

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL assessing the consistency of approaches taken by Member States in the identification of operators of essential services in accordance with Article 23(1) of Directive 2016/1148/EU on security of network and information systems

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Report of the Commission on the consistency of Member State approaches to identifying operators of essential services under the NIS Directive

Originally submitted by the Department for Digital, Culture, Media and Sport on 20 November 2019. Revised version submitted on 21 January 2020.

SUBJECT MATTER

1. This report from the Commission relates to the EU-wide progress on the implementation of Directive (EU) 2016/1148 on security of network and information systems (the NIS Directive), and assesses the consistency of approach taken by Member States in identifying Operators of Essential Services (OES).
2. The NIS Directive was adopted by the European Parliament on 6th July 2016, and Member States had approximately 2 years to transpose the Directive into domestic legislation; the UK finished its transposition via the NIS Regulations which came into force on 10th May 2018 (SI 2018/506).
3. The NIS Directive places requirements on EU Member States to identify OES and ensure that they have appropriate and proportionate security measures in place to manage and mitigate any risks to their network and information systems, and to ensure the security of critical services that are important for the economy and wider society. Currently, in the UK, the OES covered by the domestic NIS Regulations are those in the energy, transport, water, digital infrastructure, and health sectors.
4. The NIS Directive allows discretion to Member States, in their national transposition, to take into account national requirements to achieve its objectives.

Commission findings and recommendations:

5. The report evaluated the approaches in identifying OES, and assessed the level of consistency amongst Member States. It concludes, in broad terms, that there is significant fragmentation and inconsistency between Member States on the identification of OES, based on information received. It does argue, however, that this is likely due to the discretion and flexibility of the NIS Directive, allowing Member States to implement the Directive in different ways, in accordance with existing national legislation.

6. The report makes a number of recommendations for both Member States and the Commission. Member States are encouraged to undertake closer cooperation and share more information pertaining to this issue; particularly with those Member States who have not completed the identification process. The Commission is encouraged to review existing guidelines and documentation available to Member States, strengthen international cooperation through the NIS Cooperation Group, and develop more secure ways to exchange sensitive information between national authorities.

Detailed breakdown of the findings and arguments of the report

7. The report argues that a consistent approach in OES identification by Member States is important for several reasons: (1) to reduce the risks related to cross-border dependencies, (2) to guarantee a level playing field for operators in the internal market, (3) to reduce the risk of divergent interpretation of the Directive, and (4) to develop a comprehensive overview of the level of cyber-resilience across the EU.
8. The differences between Member States were broken down into the following categories, based on the methodology used by the Commission: (1) differences in identifying essential services, (2) use of thresholds, (3) degree of centralisation for NIS implementation, (4) different authorities in charge of identification of OES, and (5) Member State assessment of network and information system dependence.
9. The report showed that there is significant divergence and inconsistency between Member States on all of these categories; this is mostly due to the flexibility and discretion allowed by the NIS Directive for its implementation, and does not necessarily reflect a failure of the NIS Directive nor an indication that Member States applied the NIS Directive incorrectly. However, the report does underline that such divergence is not conducive to an efficient approach to NIS implementation and that it raises concern.
10. The report also highlights a lack of cross-border collaboration between Member States in identifying and regulating OES that are active in more than one country.

SCRUTINY HISTORY

11. No scrutiny history of this particular process or document is available; this report is a new product under the NIS Directive, [pursuant of Article 23\(1\)](#).
12. The NIS Directive was scrutinised before its transposition, and an EM was produced for that purpose ([6342/13](#)) in 2013.
13. The NIS Directive came into force in July 2016, and an EM was prepared for this event ([11013/16](#)).
14. Following the entry into force of the Directive, two further Commission Implementing Regulations were issued, laying down the rules for the application of the NIS Directive in 2017. Explanatory Memoranda were laid down for the

Committees' consideration ([Ares \(2017\) / 4460501](#) and [EM 12205/17](#)). A full history of the NIS Directive's scrutiny is available below.¹

15. For its transposition into national legislation, an EM was produced for the NIS Regulations ([SI 2018/586](#)) setting out the domestic legislation arising from the NIS Directive.

MINISTERIAL RESPONSIBILITY

16. The Secretary of State for Digital, Culture, Media and Sport is responsible for the transposition and implementation of the NIS Directive in the UK.
17. The Secretaries of State for (a) Business, Energy, and Industrial Strategy, (b) Environment, Food, and Rural Affairs, (c) Transport, and (d) Health have responsibility for sectoral implementation of the NIS Regulations where applicable and hold an interest in the wider implementation of the Directive.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

18. Although the NIS Directive as a whole is considered a reserved matter, implementation of the Directive touches on a number of sectors that are not reserved matters.
19. As such, Ministers in the Scottish and Welsh Governments and the Northern Ireland Executive have an interest in how the NIS Directive applies to their Administrations.

LEGAL AND PROCEDURAL ISSUES

20. There are no legal or procedural issues. This is not a proposal for legislation.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

21. None.

SUBSIDIARITY

22. There is no impact on subsidiarity.

¹ Sixteenth Report HC 342–xv (2015–16), [chapter 5](#) (6 January 2016) and Eleventh Report HC 342–xi (2015–16), [chapter 3](#) (2 December 2015); Thirty-seventh Report HC 219–xxxvi (2014–15), [chapter 5](#) (18 March 2015); Sixteenth Report HC 219–xvi (2014–15), [chapter 1](#) (29 October 2014); Fifteenth Report HC 219–xv (2014–15), [chapter 1](#) (22 October 2014); Thirteenth Report HC 219–xiii (2014–15), [chapter 6](#) (15 October 2014); Twelfth Report HC 219–xii (2014–15), [chapter 4](#) (10 September 2014); First Report HC 219–i (2014–15), [chapter 2](#) (4 June 2014); Forty-fifth Report HC 83–xl (2013–14), [chapter 2](#) (2 April 2014); Fortieth Report HC 86–xxxix (2012–13), [chapter 4](#) (24 April 2013); Thirty-fifth Report HC 86–xxxv (2012–13), [chapter 6](#) (13 March 2013); also see (34680), 6225/13: Thirty-fifth Report HC 86–xxxv (2012–13), [chapter 3](#) (13 March 2013)

23. The Commission is acting pursuant of Article 23(1) of the NIS Directive, which stipulates that it must carry out an assessment of the consistency of approach across Member States in identifying OES.

POLICY IMPLICATIONS (including Exit implications where appropriate)

24. On 23 June 2016, the European Union (EU) referendum took place and the people of the United Kingdom voted to leave the EU. Until exit day, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.

25. The UK's departure from the European Union on 31 January 2020 reduces the direct impact of any future proposals on NIS from the Commission. Looking forward, the UK will continue using the Regulations, as we see benefits in ensuring that Operators of Essential Services and Digital Service Providers take measures to ensure the cybersecurity of their systems. HMG will seek to ensure that the burdens on OES and Digital Service Providers are kept to the minimum necessary to ensure the security of the network and information systems that support their services.

26. The Commission's response has no direct implications on the UK. HMG agrees that there is benefit in some form of consistency in approach across the EU, which would reduce the regulatory burden on businesses, especially those who operate across borders. Thresholds for identifying Operators of Essential Services (OES) and determining what is a NIS incident are by their nature adaptable and it was determined from the beginning that there would need to be amendments in the future to ensure that the correct OES and incidents were identified. When the UK implemented the NIS Directive in 2018, HMG set the identification thresholds based on the advice of relevant government departments and devolved administrations and feedback from industry. Our intention to review the NIS Regulations at regular occasions, was set out in [HMG's response](#)² to its public consultation of the NIS Directive, published in January 2018.

CONSULTATION

27. No consultation on this document is required. This is not a proposal for an instrument, nor does it require any further action.

IMPACT ASSESSMENT

28. This is not an instrument or document that requires an impact assessment.

FINANCIAL IMPLICATIONS

29. There are no financial implications arising from this document.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677065/NIS_Consultation_Response_-_Government_Policy_Response.pdf

TIMETABLE

30. The Commission Report has been sent to the European Parliament and the Council. No further timetable is proposed in the document.

OTHER OBSERVATIONS

31. None.

MINISTERIAL NAME AND SIGNATURE

A handwritten signature in black ink, appearing to read 'Matt Warman', with a horizontal line underneath the name.

Matt Warman MP

Parliamentary Under Secretary of State (Minister for Digital and Broadband)
Department for Digital, Culture, Media and Sport