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NOTE

From: Presidency
To: Permanent Representatives Committee/Council
Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148
- Progress report

The present report has been drawn up under the responsibility of the Presidency and is without prejudice to particular points of interest or further contributions of individual Member States. It sets out the work done so far in the Council's preparatory bodies and gives an account on the state of play in the examination of the above mentioned proposal. The Council is invited to take note of the report.

I. INTRODUCTION

1. On 16 December 2020, the Commission adopted the proposal for a Directive on measures for a high common level of cybersecurity across the Union (revised NIS Directive or "NIS 2")¹ with the aim to replace the current Directive on security of network and information systems ("the NIS Directive")². The proposal was one of the actions foreseen in the EU's Cybersecurity Strategy for the Digital Decade³ to build resilience to cyber threats and ensure citizens and businesses benefit from trustworthy digital technologies.
2. The aim of the proposal, based on Article 114 TFEU, is to further improve the resilience and incident response capacities of public and private entities, competent authorities and the Union as a whole. The proposal significantly broadens the scope of the current NIS Directive, addresses security of supply chains, strengthens the security requirements imposed and streamlines reporting obligations, while introducing more stringent supervisory measures and stricter enforcement. It also contains provisions addressing information sharing and cooperation on cyber crisis management at national and Union level. The proposal also provides for regulation of databases of domain registration data.

¹ Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148, COM(2020)823 final.

² Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union

³ doc. 14133/20

3. In the European Parliament, the committee responsible for the proposal is the Committee on Industry, Research and Energy (ITRE), while the committees for opinion are the Foreign Affairs (AFET), Internal Market and Consumer Protection (IMCO), Transport and Tourism (TRAN) and Civil Liberties, Justice and Home Affairs (LIBE). The rapporteur for the file is Bart Groothuis (Renew, Netherlands). The Portuguese Presidency held an informal exchange of views with the ITRE rapporteur on 29 January 2021 on the file. On 12 April 2021, the Presidency engaged with representatives of the rapporteur for the opinion of the IMCO committee, Morten Lokkegaard (Renew, Denmark). On 16 April, the Portuguese Presidency held an informal exchange of views with the Head of Unit and other administrators from the ITRE committee on the file. The rapporteur has presented his draft report in the ITRE Committee on 03 May 2021⁴.
4. The European Economic and Social Committee adopted its opinion on 28 April 2021⁵.
5. On 3 February 2021, the Permanent Representatives Committee decided to consult the European Committee of Regions on the proposal⁶. Thus far, the European Committee of the Regions has not given its opinion.
6. The European Data Protection Supervisor adopted its opinion on 11 March 2021⁷.
7. In its statement⁸ of 26 February 2021, the European Council invited the co-legislators to swiftly take work forward, particularly on the revised Directive on security of network and information systems (NIS 2 Directive).

⁴ 2020/0359(COD)

⁵ TEN/730-EESC-2020

⁶ 5573/21

⁷ Opinion 5/2021 on the Cybersecurity Strategy and the NIS 2.0 Directive

⁸ <https://www.consilium.europa.eu/en/press/press-releases/2021/02/26/statement-of-the-members-of-the-european-council-25-26-february-2021/>

8. In its conclusions⁹ of 22 March 2021 on the EU's Cybersecurity Strategy for the Digital Decade, the Council acknowledged the importance of a comprehensive and horizontal approach on cybersecurity in the Union, while fully respecting Member States' competences and needs as well as the importance of ongoing support for technical assistance and cooperation to build the capacity of Member States. Taking into account the evolution of the cyber threat landscape, the Council took note of the new proposal for a Directive on measures for a high common level of cybersecurity across the Union that builds upon the NIS Directive and reiterated its support to strengthening and harmonising national cybersecurity frameworks and sustained cooperation between Member States. Furthermore, it stressed the need for alignment and articulation of sectoral legislation in this domain.

II. WORK WITHIN THE COUNCIL PREPARATORY BODIES

9. In the Council, the examination of the proposal is carried out in the Horizontal Working Party on Cyber Issues (hereinafter: HWPCI). At the informal videoconference meeting of the HWPCI on 17 December 2020, the Commission presented the new Cybersecurity Strategy and the proposal for the review of the NIS Directive. Subsequently, the Commission gave a more comprehensive presentation on the proposal on 12 January 2021.
10. During the informal videoconference of the HWPCI on 19 January 2021, the Portuguese Presidency outlined its methodology of work for the discussions of the NIS 2 Directive. The Presidency foresaw a careful read-through of the proposal, taking into account the important innovations included in the revised directive and allowing for delegations to comment and present questions in writing followed by clarifications by the Commission.

⁹ 6722/21

11. Additionally, the HWPCI discussed the interaction of the revised NIS Directive with sectoral legislation, notably the Regulation on the resilience of critical entities (the "CER" Directive) and the Regulation on digital operational resilience for the financial sector ("DORA"). The Commission (DG HOME) presented the new proposal for the CER Directive, underlining the main elements of interaction with the NIS 2 Directive. The HWPCI meetings also touched upon links with the proposed Regulation on digital operational resilience for the financial sector by means of a discussion note from the Presidency of the Working Party on Financial Services (responsible for the negotiations of "DORA") and also a presentation of the non-paper put forward in the context Working Party on Financial Services by three Member States on "correlation of NIS authorities and NCA under DORA". The Chair of the HWPCI also attended a meeting of the PROCIV Working Party to present the state of play of the discussions on the NIS 2 Directive. The Presidency regularly kept the HWPCI informed of the evolution of the relevant discussions in the PROCIV and the Working Party on Financial Services on their respective files, reiterating the need for close coordination at national level amongst different lead ministries for these files.
12. At its informal videoconferences on 2 and 9 February 2021, the HWPCI started examining the proposal with the first two articles ("Subject matter" and "Scope") and Annexes I and II. On the HWPCI meeting on 2 February, the HWPCI received a presentation from the Commission and the Chair of the NIS Cooperation group on the state of play of the work in the NIS Cooperation Group, including on its role in facilitating the implementation of the NIS Directive. In the aforementioned meeting, the Executive Director of ENISA also made a presentation of the Agency's Work Programme including information on the NIS Investments Study conducted by ENISA and its role in supporting Member States and EU Institutions in the implementation of policy and advice related to the NIS Directive. During these meetings, substantive discussions were held regarding the scope and questions were raised regarding proportionality.

13. During the HWPCI on 22 February 2021, the Commission presented the impact assessment for the review of the NIS Directive and discussions on the proposal continued with Articles 3 and 4 ("Minimum harmonisation" and "Definitions").
14. On 2 March 2021 the preliminary assessment of the proposal continued in the HWPCI meeting with extensive discussions on Articles 5 and 6 ("National cybersecurity strategies" and "Coordinated vulnerability disclosure and a European vulnerability registry"), with an extensive presentation by the Commission on Coordinated Vulnerability Disclosure and the EU Vulnerability Registry.
15. Discussions continued at the HWPCI meeting on 9 March 2021 with Articles 7 to 11 concerning cybersecurity crisis management frameworks, national competent authorities and single points of contact under the revised NIS Directive, Computer Security Incidents Response Teams (CSIRTs) including their requirements, tasks and cooperation at national level.
16. At its extraordinary meeting on 17 March 2021, the HWPCI discussed Articles 12 to 16 (Chapter III on "Cooperation") which includes the NIS Cooperation Group, CSIRTs Network, the European Cyber Crisis Liaison Organization Network (EU CyCLONe), the report on the state of cybersecurity in the Union and the issue of peer-reviews. In particular, a number of questions and clarifications were raised concerning these last two articles. Article 17 on "Governance" was also approached during this meeting in addition to a presentation by the Head of Team for Prevention and Outreach of EUROPOL's European Cyber Crime Centre (EC3) on the law enforcement authorities view on the revised NIS Directive.
17. At its meeting on 24 March 2021, the HWPCI looked into Chapter IV on Cybersecurity risk management and reporting obligations, namely, articles 18 ("Cybersecurity risk management measures"), 19 ("EU coordinated risk assessments of critical supply chains") and 20 ("Reporting obligations"), this last article being considered one of the core provisions of the NIS 2 Directive.

18. At its meeting on 14 April, the HWPCI tackled articles 21 ("Use of European cybersecurity certification schemes"), 22 ("Standardisation") and 23 ("Databases of domain names and registration data") as well as the subsequent articles 24 and 25 ("Jurisdiction and registration"). Chapters V and VI (respectively on information sharing and on supervision and enforcement) were also discussed at this meeting. Due to their extensiveness and detail, articles 29 and 30 on supervision and enforcement for, respectively, essential and important, triggered numerous comments and questions from Member States. Similarly, substantial comments and questions were posed concerning articles 31, 32 and 33 on administrative fines, infringements entailing a personal data breach and penalties. Further clarification was also sought by Member States in relation to article 34 on mutual assistance.
19. The HWPCI addressed Chapter VII on Transitional and Final Provisions (article 35 to 43) at its meeting on 19 April, thereby concluding the read-through of the articles.
20. At its meeting on 28 April 2021, the HWPCI finalized the complete read-through of the proposal by addressing the recitals. This was the first physical meeting of the HWPCI held during the Portuguese Presidency on the NIS 2 Directive. A correlation table between the recitals and the relevant articles in the text had previously been shared by the Commission on 15 February 2021.
21. At its meeting on 5 May 2021, the HWPCI held a first exchange of views with a view to begin drafting on the file. In order to progress with the file, the Presidency has decided to begin the drafting process on the issue of the interaction of the revised NIS directive with relevant sectoral legislation. This decision was made based on the discussions held in the HWPCI during the read-through of the file as well as the fact that this issue had already been identified by Member States as important taking into account the specific reference included in the 22 March Council Conclusions on the EU's Cybersecurity Strategy for the Digital Decade on the matter. Member States have been requested to submit concrete text proposals on this issue until 14 May 2021.

22. So far, during the Portuguese Presidency, the HWPCI has dedicated 17 meetings to the presentation and read-through of the proposal. During these discussions, some Member States have indicated scrutiny reservations on all or parts of the proposal.
23. It is the Presidency's conviction that the careful read-through of the NIS 2 Directive has allowed Member States to receive detailed explanations from the Commission on the fundamental changes to the revised directive and, simultaneously, to highlight their main concerns regarding the proposal, thus facilitating and streamlining the future work with a view to reaching a general approach in due time.

III. SUBSTANCE

24. In the discussions held in the HWPCI, while broadly welcoming the revised NIS Directive, Member States raised a number of key issues and concerns which should be reflected upon during the negotiation of the proposal.
25. One of the recurrent issues raised during the discussions has been the interaction of the revised NIS Directive and sectoral legislation. During the discussions held to date, a significant majority of Member States have stated that it is imperative to view the revised NIS Directive proposal as the horizontal framework for cybersecurity in the EU and that it should serve as a baseline standard for minimum harmonisation of all relevant sectoral legislation in this field.
26. Secondly, many concerns were raised regarding the significant expansion of the scope of the revised NIS Directive: the extent of essential and important entities falling within the scope of the directive; Member States' responsibilities to identify essential and important entities; the implications on the capacity of national competent authorities to monitor these lists of entities; specificities of the annexes detailing the essential and important entities falling under the scope e.g. the extensive inclusion of the food and transport sectors regardless of their importance to the respective sector; the limitations of introducing a size-cap threshold, especially when it comes to entities that provide more than one service or to small and micro entities with strong interdependencies with other services, resulting in cascading effects.

27. Thirdly, the size-cap criteria as the sole element for consideration in terms of identification of essential and important entities to be covered under the scope of the directive has also been raised by some member states who would prefer, cumulatively, a risk-based approach or additional qualitative criteria introduced at national level. The Commission has been clear that the size-cap criteria is the most optimal, although perhaps not ideal, gauge in order to address the inefficient identification process resulting from the current NIS Directive and thereby avoiding fragmentation on the application of the future instrument.
28. Some Member States have questioned whether the Single Market legal basis (art. 114 TFEU) allows covering public administration under the scope of the revised directive. Three Member States voice their interest in receiving a written opinion from the Council Legal Service on this matter. Additionally, the criteria by which public administration entities shall be identified (Nomenclature of territorial units for statistics - NUTS) was questioned.
29. A fifth issue which has been highlighted by several Member States during the discussions, relates to national security concerns and the application, in practice, of the exclusion from the scope of the revised directive of public entities involved in the maintenance of public security, defence and national security.
30. Other issues of interest raised by Member States related to the linkages and possible duplications between the different structures, networks and mechanisms in the cybersecurity domain at EU level, notably with the introduction of the EU CyCLONe, but also in anticipation of upcoming proposals and/or initiatives such as the establishment of a Network of Security Operations Centres (SOCs) or the proposal on the Joint Cyber Unit.
31. Regarding the introduction of peer-reviews, some Member States have questioned the mandatory nature of this exercise and the mechanism to establish the respective methodology, raised queries on the confidentiality and availability of exchanged information and underlined the scarcity of resources available for conducting such reviews, particularly in smaller Member States.

32. Concerning supply chain security, and more specifically the cybersecurity risk management measures identified in article 18 and the EU coordinated risk assessments of critical supply chains in article 19 of the revised Directive proposal, the Commission has indicated that it is currently considering a comprehensive approach, including possible new horizontal rules to improve the cybersecurity of all connected products and associated services placed on the Internal Market.
33. As mentioned above, several questions were raised by Member States concerning Coordinated Vulnerability Disclosure (CVD) and the establishment of a European Vulnerability Registry by ENISA. The Commission gave a detailed presentation on these two issues indicating that their development would occur based on existing national and international best practices and procedures in this domain.
34. As regards reporting, Member States expressed views on administrative burdens, liability implications arising therefrom, the 24-hour notification timeline and on reporting in regard to significant cyber threats and near misses.
35. Reference to practical and legal considerations regarding the repeal of the relevant provisions of eIDAS and the EECC have also been raised by many Member States who have requested additional clarifications from the European Commission on these points.
36. Member States have also questioned the extensive powers foreseen for the Commission in the revised NIS Directive concerning the adoption of delegated and implementing acts. This included queries on the linkages with the Cyber Security Act as regards certification.

IV. CONCLUSIONS

37. The Presidency expresses its sincere appreciation for the committed engagement of the Commission during the thorough read-through process in seeking to answer and clarify the questions and comments presented by the Member States during the discussions.
38. Furthermore, the Presidency acknowledges the commitment by Member States to this process as was evidenced by the multiple detailed comments and questions put forward during the discussions. The Presidency is fully cognisant of the important efforts made by Member States in terms of inter-ministerial coordination at national level on the file.
39. Based on the discussions in the HWPCI outlined above, it is the Presidency's conviction that certain crucial elements of the revised NIS Directive proposal are not yet sufficiently mature to allow for fruitful progress in deliberations between the Member States concerning their drafting. The Presidency therefore believes that tackling the issue of the interaction of the revised NIS Directive with relevant sectoral legislation will allow for progress on the file and contribute to the necessary clarification between the relevant corresponding provisions of NIS 2 and other legal acts currently and/or soon to be under discussion in Council preparatory bodies (namely, but not limited to, DORA and CER). One must also bear in mind that each legal act in this interaction finds itself in different stages of the negotiation process within the competent Council preparatory bodies. Tackling the issue of interaction with relevant sectoral legislation in the drafting process of the NIS 2 Directive *ab initio* should allow for the negotiations of the different legal acts to proceed smoothly, independently and on solid ground.

40. Until the end of June 2021, under the current planning of the Portuguese Presidency, the HWPCI will have held a total of 19 meetings dedicated to the revised NIS Directive. The Presidency considers that by concluding the thorough and, in our view, necessary read-through of the revised directive, and having subsequently initiated the drafting process, the Council is amply corresponding to the invitation made by the European Council at its meeting of 26 February to swiftly take work forward on the revised Directive on security of network and information systems.
41. The Portuguese Presidency is committed to working closely with the incoming Slovenian Presidency in order to facilitate the continuation of the discussions in the HWPCI and to ensure the smooth progress on the file in the Council.
42. In the light of the above, the Permanent Representatives Committee and Council are invited to take note of the progress made on the examination of the proposed Directive.
