Internet Telephony Services Providers' Association

Evidence regarding the Telecommunications (Security) Bill 2019-2021 (the "Bill")

About ITSPA

The Internet Telephony Services Providers' Association ("ITSPA") represents over 100 UK businesses involved with the supply of next generation communication services over data networks to industry and residential customers within the UK. Our traditional core members are VoIP providers and span the entire breadth of the industry – from some of the largest players in the market to SMEs and start-ups. ITSPA pays close attention to both market and regulatory framework developments on a worldwide basis in order to ensure that the UK internet telephony industry is as competitive as it can be within both national and international markets.

Please note that certain aspects of the ITSPA response may not necessarily be supported by all ITSPA members. Individual members may respond separately to this consultation where a position differs. However, the ITSPA Council is confident that this response reflects the views of the overwhelming majority of ITSPA members.

A full list of ITSPA members can be found at http://www.itspa.org.uk/.

Summary

ITSPA welcomes a focus on security. Hardening the UK's telecommunications networks against threats is an essential aspect of national security. However, Government intervention in an innovative and technologically driven sector must be proportionate to what it intends to achieve. There are several aspects to the Bill which, while well-intentioned, give too much power to the Secretary of State, or to the Office of Communications ("**Ofcom**"), to act unilaterally without sufficient independent oversight.

We are sure that many of these same arguments were adduced during the passage of what became the Investigatory Powers Act 2016 (the "**IPA16**") and will be familiar to the Members scrutinising the Bill. Given the oversight in the closely related context of the IPA16 is already in place and resourced, replicating it, we assume, would not be a substantial burden on public resources.

Finally, we would like to stress that the UK telecommunications industry is not just a handful of a few household names; quite the opposite. It comprises well over one-thousand companies, all of which come into the scope of the Bill. To that end, we suggest the Committee should consider the proportionality of the measures in primary legislation, not leave it to a Code of Practice which can be changed at any time without further Parliamentary scrutiny.

Background to the Industry

It is our experience that many assume that the UK's telecommunications industry comprises a few household name "giants". While this is often true for the residential sector, overall, the UK has hundreds of Public Electronic Communication Networks ("**PECNs**")[1] and thousands of independent companies providing Public Electronic Communications Services ("**PECS**")[2].

To demonstrate:

- the wholesale PECN, Gamma Communications plc ("**Gamma**"), states in its annual report that it provides service to over 1,000 'channel partners'[3]. These entities may be PECNs in their own right, and many do not simply just "resell" the service, they add components before taking a PECS to market. Gamma is not the only such wholesaler nor does every entity offering a PECS consume Gamma services; many more are customers of other ITSPA members such as Simwood, TalkTalk and Magrathea with some choosing to use BT's competitive offering.
- Ofcom's public data shows a *minimum* of 461 PECNs operating in the UK. This result is achieved by counting the number of unique entities which are allocated telephone numbers from the National Telephone Numbering Plan – a prerequisite of such is Ofcom verifying they meet the definition of a PECN.

In other words, this is not a Bill that only affects a few large and well-resourced household brands, it affects thousands of companies of all shapes and sizes. Many of the affected have a turnover below the

[1] as defined in [reference] the Communications Act 2003 ("the Act")
[2] *Ibid*
[3] Gamma Communications plc Annual Report and Accounts 2019, page 5.

£10.2m reporting threshold under the Companies Act 2006 and are also classed as microenterprises or small enterprises.

Proportionality

The guidance[4] around the Bill talks about "Tiers", which we assume are intended to focus the weight of the Bill towards larger operators. However, the Bill itself does not fetter its power in this regard. This gives rise to the prospect of Tier 3 operators having their status, or compliance requirements changed through a modification of the Code of Practice ("**Code**"), which we understand does not receive Parliamentary scrutiny. Indeed, the only requirement is one of consultation with various stakeholders before the publication or withdrawal of a Code. Our reading of the Bill suggests that the Secretary of State is not required to ensure the Code is proportionate or necessary and can, if he or she so chooses, ignore the advice received in consultation.

Despite this, the Code becomes a document of significant weight; providers will have a duty to explain non-compliance (Section 105I) under threat of penalty (Section 105T).

ITSPA members are fearful that a lack of oversight and scrutiny on the Code provides the Secretary of State too much unfettered power to interfere with the technological direction of their companies. The reference in the associated documents to "Tiers" are meaningless when they can be modified or withdrawn at any time including upon the whims of the Government of the day.

Of course, ITSPA members welcome the concept of a Code – a means by which Government codifies best practice and where compliance is a natural defence against penalty. However, the Code itself must only be issued with appropriate oversight. To that end, we suggest an amendment to Section 105E as follows:

> Insert (2)(b) to state "be satisfied that the Code of Practice is necessary and proportionate to what it intends to achieve and does not place an unfair burden on any electronic communications networks or electronic communications services".

[4] Telecommunications (Security) Bill: Factsheet 2: New Telecoms Security Framework

Given that this amendment merely encapsulates DCMS' published intent on the face of the Bill, we assume that they should be relatively uncontroversial[5].

Power of the Executive

Even if Parliament adopts such an amendment, the Secretary of State will still have relatively unfettered power to ignore the Code and act unilaterally.

Section 105B of the Bill states;

> *(1) The Secretary of State may by regulations provide that the provider of a public electronic communications network or a public electronic communications service must take specified measures or measures of a specified description.*
>
> *(2) A measure or description of measure may be specified only if the Secretary of State considers that taking that measure or a measure of that description would be appropriate and proportionate for a purpose mentioned in section 105A(1).*
>
> *(3) In this section "specified" means specified in the regulations.*
>
> *(4) Nothing in this section or regulations under it affects the duty imposed by section 105A.*

A similar structure exists in Section 105D for the response to take specified measures in response to a security compromise and elsewhere in other contexts.

Suppose this Bill receives Royal Assent as currently written. In that case, Parliament will be handing the Secretary of State a mandate to dictate the technological direction of hundreds of PECNs and thousands of PECS with very little oversight. Traditionally, the Government regulates the UK telecommunications industry in a liberal and light-touch manner. This has brought about "*good commercial outcomes*" in the words of the Department of Culture, Media and Sport[6].

[5] Telecommunications (Security) Bill - https://publications.parliament.uk/pa/bills/cbill/58-01/0216/200216.pdf
[6] Oral statement to Parliament on Telecoms Supply Chain Review by Secretary of State for Digital, Culture, Media and Sport, July 2019

Such an unfettered mandate in an innovative industry such as ours is not a prospect our membership relishes, and we note that such unrestricted power does not exist in other similar contexts. For example, the ability to direct telecommunications companies under the IPA16 receives oversight from a Technical Advisory Board[7] and a Judicial Commissioner[8].

This "double-lock" of oversight means:

- that any measures imposed on a PECN are technologically proportionate (which includes the prospect for driving consumer inflation through increased costs, or
- a competitive distortion by placing a costly burden on just one, or some, players in a competitive industry) is justified on the merits.

To that end, we would suggest that a new section is inserted into the Bill as follows;

> "In making regulations under this Section, the Secretary of State must take the utmost account of the advice of the Technical Advisory Board and a Judicial Commissioner concerning the proportionality and appropriateness of any measures therein."

In addition to the our suggested amendment to Section 105E on the Code, it would also be prudent in our opinion to insert (1)(b)(v) to state "the Technical Advisory Board" so that it is consulted during the drafting of a Code.

In other words, we suggest Parliament replicates the same structure as in the IPA16 for the Bill; given the system already exists and is already funded, we do not consider this to be a substantial burden on public resources, especially given the oversight it would provide.

The need for judicial oversight

Section 150U(1)(b) provides Ofcom with the power to require a provider to take "*interim steps*" based on a "*reasonable grounds for believing*" where "*Ofcom either have not commenced, or have commenced but not completed, enforcement action [..]*"

[7] As defined in Section 245 of IPA16
[8] As defined in Section 227 of IPA16

Aside from the departure from the common-law tradition of being innocent until proven guilty, Ofcom will be granted a power to dictate actions of a telecommunications network, without either consultation, or potentially without evidence of a standard acceptable in a Court of Law, without any oversight.

This is a rather draconian provision, and one we respectfully submit requires judicial oversight. We do not consider it to be a burden, either in the timescales involved (after all, the security services when there is a real threat to national security, still have to seek a Judicial Commissioner for an interception warrant), or on the public purse, given the existence of related oversight.

To that end, we would suggest that section 105(U)(1)(e) be inserted to state

> "OFCOM have consulted the Technical Advisory Board on the proportionality and appropriateness of the measures in paragraph (d) and have received approval from a Judicial Commissioner for the same"

It is likely that this measure will need to be repeated in whole or in part for other unfettered powers, such as with respect to assessment notices and consequential actions following an assessment,

The cost of audit compliance

The proposed powers for Ofcom to audit compliance with the Code and Bill are likely to give rise to high costs to providers, which, given the highly competitive nature of the industry, will likely be passed on to consumers through increased bills.

Ofcom have published their involvement with the TBEST[9] penetration testing scheme. Our members understand that some providers in this scheme have reported project times of twelve or more months and costs exceeding £1m. They are also fearful that Ofcom outsourcing other audit and compliance reporting work to major consultancy firms will give rise to significant bills too. This could bankrupt many smaller electronic communications networks and electronic communications services, or, place them at a severe competitive disadvantage.

[9] https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/network-security-and-resilience/our-work [accessed 14th December 2020]

Section 105N(2)(b) limits Ofcom's claim of costs on a provider to those "*reasonably incurred by Ofcom in connection with the assessment*". The Bill, however, does not fetter the specification of the assessment. This gives rise to the prospect of a multi-million-pound bill for an assessment to be reasonable in terms of the scope of the assessment, but for the assessment itself to be woefully disproportionate.

Smaller operators are also less likely to be aware of, or able to resource, recourse by way of an appeal under Section 192 of the Act (noting that they must likely pay Ofcom's costs of the appeal regardless of the outcome.

To that end, it would appear reasonable to enshrine in law that assessments have to be proportionate. We would suggest inserting Section 105N(3) as follows;

> "Where an assessment under this section is carried out, Ofcom must consult the Technical Advisory Board and ensure that the scope and costs of the assessment are necessary and proportionate to what they intend to achieve and do not place an unfair burden on the electronic communications network or electronic communications service subject to the assessment."

Designated Vendors and Persons

The direction of travel concerning ZTE and Huawei has been clear for some time. ITSPA members do not comment on the Government's recent decision on those specific high-risk vendors. However, we note that the proposed powers in the Bill for future such scenarios suffer from the same concentration of power in the Executive that we describe above. For brevity, we do not seek to repeat the analysis, save to say that the power of the Secretary of State (and where appropriate Ofcom) should be fettered by, where national security concerns allow, consultation with each other, the Technical Advisory Board and in all cases seeking the approval of a Judicial Commissioner.

ITSPA trusts that this submission is useful to the Committee and we are at the Committee's disposal o answer any questions arising.