

## **EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION AND DOCUMENTS**

COM(2020) 829 final  
2020/0365 (COD)

### **Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the resilience of critical entities**

Submitted by the Cabinet Office on 11 March 2021.

#### **SUBJECT MATTER**

1. This document is a proposal by the European Commission to the Parliament and the Council for a new Directive on the resilience of critical entities across the Union. This would replace the 2008 European Critical Infrastructure (ECI) Directive (2008/114/EC).
2. This proposed Critical Entities Resilience (CER) directive is based on the 2019 evaluation of the ECI directive.
3. The proposed CER directive parallels a separate proposal for a revised directive on network and information systems (NIS) security, which would repeal the first NIS Directive (2016/148).
4. This new proposal repeals the previous ECI directive and considerably widens the scope. As the UK is no longer a Member State of the European Union, it is under no obligation to implement this proposed Directive. However, the proposed directive may impact the Northern Ireland Protocol due to its potential impacts on the Single Electricity Market.

#### **Outcome of the 2019 Evaluation of the 2008 ECI Directive**

5. The 2019 evaluation highlighted the extent to which the operational environment has changed since 2008, particularly in terms of an increasingly complex risk landscape. This includes increasingly prevalent state-sponsored hybrid actions, natural hazards exacerbated by climate change and challenges linked to new and emerging technologies. Linked to these emerging technologies, operators have become increasingly more reliant on one another.
6. The 2019 evaluation also identified discrepancies between member states in how the directive was being implemented. Resilience efforts diverged significantly between member states resulting in inconsistent vulnerabilities across borders. This is particularly problematic given the increasing interconnection within and between member states.

7. As a result, the 2008 ECI Directive was found to have only partial relevance to the current operational landscape and was only partially effective due to the generality of some of its provisions.

### **Links to the proposal for a new directive on network and information systems (NIS 2)**

8. Following the quinquennial review of the original 2016 Network and Information Systems directive, the European Commission are proposing a new NIS directive to replace the original. This is the subject of a separate Explanatory Memorandum 14150/20, COM(2)823 has been submitted by DCMS.
9. The CER directive is intended to parallel the NIS 2 directive. While the NIS 2 directive focuses on cyber security, the CER directive would provide a stronger regulatory framework for non-cyber security and resilience. This is in greater recognition of the irrevocable links between cyber and physical security.

### **Main policy features of the CER directive**

10. The greatest change from the 2008 ECI directive is the expansion of scope from two sectors (energy and transport) to ten. The eight additional sectors are banking, financial market infrastructures, health, drinking water, waste water, digital infrastructure, public administration and space.
11. Under this directive, member states would be required to identify critical entities within these sectors according to common criteria as well as adopt a national strategy for ensuring the resilience of these critical entities and carry out regular risk assessments.

### **SCRUTINY HISTORY**

12. Council Directive 2008/114/EC was scrutinised as Proposal for a Directive of the Council on the identification and designation of European Critical Infrastructure and the assessment of the need to improve their protection (16933/06, COM(06)787 on which HO submitted an EM dated 19 February 2007. A Communication from the Commission on a European Programme for Critical Infrastructure Protection was also subject to scrutiny (16932/06, COM(06)786). That communication was the subject of a Home Office EM dated 19 February 2006. The Commons European Scrutiny Committee reported on both documents together on two occasions that the proposal raised issues of legal and political importance and the proposal completed scrutiny in a debate in European Committee B on 2 May 2007. The proposal and Communications were examined by the then sub-committee F of the

European Union Committee and scrutiny on both documents was completed on 13 June 2008.

## **MINISTERIAL RESPONSIBILITY**

13. The Chancellor of the Duchy of Lancaster holds overall responsibility for oversight of Critical National Infrastructure policy within England. The Paymaster General also has an interest.
14. The Secretary of State for Digital, Culture, Media and Sport is responsible for the transposition and implementation of the NIS Directive in the UK so may have an interest in the proposed CER directive.
15. Ministers in the Scottish and Welsh Governments and the Northern Ireland Executive are responsible for Critical National Infrastructure policy within their administrations.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

16. Scottish Government Ministers, Welsh Government Ministers and Northern Ireland Executive Ministers have an interest as Critical National Infrastructure policy is primarily devolved. The devolved administrations have been consulted in the preparation of this EM.
17. This proposal does not cover any area subject to a common framework.
18. Legal teams within the Department for Business, Energy and Industrial Strategy and the NIE Department for the Economy are currently working to clarify the relationship between the CER directive and the Northern Ireland Protocol. Further information will be provided once this has been clarified.
19. Scottish and Welsh Government officials have confirmed there is no direct impact of the proposed CER directive on their areas of responsibility.

## **LEGAL AND PROCEDURAL ISSUES**

### **i. Legal Base**

20. This proposal for a directive is based on Article 114 in the Treaty of the Functioning of the European Union (TFEU), which involves the approximation of laws for the improvement of the internal market. This is unlike the ECI (Directive 2008/114/EC) which was based on Article 308 of the Treaty establishing the European Community (corresponding to the current Article 352 of the Treaty on the Functioning of the European Union).

### **ii. Voting Procedure**

21. The proposed directive will be subject to qualified majority voting (QMV) procedure.
- iii.. Timetable for adoption and implementation (or expected next steps for non-legislative documents)
22. The proposal was published on 16 December 2020 and will be subject to negotiations between the co-legislators, notably of the Council of the EU and the European Parliament. After it is agreed, it will be adopted and EU Member States will be required to transpose the directive into national legislation within 18 months.
- iv. Does the proposal affect the substance of EU law that will remain in effect under the Northern Ireland Protocol or is it likely to be the subject of a request by the EU to be added to the Protocol under Article 13(4) thereof?
23. Legal teams within the Department for Business, Energy and Industrial Strategy and the NIE Department for the Economy are currently working to clarify the relationship between the CER directive and the Northern Ireland Protocol. There may be links to the Single Electricity Market through the Risk Preparedness Regulation ((EU) 2019/941) which replaced Directive 2005/89/EC.
- v. Do JHA opt-in, Schengen opt-out issues arise?
24. Not applicable

## **POLICY IMPLICATIONS**

25. As this proposal for a new Directive is still under negotiation and was not adopted during the Transition Period, the UK is not under any obligation to transpose it in domestic legislation. The original transposition of the 2008 ECI Directive (2008/114/EC) will remain on the UK statute book as retained EU law.
26. Legal teams within the Department for Business, Energy and Industrial Strategy and the NIE Department for the Economy are currently working to clarify the relationship between the CER directive and the Northern Ireland Protocol.
27. The proposed CER directive may indirectly impact CNI sectors with strong links to the EU, particularly Transport, as increasingly divergent regulatory approaches would increase the burden on operatives. Likewise, this directive may indirectly affect UK CNI through potential impacts on EU supply chains.

These impacts would be assessed and mitigated through sector-specific industry risk management procedures and international engagement fora.

28. As with a large proportion of proposed EU directives, the proposed CER directive could impact UK suppliers operating within EU member states. This directive may require UK suppliers to EU critical entities to share sensitive information which could be shared across member states. It is not clear what mitigation measures would be implemented to ensure the security of this information. This could create an additional risk for the suppliers in question.
29. There will be minimal direct impact on the sectors in scope of the 2008 ECI directive, Energy and Transport, as a result of the changes to the EU directives (other than in Northern Ireland). Security and resilience policy regarding Critical National Infrastructure within these sectors is mature and much wider than the 2008 ECI directive so will continue to be driven by HMG and Devolved Administrations' priorities.
30. As stated in the 2015 Strategic Defence and Security Review, the Government is committed to make sure we have the right regulatory framework to ensure that our Critical National Infrastructure is resilient to future threats. The Integrated Review will provide further detail regarding the strategic framework for national security and foreign policy.

## **CONSULTATION**

(to include consultation of external stakeholder and reference any impact assessment undertaken by the Government)

31. No consultation is required as a consequence of this proposal as the UK is not required to transpose or otherwise implement the proposed directive into domestic legislation.

## **FINANCIAL IMPLICATIONS**

32. No direct financial implications arise for the UK as a consequence of this proposal. This legislative initiative is not required to be transposed by the UK as it has not been adopted during the Transition Period.
33. Financial implications as a result of the impacts of the CER on the Single Electricity Market and Northern Ireland Protocol will be assessed by the HMG Department for Business, Energy and Industrial Strategy and the NIE Department for the Economy.

**MINISTERIAL NAME AND SIGNATURE**

A handwritten signature in black ink, appearing to read 'Penny Mordaunt', written in a cursive style.

Rt Hon Penny Mordaunt MP

Paymaster General

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[1] [Section 13A of the EU \(Withdrawal\) Act 2018](#), as inserted by [section 29 of the European Union \(Withdrawal Agreement\) Act 2020](#).