

EXPLANATORY MEMORANDUM TO
THE NETWORK AND INFORMATION SYSTEMS (AMENDMENTS ETC.) (EU
EXIT) REGULATIONS 2019

2019 No. 653

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of 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 and amends the Network and Information Systems Regulations 2018 (“the NIS Regulations”) (S.I. 2018/506), which came into force on 10 May 2018. The NIS Regulations implement a European obligation, namely 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”). This instrument amends provisions which are inappropriate or redundant as a result of the withdrawal of the UK from the EU.
- 2.2 This instrument also revokes Regulation (EU) No 526/2013 of the European Parliament and of the Council of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004 as it will be redundant as a result of the withdrawal of the UK from the EU.

Explanations

What did any relevant EU law do before exit day?

- 2.3 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. The NIS Regulations apply to digital service providers and operators of essential services in the energy, transport, health, water, and digital infrastructure sectors.
- 2.4 Regulation (EU) No 526/2013 sets out the remit of the European Union Agency for Network and Information Security (ENISA). This includes its objectives and tasks, as well as its governance, operations and financial provisions.

Why is it being changed?

- 2.5 This instrument amends provisions that are inappropriate or redundant as a result of the withdrawal of the UK from the EU. These amendments include the removal of obligations on the regulatory authorities and the National Cyber Security Centre (NCSC) to liaise, co-operate and share information with the European Commission

and authorities in other Member States. Where appropriate, co-operation and information sharing could still be conducted. NCSC is designated as the computer security incident response team and single point of contact under the NIS Regulations.

- 2.6 This instrument also revokes Regulation (EU) No 526/2013 as these provisions will be redundant as a result of 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. The UK will seek to agree continued active third country participation ENISA in line with existing third country agreements.

What will it now do?

- 2.7 The purpose of this instrument is to ensure that UK governance bodies can continue to be able to liaise, co-operate and share information with the EU where it is necessary and appropriate to do so whilst ensuring that they are not under an obligation to do so.
- 2.8 The instrument will revoke Regulation (EU) No 526/2013 in its entirety and it will have no effect in UK law.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was presented to the Sifting Committees for consideration on 4th March 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 the 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, 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(14). 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. The instrument amends the NIS Regulations in order to remove deficient provisions from the UK statute book. This includes provision to ensure that

inappropriate requirements currently placed on certain UK bodies to liaise with and share information with the EU are removed and replaced with provision that allows such functions to be exercised only where the bodies in question consider that it is necessary and appropriate to do so.

- 6.2 The instrument revokes Regulation (EU) No 526/2013 in order to remove deficient provisions from the UK statute book. The provisions in Regulation (EU) No 526/2013 will no longer be relevant once the UK has withdrawn from the EU.

7. Policy background

What is being done and why?

- 7.1 The NIS Directive includes a requirement for Member States to submit annual reports to the European Commission that must include the number and nature of incidents suffered in the UK. In the UK, submitting these annual reports is a duty of NCSC (GCHQ). In a ‘no deal’ scenario it is not appropriate for the UK to be required to share the annual reports with the European Commission. This instrument removes the duty on NCSC (GCHQ) to send annual reports to the European Commission on the number and nature of incidents. The SI will retain NCSC (GCHQ)’s ability to send the annual reports, if NCSC considers it to be appropriate.
- 7.2 The NIS Directive includes a requirement for Member States to submit biennial reports to the European Commission that must include the number of operators of essential services designated in the UK with an indication of their level of importance. In the UK, submitting the biennial reports is a duty of NCSC (GCHQ). In a ‘no deal’ scenario it is not appropriate for the UK to be required to share the biennial reports with the European Commission. This instrument removes the duty on NCSC (GCHQ) to send biennial reports to the European Commission on the number of operators of essential services designated under the NIS Regulations with an indication of their level of importance. The SI will retain NCSC (GCHQ)’s ability to send the biennial reports, if NCSC considers it to be appropriate.
- 7.3 Under the NIS Directive, if an incident affects two or more Member States, and that incident has been notified to the authorities in one of those Member States, there is an obligation to inform the relevant authorities in each of the affected Member States about that incident as soon as reasonably practicable. In the UK, if such an incident affects an operator of essential services, it is NCSC (GCHQ)’s obligation to inform the other affected EU Member States. This instrument removes the duty on NCSC (GCHQ) to inform the relevant authorities in a Member State through the mechanisms established in the NIS Directive, giving NCSC (GCHQ) more freedom to decide how and when they will share information with other countries.
- 7.4 Under the NIS Regulations, the Information Commissioner’s Office (ICO) is required to inform other affected Member States if it receives a report for an incident with cross-border impact. It is not appropriate for the ICO to have to share information in a manner that is prescribed by an EU Directive in a ‘no deal’ scenario. This instrument removes the duty on the ICO to inform the relevant authorities in other Member States when an incident has a cross-border impact although the ICO will still be able to choose to share this information.
- 7.5 The NIS Directive includes a requirement for Member States to consult with other Member States before designating the operators of essential services in scope of the NIS Regulations. In the UK, this is an obligation on the competent authorities

designated under the NIS Regulations. In a ‘no deal’ scenario it is not appropriate for the scope of the NIS Regulations to be influenced by a mandatory consultation process with EU Member States. This instrument removes the duty on competent authorities to consult and co-operate with competent authorities in EU Member States, in particular, for the purpose of designating operators of essential services or revoking designations.

- 7.6 The NIS Directive includes a requirement for Member States to co-operate with and assist relevant authorities in other Member States when a digital service provider has its main establishment in one Member State but its networks and information systems are physically located in another Member State. In the UK, this is a responsibility of the ICO. In a ‘no deal’ scenario it is not appropriate for the ICO to be obligated to engage in this process. Since there are benefits to this collaboration, it is still appropriate to enable such co-operation should the ICO consider this necessary but it is not appropriate for this to continue to be an obligation. This instrument removes the duty on the ICO to co-operate with, and assist, competent authorities in EU Member States when digital service providers have their main establishment in the UK but its networks and information systems are located in an EU Member State or vice-versa.
- 7.7 With regard to Regulation (EU) No 526/2013, when the UK exits the EU it will no longer be an EU Member State. This Regulation sets up ENISA, which is an EU body, and confers functions on it. Were it to be kept on the UK statute book it would have no operative effect in the UK. Furthermore, this Regulation will soon be repealed and replaced by Regulation (EU) 2017/0225 (the EU Cyber Security Act) which will revise the mandate and remit of ENISA and introduce an EU cyber security certification framework for EU cyber security certification schemes. While this new Regulation will supersede the current Regulation, it will not take effect until after the UK has exited the EU.
- 7.8 The Political Declaration provides a framework within which to continue to participate in the work of ENISA, and the UK will seek maximum participation in order to contribute to the development of effective cyber security regulations and standards. The UK will therefore seek to agree continued and active third country participation in Management Board of ENISA and its other networks, in line with existing third country agreements.

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 There are 12 public bodies acting as competent authorities under the NIS Regulations: 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). 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. Those governance bodies and NCSC (GCHQ) will be affected by the changes introduced by this SI, and they have all been consulted. All the affected organisations agree with the changes introduced in this instrument.

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 (link [here](#)).

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 The impact on the public sector is negligible. This instrument only affects the functions of GCHQ, the competent authorities, and other government agencies that are supporting them in their functions. The instrument will remove or convert the duties therein into information sharing powers, the resulting time cost savings from not having to exercise those information sharing requirements will be negligible. The cost of familiarisation with the changes introduced by this instrument will also be negligible.
- 12.3 An Impact Assessment has not been prepared for this instrument because there is no impact on business, as the instrument contains changes that affect the functions of governance bodies, including to remove the requirement to share information with the European Commission and relevant authorities in other Member States.

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 Isabel Bonachera at the Department for Digital, Culture, Media and Sport, email: isabel.bonacheramartin@culture.gov.uk can answer any queries regarding the instrument.
- 15.2 James Snook, 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 Margot James 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. 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 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. |
| Criminal offences | Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9, and | Set out the 'good reasons' for creating a criminal offence, and the penalty attached. |

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|---|--------------------------|---|--|
| | | 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 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 13, 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 16, 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: 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. |

Part 2

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

1. Sifting statement(s)

- 1.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James 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) 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 of State for the Department for Digital, Culture, Media and Sport, Margot James 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) Regulations 2019 does no more than is appropriate”.

- 2.2 This is the case because: this instrument does no more than prevent, remedy or mitigate legislative deficiencies arising from the withdrawal of the UK from the EU. It makes appropriate provision to correct these deficiencies and to ensure the continued operation of the regulatory framework. Examples are mentioned in section 7 of this Explanatory Memorandum under Policy Background.

3. Good reasons

- 3.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James 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: that the instrument addresses failures of EU retained law to operate effectively and 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 of State for the Department for Digital, Culture, Media and Sport, Margot James 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 of State for the Department for Digital, Culture, Media and Sport, Margot James 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, Margot James 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.