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NOTE

From:	Presidency
To:	Delegations
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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 - Presidency compromise proposal Articles 2- 4

Member States will find in Annex a Presidency first compromise proposal on the provisions regarding the scope of the Cyber Resilience Act, based on the outcome of discussions during the HWPCI meetings on 5 and 19 October 2022 and written comments received from Member States. This proposal will be presented and discussed at the HWPCI meeting on 23 November 2022. Changes compared to the Commission proposal are indicated in **bold**.

(New recital):

This Regulation should not prevent ability of Member States to impose national restrictions on products with digital elements on the basis of national security grounds, including their possible exclusion from the national market.

(New recital):

For the sake of the definition of software in this Regulation, computer code comprises of a sequence or set of instructions described in a programming language, including machine or binary code, to be executed by another software or by hardware, to process, store or transmit of digital data.

Article 2

Scope

1. This Regulation applies to products with digital elements whose intended or reasonably foreseeable use includes a direct or indirect logical or physical data connection to a device or network.
2. This Regulation does not apply to products with digital elements to which the following Union acts apply:
 - (a) Regulation (EU) 2017/745;
 - (b) Regulation (EU) 2017/746;
 - (c) Regulation (EU) 2019/2144;
 - [(d) Directive (EU) 2005/44/EC;].**

3. This Regulation does not apply to products with digital elements that have been certified in accordance with Regulation (EU) 2018/1139.
4. The application of this Regulation to products with digital elements covered by other Union rules laying down requirements that address all or some of the risks covered by the essential requirements set out in Annex I may be limited or excluded, where:
- (a) such limitation or exclusion is consistent with the overall regulatory framework applying to those products; and
 - (b) the sectoral rules achieve the same **or higher** level of protection as the one provided for by this Regulation.

The Commission is empowered to adopt delegated acts in accordance with Article 50 to amend this Regulation specifying whether such limitation or exclusion is necessary, the concerned products and rules, as well as the scope of the limitation, if relevant.

5. This Regulation does not apply to products with digital elements developed exclusively for national security, **defence** or military purposes or to products specifically designed to process classified information.
- [5b. This Regulation is without prejudice to the Member States' responsibilities to safeguard national security or their power to safeguard other essential State functions, including ensuring the territorial integrity of the State and maintaining law and order.]**
- [5c. The obligations laid down in this Regulation do not entail the supply of information the disclosure of which is contrary to the Member States' essential interests of national security, public security or defence.]**

Article 3

Definitions

For the purposes of this Regulation, the following definitions apply:

- (1) ‘product with digital elements’ means any software or hardware product and its remote data processing solutions, including software or hardware components to be placed on the market separately;
- (2) ‘remote data processing’ means any data processing at a distance for which the software is designed and developed by the manufacturer or under the responsibility of the manufacturer, and the absence of which would prevent the product with digital elements from performing one of its functions;
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- (6) ‘software’ means the **logical** part of an electronic information system which consists of computer code;
- (7) ‘hardware’ means a physical electronic information system, or parts thereof capable of processing, storing or transmitting of digital data;
- (8) ‘component’ means software or hardware intended for integration into an electronic information system;
- (9) ‘electronic information system’ means any system, including electrical or electronic equipment, capable of processing, storing or transmitting digital data;
- (10) ‘logical connection’ means a virtual representation of a data connection implemented through a software interface;

- (11) ‘physical connection’ means any connection between electronic information systems or components implemented using physical means, including through electrical, **optical** or mechanical interfaces, wires or radio waves;
- (12) ‘indirect connection’ means a connection to a device or network, which does not take place directly but rather as part of a larger system that is directly connectable to such device or network;
- (22) ‘placing on the market’ means the first making available of a product with digital elements on the Union market;
- (23) ‘making available on the market’ means any supply of a product with digital elements for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge;
- (24) ‘intended purpose’ means the use for which a product with digital elements is intended by the manufacturer, including the specific context and conditions of use, as specified in the information supplied by the manufacturer in the instructions for use, promotional or sales materials and statements, as well as in the technical documentation;
- (25) ‘reasonably foreseeable use’ means use that is not necessarily the intended purpose supplied by the manufacturer in the instructions for use, promotional or sales materials and statements, as well as in the technical documentation, but which is likely to result from reasonably foreseeable human behaviour or technical operations or interactions;

Article 4
Free movement

1. Member States shall not impede, for the matters covered by this Regulation, the making available on the market of products with digital elements which comply with this Regulation.
 2. At trade fairs, exhibitions and demonstrations or similar events, Member States shall not prevent the presentation and use of a product with digital elements which does not comply with this Regulation.
 3. Member States shall not prevent the making available of unfinished software which does not comply with this Regulation provided that the software is only made available for a limited period required for testing purposes and that a visible sign clearly indicates that it does not comply with this Regulation and will not be available on the market for purposes other than testing.
- 3a. Paragraph 3 does not apply to safety components as specified under other Union harmonisation legislation.**
- 3b. This Regulation shall not impede Member States from submitting products with digital elements to their own conformity assessment procedures when placed on the market and used for military, defence or national security purposes or processing of classified information.**
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