

For the attention of Julia Lopez MP

Minister of State for Media, Data and Digital Infrastructure
Department for Digital, Culture, Media & Sport
100 Parliament St
London
SW1A 2BQ

By post and email to security.framework.consultation@dcms.gov.uk

Our Ref: ITS1/DP/DATG

16 June 2022

Dear Sirs

Serious problem with the proposed telecoms security code of practice

We act for Comms Council UK ("CCUK"), which represents and supports telecommunications companies that provide services to business and residential customers in the United Kingdom.

Our client has spotted a serious problem with the Draft Telecommunications Security Code of Practice ("Draft Code"), which became obvious after the conclusion of recent consultation exercise.

The focus of the consultation exercise was, of course, on the proposed new regulations. The major fault our client has now identified with the Draft Code has become more recently apparent, and our client believes the Secretary of State and the Department for Digital, Culture, Media & Sport will appreciate this problem being brought to their attention as soon as possible, even though the consultation period has now ended.

In essence: the problem is that the Draft Code, in one important instance, misrepresents and goes substantially and unrealistically further than the accompanying draft regulations.

In particular: the Draft Code misrepresents and goes substantially and unrealistically further than the proposed regulations 3(1) and 3(3)(h), which impose a legal duty to take "*appropriate and proportionate*" measures to "*reduce*" the risks in relation to the design, construction, redesign, development, and maintenance of a network so as to "*ensure that, if it should become necessary to do so, the network provider would be able to operate the network without reliance on persons, equipment or stored data located outside the United Kingdom*".

The Draft Code ignores this being a duty *"appropriate and proportionate"* measures to *"reduce"* risks.

The Draft Code instead states that this duty means there is an immediate obligation on service providers to *"maintain 100% of normal service connectivity"* in the event of an incident.

This obligation is simply not technically practical - regardless of any policy merits.

No service provider can *"maintain"* such connectivity when presented with such a significant incident - all a service provider can do is seek to restore such connectivity as soon as possible.

This means that the recommendation in the Draft Code will be impossible for any service provider to comply with.

The draft regulations provide a duty that is *"appropriate and proportionate"* - but the Draft Code sets out a duty that is not only inappropriate and disproportionate, but impossible.

Saying it is only a recommendation is no solution, for although the Code itself will not have statutory effect, the Draft Code says that in determining any question arising in legal proceedings, courts and tribunals *"must"* take the provisions in the Code into account where they are relevant and in force at the time in which the question relates to.

This will mean that there is a serious risk a service provider will be held to an impossible standard by a court or tribunal taking the provisions in the Code into account when construing what is currently regulation 3(3)(h) of the draft regulations.

It cannot be open to a Code of Practice to impose an impossible standard that a court *"must"* then take account of when construing an obligation.

Our client would therefore suggest that the Draft Code be re-worded from

"the ability to maintain 100% of normal service connectivity for a period of one month in the event of loss of international connections"

to

"the ability to restore and maintain normal service connectivity within one month in the event of loss of international connections".

This change would ensure that the Draft Code is realistic - rather than it misdirecting service providers and courts into believing that they have a more onerous and less realistic obligation than which is provided for in the regulations.

This change would also mean that the Code, when published, is less open to legal challenge.

For, in the event that the Code is published in its current unamended form on this point, our client will have to consider seeking a quashing order and/or a declaration in respect of the published Code.

Please consider the above suggested change in the helpful spirit in which it offered and kindly confirm that the Code of Practice will be amended so as to allay the serious concern set out in this letter.

Please contact David Allen Green of our firm in the event of any query.

Yours faithfully

Preiskel & Co LLP

cc.

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