



Department for
Digital, Culture,
Media & Sport

Security of Network and Information Systems

Government proposed approach to regulating non-UK based digital service providers following the response to the call for views

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Department for Digital, Culture, Media and Sport

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1. Contact details

This document is the Government's approach following the public call for views, *Call for views on the UK's proposed approach to regulating non-UK based digital service providers operating in this country under the NIS Regulations* of March 2019.

Comments

Comments on the Government's response can be sent to:

NIS Directive Team
Department for Digital, Culture, Media & Sport
4th Floor
100 Parliament Street
London
SW1A 2BQ

Email nis@culture.gov.uk

This report is also available at
<https://www.gov.uk/government/consultations/digital-service-providers-eu-exit-consultation>.
Alternative format versions of this publication can be requested from the above address.

Freedom of Information

Information provided in the course of this consultation, including personal information, may be published or disclosed in accordance with access to information regimes, primarily the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (DPA).

The Department for Digital, Culture, Media and Sport will process your personal data in accordance with the DPA. In the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

2. Executive summary

The [Security of Network and Information Systems Directive](#) (NIS Directive) provides legal measures to boost the overall level of security of network and information systems that are critical for the provision of essential services and digital services. The NIS Directive was transposed into UK domestic legislation on 10 May 2018 via the [Networks and Information Systems Regulations 2018](#) (NIS Regulations). The NIS Regulations will continue to apply in the UK after the UK exits the EU.

Under the NIS Directive, a digital service provider that is not established in the EU, but offers services within the EU, is required to designate a representative and comply with the domestic legislation in one of the EU Member States where they offer services. While the United Kingdom is a member of the EU, this requirement doesn't apply to UK-based digital service providers. When the UK departs the EU, digital service providers established in the UK that offer services in another EU Member State will be required to designate a representative in an EU Member State.

There isn't a reciprocal requirement set out in the UK's NIS Regulations for non-UK based digital service provider that offer services in the UK to designate a representative in the UK. The Government is currently preparing a statutory instrument to introduce this requirement, which will apply to digital service providers based outside of the UK. The chosen approach would be aligned with the approach EU countries could legally take in requiring UK based digital service providers to designate a representative in an EU Member State.

A call for views was open from March 2019 to June 2019 to seek views on the Government's intention to include this new requirement in the NIS Regulations. The Government received a small number of positive responses which were used to inform the development of the Government's approach.

Previous consultations

The UK held a [public consultation](#) from August to September 2017 on its proposals to implement the NIS Directive. This consultation covered six main topics:

- how to identify essential services;
- a national Framework to manage implementation;
- the security requirements for operators of essential services;
- the incident reporting requirements for operators of essential services;
- the requirements on Digital Service Providers; and
- the proposed penalty regime.

The Government received over 350 responses to its consultation. These responses showed that there was broad support for the Government's approach, and for the decision to continue to apply the NIS Regulations after the UK's exit from the EU. The [Government's response to the public consultation](#) was published on 29 January 2018.

Subsequent to the Government's response, the Implementing Act was published in the Official Journal of the European Union on 30 January 2018 and can be found on the [EUR-LEX website](#).

In March 2018, the Government published a [targeted consultation](#) on the implementation of the NIS Regulations for digital service providers. The consultation covered six main topics:

- definitions of digital service providers;
- security measures;
- Incident reporting;
- digital service providers that serve operators of essential services;
- digital service providers that are also operators of essential services; and
- costs.

The Government received 12 responses to its consultation. These responses indicated there was support for the Government's overall approach towards digital service providers, but there continues to be uncertainty over exactly who was in scope, and greater clarification was needed on the subject of cost recovery. The [Government's response](#) to the targeted consultation was published on 31 August 2018.

3. Government's approach

Under the NIS Directive, digital service providers whose head office is outside of the EU are required to designate a representative in one of the EU Member States in which they offer services. When a digital service provider designates a representative in an EU Member State it will need to comply with the domestic legislation implementing the NIS Directive in that Member State. The NIS Directive sets out that requirement as follows:

Article 18

Jurisdiction and territoriality

1. For the purposes of this Directive, a digital service provider shall be deemed to be under the jurisdiction of the Member State in which it has its main establishment. A digital service provider shall be deemed to have its main establishment in a Member State when it has its head office in that Member State.
2. A digital service provider that is not established in the Union, but offers services referred to in Annex III within the Union, shall designate a representative in the Union. The representative shall be established in one of those Member States where the services are offered. The digital service provider shall be deemed to be under the jurisdiction of the Member State where the representative is established.
3. The designation of a representative by the digital service provider shall be without prejudice to legal actions which could be initiated against the digital service provider itself.

Following the UK's departure from the EU, the Government will replicate this provision in our domestic legislation. Digital service providers established outside of the UK will be required to nominate a representative in the UK, and comply with the NIS Regulations. In the United Kingdom, the competent authority regulating digital service providers for the purpose of the NIS Regulations is the Information Commissioner's Office (ICO).

Next steps

After a positive response to the approach proposed in the call for views, the new requirement will be introduced through an amendment to the NIS Regulations, which will come into effect the twentieth day after Exit day. Under this new requirement, non-UK based digital service providers that offer services in the UK must nominate a representative in the United Kingdom where the representative

- can be any natural or legal person established in the United Kingdom, who is able to act on behalf of a digital service provider with regard to its obligations under the NIS Regulations;
- must be designated in writing;
- must be contactable by the Information Commissioner or GCHQ for the purposes of ensuring compliance with the NIS Regulations;

- is nominated without prejudice to any legal action which could be initiated against the nominating digital service provider; and
- must be nominated within three months of the amendment coming into force, or within three months after the date on which a digital service providers falls in scope.

Digital service providers that nominate a representative in the UK will have to comply the NIS Regulations. This includes being required to

- meet their legal requirements in accordance with Regulation 12 of the NIS Regulations;
- notify the ICO about any security incident which has a substantial impact on the provision of digital services;
- register with the ICO;
- meet the inspection requirements; and
- comply with information, enforcement, and penalty notices.

Affected digital service providers

The new requirement to nominate a representative in the UK will affect digital service providers

- with more than 50 staff, or a turnover or balance sheet of more than €10 million a year;
- whose head office is located outside of the United Kingdom; and
- which offer services in the UK.

A digital service provider is an entity that provides one or more of these three types of digital service:

- Online marketplaces: digital services that allow consumers and/or traders to conclude online sales or service contracts with traders either on the online marketplace website or on a trader's website that uses computing services provided by the online marketplace.
- Online search engines: digital services that allow users to perform searches of, in principle, all websites or websites in a particular language on the basis of a query on any subject in the form of a keyword, phrase or other input and returns links in which information related to the requested content can be found.
- Cloud computing services: digital services that enable access to a scalable and elastic pool of shareable computing resources.

More detailed descriptions of digital services can be found in the [ICO Guide to NIS](#).