



Resilience guidance consultation KCOM Group Limited March 2024

1. Introduction

KCOM Group Ltd (“KCOM”) is grateful for the opportunity to respond to Ofcom’s consultation on their Resilience Guidance¹.

As Ofcom are aware, KCOM is a regional fixed broadband provider, providing internet and voice services to approximately 150,000 consumers and businesses and wholesale services in Hull, East Yorkshire and North Lincolnshire. KCOM is subject to Significant Market Power and Universal Service Obligations conditions in the Hull Area.

Our comments on the proposed Resilience Guidance are set out in the following sections.

2. Nature of the proposed change to the Resilience Guidance

KCOM is struck by the extensive nature of the proposed changes to Ofcom’s Resilience Guidance. The existing guidance was published on 12 December 2022², less than a year before Ofcom published the current consultation. Yet the proposed new guidance is a complete re-write, rather than a series of amendments. In the intervening period, there does not appear to have been any major changes in, for example, the legislative regime or the body of empirical evidence, that one might imagine could precipitate such a major change in approach.

KCOM does, of course, recognise the need for Ofcom to keep their guidance under review and make amendments from time to time to reflect changes and take account of events. However, in our view, substantial amendments so soon after guidance has been published, without any major changes, can be destabilising. The stated objective for Ofcom’s guidance is:

“Guidance has the benefit of contributing to effective regulation by improving transparency and understanding. One of Ofcom’s regulatory principles is that

¹ Resilience guidance consultation and Call for Input on mobile RAN power back up. Ofcom, 8 December 2023. See: https://www.ofcom.org.uk/_data/assets/pdf_file/0023/272930/Consultation-Resilience-guidance-and-mobile-RAN-power-back-up.pdf

² Ofcom guidance on resilience requirements imposed by or under sections 105A to D of the Communications Act 2003. Ofcom, 22 December 2022. See: https://www.ofcom.org.uk/_data/assets/pdf_file/0022/253750/Ofcom-guidance-on-resilience-requirements-imposed-by-or-under-sections-105A-to-D-of-the-Communications-Act-2003.pdf

Ofcom will regulate in a transparent manner. Guidance can serve as a useful means of achieving this principle and to increasing understanding of Ofcom’s policy objectives and approach to regulation.”³

However, if Ofcom seek to change guidance so substantially, in such a short period of time without any clear change in circumstances, then, in KCOM’s view, transparency and understanding are *undermined*; providers are unlikely to have confidence in it, because of the belief that it might be amended again, in the future, seemingly arbitrarily. To be clear, none of the justifications set out in paragraphs 4.3 and 4.4 of the consultation document appear to KCOM to be particularly credible; they were entirely or substantially known about in December 2022, when Ofcom published the current guidance.

A case in point is the new material on definitions (proposed section 2.2 of the draft guidance). The section defining Electronic Communications Services states that:

“It is also to be understood that the term members of the public requires a broad interpretation; it is not to be read as residential or small business customers. A service that because of its functionality or scale, such as a virtual private network service, is only likely to attract corporate or commercial customers is still considered to be available to members of the public. For example, it can include the provision of wholesale network connectivity or services provided to other communications providers or businesses”

and makes a reference to Oftel guidelines on interconnection, published over twenty years’ ago, available only on the national archive website. KCOM notes that the last sentence in the extract above would appear to be a new way of expressing this definition and, in KCOM’s view, seeks to broaden the definition of PECS; it is quite incongruous to the preceding text and would appear to require providers to have privileged knowledge of the purpose to which the service is being put by a third party. Ultimately, of course, it is for the courts to determine the meaning of these terms.

3. Resilience in the context of Communications Providers

KCOM notes Ofcom’s position set out in section 3.2 of the proposed guidance:

“As explained above, the guidance set out in this document applies to the sub-category of security compromises relating to the resilience of networks and services, in terms of their availability, performance or functionality, which we refer to as Resilience Incidents.

³ Paragraph 4.2 of the consultation refers.



We interpret this in the broadest sense as the ability of an organisation, resource, or structure to be resistant to a range of internal and external threats, to withstand the effects of a partial loss or degradation of platform, system, or service, and to recover and resume service with the minimum reasonable loss of performance.”

KCOM is concerned that this would be too broad a perspective and might include, for example, systems and processes that support the provisions of PECNs and PECSs, but are not, in themselves part of the service, such as financial and IT change systems. Ofcom acknowledge in section 2.2. that the security duties under the Communications Act 2003 do not apply to providers of associated facilities; the effect of the proposed approach set out in section 3.2 should not be to bring such systems under scrutiny by the back door.

Separately, the proposed guidance states that:

“Communications providers should take a holistic view of resilience, so that it is seen as an integral part of a set of wider company processes. In addition to the measures contained in the Security Code of Practice, we would expect that communications providers would be mindful of and incorporate measures derived from appropriate international standards such as:

- a) Overall company Risk Management (ISO 31000)
- b) Quality Management (ISO 9001)
- c) Information Security (ISO 27001)
- d) Business Continuity Management (ISO 22301)
- e) Asset Management (ISO 55001)”

Formal compliance with such measures may not be cost effective for smaller providers and, in KCOM’s view, Ofcom should reserve judgement in circumstances where a provider has not sought compliance because it would not be a sensible use of scarce resources.

4. Proportionality

KCOM is concerned that the costs implied by the proposed new guidance may be disproportionate and notes that there is very little in the way of quantitative analysis, which might seek to justify the new measures. Paragraph A1.3 of the consultation sets out the paragraphs which purport to analyse the impact the implementation of the measures. However, in KCOM’s view, none of that material seeks to evaluate the costs and benefits



in a meaningful way. Accordingly, it is not clear to us that Ofcom have satisfied the requirements of section 7 of the Communications Act, to carry out an impact assessment.

KCOM considers that an impact assessment should be carried out and should include an analysis of at least:

1. Impact on competition. KCOM's overall view is that compliance with the guidance is likely to fall disproportionately on smaller providers, on the basis that, generally, providing additional resilience is more cost effective for larger providers. To the extent that that is correct, the guidance might have a material impact on the viability of smaller providers and, consequently, on the competitive landscape. Again, Ofcom have not grappled with this meaningfully in the consultation document. In KCOM's view, this is an oversight, particularly given Ofcom's principal statutory duty, to further the interests of consumers in relevant markets, where appropriate by promoting competition;
2. Impact on prices. In addition to the impact on competition of the proposed guidance, additional costs imposed through compliance are likely to be passed on to consumers, given regulation designed to address competition problems and the competitive nature of the relevant retail markets. Ofcom have not sought to quantify this in the consultation document and do little to justify additional compliance costs above simply asserting that the benefits in the form of additional resilience are likely to outweigh the incremental costs; and
3. Dynamic effects. In KCOM's view, the proposed guidance is likely to have a "chilling effect" on the development of communications services, because of the increased compliance costs. Again, the consultation document does not consider this issue in a meaningful way.