



Network and Information Systems Regulations (NIS)

Enforcement Policy

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Introduction

The Drinking Water Inspectorate (DWI) provides independent assurance that the privatised water industry delivers the essential services of a water supply to consumers. As such, DWI is responsible for enforcing a wide range of legal obligations by water undertakers and licensed water suppliers.

During 2016, a new EU Directive was issued concerning measures for a high common level of security of networks and information systems across the European Union. The Directive was transposed into UK law as the Network and Information Systems Regulations 2018, which covers England and Wales. Amendments to the regulations have been made (the relevant regulations can be found [here](#), [here](#) and [here](#)). The Network and Information Systems Regulations 2018 remain the correct terminology for the regulations, and the regulations will be referred to as the 'NIS Regulations' throughout this document. The current version of the regulations can be found [here](#).

The NIS Regulations identify the supply of potable water as the essential service for the subsector of Drinking Water Supply and Distribution. The regulations designated the Secretary of State for Environment, Food and Rural Affairs and the Welsh Ministers as the Competent Authorities for England and Wales. The DWI has been nominated to exercise the operational function and regulatory activity of the Competent Authority ("CA") for England and Wales.

The NIS Regulations outline that in the UK, the threshold for being designated an Operator of Essential Services (OES) in the water sector is the supply of potable water to 200,000 or more people. Defra and Welsh Government can still designate an OES if numbers supplied are under 200,000 people, where an operator provides an essential service listed in Schedule 2, network and information systems are utilised to run the essential service and where the CA deem an incident affecting the provision of the essential service is likely to have significant disruptive effect on the essential service. The NIS Regulations require that an OES takes appropriate and proportionate technical and organisational measures to manage risks posed to the

security of the network and information systems on which their essential service depends.

This policy is not a comprehensive list of DWI's investigation and enforcement powers but explains the legal basis and the general principles DWI will follow in relation to our powers of enforcement in regulating NIS in the water sector in England and Wales. Scotland and Northern Ireland's water sector is regulated for NIS by the Drinking Water Quality Regulator for Scotland (DWQR) and The Department of Finance, respectively.

DWI will keep this policy under review and update it to reflect changes in law and practice. Changes will be briefed to OESs when subsequent versions are updated.

Better Regulation

DWI recognises that the best way to achieve compliance with the law is to ensure, by issuing guidance and advice, that those carrying out regulated activities understand the nature and extent of their responsibilities and comply voluntarily.

However, there are times when conformity with the law needs to be sought by formal enforcement action. Formal enforcement is about securing compliance with regulatory requirements. To this end there is a spectrum of civil sanctions available to us. These include notices to require information or enforcement for remedial activity, as well as punitive measures. This policy will guide our decision making as to the most appropriate choice of sanction in any particular case.

The Legislative and Regulatory Reform Act 2006 ("the Act") and the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 require that regulatory functions under legislation enforced by DWI are carried out in a way which is transparent, accountable, proportionate and consistent, and that regulatory activities should be targeted only at cases in which action is needed. The Act provides for a code of practice for regulators known as the Regulators' Code ("the Code").

The Code, which came into effect on 6 April 2014, requires that those carrying out regulatory functions under the Act must have regard to the Code when developing policies and operational procedures that guide their regulatory activities, as well as when setting standards or giving guidance which will guide the regulatory activities of their regulated community.

The effective use of enforcement powers in regulatory schemes is important to secure compliance with the law and, where necessary, to ensure that those who have not complied may be held to account. Enforcing authorities need to consider the need to maintain the balance between enforcement and other advisory activities when allocating resources.

Enforcement and Information Sharing

DWI may share information with other NIS Enforcement Authorities, law enforcement authorities, the computer security incident response team (“CSIRT”) the National Cyber Security Centre (NCSC) and public authorities in the EU. This will only occur should it be necessary to allow facilitation of the functions of a NIS enforcement authority, for national security purposes or for purposes relating to preventing or detecting crime, the investigation of an offence or for the investigation of the conduct of a prosecution. Only information which is relevant and proportionate to the above situations will be shared. Information shared is bound to the same strict information handling policy as deemed by its classification and will not be shared further, unless deemed appropriate by DWI.

When sharing information with a public authority in the EU, confidential information and information which could prejudice the security or commercial interests of an OES will not be shared.

Principles of Enforcement

DWI believes in firm and fair regulation of the matters for which it has responsibility and follows five principles.

i) Accountability

DWI must be able to justify decisions made within the context of the regulatory framework within which it operates. The NIS Regulations describes the competent authorities' powers which include the power to enforce when certain circumstances present themselves. However, information on any proposed enforcement or details of resulting enforcement including the delivery of actions to secure compliance or mitigate risks to network security will not be published on the DWI's website due to security considerations being presented with such sensitive information published and externally facing.

ii) Proportionality

Proportionality in securing compliance with network and information systems security law will generally involve taking account of the degree of the risk of adverse consequences resulting from non-compliance; in particular, inadequate network and information systems protection or resultant loss of supply of drinking water. Sometimes, however, the precautionary principle will require enforcement action to be taken even though the risks may be uncertain, in which case our decisions will be guided by the best available evidence as to the likelihood of the realisation of those risks in the relatively near future.

iii) Consistency

Consistency means taking a similar approach in similar cases to achieve similar outcomes within which a degree of discretion is available. There are many variables to be considered in using discretion to decide on the most appropriate course of action, such as the attitude and level of competence of the OES in bringing about the outcome sought. A specific tenet of consistency is that of

disgorgement, where an OES shall not benefit from any failure to implement the NIS Regulations.

iv) Transparency

Transparency means helping those regulated to comprehend what is required of them at the outset and setting out what they may expect from DWI in return. It also involves making clear what remedial action is required from the regulated person or business and providing details of any rights of appeal.

v) Targeting

Targeting of enforcement action means prioritising and directing regulatory effort effectively. This means concentrating on the activities which create the most significant risk, either because the nature of the activity is inherently high-risk or, despite being less high-risk, because of a lack of appropriate controls or appropriate attitude on the part of a particular business. It also involves identifying and focusing on evidence of systemic risk or behaviour not conducive to effective risk management, including timeliness of response.

Designation, Enforcement and Penalties

The competent authority has the power to:

- Designate a person as an OES, including where that person does not meet the threshold requirement for the drinking water supply sector;
- Revoke OES status of a person, for example should the person become outside the threshold requirement for the drinking water supply sector by demerger corporate activity or any other activity.

Defra has their own Designation and Independent Review procedures. Whilst DWI will act in an advisory capacity, it is the Secretary of State (Defra, in England) or the

Welsh Minister (Welsh Gov't, Wales) which designates a person as an OES. It is the responsibility of OES to identify themselves to DWI where they meet the threshold for designation. OES that do not meet the threshold for designation may still be designated in cases where a security incident affecting the provision of the essential service provided by that entity would have significant disruptive effects. DWI will request representations on behalf of Defra and Welsh Gov't regarding the prospective OES's circumstances before deciding on designation outcome.

The DWI exercises the functions of the Secretary of State and Welsh Ministers to:

- Serve information and enforcement notices upon an OES for perceived non-compliance with the NIS regulations;
- Serve an enforcement and penalty notice, dependent on the severity of the non-compliance;
- Undertake an inspection to ensure compliance of the NIS regulations.

Notices

DWI can serve the following written notices:

INFORMATION NOTICE - an information notice is a power to require information from any person who appears to have information required by it for the purpose of carrying out its functions under the NIS Regulations.

DWI can serve an information notice to obtain information from an OES. Specifically, in the following cases: to assess the security of an OES's network and information systems; to establish whether there have been any events that have, or could have, adversely impacted on the security of NIS systems; to identify any failure of the OES to comply with the NIS Regulations; and to assess the implementation of an OES's security policies. This could follow on from inspection carried out under Regulation 16 or result from any evidence gathered from such inspection. Information notices will be sent to both day to day and board level contacts and will outline what information is required and by when the Inspectorate requires the information by.

DWI can also serve an information notice on an appropriate person to assess whether a person should be identified or nominated as an OES under regulation 8(1), 8(3) or 8A respectively.

ENFORCEMENT NOTICE - An enforcement notice can be issued when DWI has reasonable grounds to believe that an OES has failed to fulfil its duties under the NIS Regulations. An enforcement notice allows DWI to set out the steps, if any, which should be taken by the OES to remedy the failure and the time period during which such steps must be taken.

Specifically, an enforcement notice can be served for the following cases: failure of a person to notify DWI and Defra or Welsh Ministers under regulation 8(2); failure of a person to comply with the requirements stipulated in regulation 8A; failure of an OES to fulfil the security duties under regulation 10(1) and (2); failure of an OES to notify DWI of a NIS incident under regulation 11(1); failure of an OES to comply with the incident notification requirements stipulated in regulation 11(3); failure of an OES to notify DWI of an incident involving a relevant digital service provider as required by regulation 12(9); failure of an OES to comply with an information notice issued under regulation 15; failure of an OES to comply with a direction given under regulation 16(1)(c) or failing to allow the requirements set out in regulation 16(3).

DWI are bound to inform an OES of the facts and circumstances that have led to an enforcement notice before serving an enforcement notice, including the alleged failure and how and when representations may be made in relation to the alleged failure. This will be sent to the day to day contact and board level contact. OES representations are due within 28 days of receiving this notice.

We may formally inform the OES in this communication, or after review of any representations received, of our intention to serve an enforcement notice. Notices of intention to serve an enforcement notice, where sent separately, will be sent to day to day and board level contacts. Where we have informed an OES of the facts of circumstances that have led to an enforcement notice, we may serve an

enforcement notice, in writing, irrespective of whether we have served a notice of intention to serve an enforcement notice in appropriate circumstances.

If we are satisfied that no further action is required, having considered any representations submitted or steps taken to rectify the alleged failure, we will inform the OES as soon as reasonably practicable. OESs have 28 days to request reasons for DWI's decision not to take further action. We shall endeavour to get this response back to the OES as soon as possible, but not later than 28 days after receiving a request.

PENALTY NOTICE - a notice of intention to impose a penalty may be issued if DWI considers that the OES has failed to take adequate steps to comply with duties set out in the NIS Regulations, as set out above and in the specific contraventions outlined further in the Monetary Penalties section below (page 12).

DWI are bound to issue a notice of intention to impose a penalty in writing, this will specify the reasons for the intended penalty and how and when representations may be made about the content of the penalty notice. This will be sent to day to day and board level contacts. OES representations are due within 28 days of receiving this notice.

DWI will review representations made relating to the notice of intention to impose a penalty and decide whether a final penalty decision is warranted based on the representations from an OES, with regard to the facts and circumstances of the case. We will send our final decision letter and, or penalty notice to the day to day and board level contact.

We may withdraw a penalty notice by informing the OES upon whom it was served in writing.

An intention to serve a penalty, or a penalty notice can be served independently or alongside an enforcement notice on an OES. We may send communication of an

intention to serve an enforcement notice and an intention to impose a penalty notice simultaneously.

Monetary Penalties

A penalty is a punitive measure either because action has not been taken or the lack of action that led to them being in non-compliance is considered serious enough to require punishment.

A monetary penalty shall be appropriate and proportionate within the prescribed limit of £17,000,000. The amount will not exceed 10 percent of the turnover of the OES. The penalties will be paid into the relevant Consolidated Fund, this will be outlined in each case in the penalty notice.

Penalty, £ (Maximum)	Penalty Banding Condition
1,000,000	If the contravention was deemed not a material one
8,500,000	If the material contravention does not meet the below band's criteria
17,000,000	If the material contravention has, or could have created a significant risk to, or significant impact on, or in relation to, the service provision by the OES

Immaterial contraventions include instances where an OES has failed to:

- Notify the CA under regulation 8A or 8(2);
- Comply with an information notice under regulation 15;
- Comply with a regulation 16(1)(c) direction;
- Comply with regulation 16(3) requirements.

A material contravention is defined in regulation 18(7) and refers to circumstances in which an OES fails to take, or adequately take, one or more of the steps required under an enforcement notice within the period stipulated in that notice to rectify a failure to:

- Fulfil the security duties under regulation 10(1) and (2);
- Notify a NIS incident under regulation 11(1);
- Comply with the notification requirements stipulated in regulation 11(3);
- Notify an incident as required by regulation 12(9).

DWI will determine an appropriate and proportionate penalty. DWI will identify which penalty band the contravention falls into and will create further bands within these penalty bands to take into consideration seriousness, culpability and where applicable, potential impact or impact seen on the essential service. We will start in the middle of bands in determining penalties. Mitigating or aggravating circumstances will determine where in the band the penalty will ultimately sit. We will follow the methodology used in the Environmental Sentencing Guidelines, historically used to set fines when a water supplies licensee has been convicted of an offence under the Water Industry Act 1991, the Water Supply (Water Quality) Regulations 2016 (as amended) (England) or the Water Supply (Water Quality) Regulations 2018 (Wales).

Enforcement by Civil Proceedings

Further enforcement by civil proceedings can be initiated where the DWI has reasonable grounds to believe that the OES has failed to comply with the requirements of an enforcement notice as required by regulation 17(3A).

The DWI can pursue an injunction to enforce the duty in regulation 17(3A). Civil proceedings can also be commenced by DWI for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or for any other appropriate remedy or relief.

Civil proceedings can be sought as above by DWI irrespective of an ongoing OES appeal to the First-tier Tribunal (covered on pages 15 and 16). However, if the Tribunal has granted suspension of the effect of the whole or part of a relevant and related decision under 19B(2), this would mean that DWI couldn't bring or continue proceedings against this aspect of the decision until the suspension was lifted or an outcome was reached by the Tribunal.

DWI may not commence civil proceedings on the OES within 28 days of serving the last enforcement notice on the OES.

General Considerations

When considering whether to take specific action in relation to the NIS Regulations, DWI will consider whether its action is reasonable and proportionate, and, where possible, take the following (but not limited to) factors into account:

- Any representations made by the notified OES;
- Any steps taken by an OES towards complying with the requirements set out in the NIS Regulations;
- Any steps taken by an OES for remedying or mitigating against the consequences of any non-compliance with the requirements set out in the NIS Regulations;
- Whether the OES has had adequate time to implement the requirements of the NIS Regulations; and
- Whether the OES has also contravened another legal requirement and the penalties that may be applied under that requirement.

The enforcement powers available to DWI are not mutually exclusive and in some circumstances will be used in combination.

Where a NIS incident leads to an impact on water supply or quality, the essential service, we are able to take action under both the NIS Regulations and the Water

Supply (Water Quality) Regulations 2016 (England) or the Water Supply (Water Quality) Regulations 2018 (Wales).

Failure to comply with an information notice or enforcement notice can result in a penalty notice.

Where the focus of enforcement occurs across national boundaries, we will outline how this specifically affects an OES, or affiliated OESs in any communications.

If there is evidence of an immediate risk to the security of supply, enforcement action may be initiated without a period for representations.

Procedure for OES Challenge

First-tier Tribunal

An OES may appeal to the First-tier Tribunal against:

- A decision under regulation 8(3) to designate that person as an OES;
- A decision under regulation 9(1) or (2) to revoke the designation of that OES;
- A decision under regulation 17(1) to serve an enforcement notice on that OES; and
- A decision under regulation 18A(3A) to serve a penalty notice with a final penalty decision on that OES.

An OES may appeal the decisions listed above on the grounds that: the decision was based on a material error of fact; any of the procedural requirements under the NIS Regulations in relation to the decision have not been complied with, causing the OES to be substantially prejudiced by the non-compliance; the decision was wrong in law; or there was some other material irrationality, unreasonableness or lack of proportionality which substantially prejudiced the interests of the OES.

The First-tier Tribunal may confirm or quash the whole or part of any decision to which the appeal relates and may suspend the effect of some decisions until it has determined the appeal.

Writing to the Chief Inspector

Alongside the formal procedures given to OES to appeal in the NIS Regulations (the First-tier Tribunal, above), DWI remain open to feedback in undertaking enforcement. Like in our enforcement activity under section 86 (2) of the Water Industry Act 1991, the Chief Executive Officer, or equivalent, of the OES, may make representations to the Chief Inspector in writing.

The Chief Inspector, or by delegation a Deputy Chief Inspector, will discuss the matter as soon as practicable, whereby a final decision will be made normally within 30 days. Writing to the Chief Inspector is optional and not a prerequisite step before initiating a formal challenge to the First-tier Tribunal.

The DWI's commitment to hearing representations does not displace the statutory right of a company aggrieved by an enforcement or penalty order to make an application to the First-tier Tribunal under the legislation.