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OPINION OF THE LEGAL SERVICE¹

Subject: Proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context

- Choice of the legal basis
- Compatibility with the Treaties
- Choice of the legal instrument and voluntary nature

I. INTRODUCTION

1. The Working Party on Structural Measures asked the Council Legal Service for its opinion on various legal issues relating to the Commission proposal for a Regulation establishing a mechanism to resolve legal and administrative obstacles in a cross-border context (the "Mechanism").²

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² Proposal of 29 May 2018 for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context, COM(2018) 373 final, doc. 9555/18.

In particular, the issues raised by delegates can be divided into three main groups concerning the choice of Article 175 TFEU as the appropriate legal basis for the adoption of the Regulation, the broader compatibility of the proposal with the Treaties and the choice of the of a regulation as the legal instrument for the proposed Mechanism, in particular in light of its voluntary nature. This opinion confirms and further develops the oral interventions made by the Council Legal Service at the meetings of the working party.

II. LEGAL BACKGROUND

i) Relevant Treaty provisions

2. Article 3 TEU, which sets out the aims of the European Union, provides in the third subparagraph of its paragraph 3 that, “[*The Union*] shall promote economic, social and territorial cohesion, and solidarity among Member States”.
3. Article 4(2) TEU clarifies that “*the Union shall respect the (...) [Member States’] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect the essential State functions (...)*”.
4. Economic, social and territorial cohesion is the subject matter of Title XVIII of Part III of the TFEU. Article 174(1) TFEU reads as follows:

“In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions. (...)

Among the regions concerned, particular attention shall be paid to (...) crossborder (...) regions”.

5. The first and third paragraph of Article 175 TFEU provide as follows:

“Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174. The formulation and implementation of the Union’s policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. (...)

If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure (...).”

ii) General description of the proposal

6. In order to tackle the legal obstacles hampering the implementation of a cross-border infrastructure project or the provision of a cross-border service of general economic interest (the "cross-border project"), the proposal envisages the establishment of a Mechanism which would allow for the application in one Member State (the "committing Member State") of the legal provisions from a bordering Member State (the "transferring Member State") (Article 1). Where no appropriate legal provision for solving the legal obstacle exists, the two Member States could also agree on an *ad hoc* legal "resolution" (Article 9(1)(b)).
7. According to the preamble of the proposal, border regions in the EU are still exposed to a number of legal barriers, especially those related to health, services, labour regulation, taxes, business development, and barriers linked to differences in administrative cultures and national legal frameworks (recital 4). While existing mechanisms to address cohesion objectives in border regions - be they financial (notably Interreg) or administrative (the European groupings of territorial cooperation) - have proven efficient, they should be supplemented by mechanisms of a regulatory nature, such as the one proposed, with a view to removing legal and administrative obstacles in cross-border contexts (recitals 4 to 8)³.

³ See also pages 1 and 2 of the explanatory memorandum of the proposal.

8. Under the proposal, Member States are allowed to opt either for the Mechanism or to opt for an existing way to resolve cross-border obstacles. Such a choice may concern all borders of a Member State or a specific one (Article 4(1) of the proposal). The Mechanism can also be applied to maritime borders and to borders between a Member State (or an overseas territory) and one or more third Countries (Article 4(3)).
9. Member States opting for the Mechanism are required to establish one or more Cross-border Coordination Points at a national or regional level according to their respective constitutional and institutional set-up, to which certain tasks concerning the coordination, activation and implementation of the Mechanism are entrusted.⁴ The national Cross-border Coordination Points are responsible for liaising with the various competent national authorities and for coordinating with the corresponding Cross-border Coordination Points in the neighbouring Member State. They carry out a preliminary assessment of the requests to remove legal obstacles, draft and adopt the measures under the Mechanism and follow up their implementation (Article 6)⁵.
10. The Mechanism envisages two alternative types of measures to tackle legal obstacles affecting cross-border projects, with an additional one in case obstacles are only of non-legislative nature (i.e. administrative or practical).
11. The first measure is a "fast track procedure" applicable when a legal obstacle to a cross-border project consists of an administrative provision or practice that can be solved unilaterally by a Member State (Article 10(2)(d) and (e) and Article 12(4)). This measure establishes a procedural obligation for the Member State to reconsider existing national administrative practices within a set deadline.

⁴ Article 5(1) allows Member States either to set up Cross-Border Coordination Points as separate bodies, or to set them up within existing national or regional authorities or to entrust the corresponding tasks to existing national or regional authorities.

⁵ However, Member States may also decide that when the legal obstacle concerns an issue of legislative competence, the drafting and adoption of the measures under the Mechanism should be entrusted to a different competent national authority (Article 5(2)).

12. The second and third measures - Statements and Commitments - come into play when the removal of a legal obstacle requires changes to a provision adopted under a national legislative procedure.
13. The Statement has no direct derogatory effect, but it obliges the competent national authority to submit a proposal to the relevant legislative body in order to amend the national legal provisions constituting the legal obstacle (Article 1(2)(b), Article 14(1) and (3), Article 19). The legal effect of a Statement is to establish a number of procedural obligations for the neighbouring Member State, culminating with the obligation to submit a proposal to the legislative body of the committing Member State in order to amend the relevant national law.
14. The third measure - the Commitment – is designed to have derogatory legal effects. The Commitment would lay down a legal regime (in principle a specific legal provision of the transferring Member State but possibly also an *ad hoc* new legal regime) which is to be regarded as provisions of national law of the relevant Member States. Commitments are labelled as "self-executing" (see Article 1(2)(a) of the proposal). This notion implicitly defines the place of those Commitments within the system of sources of national law, recognising them precedence over any other national provisions, including legislative ones (see explanatory memorandum, at page 7 and recital (19)).
15. While Member States have an obligation to provide for the adoption of the measures referred to above⁶, the choice between them is left to the Cross-border Coordination Points in relation to each specific cross-border project. The Commission proposal, however, does not clarify the criteria according to which the choice should be made and leaves this to the full discretion of the Cross-border Coordination Points.

⁶ Article 5(2) makes clear that Member States *shall* determine the authorities entrusted with the power to conclude a Commitment as well as the ones entrusted with the powers to conclude a Statement.

16. The proposal establishes the procedure for activating the Mechanism (Articles 8 to 17 of the proposal). The procedure is triggered by an "initiator" (Article 8(2) of the proposal) who identifies the legal obstacle hampering the cross-border project and proposes a resolution. The initiator, who can also be the private or public operator of the project, must submit an "initiative document" to the competent Cross-border Coordination Point of the committing Member State.
17. The proposal confers upon the Cross-border Coordination Points of the committing and transferring Member States the task of assessing the initiative documents and agreeing on a Commitment or Statement, as appropriate (Articles 8 to 17 of the proposal). Article 20 of the proposal further establishes rules on competence for monitoring the application of the Commitment or Statement.
18. Finally, Chapter IV of the proposal lays down rules on legal protection (judicial remedies) against the application of Commitments or Statements, including their monitoring, by establishing the competent jurisdiction for actions against their application.

III. LEGAL ANALYSIS

19. This opinion will first address jointly the questions relating to the choice of legal basis and the overall compatibility of the proposal with the Treaties (section A) and then address the issues relating to the choice of a Regulation as the appropriate instrument for the adoption of the proposed Mechanism, in particular in light of its voluntary nature (section B).

20. Through this examination it will be possible to address a number of remarks and questions raised by delegations in relation to the proposal, which are ultimately related to the issue of the legal basis. Many of those questions are linked to the extent to which an act based on the cohesion legal basis can affect national institutional and procedural autonomy, and to the possible conflict with other policies laid down in the Treaties, such as taxation, social security and judicial cooperation in civil matters. This opinion will not however address other questions raised by delegations relating to the particular meaning and scope of provisions of the proposal, and the eventual application and functioning of the envisaged Mechanism, for which the Commission, as author of the proposal, should provide the relevant explanations.

A. Appropriateness of the legal basis of the proposal

21. The first matter to examine is the appropriateness of the legal basis proposed, i.e. the third paragraph of Article 175 TFEU, which provides for specific actions to be taken outside the Union Structural Funds if proven necessary in order to attain the objectives of economic, social and territorial cohesion⁷.
22. According to well-established case law of the Court of Justice of the EU ("the Court"), the choice of the legal basis for a Union measure must be based on objective factors which are amenable to judicial review, in particular the aim and content of that measure⁸.

⁷ It is noted that other instruments that have been adopted on the basis of the third subparagraph of Article 175 TFEU include the European Union Solidarity Fund (Regulation (EC) No 2012/2002 establishing the European Union Solidarity Fund), the European Globalisation Adjustment Fund (Regulation (EU) No 1309/2013 on the European Globalisation Adjustment Fund), the Structural Reform Support Programme (Regulation (EU) 2017/825 on the establishment of the Structural Reform Support Programme for the period 2017 to 2020), the European Fund for Strategic Investment (Regulation (EU) 2015/1017 on the European Fund for Strategic Investment, the European Investment Advisory Hub and the European Investment Project Portal, the "EFSD") and Regulation (EC) 1968/2006 concerning Community financial contributions to the International Fund for Ireland (and successor regulations).

⁸ See, for instance, judgments in C-43/12, *Commission v Parliament and Council*, EU:C:2014:298, paragraph 29 and case-law cited; C-137/12, *Commission v Council*, EU:C:2013:675, paragraph 52 and case-law cited; C-130/10, *Parliament v Council*, EU:C:2012:472, paragraph 42; C-411/06, *Commission v Parliament and Council*, EU:C:2009:518, paragraph 45 and case-law cited.

1. Preliminary remarks

23. As the Council Legal Service has already pointed out in various opinions,⁹ neither the Treaties nor the relevant case law of the Court provide a precise definition of economic, social and territorial cohesion, to which objectives, as laid down in Article 174 TFEU, the third paragraph of Article 175 TFEU is submitted. The scope of Article 174 TFEU is not limited to specific sectors and is defined functionally - on the basis of its objectives - , rather than organically¹⁰. In this sense, the Court has stated that the Treaty provisions on cohesion policy are of a programmatic nature¹¹.
24. The notion of cohesion policy is thus particularly broad and inclusive¹² and, given its programmatic nature, leaves a large margin of discretion to the EU legislator as regards how the cohesion aims should be achieved.
25. Furthermore, the third paragraph of Article 175 TFEU does not specify the form which the "*specific actions (...) outside the Funds*" which it provides for can take¹³. Such "*specific actions*" can consist of a variety of financial assistance measures that aim at achieving a positive impact on the social and economic situation of a given region or territory and, ultimately, of the Union as a whole, by increasing economic, social and territorial convergence and homogeneity as well as economic, social and territorial development and progress¹⁴.

⁹ See in particular the recent opinions on the Proposal for a European Investment Stabilisation Function, doc. 5347/19, paragraphs 24 and following and on the Proposal for a Reform Support Programme, doc. 6582/19, paragraphs 19 and following.

¹⁰ See also the Council Legal Service opinion in doc. 14745/16, paragraph 19.

¹¹ Case C-149/96, Portuguese Republic v Council of the European Union, EU:C:1999:574, paragraph 86.

¹² See Advocate General Bot in C-166/07, *IFI*, referred to above, paragraph 90. See also Council Legal Service opinion referred to in footnote 9 above.

¹³ Case C-166/07, *IFI*, referred to above, paragraph 45.

¹⁴ Case C-166/07, *IFI*, referred to above, paragraphs 52 and 53.

26. However, in line with the broad meaning given to the notion of "*action*" in the Treaties,¹⁵ the third paragraph of Article 175 TFEU cannot be limited to measures of financial assistance. Provided that it aims at achieving the objectives of cohesion, a "*specific action*" can also take the form of a variety of instruments, such as administrative cooperation mechanisms or regulatory instruments laying down procedural or substantive rules as well as establishing rights, obligations and even legal entities¹⁶.
27. While the EU legislator can pursue a particularly wide range of actions on the basis of the third paragraph of Article 175 TFEU, any such actions must nevertheless respect a series of clearly set limits.
28. First, Article 3(3) TEU and Articles 174 TFEU and 175 TFEU establish a one way relationship between cohesion and other Union policies. While the Treaties require the formulation and implementation of Union policies - notably the implementation of the internal market - to contribute to the achievement of the overarching objective of economic, social and territorial cohesion, cohesion "*actions*" cannot be taken with the preponderant aim of achieving the Union objectives in other policy areas.

¹⁵ See for instance Article 5 TEU, 2(5) TFEU and 6 TFEU.

¹⁶ For example, this legal basis has been used to establish a legal regime for cooperative groupings of public authorities of different Member States vested with legal personality and tasked to promote cross-border cooperation (the European grouping of territorial cooperation, see Regulation (EC) 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), (OJ L 210, 31 July 2006, p. 19). This legal regime includes both substantive and procedural rules on the establishment, organisation and dissolution of the grouping, as well as provisions on applicable law and competent jurisdiction. The Council Legal Service confirmed that Art. 159, third paragraph, TEC - which was renumbered as Art. 175, third paragraph, TFEU - was the appropriate legal basis for the adoption of the legal regime since the notion of "*specific action*" is particularly wide and could not be limited to measures of operational nature only. See doc. 15253/04, points 11 and following, and notably point 12 and 13.

The third paragraph of Article 175 TFEU makes clear that the "*specific actions*" that the EU legislator may adopt outside the Funds to achieve the objectives of cohesion must not prejudice "*the measures decided upon within the framework of the other Union policies*". Thus those "*specific actions*" cannot for the sake of cohesion objectives modify, derogate from or limit the scope of application of the legal instruments adopted under other Union policies, or have the preponderant aim of regulating subject matters that fall within the scope of application of other Treaty legal bases, even in cases where such specific action would be limited to cross-border situations.¹⁷ The third paragraph of Article 175 TFEU therefore has a subsidiary character with respect to other legal bases in the Treaties and the measures decided under other such Union policies.

29. The Court has confirmed this by stating that cohesion policy is "*administered in accordance with the [Union] regulatory framework and the content of which does not extend beyond the scope of the Union policy on economic and social cohesion.*"¹⁸
30. Second, cohesion policy aims at bringing about economic, social and territorial convergence and homogeneity among all the Member States of the Union - and not among a subgroup of them. However, this does not prevent a given cohesion measure being implemented only in relation to some Member States or some of their regions which qualify for it on the basis of their particular objective situation.
31. It is in this light that the appropriateness of the third paragraph of Article 175 TFEU as the legal basis of the proposal is to be assessed.

¹⁷ The Council Legal Service has recently clarified this limitation in the specific context of the relationship between cohesion policy and economic coordination policy and those findings apply here *mutatis mutandis*. See the opinions referred to in footnote 9 above.

¹⁸ See case C-166/07, European Parliament v. Council, International Fund for Ireland ("IFI"), EU:C:2009:499, paragraph 46.

2. Examination of the aim of the proposal

32. The declared aim of the proposal is to resolve the legal obstacles hampering the implementation of cross-border infrastructure projects or the provision of cross-border services of general economic interest and, as a consequence, the full potential of cross-border regions. These regions are identified by the third paragraph of Article 174 TFEU as being among the regions to which cohesion policy needs to pay particular attention (see, in this sense, Article 1 of the proposal, as well as recitals 4 to 6 and pages 1 and 2 of the explanatory memorandum).
33. The preamble to the proposal stresses that the existing forms of financial support under the EU funds have not allowed the needs of cross-border regions - which continue to experience a lower economic performance, more difficulties accessing public services and greater and more costly administrative burdens - to be fully addressed.¹⁹ According to the preamble, the existence of divergences and duplications in the legal and administrative regimes that apply to cross-border projects is a major cause for these difficulties.²⁰
34. The proposal therefore establishes a clear link between the resolution of legal or administrative obstacles affecting certain projects and services and the pursuit of economic, social and territorial development of cross-border regions as part of the broader cohesion policy of the Union. Its aim thus clearly corresponds to the objective of cohesion policy as laid down in the Treaties.

3. Examination of the content of the proposal

35. A different question is whether the declared aims of the proposal are properly translated into its content, so that the proposed Mechanism constitutes a genuine instrument of cohesion or whether, in the alternative, the said Mechanism consists of elements whose application would go beyond, or be unrelated to, the achievement of cohesion objectives. In that regard, it is necessary to consider both i) the legal effects of the envisaged Mechanism and ii) its scope of application.

¹⁹ Recital 4, 5 and 6 and pages 1 and 2 of the Explanatory memorandum.

²⁰ Recital 4 and page 2 of the Explanatory memorandum

i) *The legal effects of the envisaged Mechanism*

36. As clarified above (paragraphs 24 and following), the EU legislator holds a very wide margin of discretion to adopt the measures it deems necessary for the achievement of cohesion objectives. These measures should not be understood as being limited to providing funding (certainly the most typical cohesion action), but can extend to other kinds of actions, including the establishment of a framework of regulatory coordination among the Member States with a view to resolving legal and administrative obstacles preventing the execution of joint projects in cross-border regions.
37. Yet, a cohesion instrument cannot be used for the purpose of conferring upon bilateral arrangements concluded among Member States (such as those envisaged under the proposal) legal effects which are specific to EU law. An EU act of secondary law cannot transform legal acts of Member States into EU legal acts, as if they were part of the system of sources of EU law. Whilst the effective application of EU law relies on national legal systems and on Member States "[adopting] *all measures of national law necessary to implement legally binding Union acts*" (Article 291(1) TFEU) ²¹, an EU act of secondary legislation cannot confer upon national legislatures and authorities the task of adopting acts in lieu of the Union institutions and bodies. The contrary would amount to a sort of "fiduciary" use of national law in place of Union law which would run counter the essential feature of EU law as a separate legal order: the Union would not be in a position to deploy all the means to ensure the autonomy of its legal order, such as the capacity to amend or derogate its rules as it sees fit, or have recourse to the instruments of application and enforcement (including legal remedies) to guarantee its full effects.

²¹ See also Article 4(3), second subparagraph, TEU.

38. Moreover, the principle of primacy of EU law, whereby EU law takes precedence over the domestic law of Member States, applies to the relationship between the law stemming from the Treaties and domestic law and cannot go as far as regulating the relationship between the respective legal orders of two Member States. The application of the law of one Member State in another Member State in order to overcome a legal or administrative obstacle (as foreseen in the proposal) must be founded on an express act of acceptance by those Member States.

Whilst the EU acquis, notably in the area of judicial cooperation in civil matters, contains legal acts which determine which of the law of different Member States apply to particular situations where a conflict of laws arises (such as contractual and non-contractual obligations, divorce and legal separation and international successions), those acts are founded on Treaty legal bases which provide for the adoption of measures concerning conflicts of laws (such as Article 81(2)(c) TFEU). Those rules do not provide for the incorporation of the law of a Member State into the legal order of another one (as the proposal would do), but rather aim at designating which of the conflicting laws applies in a given situation²².

²² See Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), (OJ L 177, 4.7.2008, p. 6), Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), (OJ L 199, 31.7.2007, p. 40), Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, (OJ L 343, 29.12.2010, p. 10), Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, (OJ L 201, 27.7.2012, p. 107).

39. In view of the above, the Mechanism may not prescribe on a Member State the obligation to set aside a whole area of its national law in order to incorporate and apply the law of another Member State, nor prescribe the legal effects that the different instruments provided for by the Mechanism have in national law, unless if it were to be agreed so by the Member States concerned.

The proposal may however establish modalities and procedures of coordination under which Member States will mutually agree on the resolution to legal obstacles with a view to achieving the objectives of cohesion - including the obligation of Member States that have recourse to the Mechanism to establish bodies such as the cross-border coordination points (Article 5 of the proposal). The envisaged Regulation may therefore lay down obligations such as the establishment of cross-border coordination points (Article 5 of the proposal) aimed at achieving such coordination.

40. The conclusion in the previous paragraph is further reinforced by the fact that the proposal may also apply to “*services of general interests*” within the meaning of Article 14 TFEU. Attention should be paid to the interpretative provisions of Protocol (No 26) on services of general interests, pursuant to which the shared values of the Union in respect of the said services of general economic interest include the “*essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users*” (emphasis added, see first indent of Article 1 of the Protocol). Moreover it recognises that “*The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest*” (see Article 2 of the Protocol).

41. It is in light of these principles that the proposed Mechanism needs to be assessed. The proposal envisages three types of measures with different legal effects (see above paragraphs 10 and following): the so-called "fast track" procedure (applicable when a "legal obstacle" to a cross-border project consists of an administrative provision or practice that can be solved unilaterally by a Member State), the adoption of Statements, and the adoption of Commitments.
42. Under both the "fast track" procedure and the Statement, Member States retain sovereign authority to agree to or refuse the application of the law of another Member State on their territory. The fast track procedure simply establishes a procedural obligation for the Member State to reconsider existing national administrative practices. Under the Statements, each Member State is only obliged to submit a formal proposal to their respective legislatures in order to amend national legal provisions accordingly, while the national legislature remains free to adopt or reject such proposal and, therefore, to set out the relevant legal effects that the possible application of the law of the other Member State would have in its legal order (see Article 14(3) of the proposal).
43. The Council Legal Service therefore considers that having regard to their legal effect, both the fast track procedure and the Statement establish mechanisms of coordination which remain within the limits associated with the recourse to the third paragraph of Article 175, as explained above (paragraphs 28 to 30).
44. A different conclusion applies to the Commitments. By setting out the legal effects of such Commitments as self-executing (Article 1(2)(a) of the proposal) - thus directly invocable by individuals and entities - and by granting them precedence over national law of the Member State concerned (Commitments have a derogatory effect over applicable national provisions, including legislative ones²³), the proposal would confer on provisions of national law legal effects into the territory of another Member State, such as direct effect and primacy, that are typical of EU law itself.

²³ See explanatory memorandum, at page 7 and recital (19) of the proposal.

45. Yet, as explained above (see paragraphs 37 to 40), in order for the Mechanism to remain coordinative, the legal effects of the said Commitments should be established by the Member States concerned rather than by the envisaged Regulation. However, the procedure applicable to the draft Commitments is very unclear: once the procedure has been triggered by an initiator, no provision of the proposal grants the committing Member State the freedom not to enter into a Commitment whereby the law of the transferring Member State would apply to it²⁴.

ii) The scope of application

46. The Mechanism applies to those situations where the "legal provisions of [a Member State] would constitute a legal obstacle hampering the implementation of a joint Project (...)" (Article 1(1) of the proposal, emphasis added). However, the proposal defines the notions of "legal provision" and "legal obstacle" in wide and unqualified terms, simply by reference to the cross-border projects in respect of which they would apply or arise. Legal obstacles refer to any legal provision - including both legislative and administrative provisions, as well as administrative practices - that relates to the planning, development, staffing, financing or functioning of a joint project and that obstructs the inherent potential of border regions when interacting across the border.

47. The proposal would accordingly apply in relation to any potential legal obstacle of any nature, affecting the execution of a joint project, regardless of the content of the joint project and the sector to which it might belong. The fact that the Mechanism can apply to any field or subject in an unqualified manner potentially opens its scope to remits other than cohesion for which the Treaties may establish specific EU competences and procedures, or for which the Union would hold no competence at all.

²⁴ The possibility to apply an ad hoc legal resolution within the legal framework of the committing Member State seems to be limited to cases where no appropriate legal provision exists in the legal framework of the transferring Member State (see Article 14(1)(g) of the proposal).

48. However, as referred to above, the "*specific actions*" that the EU legislator may adopt outside the Funds to achieve the objectives of cohesion under the third paragraph of Article 175 TFEU must not prejudice "*the measures decided upon within the framework of the other Union policies*" nor can those actions be used with the preponderant aim of achieving the Union objectives in other policy areas or extend beyond the scope of the Union cohesion policy.
49. Some examples may serve to illustrate this. The proposal could apply in respect of obstacles arising from the civil procedural law of two Member States, for which the Treaties establish a specific framework of cooperation in Article 81 TFEU (on judicial cooperation in civil matters); it could apply in respect of legal obstacles arising from the application of different tax regimes, for which the Treaties lay down harmonisation powers (see Articles 113 and 115 TFEU); or it could apply in relation to social policy for which the Article 151 TFEU establishes specific rules and procedures, including the adoption of measures designed to encourage cooperation between Member States (see Article 153(2)(a) and Article 156 TFEU).
50. It has to be stressed that the risk of overlapping with other Union policies is not ruled out by the fact that the proposed Mechanism would apply to cross-border situations only. Whilst cross-border regions are identified among those to which cohesion policy shall pay special attention (third subparagraph of Article 174 TFEU), this by itself does not suffice to justify that any action that is addressed to or may affect that kind of regions falls automatically within the scope of cohesion policy, to the exclusions of other policies (such as those identified in the previous paragraph).

51. The undefined scope of application of the proposal is also relevant from the point of view of its relationship with the legal remedies provided for by the Treaties to address breaches of EU law before the Court of Justice (Articles 258 and 259 TFEU). A legal obstacle as referred to in the proposal may also, in fact, constitute a breach of EU law (for instance, a discrimination on grounds of nationality or a restriction on the freedom of establishment or the freedom to provide services) whose removal from the domestic legal order of the Member States would not be guaranteed by the mere application of the envisaged Regulation. A situation where a measure of a Member State was concurrently subject to both an action for infringement launched by the Commission and the procedure laid down in the envisaged Regulation cannot be ruled out.
52. Finally, the geographical scope of application of the proposal must also be examined. According to Article 4(3) of the proposal, Member States may also use the Mechanism in cross-border regions between one or more Member States and one or more third countries. While it is not unusual for a cohesion instrument to support activities carried out in third countries, in particular in the case of cross-border cooperation²⁵, the scope of cohesion policy - nor of any other EU competence - does not extend to prescribing the way Member States should negotiate and conclude agreements with third countries, or to setting out the effects that such agreement should have in their domestic legal order.

²⁵ This is notably the case of the European Territorial Cooperation goal of the European Regional Development Fund, Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal, (OJ L 347, 20 December 2013, p. 259).

B. Voluntary nature and choice of the legal instrument

1. Voluntary nature

53. Under Article 4(1) of the proposal, "*Member States shall either opt for the Mechanism or opt for existing ways to resolve legal obstacles hampering the implementation of a joint project in cross border regions (...)*". This provision is drafted in such a way as to, in effect, leaving Member States the choice to apply the Regulation or to have recourse to alternative existing means which they have already implemented. It is therefore akin to allowing a system of opt-ins/opt-outs.
54. An instrument of cohesion such as the envisaged Regulation cannot be subject to opt-ins or opt-outs by the Member States. Outside specific and clearly circumscribed areas, set out in relation to a restricted number of Member States and in primary law only, it is not possible to make the scope of application of an EU instrument contingent on individual decisions of Member States²⁶. As a matter of principle, Union law applies uniformly to all Union Member States²⁷. Member States may not enjoy derogations, except where expressly provided for in primary law or where the derogations in question are temporary, based on objective criteria and objectively justified²⁸. This does not exclude the possibility that an EU Regulation may be designed to apply to a group of Member States only. However, any such limitation needs to be based on specific circumstances that distinguish the Member States concerned in an objective and characterised manner and that are relevant for the objectives of the proposal and relevant area of EU competence²⁹.

²⁶ As recalled in the Council Legal Service opinion of 2 April 2008, "*unlike public international law, Community law does not allow Member States to alter its application by means of unilateral declarations outside of the specific mechanisms for enhanced cooperation*" (document 8038/08, point 2. See also Council Legal Service opinion of 25 April 2018, document 8334/18, at point 29).

²⁷ On the uniform application of Union law in all Member States, see joined cases 205 to 215/82, *Deutsche Milchkontor GmbH and Others v. Federal Republic of Germany*, EU:C:1983:233, paragraph 17; case 182/84, *Criminal proceedings against Miro BV*, EU:C:1985:470, paragraph 14.

²⁸ See Council Legal Service opinion of 19 February 2019, document 6582/19 at point 58.

²⁹ See Council Legal Service opinion of 15 January 2019, document 5347/19 at point 49 and following.

55. In the present case, no derogation stemming from primary law exists in relation to cohesion policy, a policy aimed at addressing disparities among all Member States and their regions. A cohesion act applies therefore to all the Member States of the Union. Here, the possibility of having recourse to alternative means to tackle cross-border obstacles would not be the consequence of objective circumstances that characterise the situation of a given border or a given Member State, but would be the result of a political choice as to the degree of cooperation that Member States want to achieve.
56. The same conclusion applies even if the possibility of an "opt-out" would be limited to cases where alternative ways of cooperation are already in place for a given border, meaning that the choice would be between keeping the existing arrangements or adopting the new EU Mechanism. While it cannot be excluded that having in place alternative means of cooperation could justify a temporary derogation from the application of an EU act (notably to allow the Member States concerned to adapt their cooperation framework to the new EU Mechanism), an unlimited and unqualified opt-out would allow Member States to pursue on a permanent basis a different level of cross-border cooperation.
57. The above question of the uniform applicability of the Regulation should be distinguished from the question of its subsequent effects. Once adopted and in force, the Regulation would set out the Mechanism which would be applicable to all Member States. As is the case for other cohesion acts, the Member States could then remain free to have recourse to the rights and obligations laid down in the cohesion act or to ask for its activation, in accordance with the eligibility, programming or other conditions that it lays down. Member States would thus remain free to have recourse, case by case, to the framework of coordination that the proposed Regulation sets up and to accept the application of the law of another Member State in the sense explained above (see paragraphs 39, 42 and 43). The drafting of Article 4(1) of the proposal should be amended to reflect such an approach so as to make it clear that this would not constitute an opt-in/opt-out system.

2. *Choice of the legal instrument*

58. The question has been raised as to whether the adoption of the proposed Mechanism in the form of a directive would allow a different conclusion as regards the possibility of a voluntary participation of the Member States.
59. The fact that, unlike regulations, the scope of application of a directive can be restricted to some Member States only³⁰ does not alter the remarks made above in paragraphs 54 and following, since the possible limitation of a directive to certain Member States must also be objectively justified, and the justification must be presented clearly in the preamble to the instrument.³¹
60. In this regard, the reasons provided by the Commission for the voluntary nature of the Mechanism - namely the need to respect the constitutional and institutional set-up of the Member States and the principle of subsidiarity - are not pertinent. None of these two elements constitutes a valid justification to allow for an opt-out from an EU law instrument.
61. The possibility of a voluntary participation in the instrument could therefore not be achieved by having recourse to a directive.
62. It is recalled that, should it not be possible to gain sufficient support for the adoption of an instrument applicable to all Member States, the Treaties envisage the possibility of proceeding with an enhanced cooperation among certain Member States only, provided the substantive and procedural conditions laid down in Article 20 TEU and Articles 326 to 336 TFEU are fulfilled.

³⁰ See second paragraph of Article 288 TFEU: "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed*".

³¹ See the Council Legal Service opinion of 25 April 2018, doc. 8334/18.

IV. CONCLUSION

63. In view of the above analysis, recourse to the third paragraph of Article 175 TFEU as the legal basis of the proposal would require to a number of significant adaptations to be made to that proposal:
- a. The Mechanism should be adapted to become an instrument of coordination among Member States, limited to establishing the methods and procedures under which Member States would mutually agree on solving legal and administrative obstacles with a view to achieving the objectives of cohesion. In particular, this would require the conclusion of Commitments to be based on an act of acceptance by Member States and the legal effects of those Commitments in national law to be determined by the Member States themselves.
 - b. The material scope of the proposal, i.e. the legal and administrative obstacles, the domestic legal provisions and joint projects in respect of which it applies, should be defined in a sufficiently precise manner so that it does not prejudice the exercise of other competences and measures decided upon in the framework of other Union policies nor affect the institutional balance as laid down in the Treaties.
 - c. It should be made clear that the proposal is without prejudice to the legal remedies laid down by the Treaties for addressing breaches of EU law by Member States.
 - d. The scope of application of the proposal should be limited to regulating the cross-border cooperation among Member States of the Union. Cross-border cooperation with third countries should be excluded.
64. The possibility of voluntary participation in the way it is currently laid down in Article 4(2) of the proposal is not compatible with the Treaties. The Mechanism must apply uniformly to all Member States. The drafting should be adapted so as to make it clear that the Mechanism is applicable to all Member States, their choice being whether or not to make use of it, whether to trigger it, in a given case, under the conditions set out in the Regulation.
65. The adoption of the proposed Mechanism in the form of a directive would not make it possible to restrict its scope to some Member States.