# EXPLANATORY MEMORANDUM TO

# THE NETWORK AND INFORMATION SYSTEMS (AMENDMENT ETC.) (EU EXIT) (NO. 2) REGULATIONS 2019

## 2019 No. 1444

## 1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

## 2. Purpose of the instrument

2.1 This instrument is being made under the EU (Withdrawal) Act 2018 to amend the Network and Information Systems Regulations (S.I. 2018/506), which came into force on 10 May 2018 (the "NIS Regulations"). The S.I. 2018/506 implements a European obligation, namely implementation of Directive (EU) 2016/1148 of the European Parliament and of the Council concerning measures for a high common level of security of network and information systems across the Union ("the NIS Directive"). These amendments are being made to correct deficiencies arising as a result of the withdrawal of the UK from the EU.

2.2 This instrument also revokes Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019, on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act), as it will be redundant as a result of the withdrawal of the UK from the EU.

2.3 The instrument amends the Network and Information Systems (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/653) in order to correct a drafting error identified by the Joint Committee on Statutory Instruments in their 58th Report of Session 2017-19 in which S.I. 2019/653 was drawn to the special attention of both Houses for defective drafting.

***Explanations***

*What did any relevant EU law do before exit day?*

2.4 The NIS Directive was transposed into UK domestic legislation in May 2018 via the NIS Regulations. The NIS Regulations provide legal measures aimed at boosting the overall level of security (both cyber and physical resilience) of network and information systems that are critical for the provision of essential services and relevant digital services.

2.5 The NIS Regulations apply to certain digital service providers and operators of essential services in the energy, transport, health, water, and digital infrastructure sectors. This instrument only concerns digital service providers and not any operators of essential services mentioned above.

2.6 Digital service providers within the scope of the NIS Directive are online marketplaces, online search engines and cloud computing services. Small and micro enterprises are exempt.

2.7 Digital service providers in scope of the NIS Directive who are based outside of the EU but which offer services within the EU are required to designate a representative within one of the member states within the EU in which services are offered. The digital service provider is then subject to the jurisdiction of that member state (Article 17.2 of the NIS Directive).

2.8 In the UK, the competent authority regulating digital service providers for the purpose of the NIS Regulations is the Information Commissioner's Office. The Information Commissioner regulates digital service providers who are either based in the UK or who have designated a representative in the UK. GCHQ is the single point of contact (SPOC) and computer security incident response team (CSIRT) for the purposes of the NIS Regulations.

2.9 Regulation (EU) No 2019/881 (Cybersecurity Act), which came into force on 27 June 2019, sets out the organisation and operations of the European Union Agency for Network and Information Security (ENISA) and introduces an EU-wide cybersecurity Certification Framework for EU cybersecurity certification schemes. The Regulation also repeals Regulation (EU) 526/2013 which previously set out the governance, operations, and financial provisions in relation to ENISA.

*Why is it being changed?*

2.10 This instrument is intended to mirror the provisions in Article 17.2 of the NIS Directive to ensure that there is no gap in the regulatory regime after the withdrawal of the UK from the EU. Without the amendments made by this instrument the Information Commissioner will be unable to effectively regulate digital service providers based outside the UK but offering services within the UK which do not have their headquarters or a representative in the UK. GCHQ may also be hampered in its ability to contact a digital service provider in its role as SPOC/CSIRT.

2.11 This instrument also revokes Regulation (EU) 2019/881 (Cybersecurity Act) as these provisions will be redundant following the withdrawal of the UK from the EU. The Regulation establishes and confers functions on ENISA, an EU body, and it is not appropriate to retain this Regulation. Future participation with ENISA will be discussed in the context of third-country agreements. The Regulation also sets up an EU-wide Cyber Security Certification Framework, which would not be appropriate to retain following EU Exit. The UK will continue to engage with the EU on certification schemes provided for by the Cybersecurity Act in the long-term following EU withdrawal.

*What will it now do?*

2.12 This instrument will require digital service providers established outside of the UK but offering services within the UK to nominate a representative in the UK, and comply with the NIS Regulations. The name and contact details of the representative must be provided to the Information Commissioner. The Information Commissioner or GCHQ should be able to contact the representative instead of, or in addition to, the digital service provider for the purposes of ensuring compliance with these Regulations.

2.13 The instrument will also revoke Regulation (EU) No 2019/881 in its entirety so that it will have no effect in UK law.

## 3. Matters of special interest to Parliament

***Matters of special interest to the Sifting Committees***

3.1 This instrument was presented to the Sifting Committees for consideration on 15th October 2019. The Sifting Committees agreed with the Government that this instrument may remain subject to negative resolution procedure and did not suggest any revisions.

***Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)***

3.2 As this instrument is subject to negative resolution procedure, there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

## 4. Extent and Territorial Application

4.1 The extent of this instrument is the United Kingdom.

4.2 The territorial application of those provisions of this instrument which amend the NIS Regulations is the United Kingdom, including its internal waters, 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. Otherwise the territorial application of the instrument is the United Kingdom.

## 5. European Convention on Human Rights

5.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 6. Legislative Context

6.1 The European Union (Withdrawal) Act 2018 provides for regulations to make provision to remedy any deficiency in retained EU law arising from the withdrawal of the UK from the EU. Section 8 (1) of the European Union (Withdrawal) Act 2018 provides that a Minister of the Crown may bring forward appropriate measures to prevent, remedy, or mitigate any failure of EU retained law to operate effectively or any other deficiency in retained EU law. When the UK leaves the EU, the Information Commissioner's Office will no longer have the ability to regulate any digital service provider not established in the UK.

6.2 The instrument amends the NIS Regulations in order to remove any deficiencies from the statute book. This includes making provisions to ensure that all digital service providers which offer services in the UK, and who fall within the scope of the NIS Directive, are brought within the scope of the NIS Regulations.

6.3 These provisions are intended to replicate the effects of Article 17.2 of the NIS Directive in order to fill a gap which will arise after the UK withdraws from the EU in the ability of the UK to regulate digital service providers based outside the UK, including EU-based providers. Article 17.2 is an EU-wide requirement that will apply to UK-based digital service providers which offer services in the EU, once the UK leaves the EU.

6.4 The instrument also revokes Regulation (EU) No 2019/881 in order to remove deficient provisions from the UK statute book. The provisions in Regulation (EU) No 2019/881 will no longer be relevant once the UK has withdrawn from the EU.

## 7. Policy background

***What is being done and why?***

7.1 Under the NIS Directive, a digital service provider from a third country not in the EU must designate a representative in the EU, if it offers digital services falling within the scope of the Directive within the EU. The representative must be established in one of the EU Member States where the services are offered, and the digital service provider will be deemed to be under the jurisdiction of the EU Member State where that representative is established.

7.2 When the UK exits the EU, the UK will be considered to be a third country. Digital service providers whose head office is in the UK will have to comply with the NIS Regulations, and if they also offer digital services in an EU Member State, then they will be required to designate a representative in that EU Member State and also comply with the regulations in that Member State.

7.3 Under the current NIS Regulations, there is no requirement for non-UK based digital service providers that offer services in the UK to designate a representative in the UK and comply with UK domestic regulations. This instrument will introduce that requirement in order to enable the Information Commissioner to be able to regulate non-UK based providers. Further, in a no-deal scenario, it is not appropriate for the UK not to impose obligations on non-UK-based digital service providers that will apply to UK-based digital service providers.

7.4 This instrument will revoke Regulation (EU) 2019/881, which revised the mandate and remit of ENISA and introduced an EU Cybersecurity Certification Framework for EU cyber security certification schemes. When the UK exits the EU it will no longer be an EU Member State; therefore the Regulation would not have any operative effect in the UK if it were to remain on the statute book.

7.5 The instrument will make a correction to the Network and Information Systems (Amendment etc.) (EU Exit) Regulations 2019 (SI 653/2019), required as a result of a drafting error, as brought to the special attention of both Houses by the Joint Committee on Statutory Instruments in their 58th Report of Session 2017-19.

## 8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 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. In accordance with the requirements of that Act 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 The following 12 public bodies, acting as competent authorities under the NIS Regulations, were consulted: the Department for Business, Energy & Industrial Strategy (BEIS); the Office of Gas and Electricity Markets (Ofgem); Department for Transport (DfT); the Civil Aviation Authority (CAA); the Department of Health and Social Care (DHSC); the Department for Environment, Food & Rural Affairs (Defra); the Scottish Ministers; the Drinking Water Quality Regulator for Scotland; the Welsh Ministers; the Department of Finance - Northern Ireland; the Office of Communications (Ofcom); and the Information Commissioner's Office (ICO).

10.2 In addition, BEIS and Ofgem are supported in their functions by the Health and Safety Executive (HSE), Defra is supported in its functions by the Drinking Water Inspectorate (DWI), and DHSC is supported in its functions by NHS Digital. The Ministry of Justice (MoJ) and the National Cyber Security Centre (NCSC, part of GCHQ) were also consulted on this instrument. Since this instrument will mainly affect the functions of the Information Commissioner's Office, the ICO have actively contributed to this policy.

10.3 DCMS also published a public call for views to seek comments on the proposed instrument. The call for views was published on 16th April, closed on 11th June and was met with support from the respondents. The Government's approach following the call for views was published on 24th July 2019, and is available here.

## 11. Guidance

11.1 DCMS will publish relevant guidance for non-UK based digital service providers before EU Exit Day, and this will be available on the gov.uk website. The guidance will describe the steps that non-UK based digital service providers will need to take to comply with the requirements introduced by this instrument in the event of existing the EU without an agreement and with no implementation period.

## 12. Impact

12.1 There is no impact on business, charities, or voluntary bodies established in the UK. This instrument only affects providers of digital services that are not established in the UK.

12.2 The impact on the public sector is negligible. This instrument only affects providers of digital services, which are not in the public sector.

12.3 An Impact Assessment has not been prepared for this instrument due to the low level of impact on businesses. A *De Minimis* Assessment has been prepared, which confirms that this instrument will not have bring any significant burdens to UK businesses, and that it will not have any disproportionate effects.

## 13. Regulating small business

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

## 14. Monitoring & review

14.1 The approach to monitoring of this legislation is provided by regulation 25 of the NIS Regulations, which sets out a process for the Secretary of State to review the regulatory provision contained within the NIS Regulations and publish a report setting out the conclusions of that review. The first such report must be published on or

before 9th May 2020 and subsequent reviews must be carried out biennially after that date.

14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

## 15. Contact

15.1 Mihai-Alin Rusu at the Department for Digital, Culture, Media and Sport, email: mihaialin.rusu@culture.gov.uk can answer any queries regarding the instrument.

15.2 Emma Green, 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 Matt Warman MP, 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

## Part 1

### 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), 9 and 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), 9 and 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), 9 and 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), 9 and 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.<br><br>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), 9 and 23(1) or jointly exercising powers in Schedule 2<br>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 exit 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. |

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|---|---|---|---|
| Criminal offences | Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence | Set out the 'good reasons' for creating a criminal offence, and the penalty attached. |
| Sub-delegation | Paragraph 30, Schedule 7 | Ministers of the Crown exercising sections 10(1), 12 and 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 4 or 14, Schedule 7. | Statement of the reasons for the Minister's opinion that the SI is urgent. |
| Explanations where amending regulations under 2(2) ECA 1972 | Paragraph 14, Schedule 8 | Anybody making an SI after exit 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 exit day, and explaining the instrument's effect on retained EU law. |
| Scrutiny statement where amending regulations under 2(2) ECA 1972 | Paragraph 15, Schedule 8 | Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA | Statement setting out:<br>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,<br>b) containing information about the relevant authority's response to—<br>(i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and<br>(ii) any other representations made to the relevant authority about the published draft instrument, and,<br>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. |

# Part 2

## Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

### 1. Sifting statement(s)

1.1 The Minister for Digital and Broadband, Matt Warman MP, has made the following statement regarding 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) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)."

1.2 This is the case because: it does not meet the criteria for an affirmative procedure in the European Union (Withdrawal) Act 2018.

### 2. Appropriateness statement

2.1 The Minister for Digital and Broadband, Matt Warman MP, has made the following statement regarding 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) Regulations 2019 does no more than is appropriate."

2.2 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.

### 3. Good reasons

3.1 The Minister for Digital and Broadband, Matt Warman MP, has made the following statement regarding 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."

3.2 These are: the instrument addresses EU retained law failures to operate effectively, as well as other deficiencies arising from withdrawal of the UK from the EU, examples of which are set out in Section 7 of this Explanatory Memorandum under 'Policy Background'.

### 4. Equalities

4.1 The Minister for Digital and Broadband, Matt Warman MP, has made the following statement:

"The 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."

4.2 The Minister for Digital and Broadband, Matt Warman 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, Matt Warman 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."

## 5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.