EXPLANATORY MEMORANDUM TO

THE NETWORK AND INFORMATION SYSTEMS (EU EXIT) (AMENDMENT) REGULATIONS 2021

2021 No.

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Digital, Culture, Media and Sport is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument addresses EU-exit related deficiencies in the retained EU legislation which regulates the security of network and information systems of core UK service providers. The deficiencies mainly relate to the parameters which determine when digital service providers must report cyber incidents which are set out in retained EU law at levels appropriate for the European Union as a whole but not for the United Kingdom now it is a standalone nation.

2.2 The instrument also makes minor textual adjustments to the security requirements of digital service providers to reflect the United Kingdom's position outside of the European Union.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom, including its internal waters, the territorial sea adjacent to the United Kingdom, and the sea (including the seabed and subsoil) in any area designated under section 1 (7) of the Continental Shelf Act 1964.

5. European Convention on Human Rights

5.1 The Minister of State for Media, Data, and Digital Infrastructure, Julia Lopez, has made the following statement regarding Human Rights:

"In my view the provisions of The Network and Information Systems (Amendment) (EU Exit) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 The Network and Information Systems Regulations 2018 (S.I 2018/506) (the NIS Regulations) implement Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union (the NIS Directive), under section 2(2) of the European Communities Act 1972 (ECA). The NIS Regulations set out the legal measures required to boost the overall level of security (both cyber and physical resilience) of network and information systems that

are critical for the provision of essential services (transport, energy, water, health, and digital infrastructure services) and certain digital service providers (online marketplaces, online search engines, and cloud computing services). The NIS Regulations include an obligation on digital service providers to notify the Information Commissioner of incidents that have a substantial impact on their ability to deliver their services.

6.2 Commission Implementing Regulation (EU) 2018/151 (the NIS EU Implementing Regulation), made under powers in the NIS Directive supplements the NIS Regulations by (amongst other things) setting out the parameters to be taken into account by digital service providers in determining whether an incident had a substantial impact on the provision of services.

6.3 When the United Kingdom left the European Union, domestic regulations made under section 2(2) ECA which implemented EU Directives and directly effective EU Regulations were preserved as "retained EU law" by virtue of the European Union (Withdrawal) Act 2018 (EUWA). In tandem section 8 EUWA empowered Ministers of the Crown to amend retained EU law to prevent, remedy, or mitigate any failure of EU retained law to operate effectively in the United Kingdom. This instrument is made under section 8 EUWA and remedies deficiencies in retained EU law, specifically in the NIS EU Implementing Regulation and NIS Regulations. The affirmative procedure is being followed because this instrument includes provision that amends a power to legislate (in accordance with paragraph 1(1) and (2)(d) of Schedule 7 EUWA).

7. Policy background

What is being done and why?

7.1 Under the NIS Regulations, operators of essential services and digital service providers have a duty to notify the relevant competent authority of substantial incidents that have an impact on the security of their network and information systems that are critical to the provisions of the essential service they provide.

7.2 For operators of essential services, the parameters for determining whether an incident is "substantial" are set out in national guidance issued by the relevant competent authority. By contrast, the parameters for digital service providers are set out in retained EU legislation. This is because digital service providers operate across multiple Member States and so need to be regulated on an EU-wide basis by a single Member State (the one hosting the digital service provider's headquarters). The EU-wide regulation of digital service providers necessitated the setting of harmonised EU parameters to ensure consistent rules applied across Member States and this was achieved through the NIS EU Implementing Regulation.

7.3 The impact of having the parameters for incident reporting by digital service providers set at EU level is that they do not work effectively for the United Kingdom as a standalone nation. Most importantly, the reporting thresholds set by reference to the number of the (EU) population affected are generally too high to trigger reporting in the United Kingdom. This means that the competent authority for digital service providers, the Information Commissioner, may not be sighted on cyber incidents which have caused disruption to the service provided by the digital service providers. The purpose of the reporting requirements is to ensure that the competent authorities are sighted on such cyber incidents and the setting of the reporting thresholds at their

current (EU) level undermines this. The criteria and the thresholds for reporting in the NIS EU Implementing Regulation need amending to remedy this.

Explanations

What will it now do?

7.4 The main correction is the removal of Article 4 of the NIS EU Implementing Regulation which contains the defective reporting thresholds. These thresholds inform when an incident has a "substantial impact" and is therefore reportable by a digital service provider. In the future the thresholds will be set by the competent authority for the digital service provider (the Information Commissioner) in guidance. This brings digital service providers in line with operators of essential services for whom thresholds are already set in guidance – this can happen now digital service providers are regulated on a national basis only. Provision has been added at regulations 12 of the NIS Regulations to ensure that digital service providers have regard to the Information Commissioner's guidance (which will be issued under existing powers at regulation 3(4) of the NIS Regulations) when determining whether to report an incident. As is the case with the competent authorities for the operators of essential services, there is no express duty in the Information Commissioner to issue guidance on reporting thresholds but the Information Commissioner has confirmed they will do so and it will be in place when Article 4 is revoked. The legislation would nonetheless work without guidance in place although there would be less detail provided to help digital service providers determine when an incident has a "substantial impact".

7.5 A much smaller correction is the textual amendment made to Article 3 of the NIS EU Implementing Regulation which means digital service providers must consider the geographical impact of an incident across the United Kingdom rather than across EU Member States.

8. European Union Withdrawal and Future Relationship

8.1 This instrument is being made using the power in section 8 EUWA in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. This instrument is not being used to implement any future relationship agreement.

8.2 In accordance with the requirements of EUWA the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 There is no current plan to consolidate the legislation.

10. Consultation outcome

10.1 A Call for Views was launched on the 26th July, with a deadline of 27th August for responses. The link to the consultation is here.

10.2 These were 91 responses to the Call for Views in total, with 38 respondents answering the question on whether they agreed with our proposals. 45% either agreed or strongly agreed, with 29% neither agreeing nor disagreeing, and 27% either disagreeing or strongly disagreeing. Of those who disagreed, the most common reason was an opposition to the Information Commissioner setting thresholds without consulting directly with impacted organisations. Divergence away from the EU directive for

reporting requirements was the next most common reason, with any other response named by 5 respondents or fewer. The link to the Government response to the consultation is here.

10.3 The Government response to the Call for Views outlines how consultation responses will impact on the SI. There are no changes to the proposal in light of this feedback, as the Information Commissioner has already launched its own Call for Views (available here), which offsets the majority of negative feedback. The Government will continue to work closely with the ICO regarding the thresholds to ensure they are fair and appropriate.

11. Guidance

11.1 No further guidance is required as a result of this instrument. Existing guidance can be found on the Government's website: here.

12. Impact

12.1 An Impact Assessment has not been prepared for this instrument. We anticipate the additional annual costs to business in scope of the NIS Regulations incurred by this instrument to be less than £5 million, as concluded by the Department's own (*De Minimis*) economic assessment, and therefore a full impact assessment is not required. There is no anticipated impact on charities or voluntary bodies.

12.2 The overall estimated impact amounts to £0.8m over the appraisal period, however the equivalent annual direct cost to businesses is minimal at £0.007m. This is because the majority of the costs associated with the intervention fall on the competent authority (the ICO) and not on businesses. There is no anticipated impact on the public sector.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 In accordance with regulation 25 of the NIS Regulations, the next post-implementation review of the Regulations will take place by May 2022. After 2022, post-implementation reviews will take place no later than every five years.

14.2 As the instrument is made under section 8 EUWA, no review clause is required.

15. Contact

15.1 James Tuck (james.tuck@dcms.gov.uk), Mihai-Alin Rusu (mihaialin.rusu@dcms.gov.uk) and Alyssa Cuignet (alyssa.cuignet@dcms.gov.uk) at the Department for Digital, Culture, Media and Sport can be contacted with any queries regarding the instrument.

15.2 Irfan Hemani, Deputy Director for Cyber Security, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Julia Lopez, Minister of State for Media, Data, and Digital Infrastructure, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020

Part 1A

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before IP completion day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising section 8 or part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 5 or 19, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 14, Schedule 8	Anybody making an SI after IP completion day under powers conferred before the start of the 2017-19 session of Parliament which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 15, Schedule 8	Anybody making an SI after IP completion day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before IP completion day, and explaining the instrument's effect on retained EU law.

Part 1B

Table of Statements under the 2020 Act

This table sets out the statements that may be required under the 2020 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraph 8 Schedule 5	Ministers of the Crown exercising section 31 to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees

Part 2

Statements required under the European Union (Withdrawal) 2018 Act or the European Union (Future Relationship) Act 2020

1. Appropriateness statement

1.1 The Minister for Media, Data, and Digital Infrastructure, Julia Lopez MP, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Network and Information Systems (Amendment etc.) (EU Exit) (No. 2) does no more than is appropriate".

1.2 This is the case because: the instrument does no more than to prevent, remedy, or mitigate legislative deficiencies arising from the withdrawal of the UK from the European Union. It makes appropriate provision to correct these deficiencies and to ensure the continued operation of the regulatory framework.

2. Good reasons

2.1 The Minister for Media, Data, and Digital Infrastructure, Julia Lopez MP, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are: the instrument addresses deficiencies in retained EU law arising from withdrawal of the UK from the EU, which are set out in Section 6 of this Explanatory Memorandum under 'Policy Background'.

3. Equalities

3.1 The Minister for Media, Data, and Digital Infrastructure, Julia Lopez MP, has made the following statement:

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 The Minister for Media, Data, and Digital Infrastructure, Julia Lopez MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Julia Lopez MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in section 7 of the main body of this explanatory memorandum.

5. Scrutiny statement where amending or revoking regulations etc. made under section 2(2) of the European Communities Act 1972

5.1 The Minister for Media, Data, and Digital Infrastructure, Julia Lopez MP, has made the following statement: "In my view, there are good reasons for modifying the instrument made under section 2(2) of the European Communities Act 1972." This is because the NIS Regulations are made under section 2(2) ECA 1972. In order to rectify the deficiencies arising from EU Exit set out in Part 6 of this Memorandum, it is necessary to amend the NIS Regulations along with the associated NIS EU Implementing Regulation. If the amendments are not made, the UK's legislation dealing with the reporting of cyber incidents by digital service providers will not operate effectively. The law relevant to the amendments is set out at Part 6 of the Memorandum; the effect of the amendments is set out at Part 7.