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PROPOSAL

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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
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Subject:	COMMISSION STAFF WORKING DOCUMENT SUBSIDIARITY GRID Accompanying the document Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law

Delegations will find attached document SWD(2023) 177 final.

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EUROPEAN
COMMISSION

Brussels, 29.3.2023
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COMMISSION STAFF WORKING DOCUMENT

SUBSIDIARITY GRID

Accompanying the document

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law

{COM(2023) 177 final} - {SEC(2023) 377 final} - {SWD(2023) 178 final} -
{SWD(2023) 179 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
<p>1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?</p> <p>The proposal is based on Article 50 (1) and (2) of the Treaty on the Functioning of the European Union (TFEU). This Article empowers the European Parliament and the Council to adopt provisions aiming to attain freedom of establishment and is the legal basis for the EU's competence to act in the area of company law. In particular, Article 50(2)(b) ensures close cooperation between the competent authorities in the Member States, Article 50(2)(c) provides for abolition of administrative procedures and practices forming an obstacle to freedom of establishment, Article 50(2) (f) provides for abolition of restrictions on freedom of establishment, both as regards setting up branches or subsidiaries and Article 50(2) (g) provides for coordination measures concerning the protection of the interests of companies' members and other stakeholders. By enhancing co-operation between Member States' authorities through the Business Registers Interconnection System (BRIS), by abolishing administrative barriers to freedom of establishment including when setting up cross-border subsidiaries and branches and by providing new harmonised disclosure requirements, this proposal will contribute to attaining the freedom of establishment as enshrined in Article 50 TFEU.</p> <p>Article 50 TFEU is combined with Article 114(1) TFEU, which empowers the European Parliament and the Council to adopt measures for the approximation of the provisions which have as their object the establishment and functioning of the internal market. Administrative obstacles to the cross-border use and acceptance of company information in business registers as well as of notarial or administrative acts in the context of procedures under this Codified Company Law Directive have a direct impact on the full enjoyment of the internal market freedoms of EU businesses as described in Article 26(2) TFEU and referred to in Article 114(1) TFEU. It is therefore the suitable complementary legal basis to cover the regulation of company documents used by EU businesses in cross-border scenarios within the internal market.</p>
<p>1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?</p> <p>As regards the regulation of the internal market, including ensuring the freedom of establishment, the Union's competence is shared.</p> <p><i>Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU¹. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU² sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU³ sets out the areas for which the Unions has competence only to support the actions of the Member States.</i></p>
2. Subsidiarity Principle: Why should the EU act?
<p>2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁴:</p> <ul style="list-style-type: none"> - Has there been a wide consultation before proposing the act?

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>

- 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?

Before putting forward this proposal, the Commission consulted widely. Those consultation activities included, in line with the Commission's Better Regulation rules:

- The inception impact assessment (roadmap), with feedback from 8 stakeholders;
- The open public consultation (OPC), which received 83 responses from business associations, EU citizens, public authorities, companies and other respondents, including legal professionals.
- The targeted consultation of SMEs (“SME panel”), which received 158 replies, mainly from SMEs in the form of limited liability companies;
- Targeted interviews with key stakeholders, interviews with legal professionals specialised in company law, as well as discussions with company law experts from Member State Ministries and business registers in the Company Law Expert Group (CLEG), and with company law academics and practitioners in the Informal Expert Group on Company law and Corporate Governance (ICLEG). The ICLEG also drew up two reports on issues relevant for this initiative⁵.
- The Commission also contracted an external consultant (Milieu Consulting) to carry out a study, including specific tasks such as desk research and literature review, analysis, legal mapping, targeted e-surveys and interviews with key stakeholders to assist the Commission in collecting evidence, providing analysis, and cost estimates for the initiative. The targeted e-surveys were addressed to business registers, public authorities, legal practitioners and companies. In addition, two virtual workshops (with business registers and companies) were organised in the context of the study⁶.

Detailed information on the consultation strategy and the outcome of the stakeholder consultations can be found in Chapter 3 of the Explanatory Memorandum to the proposal and in Annex 2 of the Impact Assessment.

The Explanatory Memorandum (Chapter 2) and the Impact Assessment (Chapter 3) contain a section on the principle of subsidiarity (see 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?

The overall objective of this legislative proposal is to ensure the smooth functioning of the EU single market by facilitating the cross-border access to and use of company information in cross-border situations. There is a strong value added of action at EU level because the problems that this proposal tackles are not limited to the territory of one Member State but are of a cross-border nature, in particular due to discrepancies in national legislations, and Member States on their own could not bring about sufficient improvement to those problems.

To increase the scope of available company data at EU level through BRIS, a coordinated action is required to ensure that all Member States have the data in their business registers and that the data is accessible in comparable and multilingual format centrally at EU level through BRIS, which is existing and operational at EU level. Similarly, co-ordinated action is required to ensure that there are common checks of company data before it is entered into national business registers to improve its reliability and facilitate its use in cross-border situations. Finally, enabling the cross-border use of

⁵Register of Commission expert groups and other similar entities (europa.eu)

⁶Company law and corporate governance (europa.eu)

company data, including the application of the once-only principle, requires the elimination of barriers in cross-border situations. Similarly, the value added from linking the EU level systems of interconnection of registers can also be only achieved by an EU action.

Member States acting individually would continue to apply their own rules in this respect with little prospect that such rules would address the cross-border situations in a compatible manner. Therefore, without any action at EU level, different measures taken at national level would be likely to result in divergent national solutions and SMEs would continue to face barriers making effective exercise of the freedom of establishment more difficult and the resulting costs would negatively affect companies. Consequently, the targeted EU intervention through this proposal complies with the principle of subsidiarity.

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)?

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

This initiative focuses on cross-border issues: on access to, availability and reliability of company data on a cross-border basis and on its cross-border use.

- (b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty⁷ or significantly damage the interests of other Member States?

Without EU level action, different national initiatives to address the increasing demand for cross-border company data and the need to facilitate its use cross-border would likely result in divergent national rules and potentially overlapping requirements, leading to legal uncertainty and increasing administrative burden for companies to operate cross-border, therefore conflicting with the Treaty objective of establishing the internal market.

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

Member State measures on their own could not bring about sufficient improvement in the areas tackled by this initiative, given their cross-border nature. Co-ordinated action is required to achieve the objectives of this initiative. For instance, it is necessary to ensure that all Member States have the data in their business registers and that the data is accessible in comparable and multilingual format centrally at EU level to increase the scope of available company data in national registers and at EU level through BRIS. Reliability of company data will only be improved if all Member States carry out common checks of company data before it is entered into national business registers. Furthermore, some measures can only be achieved by EU action, e.g. introducing a common company extract or applying the once-only principle to facilitate the use of company information in cross-border situations. Linking the EU level systems of interconnection of registers can also only be achieved through EU level measures. EU action is also needed because this initiative aims to build on BRIS, which is an already operational EU level system of interconnection and provides for multilingual and comparative company information cross-border.

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

(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?
Overall, the problems tackled by this initiative – i.e. insufficient availability of reliable company information cross-border and difficulties to directly use company data when setting up cross-border branches or subsidiaries and in cross-border activities and situations (including administrative and court procedures) – are cross-border and therefore, are present across national, regional and local levels throughout the EU.
(e) Is the problem widespread across the EU or limited to a few Member States?
The problems generally arise in cross-border situations and are thus spread across the Single Market.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
The planned measures build on what exists at national and EU level today. In particular, the planned measure builds on the BRIS, which is an already operational EU level system of interconnection and provides for multilingual and comparative company information cross-border. Member State measures on their own could not bring about sufficient improvement in the areas tackled by this initiative given their cross-border nature, in particular they would not suffice to create legal certainty and reduce administrative burden on companies in the Single Market.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
In general, Member States expressed support for the measures planned under this proposal, during the discussions in the Commission Company Law Expert Group (CLEG ⁸ , bringing together Member State representatives from Ministries responsible for company law) and in replies by authorities/business registers to the public consultation and contractor surveys in the context of this initiative. In general, they considered enhancing transparency of company data important and supported the extension of company data available in BRIS, and acknowledged the importance of reliable company data. There was also support from many Member States for measures to facilitate the cross-border use of company information. At the same time, Member States expressed different views on how the proposed provisions should look like given already existing national approaches, raised questions about the potential impact on national business registers and saw some challenges in this context.
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)?
(a) Are there clear benefits from EU level action?
There is a strong value added of action at EU level in the context of this initiative because it focuses on cross-border issues. Improving the availability and reliability of comparable and multilingual company data at EU level and cross-border is an objective that needs to be achieved at EU level. In addition, EU action is needed because this initiative aims to build on BRIS, which is an already operational EU level system of interconnection and provides for multilingual and comparative company information cross-border. Similarly, the value added from connecting the EU level systems

⁸[Register of Commission expert groups and other similar entities \(europa.eu\)](http://europa.eu)

of interconnection of registers can also only be achieved by EU action. Common rules are also required to ensure that similar checks of company data are carried out before it enters business registers and only those can result in increased legal certainty about company data for companies, authorities and other stakeholders in the Single Market. The objective of enabling direct use of company data from business registers in cross-border situations equally requires action at EU level to introduce the once-only principle and provide for a common company extract that would be recognisable in all Member States.
(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?
The planned measures are expected to be highly beneficial for companies, in particular SMEs, and society in general, including consumers, due to its expected strong positive impact on ease of doing business and access to EU markets, and for providing more trust and transparency of company data across the EU. Increasing the availability, accessibility and reliability of cross-border company data will also facilitate the fight against abuse and fraud and this initiative will thus contribute to creating a fairer Single Market.
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
The free movement of goods, services and capital will be facilitated as businesses will be able to extend their operations cross-border with less administrative burden. Making it easier for companies to be set up and carry out activities cross-border can also lead to more employment. Downstream, consumers will have better access to company information and thus will be in a position to make more informed decisions when buying from or entering contracts with companies from other Member States. The value of basic company data alone is estimated to be approximately £800 (950 euros) per direct user per year in a purely national setting ⁹ . It can be reasonably assumed that the value of reliable information in the cross border context of the EU BRIS would be significantly higher.
(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)?
While competence is shared between the EU and the Member States in the area of the internal market, including freedom of establishment, EU-wide measures are necessary to increase the amount and reliability of company data available in business registers and/or through BRIS, and to enable its direct use in cross-border situations, while avoiding fragmentation of the internal market. As the proposal will take the form of a directive, 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/regional legal systems.
(e) Will there be improved legal clarity for those having to implement the legislation?
It is expected that EU rules lead to improved legal certainty as compared to today's fragmented legal framework.
3. Proportionality: How the EU should act

⁹ "Corporate Transparency and Register Reform White Paper" from the UK Department for Business, Energy & Industrial Strategy.

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 measures introduced by this proposal are proportionate to its objectives of increasing the amount and reliability of company data available in business registers and/or through BRIS, and enabling its direct use in cross-border situations. The proposed provisions are well targeted as they focus on the needs of direct users (e.g. companies, other stakeholders and public authorities) to use reliable and up-to-date official company data from business registers in the cross-border context (section 1.3 of the impact assessment). The proposal focuses on cross-border aspects and introduces solutions, which could not be achieved by Member States on their own. The harmonisation elements are limited to what is necessary and proportionate to achieve the sought-for objectives while respecting national legal traditions, including those with notarial involvement in company law procedures and, where possible, providing flexibility to Member States to achieve the requirements in line with their national laws and systems. In addition, the proposal does not introduce any new systems, but builds on the use of existing and operational systems of interconnection of registers as well as on the eIDAS Regulation¹⁰ and the 2021 proposal to amend that Regulation as regards establishing a framework for European Digital Identity¹¹.

The package of preferred measures can most comprehensively address the objectives because it will make most information available cross-border and connect BRIS with two other EU systems of interconnection of registers, thus considerably increasing the transparency about EU companies in the single market. It will also bring the most benefits in terms of increased legal certainty as it will both provide for ex-ante checks and introduce additional common procedural requirements to keep company information up-to-date. Finally, it will have the strongest positive impact on enabling direct use of company data in cross-border situations as it will not only apply the once-only principle to the setting up of cross-border subsidiaries and branches, but also introduce the common company extract and abolish formalities such as apostille (section 7.2 of the impact assessment).

The package does not go beyond what is necessary to achieve the objectives. The multi-criteria analysis (MCA) carried out for all policy options, which took into account their effectiveness, efficiency, coherence and proportionality, showed that all options had a net positive benefit and that the preferred measures ranked the highest in the analysis (section 6.5 of the impact assessment and its Annex 4 on methodology).

In line with the principle of proportionality, the planned initiative will not go beyond what is necessary to achieve its objectives by targeting specific cross-border issues (i.e. needs of direct users to access and use cross-border official company data from business registers) which could not be achieved by Member States on their own.

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?

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on

¹⁰Regulation (EU) 910/2014.

¹¹COM(2021) 281 final.

their own, and where the Union can do better?
The proposal focuses on cross-border aspects and introduces solutions which could not be achieved by Member States on their own, as explained above in replies to the sub-questions of question 2.3.
(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.)?
<p>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.</p> <p>In order to supplement the provisions of the proposed Directive, implementing acts will be adopted.</p>
(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?)
<p>The proposed provisions are limited to what is necessary and proportionate to achieve the objectives of the initiative while respecting national legal traditions and, where possible, providing flexibility to Member States to achieve the requirements in line with their national laws and systems.</p> <p>Legislative means are necessary to provide legally certain solutions for the cross-border problems targeted by this initiative.</p>
(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?
<p>The package will result in one-off costs for certain companies, i.e. for those which currently do not file specific information to a register, estimated at around EUR 311 million. However, the expected recurrent cost savings (administrative burden reduction) for companies creating new cross-border subsidiaries or branches and for all companies engaging in cross-border business activities - estimated to amount to around EUR 437 million per year - would much outweigh the one-off costs, and the initiative will therefore overall bring a significant burden reduction for companies in the single market.</p> <p>Due to the need for business registers to adapt their IT systems, the package is estimated to amount to around EUR 5.4 million one-off costs for all business registers together, and recurrent costs e.g. to carry out ex-ante verification of company data, estimated at around EUR 4 million per year for all registers. However, Member States would be able to build on investments in IT already done for BRIS in the recent years, and adjustment costs for verification should be limited given the ex-ante checks already in place in many Member States. It is also likely that there will be some loss of revenue for registers which charge fees for company extracts for cross-border use, estimated at around EUR 7.9 million for all registers. At the same time, the increased accessibility and reliability of company data, and better connections between business registers, thanks to the once-only principle and connecting other EU level systems/registers to BRIS, should facilitate registers' work due to easier search for company data from other Member States and reduced need to request documents from companies. Other authorities would also benefit from an easier access to more reliable company data directly in business registers and BRIS. Although authorities in charge of issuing apostilles will lose related</p>

revenue, estimated at 9.5 million EUR per year, abolishing of the apostille is estimated to result in an overall administrative burden reduction given the current legal uncertainty and the related human resources and time needed to issue it.

The costs are commensurate with the objectives as overall gains will much outweigh the costs and as the initiative will also be highly beneficial for society in general, including consumers, by providing more accessible and reliable company data across the EU, which is difficult to quantify.

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

Existing Member States' laws on company law issues relevant for this initiative were thoroughly examined in the preparation of this proposal (including through a legal mapping carried out in the external contractor study).

The proposed provisions overall aim to respect national legal traditions, e.g. including those with notarial involvement in company law procedures.