



Identification of Operators of Essential Services

Reference document on modalities of the consultation process in cases with cross-border impact

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ABOUT

This document has been drafted and endorsed by the NIS Cooperation Group members.

The Cooperation Group, composed of representatives of Member States, the Commission, and the European Union Agency for Network and Information Security ('ENISA'), has been established by Article 11 of the Directive (EU) 2016/1148 'concerning measures for a high common level of security of network and information systems across the Union' (NIS Directive). It facilitates strategic cooperation between the Member States regarding the security of network and information systems.

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Glossary and acronyms

| Acronym | Full Name |
|----------------------|---|
| AMS | Affected Member State: a Member State which is potentially affected by the loss of an essential service - as described in Art 5 (2) - originating from an operator located in another Member State |
| EEA | European Economic Area |
| ECI | European Critical Infrastructure means critical infrastructure located in Member States the disruption or destruction of which would have a significant impact on at least two Member States. |
| MS | Member State |
| NIS Directive | The Directive on Security of Network and Information Systems (NIS Directive) set into policy by the European Parliament in 2016 in order to create an overall higher level of cyber security in the European union. |
| OES | Operator of essential services means a public or private entity of a type referred to in Annex II of the NIS Directive, which meets the criteria laid down in Article 5(2); |
| OMS | Originating Member State: a Member State on whose territory the operator is located. |
| RA | Risk assessment |
| SPOC | The Single Point of Contact shall exercise a liaison function to ensure cross-border cooperation of Member State authorities and with the relevant authorities in other Member States and with the Cooperation Group referred to in Article 11 and the CSIRTs network referred to in Article 12 of the Directive. |

1 Introduction

Where an operator provides services¹ in more than one Member States, Article 5(4) requires that those Member States shall engage in consultation with each other before those Member States take a decision on the identification of OES. The purpose of this consultation is to facilitate the assessment of the critical nature of the operator, by the involved Member States, in terms of cross-border impact.

The cross-border consultation is a complex process, which involves the collection and exchange of ad-hoc and confidential information between the involved MS. With a view to streamline the consultation, this guide proposes two things:

- a) A five step process which allows the involved Members States to engage in a dialogue with each other in order to fulfil the requirement of article 5(4); and
- b) A list of data fields as a means to facilitate the information exchange during the consultation process. On the basis of this guideline the Member States can go beyond that proposed for exchange of information.

As regards the collection and exchange of ad hoc and confidential information between involved Member States, please note that such exchange should be subject to the following:

- the silence (acceptance) procedure i.e. a defined period of time after which if no comment is received, consultation is deemed to have taken place,
- should take place on a best effort basis from both Originating Member State (OMS) and Affected Member State (AMS) Single Point of Contact (SPOC); and
- should respect the need-to-know principle in order to avoid unnecessary sharing of information amongst different national SPOC.

This document is the output of a work stream led by experts from the national competent authority of Germany, supported by experts from ENISA and the European Commission. It consolidates input and comments from all members of the NIS Cooperation group.

1.1 Target audience

This document addresses national ministries and national competent authorities in the EU tasked with implementing the NIS directive.

1.2 Objective

The objective of this document is threefold:

2. To provide the members of the Cooperation Group with efficient and effective guidelines on how to implement Article 5(4) consultations.
3. To facilitate the Member States when taking informed decisions related to whether an operator² is essential or not.
4. To support Member States in avoiding unnecessary divergence or inconsistencies when communicating in order to implement the NIS directive article 5(4).³

¹ As referred to in point (a) of article 5(2), a service which is essential for the maintenance of critical societal and/or economic activities.

² With an establishment on their territory.

It is worth noting that article 5(4) consultations should not be seen by the Member States solely as a NIS Directive compliance requirement, but also as a means which might support the update of:

- Member States' national risk assessment; and
- the thresholds of incident reporting/notifications of the involved Member States.

1.3 Scope

The document captures the consensus of the Cooperation group and it does not prescribe nor define requirements for Member States. It is at the discretion of national authorities to diverge from this guidance, for example to take into account specific national circumstances or existing structures.

The methodology for the identification of services provided by operator(s) established on another Member State are beyond the scope of the document. Each Member State might have its own methodology to determine their own cross border dependency risks, stemming from their own particular threat landscape: process should be as simple and quick as possible, based on each other's best efforts, etc.

1.4 Versions and changes

This document may be updated by the Cooperation Group, when necessary.

1.5 Structure

Section 2 contains the main passages in the legal text of the NIS directive, for the sake of reference. In Section 3 we outline the cross border consultation process. Section 4 contains the suggested set of data to facilitate the information exchange during the consultation. Annex I contains the flowchart showing how operators, SPOCs and National Authorities can interact with each others.

³ By following the same process and by exchanging a set of agreed data fields during their communication.

2 Legal reference

In this section, only for the sake of reference, we quote verbatim the most important parts of the text in the [NIS directive](#).

2.1 Recitals

(24) For the purposes of the identification process, where an entity provides an essential service in two or more Member States, those Member States should engage in bilateral or multilateral discussions with each other. This consultation process is intended to help them assess the critical nature of the operator in terms of cross-border impact, thereby allowing each Member State involved to present its views regarding the risks associated with the services provided. The Member States concerned should take into account each others views in this process, and should be able to request the assistance of the Cooperation Group in this regard.

2.2 Articles

In accordance with Article 5(1), each Member State is obliged to identify of Operators of Essential Services (OES) with an establishment in their territory by November 2018. The criteria for identifying OES is set out in Article 5(2) of the Directive. The entities of interest must be of a type listed in Annex II of the Directive, be providing essential services which are dependent on network and information systems for their provision and in circumstances whereby an incident would result in a significant disruptive effect as defined in Article 6(1). According to article 5(4) for the purposes of 5(1), where an entity provides a service essential for the maintenance of critical societal and/or economic activities, in two or more Member States, those Member States shall engage in consultation with each other. That consultation shall take place before a decision on identification is taken.

Article 5: Identification of operators of essential services

1. By 9 November 2018, for each sector and subsector referred to in Annex II, Member States shall identify the operators of essential services with an establishment on their territory.

2. The criteria for the identification of the operators of essential services, as referred to in point (4) of Article 4, shall be as follows:

(a) an entity provides a service which is essential for the maintenance of critical societal and/or economic activities;

(b) the provision of that service depends on network and information systems; and

(c) an incident would have significant disruptive effects on the provision of that service.

(...)

4. For the purposes of paragraph 1, where an entity provides a service as referred to in point (a) of paragraph 2 in two or more Member States, those Member States shall engage in consultation with each other. That consultation shall take place before a decision on identification is taken.

Article 24: Transitional measures

(...)

2. *For the period from 9 February 2017 to 9 November 2018, and for the purposes of supporting Member States in taking a consistent approach in the process of identification of operators of essential services, the Cooperation Group shall discuss the process, substance and type of national measures allowing for the identification of operators of essential services within a specific sector in accordance with the criteria set out in Articles 5 and 6. The Cooperation Group shall also discuss, at the request of a Member State, specific draft national measures of that Member State, allowing for the identification of operators of essential services within a specific sector in accordance with the criteria set out in Articles 5 and 6.*

3 Cross border consultation process

Currently, there is no established process to facilitate the dialogue among the Member States for the purposes of article 5(4). Member States without any prior experience in the same matter might face difficulties in implementing this article.⁴ In order to provide the Member States with comprehensive guidelines, relating to the identification of OES providing service in more than one MS, a step by step process is described which facilitates the cross border consultation process.

In the following sections, the SPOC is considered as the key national entity to undertake the consultation on behalf of each member state involved. According to article 8 (4) of the Directive, the single point of contact shall exercise a liaison function to ensure cross-border cooperation of Member State authorities and with the relevant authorities in other Member States and with the Cooperation Group and the CSIRTs network. However, this does not preclude a Member State from choosing national authorities other than SPOCs and national competent authorities under the Directive (e.g. foreign ministries) to be undertaking this task.

3.1 First step

According to article 5(4), a Member State shall identify the OES with an establishment on its territory; where an entity **provides** a service in two or more Member States then those Member States shall engage in consultation with each other. However, there are various possibilities via which an OMS might identify the need for a consultation with other Member States:

- a. After performing a national risk assessment,⁵ an OMS identifies an OES that provides a service to two or more MS. Then OMS national authority contacts the OMS SPOC about this operator.
- b. The AMS SPOC may contact the OMS SPOC in case the following conditions are met:
 - i. it has identified, through its own means (e.g. a national risk assessment⁵), a service or an operator which depends on a service provided by an operator established on that OMS; and
 - ii. the AMS SPOC has not yet been contacted by the OMS SPOC.
- c. The operator that offers the service contacts the national authority of the OMS on a voluntary basis. The way that this is implemented depends on the national approach of identification of OES and it goes beyond the scope of this guideline.

OMS and AMS have the same right to the consultation. Therefore, and in the spirit of mutual partnership, common will, concern and collaboration, the OMS should initiate the process of consultation. National authorities, where they intend to designate as an OES a subsidiary company depending on a group that is located on the territory of another Member State(s) might include, via their national SPOC, the SPOC of that Member State(s) in the consultation process or at least inform them. This practice is recommended even if that subsidiary company does not provide any essential service in that Member State(s).

Once the OMS has identified the need for consultation, the OMS SPOC requires a list of information (minimum list A, see below) from the OES in its territory.

⁴ However, other EU procedures with similar objectives e.g. the ECI Directive (Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and assessment of the need to improve their protection) might also be taken into account.

⁵ The methodology for the identification of such services (i.e. criteria used, thresholds, etc.) are beyond the scope of this document.

3.2 Second step

The OES submits to the OMS SPOC the information requested during the previous step. Multiple iterations of this step might be triggered until the SPOC considers the information collected sufficient for the purposes of the consultation.

3.3 Third step

The OMS SPOC sends appropriate information (minimum list B, see below) to facilitate the consultation with each Member State engaged in the cross border service provision, based on the information received from the previous step.

The consultation procedure starts when the OMS SPOC submits the necessary information to the SPOC of the engaged Member States.⁶ Each national SPOC or other relevant authority might make aware the 'domestic' operator, described in the consultation documents, that is engaged in an article 5(4) identification process, which is in progress.

In case that more information is needed, for the assessment of the involved risk, an AMS SPOC might deliberately request for individual consultation with the OMS SPOC. Consultation is deemed as concluded in the absence of any comment from the involved AMS SPOC within three weeks. In these ad hoc consultations, other additional authorities or stakeholders might be involved e.g. national authority, sector regulator, the operator itself. In addition, the involved parties might exchange extra information other than this described on the next section, data formats and templates, e.g. statistics, maps, risk assessment reports etc. This type of ad hoc consultations, as well as the data involved therein, are out of the scope of this guideline.

3.4 Fourth step

After the period of the three weeks silent procedure is finished, the consultation procedure concludes. The involved SPOC consider that the information is sufficient and that no further information is needed. Then, each SPOC might forward the final set of information (minimum list B) to the national competent authority, which is responsible for the maintenance of the list of OES.

3.5 Fifth step

The national competent authority might take under consideration the exchanged information in order to determine the cross border nature of the service. It remains at the discretion of each national competent authority, the description of particular extra criteria for the risk assessment of the cross border service other than those appearing in data list B. Finally, the competent authority might update the national list of OES or not, based on the result of the consultation. In addition, it might voluntarily inform the OES – with an establishment on its territory - about the result of the consultation process.

Concerning the case of European critical infrastructure's operators which also will be designated as an OES, the already existing procedures, and more specifically those mentioned in article 4 of the ECI Directive (see Footnote no 4, above), must be taken into account as well.

More specifically article 4 on designation of ECI states that:

1. Each Member State shall inform the other Member States which may be significantly affected by a potential ECI about its identity and the reasons for designating it as a potential ECI.

⁶ The exchange of information should maintain the characteristics mentioned already at §1, Introduction.

2. Each Member State on whose territory a potential ECI is located shall engage in bilateral and/or multilateral discussions with the other Member States, which may be significantly affected by the potential ECI. The Commission may participate in these discussions but shall not have access to detailed information, which would allow for the unequivocal identification of a particular infrastructure.

A Member State that has reason to believe that it may be significantly affected by the potential ECI, but has not been identified as such by the Member State on whose territory the potential ECI is located, may inform the Commission about its wish to be engaged in bilateral and/or multilateral discussions on this issue. The Commission shall without delay communicate this wish to the Member State on whose territory the potential ECI is located and endeavour to facilitate agreement between the parties.

3. The Member State on whose territory a potential ECI is located shall designate it as an ECI following an agreement between that Member State and those Member States that may be significantly affected.

The acceptance of the Member State on whose territory the infrastructure to be designated as an ECI is located, shall be required.

4. The Member State on whose territory a designated ECI is located shall inform the Commission on an annual basis of the number of designated ECIs per sector and of the number of Member States dependent on each designated ECI. Only those Member States that may be significantly affected by an ECI shall know its identity.

4 Data lists for information exchange purposes

In this section, we mark the optional fields with an asterisk (*). The other fields should be used, as good practice, to allow the national authority and/or CSIRT to process and use the information received efficiently and effectively.

4.1 Data list A: OES to SPOC notification data

It is important to underline that in each country templates will be different because in each country there are different notification and reporting processes, there is a different language, a different organizational setup between OES, national authority, a different culture, etc. Every country takes a different approach in terms of the amount of information and the amount of detail requested.

The following data list (list A) serves as a guide for the OES to communicate information to the SPOC.

1. CONTACT DETAILS OF THE OPERATOR WITH CROSS BORDER IMPACT

- Name of the Operator
- Address of the headquarters
- Name and location of the applicant⁷
- Address of the applicant
- Contact Person details
- Name and/or function of contact person (note: the contact person may change, you may indicate a function rather than the name of a specific person):
- Address
- Country
- Phone number
- E-Mail

2. DESCRIPTION OF THE CROSS BORDER SERVICE⁸

- Name and location of the affected operator outside the country
- Address
- Short description of the cross border service (in text)
- The sector to which the service belongs (Energy, Transport, Banking, Financial market infrastructures, Health, Drinking water, Digital infrastructure/ICT, other)
- The operator offers the service at a level which is at or above the supply level considered as essential according to the national regulation⁹ (Yes/no) *
- List of Member States involved
- Type of dependency(ies) the cross border service creates *
 - **Inbound:** The service in scope depends on another service offered by another Member State (Yes/no)
 - **Outbound:** Another Member State depends on the service in scope (Yes/no)
 - **Bi-directional** (Yes/no)

⁷ The applicant may act on behalf of the operator.

⁸ Multiple copies of section 2 in case of multiple cross border services offered/received.

⁹ Fill in the number of regulation which identifies the criteria for the identification of OES.

- EEA countries *
 - The cross border service depends on EEA country(ies) (Yes/No)
 - The service in scope is covered by a national CIIP regulation at the EEA country (Yes/No)
 - Explain how adherence to information security good practices is binding to the subsidiary at the EEA country (text)
 - How adherence to information security good practices is binding to the subsidiary at the third country (text)

Information relevant to national authorities as well as national SPOC and CSIRTs network is publicly available and accessible at <https://ec.europa.eu/digital-single-market/en/nis-cooperation-group>.

4.2 Data list B: SPOC to SPOC notification data

The notification and reporting processes in the different EU countries are interlinked and information needs to be shared between authorities, as part of cross-border consultation, and collected and analysed bi-annually, as part of the list of identified OES update process foreseen in article 5(5). Therefore, it is important that there is an agreement about a basic set of fields that need to be included in the notification data list.

For the sake of simplicity and in line with the features of an efficient information exchange demonstrated at §3.3, page 10, the data list B should be a subset of data list A, namely:

- The name of the Operator
- The address of the operator
- The full data set contained in the Description of the cross border service.

Annex I: Flow diagram

