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CONTRIBUTION OF THE LEGAL SERVICE[1]

To:	Working Party on Structural Measures and Outermost Regions
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 – Legal and procedural issues

I. INTRODUCTION

1. On 29 May 2018, the Commission tabled a 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.[2] Following a request of the Working Party on Structural Measures, the Council Legal Service (the "CLS") issued a written opinion on various legal issues relating to that proposal.[3]

[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] COM (2018) 373 final, document 9555/18 (the "Initial Proposal").

[3] Document 6009/20 (the "2020 CLS Opinion").

2. On 13 December 2023, the Commission tabled an amended proposal[4]. During the discussions in the Working Party on Structural Measures, delegations raised a number of legal questions with regard to that Amended Proposal, in particular whether it meets the requirements set out by the Legal Service in the 2020 CLS Opinion. This contribution confirms and further develops the oral interventions made by the CLS representative in that working party.

3. This contribution will assess whether the Amended Proposal addresses the legal issues identified in the 2020 CLS Opinion (section A). Additionally, it will examine certain legal issues raised by delegations in the course of the examination of the Amended Proposal (section B).

II. LEGAL AND FACTUAL BACKGROUND

4. A detailed description of the Initial Proposal is set out in points 6 to 16 of the 2020 CLS Opinion. In paras 63 to 65 of its 2020 Opinion, the CLS concluded, in essence, that the Initial Proposal:

   – should be adapted to become an instrument of coordination among Member States, limited to establishing the methods and procedures for solving legal or administrative obstacles;

   – should be clarified so as to ensure that it does not prejudice the exercise of other competences and measures decided in the framework of other Union policies nor affect the institutional balance and the legal remedies laid down by the Treaties for addressing infringements of Union law by Member States;

   – should be limited to regulating the cross-border cooperation among Member States and that such cooperation with third countries should thus be excluded from its scope; and

[4] COM(2023) 790 final, Council document 16805/23 (the "Amended Proposal" or the "proposed Regulation").

– must apply uniformly to all Member States, limiting thereby the voluntary elements of participation to a possibility of choosing whether or not to make use of the mechanism set out in that proposal in a specific case, under the conditions set out in the proposed Regulation.

5. Moreover, in paras 61 and 65, the CLS concluded that the choice of the legal form of a directive, although possible, would not alter the conclusion as to the voluntary participation.

6. The Amended Proposal replaces the whole text of the Initial Proposal (that is all 28 recitals and all 26 articles). The overall objective of both the Initial and the Amended Proposals is to provide for a mechanism intended to resolve legal and administrative obstacles that hamper the implementation of cross-border infrastructure projects or the provision of cross-border services of general economic interest and, as a consequence, adversely affect the development of cross-border regions. However, the solutions proposed in the Amended Proposal differ considerably from those contained in the Initial Proposal. It is therefore appropriate to describe them briefly.

7. In essence, the Amended Proposal aims at establishing a procedural legal framework to resolve cross-border obstacles existing in border regions of neighbouring Member States (Article 1). It includes granting any private or public entity the right to lodge with a "cross-border coordination point" (to be set up in accordance with Articles 4 and 5 as part of an existing authority or as a separate authority) an application (so called "cross-border file") aiming at resolving a cross-border obstacle (Articles 6 and 7). The Amended Proposal also includes obligations on the cross-border coordination point (i) to examine such application, where relevant in consultation and coordination with the authorities competent for a given matter within that Member State or with the relevant authorities in the neighbouring Member State(s); and (ii) to provide the applicant (referred as to the "initiator") with a reply informing about the steps that it has taken or intends to take (if any) and the reasons for taking such steps or for not doing so (Articles 8 to 11).

8. Paragraphs 2, 3, 4 and 6 of Article 8 provide for four distinct procedures applicable, respectively, to cases where:

   i) the border file does not meet in a sufficient manner the requirements of Articles 6 and 7 (see second subparagraph of Article 8(2));

   ii) the alleged cross-border obstacle does not exist (Article 8(3));

   iii) the cross-border coordination point decides not to resolve the cross-border obstacle despite finding that it exists (Article 8(4)); and

   iv) the cross-border coordination point decides to resolve an existing cross-border obstacle (Article 8(6)).

9. Articles 10 and 11 lay down the procedure to be applied in the fourth case (referred to as the "Cross-Border Facilitation Tool"). It is worth noting that Member States may choose whether to apply that Tool or not (Article 10(1) in conjunction with Article 8(6)).

10. Finally, the Amended Proposal provides that the cross-border coordination points are to set up a public register of cross-border files (Article 5(5)) and confers upon the Commission several coordinating and supporting tasks (Article 12).

III. LEGAL ANALYSIS

A. Assessment with regard to issues identified in the 2020 cls opinion

a) Appropriateness of the proposed legal basis

11. The Amended Proposal is founded on third paragraph of Article 175 TFEU. The 2020 CLS Opinion contains in paras 21 to 28 a detailed analysis of the scope of that provision. As required by the settled case-law cited in para 22 of that Opinion, it is appropriate to assess whether, in the light of the aim and content of the Amended Proposal, the third paragraph of Article 175 TFEU constitutes the appropriate legal basis.

12. As the overall aim of the Amended Proposal is the same as that of the Initial Proposal (see point 7 above), the assessment in paras 32 to 34 of the 2020 CLS Opinion is transposable to the Amended Proposal. It follows that the aim of the Amended Proposal corresponds to the objectives of cohesion policy as laid down in Article 174 that may be pursued under the third paragraph of Article 175 TFEU.

13. When it comes to the content of the Amended Proposal, the measures proposed therein are much less far-reaching in terms of legal effects than the measures envisaged in the Initial Proposal. In particular, the Amended Proposal no longer contains the element of the Initial Proposal raising the most serious legal concerns[5]. Rather, the Amended Proposal establishes a single procedural legal framework to resolve cross-border obstacles existing in border regions of neighbouring Member States whether administrative or legal in nature (points 7 to 9 above).

14. In its 2020 Opinion, the CLS stated that the measures that may be adopted by the legislator under the third paragraph of Article 175 TFEU go beyond providing funding and can include other kinds of "specific actions", including the establishment of a framework of regulatory coordination among the Member States with a view to resolving obstacles in cross-border regions (point 36).

15. It is important to stress that the obligations under Articles 4 to 11 presented above are purely procedural in nature, that is to say limited to ensuring that certain procedural steps are taken. The Amended Proposal does not comprise any "substantive" obligation to resolve an alleged obstacle nor does it prescribe the manner in which an obstacle is to be resolved. In line with the assessment in the 2020 CLS Opinion, such measures fall within the scope of what the legislator can adopt on the basis of the third paragraph of Article 175 TFEU (point 39).

[5] Notably, the so called "commitments" whereby a decision of one Member State would produce legally binding effects in a neighbouring Member State and thus take precedence over the national legal order of the latter (see paras 37, 38 and 44 of the 2020 CLS Opinion).

16. It is also important to note that the 2020 CLS Opinion concluded that the Initial Proposal presented an unacceptable risk of overlapping with other Union policies, since the measures adopted under the proposed legal bases cannot prejudice "*the measures decided upon within the framework of the other Union policies*" (paras 47 to 50).

17. Here again, by removing from the Initial Proposal measures likely to produce legally binding effects in the legal order of the Member States, the Amended Proposal considerably reduces the risk of interference with policy areas other than cohesion.

18. Article 2 explicitly specifies that the proposed Regulation is without prejudice to any other Union legal acts, in particular those applicable to the non-judicial resolution of legal issues arising from cross-border obstacles, to the correct interpretation or implementation of Union law, and to the coordination mechanisms established for social security and taxation.

19. Moreover, the Amended Proposal includes a set of definitions intended precisely to delimit the scope of application of the proposed Regulation:

    i) Article 3(1)(2) defines a the cross-border obstacle as "any legislative or administrative provision or practice by a public authority in a Member State that potentially negatively affects a cross-border interaction and thus the development of a cross-border region";

    ii) Article 3(1)(1) defines in turn the cross-border interaction as "any item of infrastructure necessary for public or private cross-border activities or the establishment, the functioning or the provision of any cross-border public service in a cross-border region"; and

    iii) Article 3(1)(5) defines cross-border public service as "an activity carried out in the public interest to provide a service or address joint problems or development potentials of border regions located on different sides of one or more neighbouring Member States' borders, provided it fosters economic, social and territorial cohesion in the cross-border territory" (emphasis added).

20. The above definitions effectively limit the scope of the proposed Regulation to situations presenting a genuine link, first, with a specific (cross-border) geographical area and, second, with specific categories of activities (cross-border activities and services). Furthermore, the three definitions referred to above circumscribe the scope of the proposed Regulation to situations potentially negatively affecting the development of the cross-border region. It follows that the combined effect of the changes referred to in paragraphs 17 and 18 above together with those functional definitions is sufficient to confine the scope to cohesion policy alone and ensure thereby the absence of interference with other policy areas.

21. It is noted that such precise delimitation of the scope of the proposed legislation, based on objective criteria which are relevant from the point of view of the objectives of cohesion policy also, mitigates, together with the removal from the Initial Proposal measures likely to produce legally binding effects in the legal order of the Member States, the potential risk of unequal treatment between the natural and legal persons residing or established in cross-border regions and those in other regions.

22. Finally, Article 3(1)(2) of the Amended Proposal explicitly excludes from the scope of the proposed Regulation situations which "*involve a potential breach of Union law governing the internal market*", which addresses most cases of potential interferences with procedures provided for in Articles 258 to 260 TFEU that the CLS pointed to as being problematic in its 2020 Opinion (point 51). In order to exclude the risk of overlap with procedures relating to infringements of Union law in policy areas other than the internal market, it is advisable to delete the words "*governing the internal market*" so as to cover any potential breach of Union law.

23. The 2020 CLS Opinion also concluded that Cross-border cooperation with third countries should be excluded from the scope of the Initial Proposal (para 52). In that regard, the second paragraph of Article 2(1) of the Amended Proposal effectively excludes from its scope "*cross-border obstacles in border regions between Member States and third countries*".

24. In light of the above analysis and suggestion, it can be concluded that the third paragraph of Article 175 TFEU constitutes the appropriate legal basis for the Amended Proposal.

b) Opt-outs and voluntary nature of the proposed Regulation

25. The Initial Proposal provided for an unfettered possibility for the Member States to choose whether to apply the procedures set out in that Proposal or opt for the existing mechanisms or procedures to resolve cross-border obstacles. The 2020 CLS Opinion concluded that Union law must apply uniformly to all Member States and that derogations, except where expressly provided for in primary law, must be temporary, based on objective criteria and objectively justified (para 54). It further concluded that the voluntary elements of participation in the proposed Regulation should be limited to the possibility of choosing whether to make use of the framework for cooperation in a specific case, under the conditions set out in the Regulation provided that it is not tantamount to an opt-in/opt-out system (para 53 to 57 and 64).

26. The CLS notes that the opt-in/opt-out system envisaged in the Initial Proposal has been removed to the extent that the proposed Regulation is intended to apply to all the Member States.

27. The CLS notes, however, that the Amended Proposal provides an important discretionary element for the Member States in granting them the possibility of choosing whether to apply the Cross-Border Facilitation Tool or not, in situations where the cross-border coordination point identifies an obstacle and attempts to resolve it (Article 8(6)).

28. In the Explanatory Memorandum accompanying the Amended Proposal, the Commission explains that such solution is intended to reflect the principle of subsidiarity, namely "*the Cross-Border Facilitation Tool … should be used only if no other tools from existing cooperation structures are available or able to satisfactorily resolve the obstacle*" (page 3). Recital 5 appears to reflect the same logic. It states that "*to complement the existing tools, an additional tool established by Union law, namely the Cross-Border Facilitation Tool is therefore needed*" (emphasis added).

29. It appears, however, that Article 8(6) of the Amended Proposal does not reflect that logic, as it offers the Member States a seemingly unfettered possibility not to apply the Cross-Border Facilitation Tool. This raises some important practical and legal concerns.

30. In practical terms, such a solution may lead to a situation which could be seen as undesirable from the point of view of the objectives sought by the Commission: in cases where a Member State decides to resolve an existing obstacle but at the same time chooses not to use the Tool despite the absence in its legal order of any other adequate procedure, the cross-border file could end up in a legal limbo because of lack of a procedural framework, either in Union or national law, for resolving the obstacle in question.

31. In legal terms, if Article 8(6) were to grant Member States a choice, its drafting would have to be adapted so as to ensure the uniform application of the Regulation, in line with the conclusion reached in paras 54 and 64 of 2020 CLS Opinion. In order to avoid a fragmentation of the legal framework, the possibility for Member States to disapply the Cross-Border Facilitation Tool should thus be limited to cases where other existing procedures or mechanisms (resulting from national law of that Member State or from international agreements concluded by that State) ensure the attainment of the objectives of the Amended Proposal and in particular of that Tool, or where justified by other objective reasons.

c) Choice of legal instrument

32. The 2020 CLS Opinion addressed the question of the choice of instrument only in connection with the possibility to limiting the participation of certain Member States if adopted in the form of a Directive (paras 58 to 61). In the course of recent discussions, the delegations raised a number of additional questions regarding the choice of legal instrument.

33. Under Article 296 TFEU, first paragraph, the institutions are to select the type of act they adopt, when granted a choice of measure, on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality. The legislature thus has a certain discretion in assessing the appropriate legal form of the measure.

34. The CLS is of the view that, in so far as the Amended Proposal is intended to provide for a procedural framework, which includes the obligation to designate the cross-border coordination points and confers upon private and public entities certain procedural rights, the form of instrument chosen by the Commission, that is a regulation, may be considered as appropriate.

35. In accordance with Article 288 TFEU, a regulation is binding in its entirety and directly applicable in all Member States. In practical terms, it implies that the rights of individuals and corresponding procedural obligations of the relevant authorities will be directly effective in all Member States and will not require any transposition. That also means that those rights will be identical in all Member States, which serves the objectives of cohesion and equal treatment.

36. Several delegations suggested that the Amended Proposal be modified so as to be adopted in the form of a directive.

37. While the CLS considers that such a choice is possible[6], opting for a directive would not in itself substantially alter the result in terms of the scope or nature of the respective rights and obligations referred to in para 35 above. Under the third paragraph of Article 288 TFEU, a directive is binding as to the result to be achieved and leaves to the Member States the choice of form and methods. However, that freedom as to how to ensure that a directive is implemented does not affect the obligation on the Member States to adopt, in their national legal systems, all of the measures necessary to ensure that the directive is fully effective, in accordance with the objectives pursued thereby[7].

38. Since several delegations suggested that the Amended Proposal could instead be adopted in the form of a recommendation, it is appropriate to briefly address that proposition, especially as such a modification of the Amended Proposal would have far-reaching legal and institutional consequences.

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6 This is partly a policy choice, see e.g., CLS Opinion 6021/13, point 11.

7 Judgment of 15 December 2022 in Case C-311/21, *TimePartner*, EU:C:2022:983, paragraph 59.

39. Under the fifth paragraph of Article 288 TFEU recommendations, unlike regulations and directives, do not have binding force. Pursuant to Article 292 TFEU, the Council (acting alone) may adopt recommendations in all the areas of competence of the Union, including cohesion policy, acting by qualified majority upon a proposal from the Commission. Such recommendations may thus, in principle, also concern the coordination foreseen in the Amended Proposal. As is clear from Article 293(1) TFEU, the Council may, in principle, amend the Commission's proposal acting by unanimity.

40. The right of the Council to amend a Commission proposal is, however, not without limits. In accordance with the settled case-law, the Council's power of amendment cannot extend to enabling it to distort the Commission's proposal in a manner which would prevent the objectives pursued by the proposal from being achieved and which, therefore, would deprive it of its *raison d'être*[8].

41. In the case at hand, opting for a recommendation would indeed substantially alter the nature of the Amended Proposal and substantially impair the prospects of realistically attaining the cohesion policy objectives pursued by the Commission through its Amended Proposal. If the resulting Council recommendation were to be adopted without the agreement of the Commission[9], there would thus be a significant risk that the Court, in case of a legal challenge, would find that the modification of the form of the proposed instrument amounted to a distortion of the Commission's proposal going beyond the Council's power of amendment and that the Council, by adopting it, had infringed on the Commission's right of initiative. In such a case, the Court would, in all likelihood, annul the act.

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8 Judgment of 22 November 2022 in Case C-24/20, *Commission v Council*, paragraph 93 and the case-law cited.

9 The right of the Council to amend the proposal has to be seen in light of the right of the Commission to amend its proposal in accordance with Article 293(2) TFEU. The Court has already held that "*the amended proposals that the Commission adopts do not have to be in writing as they are part of the process for adopting EU acts, a characteristic of which is a degree of flexibility, necessary for achieving a convergence of views between the institutions*", see judgment of 6 September 2017, *Slovak Republic and Hungary v Council*, C-643/15 and 647/15, EU:C:2017:631, paragraph 179.

42. In addition, it is worth noting that opting for a recommendation would imply that, unlike in the case of a regulation or a directive (which would be adopted through ordinary legislative procedure), the European Parliament would be deprived of the right to participate in the procedure of its adoption. In accordance with Para 25 of the Interinstitutional Agreement on Better Law-Making, the intention to change the legal basis to include Article 292 TFEU would trigger an obligation to have an exchange of views with the European Parliament and the Commission on such modification.[10]

43. It follows that modifying the form of proposed act from regulation to directive could be a legally viable option, whilst opting for a Council recommendation is not a legally viable option unless the Commission agrees to it.

B. Assessment of additional questions raised by the delegations

44. *First*, some delegations questioned whether the Commission could amend its own proposal in the way it did, namely by replacing all recitals and articles proposed in the Initial Proposal with a new text.

45. That question pertains to the power of legislative initiative which is accorded to the Commission by Articles 17(2) TEU and 289 TFEU. Article 293(2) TFEU provides explicitly that, as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act. The Court confirmed in its case-law that that right includes the right to amend or even, under certain conditions, to withdraw the proposal.[11]

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10 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123, 12.5.2016, p. 1) (the "Interinstitutional Agreement on 'Better Law-Making'") .

11 Judgment of 14 April 2015 in Case C-409/13, *Eurotunnel*, EU:C:2015:217, paragraph 74 in which the Court stressed that "*just as it is, as a rule, for the Commission to decide whether or not to submit a legislative proposal and, as the case may be, to determine its subject-matter, objective and content, the Commission has the power, as long as the Council has not acted, to alter its proposal or even, if need be, withdraw it*." As indicated in footnote 9 above, the Court has shown considerable flexibility with regard to the form such an amendment takes.

46. It follows that amending substantially the Initial Proposal by tabling the Amended Proposal does not go beyond the limits of the Commission's prerogative of legislative initiative.

47. *Second*, some delegations questioned whether the absence of a new impact assessment does not entail, the illegality of the Amended Proposal.

48. The Interinstitutional Agreement on 'Better Law-Making' provides in point 13 that "the Commission will carry out an impact assessment of its legislative initiatives that are expected to have significant economic, environmental or social implications" (emphasis added).

49. However, as is clear from the case-law, the relevant provisions of that interinstitutional agreement (namely its points 12 to 15) are not intended to create an obligation to carry out an impact assessment in every circumstance.[12] The Court notably found that "[n]*ot carrying out an impact assessment cannot be regarded as a breach of the principle of proportionality where the EU legislature is in a particular situation requiring it to be dispensed with and has sufficient information enabling it to assess the proportionality of an adopted measure*."[13]

50. It follows that the absence of a new, updated impact assessment is not such as to entail illegality of the procedure of adoption of the proposed Regulation or the Regulation itself. That conclusion is corroborated by the fact that the impact assessment relating to the Initial Proposal remains to large extent relevant for the purposes of the Amended Proposal. In fact, the Amended Proposal is based on the same rationale as the Initial Proposal, namely the need to tackle legal and administrative obstacles hampering the implementation of cross-border infrastructure projects or the provision of cross-border services of general economic interest and, as a consequence, adversely affecting development of cross-border regions.

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12 Judgment of 3 December 2019, *Czech Republic* v *European Parliament and Council*, C-482/17, EU:C:2019:1035, point 82.

13 Ibid. point 85. See also judgment of 13 March 2019 in Case C-128/17, *Poland v Parliament and Council*, EU:C:2019:194, paragraph 43. In that Case the Court also stated that for the purpose of examination of Commission proposals the two branches of Union legislature are entitled to consider any other sources of information (paragraph 31).

51. *Third*, several delegations were of the opinion that the Amended Proposal lacks clarity with regard to the scope and nature of the right to a legal remedy.[14]

52. It is clear that the Amended Proposal does not seek to harmonise the scope or nature of the right to a remedy, but leaves regulating those aspects to national laws of the Member States. The only harmonised aspect relating to legal remedies resulting from the Amended Proposal is very limited and concerns the time limit of six months for the initiator to request a review of the decision of the cross-border coordination point which would apply in the absence of a standard deadline provided for in the national legislation.

53. On a general level, it is recalled that Article 47(1) of the Charter of Fundamental Rights requires granting the individuals whose rights and freedoms guaranteed by the law of the Union are violated, the right to an effective remedy with regard to acts adversely affecting them.[15]

54. Since the Amended Proposal is not intended to introduce any obligation of result (that is an obligation to resolve an alleged cross-border obstacle, let alone to resolve it in a particular manner), it would not be coherent to suggest that the legal remedy could result in imposing on a Member State an obligation to actually resolve such an obstacle. Considering that the Amended Proposal confers on the interested persons certain procedural rights (in particular to submit a file to the cross-border coordination point and to obtain a reasoned reply, where applicable following relevant consultations or coordination), granting the right to a legal remedy limited to verifying whether those procedural rights were respected would comply with the requirements flowing from the case-law cited above.

55. In order to avoid difficulties in interpretation and implementation, it would be advisable to clarify the scope of the right to a legal remedy in that sense.

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[14] That right is referred to in Recital 14, Article 9(3)(b) and Article 11(1)(e) of the Amended Proposal.

[15] Judgments of 11 November 2021 in Case C-852/19, *Gavanozov II*,EU:C:2021:902, paragraphs 45 and 46; and of 6 October 2020 in Case C-245/19 and C- 246/19, État luxembourgeois, EU:C:2020:795, paragraph 58.

IV. CONCLUSIONS

56. In view of the above analysis, CLS concludes that:

a) The third paragraph of Article 175 TFEU constitutes the appropriate legal basis for the Amended Proposal;

b) in Article 3(1)(2) of the Amended Proposal it is advisable to delete from the definition of 'cross-border obstacle' the words "*governing the internal market*" and thus refer to Union law more broadly;

c) in Article 8(6) of the Amended Proposal, it is necessary to limit the possibility to decide not to apply the Cross-Border Facilitation Tool to cases where other existing procedures or mechanisms ensure the attainment of the objectives of the Amended Proposal, or where it is justified by other objective reasons;

d) modifying the legal form of the proposed act from a regulation to a directive is a legally viable option, whilst opting for a recommendation would, if the Commission objects to such an amendment, not be a legally viable solution;

e) amending substantially the Initial Proposal by tabling the Amended Proposal does not go beyond the limits of the Commission's prerogative of legislative initiative;

f) the absence of an updated impact assessment is not such as to entail the illegality of the procedure of adoption of the proposed Regulation or the Regulation itself;

g) it would be advisable to clarify the scope of the right to a legal remedy by indicating that it is limited to verifying the respect of procedural rights referred to in the Amended Proposal.