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REGULATORY SCRUTINY BOARD OPINION

Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities

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EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB

Opinion

Title: Impact assessment / Additional measures on critical infrastructure protection

Overall opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

The European Critical Infrastructure Protection (ECI) Directive was adopted in 2008. It established a procedure to designate critical infrastructures in the transport and energy sectors. It aimed to improve their protection and performance. Since then, the context has changed. An evaluation of the Directive in 2019 found increasing interdependencies and that risks have evolved.

This initiative is part of the EU Security Union Strategy. It aims to enhance the protection and resilience of critical infrastructures and to address some identified shortcomings of the Directive. This impact assessment is undertaken in coordination with the review of the Directive on security of network and information systems (NIS Directive).

(B) Summary of findings

The Board notes the additional information provided in advance of the meeting and commitments to make changes to the report.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the DG to rectify the following aspects:

(1) The report does not sufficiently explain the risks related to critical infrastructure and the cross-border dimension.

(2) The report lacks a clear description of the link between this initiative and the NIS revision. It does not provide a clear justification for expanding the sectoral scope of the ECI and aligning it with that of the NIS Directive.

(3) The report is unclear on how it relates to sectoral legislation. It does not sufficiently address the risk of unclear requirements for operators and enforcement bodies.

(4) The report is not clear about the criteria Member States will have to apply for the designation of European critical infrastructures. It does not explain their role in a) factoring in interdependencies and cross-border risks, b) in ensuring

This opinion concerns a draft impact assessment which may differ from the final version.

proportionality, while c) promoting greater coherence in the designation process across the EU.

(5) The report does not sufficiently explain how the preferred option would lead to better national responses to cross-border risks. It remains unclear why this is a proportionate measure in view of the problems identified.

(C) What to improve

(1) The report should clarify upfront that the ECI deals only with 'physical' risks to critical infrastructures as opposed to 'non physical'(e.g. cyber risks, as addressed by NIS). It should better explain the type of risks that the initiative should address. In particular, given the proposed internal market legal base, it should further substantiate the key argument of interdependencies of critical infrastructure across sectors and Member States.

(2) The report should clarify the link between this initiative and the NIS revision. It should better substantiate why there is a need to align the ECI's sectoral scope to that of the NIS, given that the respective initiatives address different types of risks (physical versus cyber). It should clarify whether there will be a potential to align processes, reporting requirements, supervision, or cooperation structures under the revised ECI and NIS Directives.

(3) The report should explain how this initiative relates to relevant sectoral legislation. It should assess in more detail which security-related aspects are already covered in sectoral legislation and what gaps the revised ECI would cover. It should further examine the risk of unclear provisions, multiple supervision levels or divergent national interpretations that may create burdens for concerned operators and authorities.

(4) Member States will be competent for the designation of critical infrastructures and will be able to take account of national specificities. In that context, the report should explain how the ECI framework will effectively ensure: (i) that cross-border interdependencies are adequately taken into account, (ii) that ECI designations (and related investments) are proportionate to the risk assessment, and (iii) that there is an aligned approach across the EU. The report should be more detailed on the planned ECI designation criteria and what role they will play in combination with the results of the national risk assessments. It should explain on which basis these criteria have been set and whether any alternatives were considered. In the same vein, the report should more clearly explain the role and division of supervisory responsibilities between the EU and national levels. It should better explain how supervisors would enforce the integration of cross-border spillovers of security threats in the risk analysis.

(5) The report should explain how the preferred option solves the coordination problem between Member States. Given that the more centralised option, which could lead to cost savings at the national level, ranks higher except for proportionality, the choice of the preferred option should be better explained. The analysis should detail how many and which types of companies would be covered by the preferred option. It should provide a differentiated picture of the compliance costs for these operators.

(6) The report does not sufficiently develop the scope for simplification and cost reduction for companies and public authorities. The report should quantify costs and benefits and describe the estimation method. It should explain the translation of expected costs and benefits into the scoring table.

Some more technical comments have been sent directly to the author DG.

(D) Conclusion **The DG may proceed with the initiative.** **The DG must revise the report in accordance with the Board's findings before launching the interservice consultation.** **If there are any changes in the choice or design of the preferred option in the final version of the report, the DG may need to further adjust the attached quantification tables to reflect this.**	
Full title	Impact Assessment on a proposal to introduce additional measures on critical infrastructure protection
Reference number	PLAN/2019/5448
Submitted to RSB on	21 October 2020
Date of RSB meeting	18 November 2020

ANNEX: Quantification tables extracted from the draft impact assessment report

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

The tables below summarise the costs and benefits for the preferred option, with respect to the baseline situation. Given the limitations created by the lack of available data, the tables have been filled to the extent possible:

I. Overview of Benefits (total for all provisions) – Preferred option (Policy Option 3)		
Description	***Amount***	***Comments***
Direct benefits		
Compliance cost reductions		Member States will benefit from reduced compliance costs since the burdensome designation process of ECIs would be replaced by a process aligned to the largest extent possible with the one set up for the NIS Directive (which in many cases is aligned with the national designation process).
Improved functioning of the Internal market		The improved resilience of CI operators would reduce the number of disruptive events affecting essential services, making more stable and reliable the provision of those services. This would have an overall positive impact on the economy, given the key role of such services for all types of business activities.
Reinforced security		The increased protection and improved capacity of reaction of operators would reduce the number of incidents, and decrease the impact of current and anticipated future threats (such as terrorism or natural events). This would positively affect the security interests of Member States and reinforce the security of the society as a whole.

II. Overview of costs – Preferred option (Policy Option 3)[1]						
Measures	*Administrations*		*Businesses (critical operators of essential services, OES)*		*Citizens/ Consumers*	
	One-off	*Recurrent*	*One-off*	*Recurrent*	*One-off*	*Recurrent*
Member States national strategy on resilience	Member States adopting 1st national strategy according to new requirements. In many instances, this will mean complementing already existing strategies with resilience elements and/or enlarging its sectoral coverage, meaning that some	Member States updating their national strategies (every 3 years on average) ***EUR 0.65 million / EUR 0.80 million every three years***	None	None	None	None

[1] Because of the sensitive nature of this policy area, it was difficult to obtain quantitative data from Member States and operators. These estimates have been made on the basis of the considerations outlined in the Impact Assessment and of partial estimates shared by some Member States. The costs in the table are aggregated for all Member States and all potentially concerned operators.

II. Overview of costs – Preferred option (Policy Option 3)[1]						
Measures	*Administrations*		*Businesses (critical operators of essential services, OES)*		*Citizens/ Consumers*	
	One-off	*Recurrent*	*One-off*	*Recurrent*	*One-off*	*Recurrent*
	Member States will only have to adjust their existing strategies ***EUR 1 million / EUR 1.25 million***					
Member States national risk assessments (incl. interdependencies)	Member States carrying out 1st national risk assessment (RA) according to new requirements. In many instances, this will mean adapting existing RA practices to include interdependencies as well as more sectors, meaning introducing adjustments to existing RA practices ***EUR 2.9 million / EUR 3.3 million***	Member States updating national risk assessment (every 3 years on average) ***EUR 2 million / EUR 2.25 million***	Possible contribution of selected operators to national risk assessment (1st risk assessment according to new requirements). This will depend on whether MS will want to involve the operators ***EUR 2.9 million / EUR 3.2 million*** (5 operators per sector, [for 9 sectors: current NIS + space and telecommunications] per Member State)	Possible contribution of selected operators to national risk assessment (updates, every 3 years on average) ***EUR 1.8 million / EUR 2 million***	None	None
Designation process of critical operators of essential services	Member States designating critical operators of essential services. This would involve collecting sector-specific information on operators to verify if thresholds in new legislative instrument are fulfilled, and nominating operators. The costs would be lower for those MS already using NIS designation process ***EUR 0.75 million / EUR 1 million***	Member States updating the designations of critical operators of essential services (every 2 years on average) ***EUR 0.4 million / EUR 0.5 million***	Participation in the designation process (consultation with MS) ***EUR 3.75 million / EUR 9 million*** [entities concerned: potentially 5.000 operators in 27 MS]	Reporting back to authorities if criteria for qualifying as critical operator of essential services is still fulfilled (every 2 years on average) ***EUR 1.9 million / EUR 3.2 million*** [entities concerned: potentially 5000 operators in 27 MS]	None	None
Member States oversight of critical operators of essential services		When relevant and necessary, MS could request information from operators, and issue instructions. It is assumed that every year, only a part of designated operators would be asked to provide information on their resilience plans. It is also assumed that only a part of those providing information would be subject to detailed		Operators providing information on their resilience plans to authorities. ***EUR 2.25 million / EUR 3.6 million*** [entities concerned: potentially 25% of 5000 operators in 27 MS per year asked to provide information on resilience plans. Of those, a small part would be asked for in-depth scrutiny]	None	None

II. Overview of costs – Preferred option (Policy Option 3)[1]						
Measures	*Administrations*		*Businesses* (critical operators of essential services, OES)		*Citizens/ Consumers*	
	One-off	*Recurrent*	*One-off*	*Recurrent*	*One-off*	*Recurrent*
		scrutiny/instructions by MS authority. ***EUR 3.2 million / EUR 3.5 million***				
Operators Resilience Plans and risk assessments		*[costs related to oversight - see above]*	Operators adopting 1st resilience plan and carrying out the risk assessment according to new requirements. In many instances, this will mean updating the existing security plans (to include business continuity and recovery measures and employee security management) and adjusting existing RA methodology. ***EUR 98 million / EUR 117 million***	Regular updates of Operators resilience plans and risk assessments ***EUR 37.5 million / EUR 72 million*** *[costs related to oversight - see above]*	[indirect transfer on consumer prices]	
Cooperation structures (incl. information exchange) and capacity support of authorities to operators	Member States setting up sectoral and cross-sectoral cooperation structures and providing support to operators. In many instances, this would entail adjusting existing mechanisms. ***EUR 3.6 million / EUR 4.2 million***	Member States running cooperation structures and providing support to operators. ***EUR 2.9 million / EUR 2.1 million***		Operators participating in cooperation structures ***EUR 4.5 million / EUR 7.2 million***	None	None
Designation, oversight and support to operators of essential services of European significance (OES-ES)	<u>European Commission:</u> - setting up process and participation in designation of OES-ES with MS (identification of potential candidates, assessment of essential nature of service, designation decision with MS) - organisation of Resilience advisory teams ***EUR 0.12 million / EUR 0.16 million*** <u>Member States:</u> - participation in designation of OES-ES with COM (identification of potential candidates, collecting/assessing information on potential ECIs,	<u>European Commission:</u> - participation in additional designations (if new OES-ES candidates are identified); - guidance and oversight of designated OES-ES (together with MS) - day-to-day coordination of Resilience advisory teams ***EUR 0.21 million / EUR 0.27 million*** <u>Member States:</u> - participation in additional designations (if new OES-ES candidates are identified); - guidance and oversight of	*[Obligations of OES-ES are the same as for Operators of essential services - see above]*	*[Obligations of OES-ES are the same as for Operators of essential services - see above]*	None	None

II. Overview of costs – Preferred option (Policy Option 3)[1]						
Measures	*Administrations*		*Businesses (critical operators of essential services, OES)*		*Citizens/ Consumers*	
	One-off	*Recurrent*	*One-off*	*Recurrent*	*One-off*	*Recurrent*
	designation decision) ***EUR 0.5 million / EUR 0.7 million***	designated OES-ES (together with the Commission) - Resilience advisors (support to ECIs, assessment of security measures in place) ***EUR 0.85 million / 1 million***				
Capacity building – EU knowledge hub	European Commission: Initial set-up of organisation ***EUR 0.16 million / EUR 0.21 million*** Member States: Provision of initial strategic direction to the knowledge hub at the inception phase ***EUR 0.4 million / EUR 0.5 million***	European Commission: Development of guidance materials, organisation of capacity building activities, conduct of risk assessments, etc. ***EUR 0.5 million / EUR 0.7 million*** Member States: Voluntary participation in capacity building activities, risk assessments, etc. ***EUR 0.8 million / EUR 1 million***	None	Voluntary participation in capacity building activities (assuming about one tenth of designated operators would participate annually) ***EUR 1.5 million / EUR 2.7 million***	None	None