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NOTE

From:	General Secretariat of the Council
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/102 - Progress Report

The Presidency has drawn up a progress report on the proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020, in order to report on the work carried out so far by the Council preparatory bodies and on the state of play in the examination of the proposal.

This report was presented by the Presidency to the Horizontal Working Party on Cyber Issues (HWPCI) at its meeting on 18 November 2022.

INTRODUCTION

1. On 15 September 2022, the Commission adopted the proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020. First announced by President von der Leyen in her State of the Union Address in September 2021, the idea was reflected in the Council Conclusions of 23 May 2022 on the development of the European Union's cyber posture, which called upon the Commission to propose common cybersecurity requirements for connected devices by the end of 2022. Prior to the announcement, the Council conclusions on the cybersecurity of connected devices of 2 December 2020 underlined the importance of assessing the need for horizontal legislation, also specifying the necessary conditions for the placement on the market, in the long-term to address all relevant aspects of cybersecurity of connected devices, such as availability, integrity and confidentiality.
2. The purpose of the proposal, which is based on Article 114 TFEU, is to harmonise essential cybersecurity requirements for products with digital elements in all Member States and avoid overlapping requirements stemming from different pieces of legislation. The proposal aims to fill the gaps in the existing cybersecurity legislation by ensuring that products with digital elements for example Internet of Things – IoT – products, such as connected home cameras, refrigerators, TVs, toys, and non-embedded software become secure throughout the whole supply chain and throughout their whole lifecycle. It also clarifies links with existing legislation and contributes to making the existing legislation more coherent. Finally, the proposal also allows users to take cybersecurity into account when selecting and using products with digital elements.

3. In particular, the proposal lays down:

- rules for the placing on the market of products with digital elements to ensure the cybersecurity of such products;
- essential requirements for the design, development and production of products with digital elements, and obligations for economic operators in relation to these products with respect to cybersecurity;
- essential requirements for the vulnerability handling processes put in place by manufacturers to ensure the cybersecurity of products with digital elements during the whole life cycle, and obligations for economic operators in relation to these processes; and
- rules on market surveillance and enforcement of the above-mentioned rules and requirements.

STATE OF PLAY OF WORK WITHIN THE COUNCIL PREPARATORY BODIES

4. The Horizontal Working Party on Cyber Issues (HWPCI) began to discuss the proposal on 21 September 2022, with a general presentation by the Commission. After this general presentation, the HWPCI discussed the impact assessment at its meeting on 28 September 2022. Several Member States entered scrutiny reservations to further study the assessment.
5. The HWPCI had a full read-through of the entire text of the proposed Regulation at its meetings on 5, 12, 19 and 26 October 2022. This read-through allowed Member States to request and receive detailed explanations from the Commission on all articles and annexes of the proposed Regulation.

6. In addition, in the meeting of HWPCI on 9 November 2022, the Commission provided a detailed explanation of product liability rules in the Union with a particular focus on a recently published proposal for a Directive on liability for defective products and on the interaction of the proposed Regulation and Union's product liability rules.
7. At the request of the Presidency and following interest of Member States, the Commission organised an online workshop on the New Legislative Framework on 13 October 2022 to clarify the structure and fundamental elements of the New Legislative Framework for EU product legislation which is used as a basis for the proposed Regulation. Additionally, the Commission provided details on deviations from the New Legislative Framework specific for the proposed Regulation.
8. On 17 October 2022 the Council adopted Council conclusions on ICT supply chain security. These conclusions welcomed the proposed Regulation as an important legislative instrument for advancing secure development of products with digital elements, and for ensuring cybersecurity is accounted for in the whole life cycle of products with digital elements. Furthermore, the Council noted that the proposed Regulation has a potential to significantly contribute to the strengthening of ICT supply chain security and encouraged constructive negotiations and timely adoption of the proposed Regulation.
9. On 9 November 2022 the European Data Protection Supervisor (EDPS) issued an opinion on the proposal¹.
10. In the HWPCI meetings dedicated for the read-through of the proposed Regulation, Member States broadly welcomed the proposed Regulation as appropriate and generally supported its overall objectives. The horizontal nature was highlighted by several Member States as an important aspect of the proposed Regulation.

¹ EDPS Opinion 8/2022

11. In the discussions, Member States asked for more clarifications on the scope of the proposal. In particular, the extent to which Software-as-a-Service is covered or not, and how broad is the exclusion from the scope of products developed exclusively for national security and military purposes. Furthermore, Member States indicated that scoping of critical products will merit thorough discussion. Member States also underlined the need for clarity on the interaction with other relevant legislation, such as the NIS 2 Directive or the Cybersecurity Act. The need for clarification of some terms used in the proposed Regulation was also highlighted by some Member States.
12. In addition, Member States also called for a close assessment of the burden arising from obligations under the proposed Regulation for small and medium enterprises and start-ups developing and manufacturing products with digital elements covered by the proposed Regulation. Some Member States expressed wishes for a close examination of the proposed limitation for compliance with the essential requirements to expected product lifetime or five years after the placing of a product on the internal market, whichever is shorter.
13. Moreover, the exchanges held during the read-trough sessions indicated that the role and tasks envisaged for ENISA should be subjected to further discussions.
14. Following the discussions in the HWPCI, the Presidency invited Member States to submit written comments on the scope of the proposed Regulation and clause on free movement, including Articles 2 and 4 and partially including Article 3. Both the current Czech Presidency and the upcoming Swedish Presidency believe that tackling the issues of scope and free movement clause in the first negotiating sessions in the HWPCI will bring needed clarity on the applicability of the proposed Regulation and provide a good basis for further negotiations.
15. On the basis of written contributions from Member States and the work within the HWPCI, the Presidency intends to draw up a compromise text on the scope and free movement clause.

16. Altogether, the HWPCI will have held a total of 10 meetings on the Cyber Resilience Act proposal under the Czech Presidency.
17. On the basis of the progress made under the Czech Presidency, the incoming Swedish Presidency plans to continue the work on this important file.
18. In the light of the above, the Permanent Representatives Committee and the Council are invited to take note of the progress made on the examination of the proposal for a Regulation.
