Council of the European Union

Brussels, 8 September 2023
(OR. en)

12800/23
ADD 2

Interinstitutional File:
2023/0315(COD)

COMPET 850
MI 725
SOC 593
ECOFIN 855
DRS 45
FREMP 238
JAI 1128
MDC 1
ENT 187
ENV 963
DIGIT 169
CODEC 1562
IA 217

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	5 September 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2023) 292 final
Subject:	COMMISSION STAFF WORKING DOCUMENT Subsidiarity Grid Accompanying the document Proposal for a Directive of the European Parliament and of the Council on European cross-border associations

Delegations will find attached document SWD(2023) 292 final.

Encl.: SWD(2023) 292 final

EUROPEAN
COMMISSION

Brussels, 5.9.2023
SWD(2023) 292 final

COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a Directive of the European Parliament and of the Council

on European cross-border associations

{COM(2023) 516 final} - {SEC(2023) 306 final} - {SWD(2023) 293 final} - {SWD(2023) 294 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
The legislative basis for this proposal is Article 114 of the Treaty on the Functioning of the European Union ('TFEU') which provides for the adoption of measures to ensure the establishment and functioning of the internal market, in combination with Article 50 TFEU which empowers the European Parliament and the Council to adopt provisions in order to attain freedom of establishment.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In the case of internal market policy, the Union's competence is shared according to Article 4 TFEU.
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[1]: - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
The Impact Assessment accompanying the proposal for a Directive on European Cross-Border Associations was subjected to a comprehensive consultation process (between August and November 2022) to gather the views of different stakeholders (including, among others, associations and other non-profit organisations, service providers and competent authorities). The consultation activities carried out were: – A call for evidence, which received 50 replies; – A public consultation, which received 64 replies; – A targeted consultation through an online survey, with responses from domestic and cross-border associations (88 in total, including umbrella organisations), service providers (in total 12), academia/research institutes (in total 14), competent authorities (in total 11); and 64 interviews with associations and 29 umbrella organizations regrouping national associations. Additionally, the Commission informed and discussed regularly with the members of the GECES (Expert group on social economy and social enterprises (2018-2024) on the initiative on cross-border activities of associations. A synopsis report summarising all the stakeholders' positions and contributions to the legislative initiative is attached as Annex 2 to the Staff Working Document on the Impact Assessment report. Section 3 of the Impact Assessment report and section 2 of the proposal's explanatory memorandum contain a section on the principle of subsidiarity as presented in question 2.2 below.
2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

The explanatory memorandum contains the following text:

"The overall objective of the proposal is to remove identified barriers to the cross-border activities and cross-border mobility of associations in the EU single market.

There is a strong value added by acting at EU level because the problems that the Commission's proposal tackles are of cross-border nature. Currently, there is little coordination by individual Member States to facilitate cross-border activities, mobility and capital transfers of associations. Such coordination, although theoretically possible, appears unlikely in the near future. For instance, following the withdrawal in 2005 of the Commission proposal for a Council regulation on the statute for a European association, only three Member States have legislated in ways to facilitate cross-border activities of associations as to registration duties. In particular, individual action or inaction by Member States mainly focuses on regulating associations in their specific national context and does not address the cross-border dimension, with exception of existing legislation in a few Member States. Relying on Member State action alone, it is likely that the legal, administrative, and economic barriers for associations would therefore persist, resulting in the continuation of legal uncertainty and red tape and not allowing a level playing field for associations operating or wishing to operate in the single market.

The objective of this initiative, therefore, cannot be achieved sufficiently by the Member States alone and can be better achieved at Union level. Only EU action will enable the adoption of common or mutually recognised rules that would ease the cross-border activities and mobility of associations. By acting, the EU will provide a clear and predictable framework enabling associations to fully benefit from their single market freedoms. Indirectly, EU intervention may potentially help to promote the diversity and strengthen the potential of the non-profit organisations, of which associations are the dominant legal entities, thereby contributing to unleashing the full potential of the non-profit sector in the European Union.

Furthermore, the proposal is targeted at those associations interested in operating in more than one Member States to benefit from recognition of their legal personality across the Union, as well as to have improved clarity on administrative procedures applying when operating cross-border, including providing goods and services, receiving capital, welcoming members, merging with associations cross-border and converting cross-border This could not be achieved without a EU intervention."

The impact assessment (sections 2 and 3) provides a justification regarding conformity with the principle of subsidiarity, and addresses the issue in the context of the options analysed, where relevant.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

Reducing uncertainty and administrative burden faced by associations operating or whishing to operate cross-border cannot be achieved sufficiently by Member States acting alone. Indeed, the study and the stakeholders' consultations performed to support the proposal showed that barriers and legal loopholes between Member States legal regimes exist, thereby hampering associations from expanding cross-border and from conducting cross-border activities (including economic ones) in the single market, moving freely and receiving capital. It is therefore necessary for the EU to take action.

These barriers and legal loopholes are the result of a regulatory fragmentation impacting on cross-border activities of associations. In particular, the legal comparative analysis conducted during the

Impact Assessment supporting this proposal, as well as the overall stakeholders' consultation, demonstrated the need for associations to easily operate cross-border in the single market in order to reach their objectives. An EU-level intervention is necessary to lower the barriers as identified in the following areas: 1) the cross-border activities of associations in relation to their right to establishment, thereby hampering associations' capabilities to provide services and goods in the single market; 2) the movement of capital in the single market; 3) the possibilities for cross-border membership and participation in governance bodies; and 4) associations' possibilities for cross-border mobility. This, in turn, would promote a level playing field for associations throughout the single market and would enable them to unleash their full potential to generate economic and societal value in the EU. An intervention at EU level is necessary to address this issue.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

As indicated in the European Parliament's resolution of February 2022 and as emerged from the Public consultation and the consultation activities conducted in the framework of the impact assessment supporting the Commission's proposal , the intensity of cross-border activity of associations does not reach its full potential in the EU. The identified problem has therefore a transnational dimension: an estimated 310 000 associations appear to already perform their activities in several Member States and an estimated theoretical maximum potential of 350 000 associations could be engaged in cross-border activities, should the identified barriers be removed. Only EU action will enable the adoption of common or mutually recognised rules that would ultimately ease the cross-border activities and mobility of associations in the single market, including through reduction of excess costs.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[2] or significantly damage the interests of other Member States?

National action is, in principle, adequate for the development of associations operating at national level. However, rules on cross-border aspects of associations are generally not provided for in national legislations or, when provided, they differ or they may be effectively constraining associations operating in more than one Member State. This results in regulatory fragmentation legal uncertainty about the applicable rules and unjustified administrative practices and costs for associations, creating barriers for those associations engaged or wishing to engage in activities in more than one Member State.

Therefore, national action or the absence of EU level action would not conflict with the Treaty objectives of establishing the single market, but it might undermine the proper functioning of the single market as differing legal frameworks in Member States in the area lead to legal uncertainty, fragmentation of the single market, additional costs and administrative burden for associations when operating across borders.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

The Commission proposal aims to reduce legal and administrative barriers for cross-border associations and enable a level playing field for them to pursue their economic and societal roles. In doing so, Member States remain the solely competent authorities in terms of permitting the

[2] https://europa.eu/european-union/about-eu/eu-in-brief_en

deployment of administrative practices such as the registration procedure of associations at national, regional or local level and remain responsible for designation of a register for the purpose of registration (allowing the use of already existing registers and promoting online solutions).
(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
The identified problems do not significantly vary across national, regional and local levels across the EU. Associations that want to operate across border in the single market are faced with uncertainty and administrative burden and costs in the whole EU.
(e) Is the problem widespread across the EU or limited to a few Member States?
The problem that the proposal aims to address is widespread across the EU and is not limited to a few Member States and is present in four main areas: cross-border activities of associations in relation to their right to establishment and provision of services and goods; the movement of capital; cross-border membership and participation in governance bodies; and cross-border mobility. As previously underlined, the regulatory landscape in the single market for cross-border activities associations is fragmented and will remain so in the absence of an EU intervention.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
The consultations and the study performed in the preparation of this proposal revealed that Member States responding to the consultation could support the initiative. It could also be concluded that facilitating and enhancing the cooperation between Member States could be beneficial to achieve the objectives of this proposal. This need is addressed in the proposal through the use of the Internal Market Information system (IMI). Furthermore, a dedicated network of national competent authorities will be set-up in order to ensure the proper implementation of the Directive.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
The overall stakeholders' consultation indicated that views and preferred courses of action are mostly similar across the EU, and do not differ between national, regional and local authorities.
2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?
The objectives of the proposed action can be better achieved at Union level by reason of scale and the added value that the change will bring.
(a) Are there clear benefits from EU level action?
There is a clear added value from acting at the EU level. In particular, when it comes to the freedom of establishment, the freedom to provide and receive services and goods, as well as the free movement of capital, the absence of harmonised rules hampers associations from unleashing their full potential to generate economic and societal value in the EU. Differing requirements for associations to operate across borders, create legal uncertainty, fragmentation of the single market and result in additional costs for associations. An EU level action will prevent this and therefore has added value.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
Overall, Member State-level measures are of limited benefit, in the absence of a simple way to obtain recognition of the legal personality of associations, facilitating mobility as well as the free

movement of capital, and the provision of goods and services cross-border.

Based on a combination of stakeholder surveys, expert interviews and literature, the Impact Assessment underpinning the legislative proposal concluded that the proposal can generate excess cost reductions for associations. For example, the time allocated by associations' employees for the management of the cross border-related administrative procedures, as well as related direct costs, will be reduced. The proposal is also expected to bring indirect economic benefits by facilitating activities of associations operating or with the ambition to operate across borders, for example in terms of less burdensome access to new cross-border markets and cross-border provision of goods and services. This will allow associations to expand and achieve economies of scale.

Finally, for Member States authorities, an EU intervention will provide economies of scale for the performance of their administrative cooperation tasks thanks to the creation of a dedicated information exchange mechanism through the Internal Market Information System (IMI), the encouragement for digitalisation of procedures and to the enhanced cooperation through the setting of a dedicated network among competent authorities.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

As explained in section 2.2, introducing in national legal systems a legal form of association for cross-border purposes which co-exists alongside existing legal forms for associations in national law will create an enabling regulatory framework for the cross-border activities and mobility of associations. In the absence of an EU intervention, current obstacles are expected to continue and increase given the overall shrinking civic space trends observed in Europe. A more homogenous policy approach at EU level would be necessary to address this fragmentation and face societal trends.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

There is no loss of competence for Member States and local or regional authorities as they retain their regulatory competences with regards to the supervision and enforcement of the rules prescribed by the Directive, including registration procedures.

(e) Will there be improved legal clarity for those having to implement the legislation?

There will be one set of rules applicable, which aims at improving legal clarity

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The explanatory memorandum (Chapter 2) contains a section on the principle of proportionality, as summarised below.

"The proposed measures do not go beyond what is necessary to achieve the objectives of the initiative. This initiative is targeted at associations who wish to operate cross-border and will not necessarily lead Member States to change their existing association law nor will it have direct

implications on associations not interested in cross-border activities, in proportion with the scale of the identified problem (8% of all associations in the EU are estimated as currently engaged in cross-border activities).

A new legal form for cross-border associations at Member State level will allow for flexibility for Member States to adapt it to their respective settings. Moreover, the provisions enshrined in this Directive will not require changing Member States legislation for all associations."

The measures proposed are well targeted as they focus on aspect concerning cross-border activities.

The summary of impacts on stakeholders of the preferred policy option is presented in Annex 3 of the impact assessment. The assessment of all policy options in terms of proportionality is provided in sections 7 and 8 of the impact assessment.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The explanatory memorandum contains the following text:

"The proposal is targeted at associations which operate or wish to operate cross-border and will not necessarily lead Member States to change their existing association law nor will it have direct implications on associations not interested in cross-border activities. The content and form of the proposal are, therefore in proportion with the scale and scope of the identified problem.

The envisaged new legal form for cross-border associations introduced at national level in the Member States, will allow flexibility for Member States to adapt it to their respective settings. The provisions prescribed in the proposed Directive will not require changing Member States legislation governing existing forms of associations established in their territory.

The analysis carried out for all policy options, which took into account their effectiveness, efficiency, coherence and proportionality, showed that all options could have a positive impact and that the preferred measure ranked highest in the analysis in relation to efficiency, coherence, proportionality and subsidiarity, as indicated in Section 7 of the Impact Assessment."

Furthermore, the Impact Assessment accompanying the legislative proposal analysed the impacts of the policy options through a quantitative and qualitative assessment that proves the proposal is proportionate and does not exceed what is necessary to achieve the intended objectives.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

The proposal only covers those aspects where actions at the Union level represent an added value.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The proposed instrument is a Directive, since Article 50 TFEU requires the European Parliament and the Council to act by means of directives. Consequently, Member States will be able – by transposing the EU rules into their national laws – to take account of the need for consistency and coherence

within their national legal systems.

In addition, a Directive is considered the most appropriate legal instrument as it allows to adapt the prescribed rules to national settings. Moreover, the overall level of precision of the proposed instrument will help mitigate the potential risk of fragmentation that may arise from divergent interpretations among the Member States

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument and approach?)

The overall level of precision of the proposed instrument will mitigate possible risk of fragmentation resulting from divergent interpretations among the Member States, while leaving them the possibility to adapt the prescribed rules to their national settings. This is particularly relevant for Member States having traditionally strong cross-border civil society ties.

As emerged from the impact assessment, limiting the European action to e.g. non-legally binding options would not solve the problems identified.

(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The proposed directive does not entail unnecessary costs for the Union, national governments, regional or local authorities. Nor it does impose new administrative obligations on associations, while it is expected to lower launch costs as well as the recurrent costs of associations operating across borders. Member States may face some adaptation costs, which, however, have not emerged to be significant. The Impact Assessment has shown that on average up to EUR 100 000 per Member State additional one-off adaptation costs could be expected. Once this adjustment is implemented, the public authority is expected to return to its business as usual. Hence, no significant additional annual running costs can be expected.

This proposal will have limited implications in terms of costs for the Commission relating to two expenditure categories for the necessary extension of the Internal Market Information System and the Digital Single Gateway, which would be covered under the Single Market Programme.
As explained in the impact assessment (sections 6 and 7), the proposal will not imply costs for associations, but it will lead to savings in administrative burden. The financial and budgetary impacts are explained in detail in the legislative financial statement accompanying this proposal.

(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?

The proposal is framed around commonalities found across existing national regimes, while also making room for Member States to adapt to their national settings and traditions. The Commission also conducted a comparative legal analysis of associations laws and regimes in the EU as well as a comparative legal analysis of mergers rules in Member States which have informed the Impact Assessment accompanying the legislative proposal on those aspects relevant to the identified problem.