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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2023) 660 final
Subject:	COMMISSION STAFF WORKING DOCUMENT SUBSIDIARITY GRID Accompanying the document Proposal for Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937

Delegations will find attached document SWD(2023) 660 final.

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COMMISSION

Strasbourg, 12.12.2023
SWD(2023) 660 final

COMMISSION STAFF WORKING DOCUMENT

SUBSIDIARITY GRID

Accompanying the document

Proposal for Directive of the European Parliament and of the Council

establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937

{COM(2023) 637 final} - {SEC(2023) 637 final} - {SWD(2023) 663 final} - {SWD(2023) 664 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 proposal aims first and foremost to contribute to the proper functioning of the internal market for interest representation on behalf of third countries by laying down harmonised rules for a high level of transparency of such activities when carried out in the internal market. The legal basis for the 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. This provision enables measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market. It is the appropriate legal basis for an intervention covering service providers in the internal market and addressing differences between Member States' provisions which obstruct the fundamental freedoms and have a direct effect on the functioning of the internal market. This proposal also aims to contribute to the transparency, integrity of, and public trust in, Union and Member State decision-making processes, with regards to the influence of third countries by improving the knowledge about the magnitude, trends and actors of interest representation carried out on behalf of third countries.
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.
*Subsidiarity does not apply for policy areas where the Union has **exclusive** competence as defined in Article 3 TFEU[1]. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU[2] sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU[3] sets out the areas for which the Unions has competence only to support the actions of the Member States.*
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[4]: - 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 following consultation strategy has been undertaken to support the preparation of the proposal: - an ad hoc scoping study; - a study "to support the preparation of an EU instrument on how to help improve the resilience of our democracies and address activities that may impact public opinion or

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN
[3] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

democratic sphere funded by third countries";

- a call for evidence and a public consultation;
- targeted consultations of stakeholders, including through focus group meetings, such as: representative organisations of the business community (e.g. lobbying and PR firms), civil society, relevant professional and industry organisations, educational institutions, experts in relevant fields, relevant national authorities, and relevant international organisations and standard setting bodies.;
- the inclusion of relevant questions in two Eurobarometer surveys: Citizenship and Democracy, and Democracy and Rule of Law;
- additional questionnaires on potential policy options sent out to Member States authorities, commercial entities and civil society organisations.

The explanatory memorandum of the proposal[5] and its accompanying impact assessment[6] contain a section on the principle of subsidiarity.

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?

The explanatory memorandum contains the following text:

"According to the principle of subsidiarity (Article 5(3) TEU), action at Union level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects, be better achieved by the Union.

As Member States' rules affecting interest representation on behalf of third countries diverge in their scope, content and effect, a patchy framework of national rules is appearing and risks to increase, especially when it comes to interest representation activities carried out on behalf of third countries. It undermines the internal market by creating an uneven playing field and unnecessary costs for entities that seek to carry out cross-border interest representation activities on behalf of third countries. It invites regulatory arbitrage to avoid transparency measures which in turn impacts the citizens' confidence and trust in the effectiveness of regulation.

Only intervention at Union level can solve these problems, as regulation at national level already results in the creation of obstacles to cross-border interest representation activities in the internal market. In contrast, the effects of any action taken under national law would be limited to a single Member State and risk being circumvented or be difficult to oversee in relation to entities carrying out interest representation on behalf of third countries from other Member States. Furthermore, some Member States are currently considering legislative initiatives in the field of foreign influence that might not align with the proportionate and targeted approach of this initiative and that might not provide with a comprehensive system of safeguards. Only action at Union level can address this consistently across the internal market. Introducing common and proportionate standards for transparency of interest representation carried out on behalf of third countries at Union level is essential to ensure that such measures are established consistently across all Member States with respect to all fundamental rights and in particular subject to comprehensive safeguards including access to the courts.

Finally, interest representation activities carried out on behalf of third countries is a transnational

[5] COM(2023) 637 final.
[6] SWD(2023) 663 final.

issue with cross-border implications that need to be addressed at Union level. Influencing policy decisions and political processes in one Member State can have an impact beyond that Member State's borders, in another Member State or at the European level. The absence of Union-level action may result in some Member States being less aware than others about interest representation activities carried out on behalf of third countries. It seems unlikely that Member States would converge on aligned standards on how to collect comparable data on interest representation activities carried out on behalf of third countries, or establish a systematic Union-wide cooperation mechanism to exchange information with each other and the Commission."

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)?

As regulation at national level already results in the creation of obstacles to cross-border interest representation activities in the internal market, which is one of the main problems, Union action is necessary to prevent the increase of the existing obstacles in the internal market.

The absence of Union-level action may result in some Member States being less aware than others about interest representation activities carried out on behalf of third countries. It seems unlikely that Member States would converge on aligned standards on how to collect comparable data on interest representation activities carried out on behalf of third countries, or establish a systematic Union-wide cooperation mechanism to exchange information with each other. The effects of any action taken under national law would be limited to a single Member State and risks being circumvented or be difficult to oversee in relation to entities carrying out interest representation on behalf of third countries from other Member States. This would not address the Union-wide problems identified and would exacerbate the obstacles within the internal market caused by fragmentation.

A Union-level intervention is necessary to address the existing and potentially increasing obstacles to the provision of those services which may result from divergent regulatory environments across Member States, and to provide legal certainty to market operators. This, in turns, would promote fair competition and a level playing field throughout the internal market.

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

Third countries influencing decision-making processes via interest representation activities is a transnational issue with cross-border implications that can affect the policy decisions and political processes of other countries. It may be difficult to quantify the extent of these transnational/cross-border aspects of interest representation on behalf of third countries, as the impact of such activities can be difficult to measure. Nonetheless, this initiative will introduce harmonised requirements for the performance of interest representation activities on behalf third countries in the internal market, which will increase the knowledge of the cross-border dimension of such activities. At present, the regulatory landscape is extremely fragmented with regards to interest representation activities, as evidenced by the consultations conducted by the Commission as well as the regulatory mapping undertaken during the study supporting the initiative. The introduction of these requirements will provide additional legal certainty to the entities falling under the scope of the initiative, leading to fairer competition and a level-playing field across the internal market.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[7] or significantly damage the interests of other Member States?

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

If national action is taken instead of Union-level action, there is a risk that the regulatory approach will keep on diverging, leading to different regulatory requirements across Member States, negatively affecting the functioning of the single market. Furthermore, any interventions at Member State level would not necessarily be equipped with the robust safeguards envisaged by the initiative and may be disproportionate.

Moreover, a lack of Union-level intervention would also fail to systematically address actions by third countries that seek to covertly influence decision-making in the Union. The absence of Union-level action may result in some Member States being more vulnerable to foreign interference, while others be better equipped to prevent and address such interference, leading to a situation where the Union's security and democracy are jeopardized by the weaknesses of its weakest link.

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

By imposing full harmonisation of the transparency and accountability requirements, the initiative would prevent Member States from laying down more extensive transparency requirements within the framework of the harmonised rules.

However, the possibility for Member States to establish rules, in full respect of Union law, for aspects not covered by the harmonised rules would not be affected (e.g. to establish rules for their public officials in contact with entities carrying out interest representation activities on behalf of third countries).

Within the limits of the harmonised framework, Member States would have the ability and possibility to enact appropriate measures to tackle the issues at hand. For example, Member State authorities would be required to ensure that publicly available national transparency registers concerning interest representation activities on behalf of third countries are in place and that they cover the information and reporting requirements included in the initiative, while being free to decide whether to do so by amending any pre-existing transparency registers or establishing new ones. Member States would also be responsible for deciding how to establish governance, supervision and sanctions regimes associated with their transparency register(s), as long as they comply with the requirements laid down in the initiative (e.g. only administrative fines).

(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 vary across national, regional and local levels across the Union. The phenomenon, that is, obstacles in the internal market to the cross-border provision of interest representation activities on behalf of third countries, can be observed across the whole Union. Similarly, the unknown magnitude, trend and actors in the area of interest representation activities carried out on behalf of third countries do not vary between the different levels mentioned.

(e) Is the problem widespread across the EU or limited to a few Member States?

The main problems the proposal aims to address are widespread across the Union. Indeed, the level of obstacles to the internal market for the provision of interest representation services in general and for third countries in particular is high and will become higher in the absence of an intervention at Union level.

(f) Are Member States overstretched in achieving the objectives of the planned measure?

The consultations and the study performed in the preparation of the initiative revealed that some Member States expressed concerns over potential lack of resources to perform some of the supervisory and enforcement activities foreseen. In particular, it is necessary to facilitate the administrative cooperation, that is, exchange of information, between the different national authorities, as well as the Commission. This is achieved by making use of the Internal Market Information System (IMI system).

(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?

The consultations undertaken for the preparation of the initiative have shown that there is a general demand for Union action regarding interest representation activities carried out on behalf of third countries. Harmonised targeted transparency requirements are the preferred option for most Member States consulted. Only a minority of Member States would prefer a recommendation. No divergence was found between the position of national and regional or 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)?

Overall, the functioning of the internal market can be improved through Union-level action to tackle the issues related to the uneven playing field, the risk of regulatory arbitrage and the unnecessary costs for entities carrying out interest representation activities on behalf of third countries that wish to operate across Member States.

The harmonisation of measures regarding interest representation activities on behalf of third countries would improve the free movement of services across the EU. Because a uniform level of transparency would be provided and following an internal market logic, entities carrying out interest representation on behalf of third countries in more than one Member State they would be able to register solely in their Member State of establishment and use that registration throughout the internal market. Furthermore, a Union-level intervention would also help competent authorities in their oversight functions since sharing information and best practices can help all Member States improve their ability to detect and respond to foreign interference.

(a) Are there clear benefits from EU level action?

The functioning of the internal market will be improved by Union-level action because the establishment of harmonised rules for the provision of interest representation services for third countries would result in the creation of a level playing field and fairer competition for economic operators. This intervention would also enhance the integrity of, and public trust in, the Union and Member State democratic institutions by ensuring the transparency of interest representation activities carried out on behalf of third countries, and by improving the knowledge of the magnitude and trends and actors of interest representation activities carried out on behalf of third countries.

(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?

Common rules on the provision of interest representation activities carried out on behalf of third countries would allow economies of scale for economic operators, which will more easily be able to provide services across the internal market, in particular thanks to the harmonisation of transparency and record keeping requirements. For Member States authorities, a Union 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 IMI system.

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

According to the evidence collected and analysed during the proposal, in the absence of a Union intervention, current trends identified in the previous chapters are expected to continue on the same trajectory. There is an increased risk awareness on foreign influence in the Member States, in particular as regards activities carried out on behalf of a third country, and increasing national plans for intervention, which risks further deepening the market fragmentation currently observed. A more homogenous policy approach at Union level would be necessary to address this fragmentation.

(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)?

By imposing full harmonisation of the transparency and accountability requirements, the initiative would prevent Member States from, within the framework of the harmonised rules, laying down more extensive transparency requirements. However, the competence of Member States to establish rules, in full respect of Union law, for the aspects not covered by the harmonised rules would not be affected (e.g. to establish rules for their public officials contacting entities carrying out interest representation activities on behalf of third countries). Therefore, the proposed new rules would result in a minimal loss of competence for Member States and their competent authorities.

In any event, the benefits of this initiative will outweigh this cost. These benefits include, first, an increased knowledge and understanding of the market for third country interest representation due to increased transparency. Second, Member States will benefit from a higher degree of awareness of the issues related to covert interest representation and attempts by third countries to influence in European democracies or impact public opinion across the Union. Third, the establishment of a governance structure at Union level could facilitate cooperation between Member States and improve coordination in addressing certain problems related to interest representation. Lastly, Member States will benefit from the fact that the initiative will facilitate effective citizens' participation in democratic processes, which could enhance public trust in democratic processes, increase voter turnout in elections, strengthen the legitimacy of elected officials, and potentially reduce the risk of political polarization.

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

Yes. From the perspective of private entities falling under the scope of the proposal, the establishment of clear and harmonised requirements for the provision of interest representation services on behalf of third countries would facilitate the provision of services across the internal market thanks to a higher level of legal certainty. From the perspective of the Member States' authorities in charge of the supervision and enforcement of those rules, the harmonisation of requirements would facilitate administrative cooperation.

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 of the proposal contains the following text on the proportionality of the legislative proposal:

"Regarding proportionality, the content and form of the proposed action does not exceed what is necessary to achieve the goal of ensuring the proper functioning of the internal market.

The proposal builds on existing Union legislation and is proportionate and necessary to achieve its objectives. The envisaged measures are limited to what is necessary to tackle the current and expected fragmentation of the relevant regulatory framework.

The proposal is limited to transparency requirements addressed only to entities that are carrying out interest representation services on behalf of third countries. The proportionality of the transparency obligations has been carefully considered and is reflected in the limited requirements imposed (clearly limited information requirements, limited obligations in terms of record keeping, etc.). The proposal does not aim to restrict the provision of interest representation services, but rather to improve the functioning of the internal market and facilitate their provision cross-border by making them more transparent in a coherent manner across the Union.

The proposal includes necessary safeguards aimed at ensuring a proportionate transposition and enforcement and avoiding risks of stigmatisation. The proposal does not seek to prevent third countries from promoting their views but aims to ensure that this is taking place in a transparent and accountable manner. It does not impose requirements on entities merely because they receive funding from abroad, but instead focuses on ensuring increased transparency when they carry out interest representation activities on behalf of third countries that seek to influence the development, formulation or implementation of policy or legislation, or of public decision-making process in the Union. For this reason, contributions to the core funding of an organisation or similar financial support, for example provided under a third country donor grant scheme to a non-profit organisation, should not be considered as remuneration for an interest representation service where they are unrelated to an interest representation activity, that is, where the entity would receive such funding regardless of whether it carries out specific interest representation activities for the third country providing such a funding.

In addition, the proposal includes a specific requirement that the information in Member States' national registers is presented in a neutral manner and in such a way that it does not lead to stigmatisation of registered entities. In particular, the publication should not be presented with or accompanied by statements or provisions that could create a climate of distrust with regard to the registered entities, apt to deter natural or legal persons from Member States or third countries from engaging with them or providing them with financial support.

The powers of supervisory authorities to ask for information from entities within the scope of the initiative are carefully framed to ensure that the concerned entities are not subject to unnecessary or excessive requests. That framing is twofold: supervisory authorities may only require limited information additional to what is included in the national register and only in limited circumstances.

In order to ensure the proportionality of the sanctions, the proposal provides that supervisory authorities may only impose sanctions limited to administrative fines and below a certain ceiling based on the entity's economic capacity for breaches of the proposed obligations. Criminal sanctions are explicitly excluded. Member States are responsible for ensuring that it is prohibited to participate in activities that circumvent the provisions of the Directive."

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 proposal addresses the identified issues in the most appropriate and proportionate way. The proposal would impose harmonised requirements for the provision of interest representation carried out on behalf of third countries throughout the internal market, while limiting those requirements to

what is necessary to achieve the intended objectives, thereby contributing to a level playing field in the internal market.
(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 requirements provided for in the proposal would fully harmonise the areas they cover, including in terms of registration requirements, record keeping requirements, supervisory powers of competent authorities and sanctions. This is essential to establish a level playing field in the provision of interest representation services for third countries across the internal market, something the Member States cannot achieve satisfactorily on their own.
(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.)?
A Directive providing for full harmonisation of the transparency requirements applicable to entities carrying out interest representation on behalf of third countries conducted with the objective of influencing the development, formulation or implementation of policy or legislation, or public decision-making processes in the internal market is the appropriate legal instrument. It would set legally binding standards to be met in all Member States while leaving some flexibility, in particular regarding the articulation with existing transparency registers.
(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 or approach?)
The proposal strikes a balance between the regulatory autonomy of Member States and the need to tackle the problems identified. Member States would maintain limited discretion within the scope of the fully harmonised measures, as expressly framed by the initiative. Notably, Member States would be free to provide for one or multiple national registers and supervisory authorities in their territory, in full respect of their procedural autonomy (e.g. authorities responsible for different regional entities). Furthermore, it is left for Member States to establish rules for the aspects not covered by the Directive. For example, it is left to Member States to decide whether to establish rules for their public officials when it comes to their contacts with entities carrying out interest representation activities on behalf of third countries.
(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 expected results and impact of the proposal are a more homogenous policy approach across the Union regarding interest representation activities carried out on behalf of third countries. These will provide greater clarity and predictability for businesses, citizens, and other stakeholders, and facilitate the functioning of the internal market. **Costs for Member States** Member State authorities would need to ensure that national transparency registers for interest

representation activities carried out on behalf of third countries exist and cover all activities within the scope of the legislation. Updated or newly established registers will need to support an online public interface. They would also need to publish an annual report based on the information entered in the register. Member States authorities would also participate in a Union-level advisory group or network of authorities and share information with the authorities of other Member States. The expected costs are outlined in the proposal as well as the accompanying impact assessment.

Costs for private entities

Many commercial interest representation service providers already conduct certain activities that could constitute record-keeping, but these activities are often informal in nature. The record-keeping obligations of the proposal would require the formalisation of existing record-keeping activities in the context of activities carried out on behalf of third countries and therefore would only constitute business-as-usual costs.

Entities that carry out interest representation on behalf of third countries in the internal market would also need to abide by information disclosure and reporting obligations established in the Member States in which they operate. This would require the disclosure of information upon registration, with periodic updates required on certain information. They would be required to ensure the collection, reporting and accuracy of the disclosed information. They may also be required to respond in an ad hoc manner to requests for clarification from Member State monitoring and enforcement authorities on the information disclosed. Non-compliance in this regard could result in administrative sanctions. Through the implementation of these compliance activities, interest representation service providers will bear a range of costs but will also benefit from positive organisational impacts. However, it is not possible to precisely quantify these costs due to lack of information on their likely nature and scale. In specific cases, these entities might be required to provide more information.

Familiarisation costs with the new framework are also to be expected. Such costs would mainly be one-off and borne in the first year of the entry into application of the framework. Administrative costs would include initial registration costs, initial information update costs, and ongoing information disclosure costs. Initial registration costs will be borne in the first year of the entry into application of the legislative intervention by entities that carry out interest representation on behalf of third countries in Member States that currently do not have existing registers. For record keeping activities, feedback gathered suggests that the costs related to these activities could be characterised as business-as-usual costs, thereby adding no incremental costs to the intervention.

The expected costs are outlined in the proposal as well as the accompanying impact assessment.

Costs for the Commission

The proposal has implications in terms of costs and administrative burden for the Commission relating to two expenditure categories. These costs concern administrative expenditure and costs for the necessary extension of the IMI system. The financial and budgetary impacts are explained in detail in the legislative financial statement annexed to the proposal.

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

No special national circumstances requiring a specific treatment of individual Member States have been identified during the preparation of the proposal or during the consultations undertaken to prepare the accompanying impact assessment.