



Department for
Business, Energy
& Industrial Strategy



**MEMORANDUM OF UNDERSTANDING
BETWEEN THE DEPARTMENT FOR BUSINESS,
ENERGY AND INDUSTRIAL STRATEGY AND
THE HEALTH AND SAFETY EXECUTIVE IN
RELATION TO THE DISCHARGE OF
FUNCTIONS FOR OIL AND UPSTREAM GAS
SUB-SECTORS REGARDING THE NETWORK
AND INFORMATION SYSTEMS REGULATIONS
2018**

26TH FEBRUARY 2021

The Memorandum of Understanding

This Memorandum of Understanding (MoU) is between the following parties:

- 1) The Department for Business, Energy and Industrial Strategy (“BEIS”) and
- 2) The Health and Safety Executive (“the Executive”);

together referred to below as the “**Parties**”.

Background

An Agency Agreement dated 23 May 2018 between the Secretary of State for BEIS (“SSBEIS”) and the chair of the Executive, made under section 13(4) of the Health and Safety at Work etc. Act 1974 (“the 1974 Act”) sets out functions exercisable by the SSBEIS under the Network and Information Systems Regulations 2018 (“NIS Regulations”) which the Executive has agreed to perform.

The purpose of this MoU is to set out the framework whereby the Executive will carry out certain activities on behalf of the SSBEIS. Specifically, assessment, inspection, investigation and enforcement under the NIS Regulations with regard to the following subsectors of the energy sector:

- the oil subsector in England and Wales and Scotland as defined in Schedule 2, paragraph 2; and
- the upstream gas subsector in England and Wales and Scotland, in relation to the essential services specified in Schedule 2, paragraph 3, sub-paragraphs (5) to (8).

It also sets out how the Executive will discharge the functions described in the Agency Agreement between the SSBEIS and the Executive relating to the NIS Regulations, dated 23rd May 2018.

BEIS also maintains an Information Sharing Protocol (ISP) with the Executive. The purpose of the ISP is to make provision for information sharing arrangements between BEIS and the Executive. The ISP makes provision for information sharing arrangements between BEIS and HSE. It identifies the type of information that will be shared for the purpose of the NIS Regulations and the purposes of the data sharing, and the agreed mechanisms for the sharing of special categories of sensitive information.

IT IS AGREED AS FOLLOWS:

1. Interpretation

1.1. “Confidential Information” means any information which has been designated as confidential by either Party in writing or that ought to be considered as confidential (howsoever it is conveyed or on whatever media it is stored) including:

- 1.1.1. information whose protection is necessary for the purpose of safeguarding national security or the safety of individuals;
- 1.1.2. information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person or trade secrets or Intellectual Property Rights of either Party; and
- 1.1.3. all personal data and sensitive personal data within the meaning of the Data Protection Act 2018 and UK GDPR.

- 1.2. "Confidential Information" does not include information which:
- 1.1.4. was public knowledge at the time of disclosure (otherwise than by breach of clause 6 (Confidential Information));
 - 1.1.5. was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;
 - 1.1.6. is received from a third party (who lawfully acquired it) without restriction as to its disclosure; or
 - 1.1.7. is independently developed without access to the Confidential Information.
- 1.2. In this MoU unless otherwise expressly provided, or unless the context otherwise requires:
- 1.2.1. references to the singular include the plural and vice versa;
 - 1.2.2. references to words denoting any gender shall include all genders;
 - 1.2.3. references to the Parties and individuals include their respective successors in title, permitted assigns and legal personal representatives.
- 1.3. In this MoU any reference to regulations, unless otherwise stated, should be construed as a reference to the Network and Information Systems Regulations 2018 as amended from time to time.
- 1.4. In this MoU any reference to any statute or statutory provision shall, unless the context otherwise requires, be construed as a reference to that statute or provision as from time to time amended, consolidated, modified, extended, re-enacted, or replaced.
- 1.5. The Annex forms part of this MoU and will have effect as if set out in full in the body of this MoU.
- 1.6. In the case of conflict or ambiguity the order of precedence for this MoU and the documents attached to or referred to in this MoU will be as follows:
- 1.6.1. the Agency Agreement (see clause 2.1);
 - 1.6.2. the body of this MoU;
 - 1.6.3. the Annex to this MoU.
- 1.7. Unless otherwise stated, reference to 'BEIS' in this MoU relates to the Regulatory Policy team within the Energy Cybersecurity Team of the Energy Development and Resilience Directorate at BEIS. This is a dedicated team responsible for ensuring the regulatory duties of the Secretary of State for BEIS as NIS Competent Authority (CA) are carried out.

2. Services and Functions to be Performed

- 2.1. An Agency Agreement has been established, which describes the functions that the Executive can perform on behalf of SSBEIS including the appointment of inspectors and the relevant powers and functions of the CA. The Agency Agreement also permits the Executive to directly recover its costs in performing its functions in accordance with regulations 16(3)(a) and 21 of the NIS Regulations.
- 2.2. BEIS can exercise any regulatory functions which HSE has agreed to perform under the NIS Regulations having given written notice to the Executive.

3. Working Arrangements

- 3.1. The split of functions and agreed working arrangements are set out in the Annex to this MoU.

4. Duration/Review/Termination

- 4.1. The MoU shall come into effect on and from 22nd February 2021.
- 4.2. BEIS and the Executive shall carry out a review of this MoU on or before 22nd February 2023.
- 4.3. BEIS and the Executive may amend this MoU and the working arrangements made under it at any time, subject to the agreement of both Parties.
- 4.4. The MoU may be terminated on the expiry of six months written notice given at any time by either Party to this MoU to the other, or immediately with the consent of both Parties. Prior to the expiry of the MoU, the Executive and BEIS officials will carry out a review of the MoU to determine whether it should be extended. The review will begin not less than three months prior to the expiry date.

5. Freedom of Information and Information Sharing

- 5.1. Each Party to this MoU will:
 - 5.1.1. provide to the other Party any information in its possession that may be reasonably requested by the other, subject to necessary confidentiality constraints, safeguards and statutory rules on disclosure;
 - 5.1.2. share information in line with the ISP;
 - 5.1.3. consult the other Party before making to any third party any disclosures of information under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004; and
 - 5.1.4. seek the approval of the other Party before externally publishing any information resulting from the use of information received from the other Party, and such approval will not be unreasonably withheld.

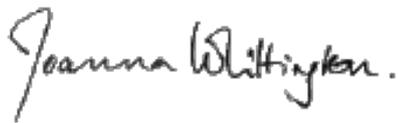
6. Confidential Information

- 6.1. Each of the Parties understands and acknowledges that it may receive or become aware of Confidential Information belonging to the other Party whether in the course of the performance of the obligations under this MoU or otherwise.
- 6.2. Except to the extent set out in this clause or where disclosure is expressly permitted elsewhere in this MoU, each Party must:
 - 6.2.1. treat the other Party's Confidential Information as confidential and safeguard it accordingly;
 - 6.2.2. share Confidential Information in line with the ISP; and
 - 6.2.3. not disclose the other Party's Confidential Information to any other person (except their employees, agents and professional advisers to the extent to which such disclosure is necessary for the purposes contemplated under this MoU, and subject to ensuring that such persons are made aware of, and comply with, these obligations of confidentiality).

- 6.3. Clause 6 continues in force notwithstanding termination of this MoU. It does not apply to any Confidential Information to the extent that it is required to be disclosed by a requirement of law placed upon the Party making the disclosure (including any requirements for disclosure under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004). The Parties are subject to any Government requirements as to transparency which may apply to the Parties from time to time.
- 6.4. The Parties must not use the confidential information under this MoU for commercial purposes without the prior written agreement of the supplying Party.

SIGNATORIES

The duly authorised representatives of the Parties affix their signatures below:

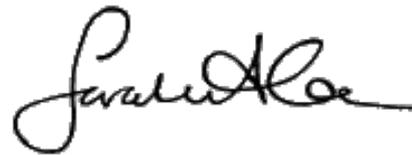


**Signed for and on behalf of the
Department for Business, Energy and
Industrial Strategy**

Name Joanna Whittington

Role Director General, Energy & Security

Date 26 February, 2021



**Signed for and on behalf of the
Health & Safety Executive**

Name Sarah Albon

Role Chief Executive

Date 2nd March 2021

Annex

AGREED WORKING ARRANGEMENTS

1. Undertakings

- 1.1. The Executive will exercise functions regarding the NIS Regulations as set out in the Agency Agreement agreed between the Parties.
- 1.2. In carrying out these functions, the Executive will have regard to the National Cyber Security Strategy.

2. Informing parties of the role of the Executive

- 2.1. BEIS will inform relevant Operators of Essential Services (“OES”) that the Executive will perform the functions of the SSBEIS as designated CA and NIS enforcement authority to the extent required for the Executive to carry out the functions set out in the Agency Agreement and the activities set out in this MoU.
- 2.2. BEIS will inform relevant OES that any requirement on OES in the NIS Regulations to have regard to relevant guidance includes guidance produced by the Executive.
- 2.3. BEIS will inform the Single Point of Contact (SPOC) and Computer Security Incident Response Team (CSIRT), as defined in the NIS Regulations, of the functions of the SSBEIS which will be carried out by the Executive regarding the NIS Regulations.
- 2.4. With regard to regulations 3(3)(f) and 3(3)(g) the Executive may, with agreement from BEIS, liaise with any of the bodies specified in those regulations that it considers appropriate to exercise its functions under this MoU.
- 2.5. With regard to regulation 6(1) the Executive may, with agreement from BEIS, share information with any of those bodies that it considers appropriate to exercise its functions under this MoU.

3. Liaison between BEIS and the Executive

- 3.1. The Executive and BEIS officials will meet regularly as required for the duration of the MoU to discuss issues related to the implementation and enforcement of the NIS Regulations. The Executive and BEIS may review this MoU as part of this process and may agree to amend it accordingly.
- 3.2. Any disputes between BEIS and the Executive will be escalated through management chains.
- 3.3. BEIS shall indemnify the Executive against the whole or part of any damages, costs or expenses which the Executive may be liable to pay by reason of performing a function of the CA under the NIS Regulations, providing BEIS is satisfied that the act which incurred liability was within the powers of the CA and was, in the circumstances, one that the Executive was required or entitled to perform. This serves to provide indemnity to the Executive as a body in the event of action being brought, which is in addition to the indemnity provided to inspectors through the Agency Agreement.

4. Appointment of inspectors

4.1. The Executive shall:

- 4.1.1. inform BEIS of the competencies and instruments of appointment of inspectors under regulation 16(1) of the Regulations for the purposes of fulfilling the Agency Agreement;
- 4.1.2. appoint under regulation 16(1) of the Regulations such numbers of inspectors as appear sufficient for the purpose of carrying the Agency Agreement into effect and inform BEIS of the arrangements for their deployment;
- 4.1.3. inform BEIS of any proposed changes to the deployment of the inspectors appointed for the purpose of the Agency Agreement; and
- 4.1.4. enable inspectors to provide advice to BEIS when required or desirable to support SSBEIS's performance its functions under the NIS Regulations or BEIS policy development in relation to the administration of the NIS Regulations (including proposed amendments to the NIS Regulations).

5. Guidance and procedures

- 5.1. In relation to regulation 3(3)(b) to support the performance of the specified functions in accordance with requirements of the NIS Regulations the Executive shall develop:
 - 5.1.1. sector specific guidance on appropriate and proportionate technical and organisational measures including enforcement standards and expectations;
 - 5.1.2. procedures and instructions for inspections, investigations and follow up activity including, for example, templates for Enforcement Notices, Information Notices and information recording;
 - 5.1.3. clear and transparent terms of reference in relation to enforcement activities; and
 - 5.1.4. clear and transparent terms of reference in relation to the handling of incident notifications.
- 5.2. The guidance, procedures, instructions, and terms of reference described in paragraph 5.1 of this Annex will be agreed with BEIS.
- 5.3. Where appropriate the guidance, procedures, instructions, and terms of reference described in paragraph 5.1 of this Annex will be developed in conjunction with other NIS Competent Authorities and the National Cyber Security Centre (NCSC).
- 5.4. With regard to regulation 3(5) BEIS and the Executive will agree the most appropriate methods for publication of the guidance referred to in paragraph 5.1.
- 5.5. Any guidance produced by the Executive will have regard to the National Cyber Security Strategy and any guidance produced by the NCSC, including the Cyber Assessment Framework (CAF).

6. Programme of Work

- 6.1. The Executive shall perform the specified functions in accordance with requirements of the NIS Regulations. With regard to specific functions of the NIS Regulations, the following shall apply:

Designation of OES

- 6.2. The designation functions under regulations 3(3)(c)-(e), 8 and 9 will be carried out by BEIS.
- 6.3. BEIS will provide the Executive with a list of OES for the sub-sectors for which the Executive will be performing the specified functions.
- 6.4. BEIS will formally review the list of OES at regular intervals, at least, biennially.
- 6.5. Any changes to this list through either deemed designation under regulation 8(1), designation by BEIS using the power in regulation 8(3) or revocation of designation under regulation 9 should be notified to the Executive as soon as is reasonably practicable.
- 6.6. The Executive will notify BEIS where they become aware of any change in the designation status of an OES. The Executive will also notify BEIS if they receive any feedback or queries in relation to the designation of OES. Queries about designations will be dealt with by BEIS.

Inspections and adequacy of measures

- 6.7. The Executive shall review the assessments carried out by OES of their technical and organisational measures for the purpose of deciding future inspection priority. The reviews shall be carried out using guidance produced by the Executive, which will have regard to the CAF and additional guidance produced by BEIS and the NCSC.
- 6.8. Using the conclusions of the review the Executive shall determine prioritisation of inspection activity of OES, based on the understanding of sector risk and in line with its targeting and intervention strategies for major hazard sectors.
- 6.9. The Executive will share its inspection plans for OES with BEIS as soon as reasonably practicable. These plans may be updated and revised by the Executive following consultation with BEIS, to reflect BEIS current requirements for the security of network and information systems in the oil and upstream gas sub-sectors and the Executive's current requirements and priorities for the prevention of major accidents.
- 6.10. In carrying out inspections, the Executive will determine if further action is required, for example whether a notice under regulation 15(2) is necessary to obtain further information or, if duties under regulation 10 or regulation 11 have not been fulfilled, whether an Enforcement Notice under regulation 17 should be served.
- 6.11. If no further action is required, the conclusions of any assessment or inspection will not be communicated to OES unless requested.
- 6.12. The Executive shall only deploy the powers listed in regulation 16(5) for the purpose of inspections under the NIS Regulations, and inspectors must follow the requirements in regulations 16(6)-(8). The Executive might implement additional processes to ensure further transparency and accountability of

inspections, for example by verifying their authority for carrying out activities under the NIS Regulations if so requested by an OES.

Notification of incidents

- 6.13. BEIS will inform relevant OES that notifications of incidents under regulation 11(1) and regulation 12(9) should be made to the Executive via the relevant mailbox: NIS.Cyber.Incident@hse.gov.uk.
- 6.14. As outlined in paragraph 5.1 of this Annex the Executive will develop procedures and instructions for follow up activity, where this is necessary, in response to an incident, including record keeping and information recording.
- 6.15. The Executive will establish clear and transparent terms of reference in relation to the handling of notifications of incidents and information provided to the Executive as a result of such notifications (referred to collectively as "incident information").
- 6.16. The Executive will share the notifications of incidents with NCSC as soon as reasonably practicable to comply with the statutory duty in regulation 11(5)(b).
- 6.17. The Executive will share the notifications of incidents with BEIS and will provide details of the incident and any follow up activity to enable BEIS to carry out the CA duties and functions under regulation 11(5)(a), regulation 11(7) and 11(8).
- 6.18. BEIS will confirm, in writing, the format and timescales for the Executive to provide incident information to enable BEIS to produce the report to the SPOC required by regulation 11(9).
- 6.19. BEIS or HSE may issue information notices under regulation 15(2)(b) to establish whether there have been any events that the authority has reasonable grounds to believe have had, or could have, an adverse effect on the security of network and information systems and the nature and impact of those events.

Information Notices and Enforcement Notices

- 6.20. The powers to issue Information Notices under regulation 15(2) and Enforcement Notices under regulation 17(1)(a)-(f) will be exercised by the Executive as it considers appropriate to secure compliance with the NIS Regulations.
- 6.21. Consideration of whether an Enforcement Notice is appropriate will be supported by use of an enforcement management model (EMM) developed by the Executive in collaboration with BEIS.
- 6.22. The Executive will inform BEIS before serving an Information Notice or Enforcement Notice.
- 6.23. The powers to issue Information Notices under regulation 15(1) will be exercised by BEIS to confirm whether a person should be designated as an OES.
- 6.24. The powers to issue Information Notices under regulation 15(2) and Enforcement under regulation 17(1)(za)-(zb) will be exercised by BEIS in relation to breaches of designation requirements under regulation 8(2), 8(7A) and 8A.

6.25. BEIS will inform the Executive before serving an Information Notice or Enforcement Notice.

Penalty Notices

6.26. The Executive will inform BEIS where the Executive is of the opinion that an OES has failed to comply with the requirements, if any, of an Enforcement Notice or whether the Executive is of the opinion that a penalty is warranted having regards to the facts and circumstances of the case. The Executive will put forward a recommendation from which BEIS will determine whether to serve a Notice of Intention to Impose a Penalty, which may be followed by a Penalty Notice, under regulation 18.

6.27. In notifying BEIS, the Executive shall outline the nature of the contravention and an assessment of its severity as well as a description of any action taken by the OES or any representations made in relation to the contravention.

6.28. BEIS will be responsible for determining whether a Penalty Notice should be issued and the level of penalty in line with regulation 18(6) and regulation 23, taking into account the information provided by the Executive.

6.29. BEIS may serve Penalty Notices in circumstances where the OES has not previously been served with an Enforcement Notice, or has contemporaneously been served with an Enforcement Notice, if BEIS considers that a penalty is warranted having regard to all the facts and circumstances of the case.

6.30. BEIS will inform the Executive before serving a Penalty Notice.

6.31. BEIS will be responsible for enforcing Penalty Notices as necessary under regulation 20. BEIS will also be responsible for ensuring that the proceeds of penalties are paid into the Consolidated Fund in accordance with regulation 22.

6.32. BEIS will publish clear and transparent terms of reference in relation to the penalty framework.

Enforcement by civil proceedings

6.33. BEIS will be responsible for enforcing Enforcement Notices as necessary under regulation A20.

6.34. BEIS may commence civil proceedings against the OES under Regulation A20 instead of, or in addition to, issuing a Penalty Notice.

6.35. BEIS will publish clear and transparent terms of reference in relation to enforcement by civil proceedings.

6.36. BEIS will inform the Executive before initiating civil proceedings against an OES.

Appeal to the First-tier Tribunal

6.37. An OES may appeal to the First-tier Tribunal in relation to designation, revocation, enforcement and penalty decisions. BEIS and the Executive will

cooperate with the First-tier Tribunal for the duration of the determination of the appeal in line with the General Regulatory Chamber tribunal procedure rules.

- 6.38. Where an OES submits a notice of appeal and any follow-up notices, BEIS or the Executive, as appropriate, will submit responses to defend the decision that is being appealed.
- 6.39. After a Tribunal decision is issued, BEIS or the Executive, as appropriate, may make a written application for permission to appeal against the decision of the Tribunal on a point of law.

Policy development and liaison with DCMS

- 6.40. BEIS will lead on policy development and liaison with the Department of Culture, Media and Sport (DCMS) concerning the NIS Regulations, and the Executive shall engage with BEIS to facilitate this work.

Cost Recovery

- 6.41. The Executive shall recover its costs for the discharge of the specified functions directly from OES under the NIS Regulations. A full list of cost recoverable items is in the annex to the Letter of Comfort dated 25th January 2021.
- 6.42. The Executive will publish details of the rate to be used for cost recovery for the specified functions.

Request for Further Information

- 6.43. The Executive will respond to any reasonable requests for further information from BEIS as soon as reasonably practicable.

7. Potential Conflicts

- 7.1. Where a potential conflict arises between the Healthy and Safety at Work Act or other health and safety regulations, and security or resilience at a site, safety concerns will take precedence.

8. Reports to BEIS

- 8.1. The Executive shall submit regular reports to BEIS on the work it has carried out in fulfilment of the MoU. The format and content for such reports will be agreed in advance between the Executive and BEIS, having regard to the Reporting Framework.
- 8.2. As far as is reasonably practical the Executive shall provide any information required by BEIS to contribute to the Department for Digital, Culture, Media and Sport (DCMS) post-implementation reviews of the NIS Regulations and other policy development in relation to the NIS Regulations.

9. Exchange of information

- 9.1. BEIS and the Executive shall provide such information to each other as they may reasonably require for the purpose of performing the functions specified in the MoU.

10. Additional sponsorship costs

10.1. In FY2018-2019 the Executive received funding from BEIS of circa £490k to cover start-up costs and the costs of undertaking the regulatory functions and other activities for which costs cannot be recovered under the NIS Regulations. In FY2020-2021 BEIS agreed to provide an additional £115k to the Executive to cover the further costs incurred by the Executive in supporting BEIS to develop the framework for the implementation of the NIS Regulations.