditions and restrictions.
- 2.6 In the exercise of her 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 (SI 2003 No.2553) (the “Regulations”).

⁵ The Code is set out in Schedule 2 to the Telecommunications Act 1984 as amended by Schedule 3 to the Communications Act 2003.

- 2.7 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 should a relevant event occur⁶. Paragraph 9 of the Code allows Code operators to carry out street works without the need to apply for a licence to do so under the NRSWA 1991. Such funds could be demanded by appropriate authorities to cover costs or expenses reasonably incurred in removing any electronic communications apparatus once a relevant event occurred.
- 2.8 Regulation 16(1)(b) of the Regulations requires Code operators to send Ofcom a certificate by 1 April every year certifying that sufficient funds are available to meet any specified liabilities, as required by Regulation 16(1)(a), and to send Ofcom copies of any insurance policy, bond, guarantee or other instrument which will provide for the funds.

Notification under section 110 of the Act

- 2.9 Section 110 of the Act sets out the procedure that Ofcom must follow in commencing enforcement action in relation to the contravention of any conditions and restrictions imposed by the Secretary of State under section 109 of the Act. Section 110 of the Act states that Ofcom may issue a notification to a Code operator where it has reasonable grounds for believing that that person is contravening, or has contravened, a requirement imposed by virtue of any restrictions or conditions under section 109 of the Act.
- 2.10 Ofcom had reasonable grounds for believing that Infolines contravened, and was continuing to contravene, the conditions and restrictions contained in Regulation 16 and therefore issued a section 110 notification to Infolines on 24 August 2006 (“the Section 110 Notification”).
- 2.11 The Section 110 Notification explained that Ofcom had reasonable grounds for believing that Infolines had been, and continued to be, contravening restrictions and conditions contained in Regulation 16. Infolines had not provided Ofcom with a certificate or accompanying copy of an insurance policy, bond, guarantee or other instrument as required by Regulation 16 and had therefore failed to comply with conditions and restrictions set out in the Regulations.
- 2.12 The Section 110 Notification required Infolines to:
- a) ensure that it put in place sufficient funds 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; and
 - b) provide Ofcom with a certificate confirming that it had put in place sufficient funds and to ensure that it had done so in the manner specified by 16(2) to 16(6) of the Regulations; and
 - c) remedy any consequences of its breach of Regulation 16.
- 2.13 In accordance with the statutory period set out in section 110(4) of the Act, Infolines was given a period of one month during which it had an opportunity to:

⁶ “Relevant Event” is defined in paragraph 10 of Regulation 16 of The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 and, in short, refers to a Code operator ceasing to trade.

- (a) make representations about the matters notified;
- (b) come into compliance with the requirements to which the Section 110 Notification related and which it was contravening; and
- (c) to remedy the consequences of the notified contraventions.

Accordingly, Infolines was given until 25 September 2006 to respond to Ofcom ("the Opportunity Period").

- 2.14 The Section 110 Notification further explained that if Infolines did not comply with Regulation 16 by meeting the notified requirements in full, and/or did not remedy any consequences of its contravention, Ofcom could decide to issue an enforcement notification under section 111 of the Act and/or impose a penalty under section 112 of the Act.
- 2.15 Infolines responded to Ofcom in confidence on 25 September 2006. The company did not dispute that it had contravened and was continuing to contravene Regulation 16(1)(a) and (b). It stated, however, that it was seeking to put into place a suitable instrument for the purposes of Regulation 16(1)(a) and 16(6).
- 2.16 Infolines cited difficulties in obtaining insurance cover, a bond or a suitable guarantee at a cost which would be proportionate to the costs of operating its street payphones.
- 2.17 On 10 October 2006, Ofcom met Infolines. ✂
- 2.18 ✂
- 2.19 Ofcom sent Infolines an email on the same day (10 October 2006) re-emphasising that the matter needed to be resolved and that Ofcom may take action further to the Section 110 Notification.
- 2.20 On 13 October 2006, Infolines provided Ofcom with the methodology that it had put together to calculate any potential liability that might arise. Infolines provided this as a first step towards securing a suitable bond.
- 2.21 On 25 October 2006, Ofcom sent an email to Infolines in which it asked what progress had been made since 13 October.
- 2.22 On 26 October 2006, Infolines responded to Ofcom explaining that it had opened discussions with its bond holder of choice in relation to securing a suitable a bond.
- 2.23 On 7 November 2006, Ofcom sent a further email to Infolines enquiring why Ofcom still had not seen any evidence from Infolines to show that the matter was being dealt with expeditiously.
- 2.24 On 10 November 2006, Infolines confirmed verbally that its bond holder of choice had agreed to put a bond in place.
- 2.25 On 13 November 2006, Infolines sent Ofcom copies of correspondence that it had sent to its bond holder of choice attempting to secure the bond.
- 2.26 On 4 December 2006, Infolines explained that the matter remained in the hands of its bond holder of choice. Ofcom again queried the delay and reiterated that it

expected the matter to be progressed with the utmost urgency. Infolines stated that it believed the bond could take some time to execute, as the matter was in the hands of its bond holder of choice, but undertook to do what it could to bring the matter to a conclusion as soon as possible.

- 2.27 On 12 December 2006, Infolines sent Ofcom a further email in which the company stated that it would pursue the matter with its bond holder of choice vigorously. The company acknowledged that Ofcom would review the matter in January 2007.
- 2.28 On 8 January 2007, Ofcom explained verbally that in view of the sustained lack of progress the case was to be reviewed internally the next day (9 January 2007) and that Ofcom would need to consider whether further action was necessary. Infolines acknowledged the position and reiterated that the matter remained in the hands of its bond holder of choice.
- 2.29 On 10 January 2007, Infolines sent Ofcom a copy of an email and attached letter of the same date which it had sent to its bond holder of choice in which the company emphasised the urgency of the matter and set out its regulatory obligations.
- 2.30 On 30 January 2007, Infolines sent Ofcom a copy of its profit and loss account and cash book for the calendar year ending 31 December 2005.
- 2.31 Notwithstanding Infolines' response of 25 September 2006 and the representations made since that date (as detailed in full in paragraphs 5 to 20 of the Notification), Ofcom does not consider that Infolines has explained satisfactorily why it has not put a bond in place to meet the requirements of the Regulations and nor does it consider that it is acceptable for the situation to continue to remain unresolved. Infolines has not put in place sufficient funds to meet specified liabilities despite having been afforded every reasonable opportunity to do so by Ofcom and nor has it provided Ofcom with a certificate as required by Regulation 16(1)(b).

Enforcement Notification and/or Penalty for contravention

- 2.32 As the contravention is ongoing, and Ofcom considers that Infolines has not taken all such steps as required by the Section 110 Notification, Ofcom can issue an enforcement notification under section 111 of the Act and/or impose a penalty under section 112 of the Act.
- 2.33 Infolines has explained that the matter is with its bond holder of choice and therefore the timetable is not in its hands. Ofcom does not consider that this is an acceptable position. Infolines could have tried to secure a bond from other sources should it have found that its present bond holder of choice was delaying matters unacceptably. The Regulations apply to Infolines and it is required to adhere to the requirements set out therein.
- 2.34 This notification now therefore requires Infolines to take the steps set out in paragraph 24 of the Notification. Ofcom's reasons for requiring Infolines to take these steps are set out at in Section 2 of this Explanatory Statement.
- 2.35 Infolines is required under section 111(5) of the Act to comply with the enforcement notification. The Notification requires Infolines to comply with Regulation 16(1)(a) of the Regulations by 22 March 2007. This means that Infolines is required to ensure that it puts in place sufficient funds to meet any potential specified liabilities as defined in the Regulations. This is its primary duty under Regulation 16. Failure to so comply is enforceable in civil proceedings by Ofcom. Ofcom further considers that

the nature and duration of the contravention and Infolines' failure to take the steps set out in paragraph 23 of the Notification is such that it is also appropriate to impose a penalty under section 112 of the Act.

2.36 Section 112 of the Act (penalties for contravention of code restrictions) applies in addition to section 111 (enforcement notification) where a person has been given a notification under section 110 and Ofcom has allowed an opportunity to make representations about the matters notified and the Opportunity Period has expired. As in relation to an enforcement notification under section 111, Ofcom may impose a penalty on a notified provider if he:

- a) has been in contravention, in any of the respects notified, of a requirement specified in the notification under section 110; and
- b) has not, during the period allowed under that section, taken all such steps as Ofcom considers appropriate –
 - i) for complying with the notified requirement; and
 - ii) for remedying the consequences of the notified contravention of that requirement.

Conclusions

2.37 As set out in paragraph 24 of the Notification, Infolines is now required to:

- a) obtain an insurance policy, bond, guarantee or other instrument from an appropriate financial institution to meet any potential specified liabilities that might arise should a relevant event occur;
- 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

by 22 March 2007

2.38 A penalty imposed under section 112(6) of the Act is to be such amount not exceeding £10,000 as Ofcom determine to be –

- a) appropriate; and
- b) proportionate to the contravention in respect of which it is imposed.

2.39 For the reasons set out above and in Section 2 of this Explanatory Statement and having regard to the criteria set out in Ofcom's Penalty Guidelines (as described in Section 3), Ofcom considers that £7,500 is appropriate and proportionate to the contravention in respect of which it is imposed. This should be paid in full by 22 March 2007. All fines are payable to HM Paymaster General and once received by Ofcom are forwarded to The Treasury.

Section 3

Ofcom's investigation and reasoning

Background

- 3.1 The Code grants Code operators various powers to install and maintain electronic communications networks. Amongst other things, Code operators:
- have the power to install apparatus under, over, [in, on,] along or across streets without needing a specific licence to do so under the NRSWA 1991 (paragraph 9 of the Code);
 - benefit from important exemptions under The Town and Country Planning (General Permitted Development) Order 1995 as amended; and
 - have the right to apply to the Court conferring a right, where agreement cannot be reached, to execute works on private land (paragraph 5 of the Code).
- 3.2 On 1 September 2000, the Secretary of State granted Infolines a licence under section 7 of the 1984 Act authorising Infolines to run a telecommunications system (as defined in the 1984 Act) and applying the Code to Infolines. As explained in paragraph 1.3 of this Explanatory Statement, following the entry into force of the Act, Infolines is treated as a Code operator by virtue of paragraph 17 of Schedule 18 to the Act.

Funds for liabilities and Regulation 16

- 3.3 Streets or, in Scotland, roads (“public highways”) are run by appropriate authorities and traffic authorities (“relevant authorities”) and these authorities are responsible, amongst other things, for ensuring that public highways are kept in a good state of repair and remain accessible. In general, therefore, it is necessary for anyone wishing to place anything on public highways or wishing to break up public highways to apply for a 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.
- 3.4 Code operators, however, have a statutory right to access public highways and they are therefore permitted, amongst other things, to install apparatus: “under, over, [in, on,] along or across public highways” under paragraph 9 of the Code. Code operators’ right or privilege to access public highways could therefore leave relevant authorities to remove any apparatus and incur the costs for doing so unless Code operators provide for funds to meet liabilities for the removal of apparatus in the event that they ceased to operate. It is for this reason that the funds for liabilities regime was put in place.
- 3.5 The Regulations were issued on 2 October 2003 under section 109(1) of the Act. 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 should a relevant event occur. Paragraph 9 is the part of the Code which allows Code operators to carry out street works under the NRSWA 1991.

- 3.6 Specified liabilities are defined in the Regulations as, amongst other things, costs or expenses reasonably incurred by an authority in making good any damage caused by the installation or removal of electronic communications apparatus. By virtue of Regulation 16(1)(a), Code operators must therefore ensure that sufficient funds are available to meet those specified liabilities.
- 3.7 Regulation 16 contains a number of provisions containing specific requirements in relation to ensuring that Code operators have sufficient funds available to meet specified liabilities as follows:
- 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 1st 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, that the Code operator has fulfilled its duty to put in place sufficient funds to meet any 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; 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 for the funds.

Funds for liabilities and public call boxes

- 3.8 Public call boxes (PCBs) are public pay telephones located on public highways. Ofcom's experience is that, in general, relevant authorities are concerned about the upkeep of street furniture and therefore would be inclined to remove furniture such as PCBs on public highways which is no longer used for the purposes of an ECN and in relation to which there is no reasonable likelihood that it would be so used. Paragraph (c)(iii) of the definition of "specified liabilities" states that appropriate authorities may seek their costs in removing any electronic communications apparatus: "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".
- 3.9 Ofcom considers that relevant authorities are likely to wish to remove disused PCBs. Indeed, in this case, Ofcom has been approached by two relevant authorities who have expressed concern about Infolines' continuing contravention of the Regulations and the risk of being left with the costs of the removal of any apparatus should a Relevant Event occur.

Infolines

- 3.10 A significant part of Infolines' business relates to the provision of PCBs. As the PCBs operated by Infolines are installed on public highways, they consist of relevant infrastructure for the purposes of the Regulations and therefore an insurance policy, bond, guarantee or other instrument is required to be put in place to cover the cost of

their removal should the company cease to trade. Code operators can, in assessing potential liabilities under the funds for liabilities regime, consider whether there is any likelihood that their apparatus would be used by another Code operator and this might reduce the quantum that they need to put in place to indemnify appropriate authorities.

- 3.11 Infolines, as a Code operator, is required to comply with the conditions and restrictions set out in the Regulations. The Regulations came into effect on 2 October 2003. Ofcom should therefore have received a certificate and an insurance policy, bond, guarantee or other instrument from Infolines on 1 April 2004, 1 April 2005 and 1 April 2006⁷. Infolines has not provided Ofcom with any certificate and nor has Ofcom received an insurance policy, bond, guarantee or other instrument from Infolines as required by the Regulations.
- 3.12 Infolines has repeatedly stated that it intends to put in place funds to meet any specified liabilities. However, as yet, Ofcom has not received an insurance policy, bond, guarantee or other instrument that would provide for the funds. At this present time, therefore, relevant authorities have no protection should a Relevant Event, as defined in the Regulations, occur. This would mean that relevant authorities would have no recourse to secured funds to meet the cost of removing the relevant infrastructure operated by Infolines should a Relevant Event occur.

⁷ The instrument used to provide for funds may cover a period longer than one year and, if it did, it need not be resubmitted annually.

Section 4

Ofcom's reasons for the level of penalty imposed

- 4.1 On 24 August 2006, Ofcom issued a Notification under section 110 of the Act because it had reasonable grounds to believe that Infolines was contravening and continued to contravene a requirement set out in conditions and restrictions imposed under section 109 of the Act. The conditions and restrictions were set out in the Regulations.
- 4.2 The Regulations require, amongst other things, Code operators to ensure that sufficient funds are available to meet specified liabilities.
- 4.3 As explained in Section 1 of this Explanatory Statement, Ofcom considers that it should impose a penalty on Infolines because of the duration of the contravention and because it is ongoing. Section 112(6) of the Act states that:
- “The amount of a penalty imposed under this section is to be such amount not exceeding £10,000 as Ofcom determine to be –
- a) appropriate; and
 - b) proportionate to the contravention in respect of which it is imposed”.
- 4.4 Section 112(7) requires Ofcom to: “have regard to:
- a) any representations made to them by the notified provider;
 - b) any steps taken by him towards complying with the requirements contraventions of which have been notified to him under section 110; and
 - c) any steps taken by him for remedying the consequences of those contraventions.”
- 4.5 Ofcom has considered these requirements in assessing the level of the penalty that it proposes to impose on Infolines.
- 4.6 In addition, section 392 of the Act requires Ofcom to prepare and publish a statement containing the guidelines that it proposes to follow in determining the amount of any penalties that it proposes to impose. To this end, Ofcom has published the Penalty Guidelines (see <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>) setting out criteria that it will take into account, as appropriate to the particular circumstances of each case, when imposing a penalty under relevant sections of the Act.
- 4.7 Ofcom's reasons for imposing a penalty of £7,500 on Infolines in this case are set out in the following paragraphs.

Applying Ofcom's Penalty Guidelines

The General Criteria

- 4.8 The Penalty Guidelines state that Ofcom will ensure that any penalty will be appropriate and proportionate to the contravention in respect of which it is imposed and, additionally, Ofcom will have regard to any representations made by the regulated body. They also set out a list of factors which Ofcom are likely to consider first when setting a starting figure for each penalty. These are:
- The seriousness of the contravention;
 - Any precedents set by previous cases; and
 - The need to ensure that the threat of penalties will act as a sufficient incentive to comply.
- 4.9 *Seriousness of the contravention:* Infolines has contravened and is continuing to contravene the Regulations. Infolines was required to send to Ofcom a copy of an insurance policy, bond, guarantee or other instrument and to send, on an annual basis, a certificate confirming that sufficient funds are in place to meet any potential specified liabilities. Infolines has never provided a copy of an insurance policy, bond, guarantee or other instrument and has failed to provide an annual certificate to Ofcom on 1 April in each of the three years since Regulation 16 came into force in October 2003. In addition, Infolines has 143 PCBs located on public highways and all of these consist of relevant infrastructure for the purposes of the Regulations. Ofcom considers, therefore, that this is a serious contravention.
- 4.10 *Previous precedents:* Ofcom has not previously imposed a penalty under section 112(6) and therefore there are no previous precedents for Ofcom to rely on in determining the level of the penalty.
- 4.11 *Ensuring that there are sufficient incentives to comply:* Ofcom needs to ensure, as required by section 112(6), that any penalty imposed is appropriate and proportionate. In terms of the funds for liabilities regime, Ofcom considers that the likely cost of putting an insurance policy, bond, guarantee or other instrument in place needs to be measured against the level of penalty that might be imposed. Ofcom considers that any penalty would need to act as deterrent to the continuation of the contravention.
- 4.12 Infolines has 143 PCBs. Of these, Infolines considers that \times of these would be of value to a prospective market entrant and would not therefore need to be removed by relevant authorities. Infolines considers that these may be omitted in calculating the likely level of any liability. Ofcom understands that it would cost something in the region of \times to remove a PCB and on this basis Infolines would need to put in place a bond equating to approximately \times (that is, \times PCBs multiplied by \times). Ofcom estimates that an insurance broker or banking institute would charge significantly less than 5% per annum ($>\times$) to put in place a bond this magnitude. Any penalty would therefore need to be in excess of this to ensure that the incentive, as well as the statutory obligation, is to put a bond in place.

The Specific Criteria

- 4.13 The Penalty Guidelines also identify specific criteria that may be relevant to adjust the starting figure of the penalty, depending on the type of contravention. These include:
- a) Any gain (financial or otherwise) made by the regulated body in breach (or any connected body);
 - b) The degree of harm caused, or increased cost incurred by consumers or other market participants;
 - c) Size and turnover of the regulated body;
 - d) The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body;
 - e) The duration of the contravention; and
 - f) Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body.
- 4.14 All of these criteria are relevant to a greater or lesser degree. Ofcom considers, however, that the main criterion relevant to this case is the duration of the contravention.
- 4.15 The Regulations were laid before Parliament in October 2003 and the obligations were therefore effective from then.
- 4.16 Ofcom considers that turnover is also an important criterion in assessing the level of any penalty. Ofcom has received Infolines' profit and loss account and cash book for the calendar year ending 31 December 2005 – the most recent information available – and this showed that the company had cash book sales in excess of ₤.
- 4.17 Ofcom notes that a penalty in respect of this conduct has not already been imposed by Ofcom, or as far as Ofcom is aware, by another body.

Factors tending to increase the level of penalty

- 4.18 The Penalty Guidelines suggest that factors that might lead to an increase in the level of any penalty (“aggravating factors”) include:
- a) repeated contraventions;
 - b) continuation of the contravention once notified by Ofcom;
 - c) senior management knowledge of the contravention; and
 - d) the absence, ineffectiveness or repeated failure of internal procedures intended to prevent contravention.
- 4.19 This is the first time that Ofcom has taken action against Infolines in relation to its contravention of the Regulations. Infolines is, however, required to submit a certificate to Ofcom annually which it has failed to do since the Regulations were laid

before Parliament. Infolines, therefore, has been in contravention of the Regulations over a significant period of time.

4.20 Ofcom issued a Notification under section 110 of the Act on 24 August 2006 and in the Notification it stated that Infolines was required to comply with the requirements of that Notification by 25 September 2006. Despite this, Infolines remains in contravention of the Regulations.

4.21 In terms of the other factors, senior management within Infolines is aware of the contravention and yet the contravention persists. This suggests to Ofcom that the company does not have adequate or effective internal mechanisms or procedures in place to ensure compliance with the requirements of the Regulations.

Factors tending to decrease the level of penalty

4.22 The Penalty Guidelines suggests that factors that might lead to a decrease in the level of any penalty (“mitigating factors”) include:

- a) the extent to which the body has taken steps to identify and mitigate external factors that might result in a contravention;
- b) the extent and timeliness of any steps taken to end the contravention and remedy the consequences; and
- c) co-operation with Ofcom’s investigation.

4.23 Ofcom understands that Infolines is attempting to put in place a bond for the purposes of the Regulations but that it has encountered some difficulties in doing so. This does not, however, mitigate from the fact that the bond should have been put in place some considerable time ago. Despite repeated assurances to Ofcom that Infolines has been attempting to put funds in place, Infolines has failed to secure any appropriate funding or to explain satisfactorily to Ofcom its reasons for the continued contravention of the Regulations.

4.24 Ofcom considers that Infolines should have been able to obtain a bond to satisfy the requirements of the Regulations and certainly should have been able to do so since publication of the Notification. Infolines has not, however, provided Ofcom with a satisfactory explanation for the protracted delay and why it still has not been able to secure a bond from its bond holder of choice or, failing that, from an alternative financial institution. In addition, Ofcom considers that the sum of money needed to secure a bond would not be beyond Infolines’ means and nor has it argued that this is the case.

Final amount of penalty

4.25 For the reasons set out in this Explanatory Statement, Ofcom considers that it is appropriate to impose a penalty under section 112 of the Act. Ofcom could set a fine to a maximum of £10,000 under section 112(6) of the Act. The duration of the contravention is such that Ofcom considers that it has to set a significant fine

4.26 Having regard to the specific criteria in the Penalty Guidelines and having also considered the aggravating and mitigating factors, Ofcom determines that an appropriate and proportionate penalty in relation to the contravention in this case is £7,500. Ofcom considers that the level of the penalty is reasonable given the duration of the contravention and the size of the company.

Conclusions

- 4.27 Ofcom has considered the criteria set out in section 112(7) and concluded that, in this case, it is appropriate to set a penalty. Ofcom believes that the level of the penalty is proportionate given the circumstances of the case and the duration of the contravention.
- 4.28 Ofcom considers that it is reasonable to require that this penalty should be paid in full. Infolines is therefore required to pay the penalty set out in the determination by 22 March 2007.

Annex 1

Ofcom correspondence

Request for action

22 June 2005

Mr P Pearson
Infolines Public Network Ltd
The White House Limited
Lichfield Street
Tamworth
Staffordshire
B77 1PG

MICHAEL GALVIN

Direct line: 020 7783 4158

Direct fax:

michael.galvin@ofcom.org.uk

Dear Mr Pearson

Regulation 16: Funds for liabilities

1. I am writing further to our letter of 11 February 2005 in which we set out Infolines Public Networks Ltd's duties under the Electronic Communications Code (Conditions & Restrictions) Regulations 2003, Regulation 16: Funds for meeting liabilities ("Regulation 16"). Our records show that you have not provided us with the relevant documentation required by Regulation 16.
2. This letter, therefore, constitutes further notice of your obligations under Regulation 16. You should be aware that Ofcom may take enforcement action under its powers which are set out in sections 110 to 112 of the Communications Act 2003.
3. For ease of reference, you are required to:
 - "ensure that sufficient funds are available to meet specified liabilities" (Regulation 16(1)(a));
 - "on 1st April each year, provide OFCOM with the certificate the requirements of which are set out in paragraphs (2) to (6)" (Regulation 16(1)(b)); and
 - "[with the certificate, provide] copies of any insurance policy, bond, guarantee or other instrument which will provide the funds in paragraph 1(a)" (Regulation 16(6)).
4. We intend to publish on our website a list of all operators who have failed to fulfil their duties under Regulation 16. At this stage, we are intending to include your company's name on the list.
5. However, Infolines Public Networks Ltd's will not be included on the list of operators who have failed to fulfil their duties under Regulation 16 if we receive the documentation required before we publish any list.
6. I should reiterate that you are required to provide us with this documentation under Regulation 16.

7. Please contact me on 020 7783 4158 should you wish to discuss this matter or via email to michael.galvin@ofcom.org.uk.

Yours sincerely

MICHAEL GALVIN

11 February 2005

Mr P Pearson
Infolines Public Network Ltd
The White House
Lichfield Street
Tamworth
Staffordshire
B77 1PG

FAO – Mr Pearson

Dear Mr Pearson

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

1. Infolines Public Network Ltd ("Infolines") is a person to whom the Electronic Communications Code (as defined in section 106(1) of the Communications Act 2003 (the "Act")) applies by a direction under section 106(3) of the Act and is therefore a code operator as defined in paragraph 2(2) of the Electronic Communications Code (Conditions & Restrictions) Regulations 2003 (the "Regulations"). Infolines is therefore required, by paragraph 16(1)(a) of the Regulations, to ensure that sufficient funds are available to meet the specified liabilities as defined in the Regulations, which may arise from the exercise of rights by Infolines under paragraph 9 of the Electronic Communications Code.
2. Where Infolines has previously exercised its rights under the Electronic Communications Code, the Regulations require Infolines to:
 - provide Ofcom with a certificate on 1st April each year (paragraph 16(1)(b)), which should be signed by a director or company secretary of Infolines, and approved by a resolution of the board of Infolines (paragraph 16(2));
 - state on the above-mentioned certificate that in the reasonable opinion of the Board of Infolines, Infolines has fulfilled its duty under paragraph 16(1)(a) (paragraph 16(3)(a)) (and the Board must not make that statement unless it has first made appropriate enquiries into whether Infolines has fulfilled its duty under Regulation 16(1)(a));
 - state on the certificate the amount of funds that have been provided for (paragraph 16(5)(a), and the systems and processes which enabled the Board to form the opinion referred to in Regulation 16(3) (Regulation 16(5)(b)); and
 - provide with the certificate copies of the insurance policy, bond, guarantee or other instrument which will provide the funds (Regulation 16(6)).
3. Where Infolines has not previously exercised any rights conferred by the Electronic Communications Code, it is required to provide Ofcom with such a certificate two weeks before it exercises such rights (Regulation 16(1)(c)). For ease of reference, I attach a copy of Regulation 16. You might also wish to read the statement entitled *Funds for liabilities*, which we published in October 2003 and is available via the following website link (<http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/funds1003.pdf>).
4. Despite this, Ofcom does not have any record of receipt of the relevant certificate and instrument confirming that Infolines has put in place sufficient funds to meet any liabilities

and nor does it have any record that states that Infolines has not exercised the powers conferred on it by the Electronic Communications Code. In the former case, Ofcom should have received these documents on 1st April 2004 and the next certificate will be due on 1st April 2005. This is, therefore, of increasing concern to us.

5. Please, therefore, provide Ofcom with the relevant certificate and instrument within the next two weeks or advise us whether or not Infolines has utilised code powers. If Infolines fails to discharge its duties, Ofcom will take formal enforcement action against you under sections 110-114 of the Communications Act 2003.

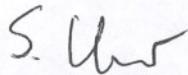
6. You should send the relevant certificate and instrument to Michael Galvin at:

Office of Communications
Competition and Markets
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

7. Alternatively, if Infolines has not utilised its Code powers and nor does it intend to do so, it can apply to Ofcom for the revocation of those powers. Ofcom would then issue a Notification of its proposals to revoke the Code powers for consultation under section 107(6) of the Communications Act 2003, and then, subject to any comments received, revoke Infolines's Code powers by further direction under section 106 of the Act. This should again be sent to the above address.

8. Any enquiries regarding this letter should be directed to Michael Galvin on 020 7783 4158 or by e-mail to michael.galvin@ofcom.org.uk

Yours sincerely,



STEVE UNGER
DIRECTOR OF TELECOMS TECHNOLOGY
COMPETITION AND MARKETS

2 April 2004

Infolines Public Networks Ltd
Mr P Pearson
The White House
Lichfield Street
Tamworth
Staffs
B77 1PGB

Dear Mr. Pearson,

Funds for liabilities

I am writing to you with regard to the obligation on Code Operators to put in place funds for liabilities under Regulation 16 of the Electronic Communications Code Regulations 2003 (the 'Regulations').

A full explanation of the legal obligation is set out in the Statement on Funds for Liabilities, which was published by Ofcom on 15 October 2003 and which is available at: www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/funds1003.pdf

As set out in that statement, on 1st April of each year, Code Operators have to provide Ofcom with a certificate unless they have not exercised any rights conferred by the electronic communications code (the code). A specimen certificate is annexed to the Statement on Funds for Liabilities.

In addition, Code Operators also have to supply Ofcom with a copy of the financial instrument which has been put in place for the purposes of Regulation 16. A specimen bond for the purposes of Regulation 16 is available at: www.ofcom.org.uk/licensing_numbering/tele_gen_auth/g_a_regime/ffl/spec_bond.pdf

To assist Code Operators, Ofcom has published guidelines on how to assess liabilities for the purposes of Regulation 16. The guidelines are available at: www.ofcom.org.uk/licensing_numbering/tele_gen_auth/g_a_regime/ffl/funds_liability.pdf

The 1st April deadline has now passed, and we do not seem to have any record of a copy of the certificate and bond being supplied to us or any notification that you are in the process of finalising these documents.

I would be grateful if you could either provide the relevant documents or confirm to Christina Spyrelli the steps that you are taking to put funds for liabilities in place. Could you please supply such details by close of business on Friday, **30 April 2004**.

Should you have any queries, please contact Christina Spyrelli on 020 7783 4312 or by e-mail: christina.spyrelli@ofcom.org.uk

All the requested information should be sent to Christina Spyrelli by e-mail to christina.spyrelli@ofcom.org.uk or by post to:

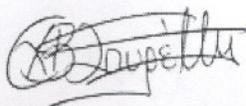
Office of Communications
Riverside House
2A, Southwark Bridge Road
London
SE1 9HA

Thank you in advance for your prompt attention to this matter.

Yours sincerely,

Neil Buckley
Head of Consumer Policy

pp. Christina Spyrelli

A handwritten signature in black ink, appearing to read 'Christina Spyrelli', with a horizontal line drawn underneath the name.