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NOTE

From:	Presidency
To:	Delegations
N° Cion doc.:	ST 14150 2020 INIT
Subject:	Presidency non-paper on comparison and analysis of definitions and overlap between the NIS 2 Directive and the EECC security provisions.

Delegations will find in Annex the Presidency non-paper on comparison and analysis of definitions and overlap between the NIS 2 Directive and the EECC security provisions.

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Presidency non-paper following the presentation of the discussion paper by the Netherlands on comparison and analysis of definitions and overlap between the NIS2 and the EECC security provisions

Following the presentation of the NL discussion paper on comparison and analysis of definitions and overlap between the NIS2 Directive and the EECC security provisions (WK 8543/2021) in the Horizontal Working Party on Cyber Issues (HWPCI) on 7 and 12 July 2021, the Commission in its intervention raised in particular the following points:

- ✓ definition on security of network and information systems / scope of “services” defined in Article 18(1) of the NIS2 proposal

As entities run their services on network and information systems, in the view of the Commission there is no necessity for the definition of security of network and information systems laid down in Article 4(2) to refer explicitly to the term “services”.

With regard the scope of Article 18(1) of the NIS2 proposal, the Commission explained that entities under the scope of NIS2 are not only required to ensure the security of its core (essential) service but also the security of all services that the entity as such provides. This derives from the wording of the provision and the new rationale of NIS2, which – in contrast to the current NIS Directive- does not differentiate between the provision of essential and non-essential services¹.

- ✓ *Art 108 and 109 (8) of the EECC*

With regard to the provisions of Articles 108 and 109 (8) of the EECC, and the concern that those have not been revoked together with Articles 40 and 41 of the EECC although they include security elements, the Commission expressed the view that the main objective of these provisions is to ensure the end-user rights in relation to the indicated services which goes beyond security.

The first sentence of Article 108 obliges Member States to ensure the availability of voice communications services and internet access services provided over public electronic communications networks in the case of catastrophic network breakdown or force majeure. As far as the second sentence of Article 108 is concerned, the focus of the provision is to ensure the uninterrupted access of end-users to emergency services and the uninterrupted transmission to public warnings. Such measures may include some security elements such as business continuity and crisis management. At the same time, the mere fact that some security elements can also be applicable in the context of the overarching purpose of ensuring the access to emergency services, cannot lead to the conclusion that NIS2 should take over from the EECC also the provisions regulating the access to emergency services. In view of the Commission, similar considerations also apply with regard to Article 109(8) EECC where the

¹ Approach applied in relation to operators of essential services

assumption that the delegated act may include a security element cannot justify a move of this article to NIS2 as the core regulatory purpose of the article is to ensure the effective access to emergency services and not the overall security of the provided services.

Finally, the Commission underlined that as far as the supervision of providers of public electronic communications networks and providers of electronic communications services under NIS2 is concerned, it is in the discretion of the Member State to decide whether they will ask the national telecom regulators to continue to carry out their current tasks related to security or not. This was also reflected in a new recital proposed by the PT Presidency as part of the compromise proposal.

In view of the arguments exchanged in the meeting of the HWPCI and based on the written contributions received from MS, the Presidency proposal builds on Article 18(1) of the NIS2 proposal, as the wording of the provision appears to be sufficiently clear in its application. The provision requires essential and important entities to take cybersecurity risk management measures in relation to all services they provide without introducing any differentiation based on the type of the services. At the same time, the Presidency considers that the text of Article 4(2) could gain additional legal clarity if the word “related” is removed. In this way, the definition of security of network and information systems would become more straightforward in its application by encompassing any services offered by or accessible via network and information services:

Article 4(2): ‘security of network and information systems’ means the ability of network and information systems to resist, at a given level of confidence, any action that compromises the availability, authenticity, integrity or confidentiality of stored or transmitted or processed data or the ~~related~~ services offered by, or accessible via, those network and information systems;

The Presidency will consider the above-mentioned change in the next revision of the text foreseen in September 2021.