

BNC Assessment no. 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context

1. General information

a) *Title of proposal*

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.

b) *Date Commission document received*

29 May 2018

c) *Commission document number*

COM (2018) 373

d) *EUR-Lex*

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1529318593777&uri=CELEX:52018PC0373>

e) *Document numbers of Commission impact assessment and Regulatory Scrutiny Board opinion*

SWD(2018)282

SWD(2018)283

f) *Council configuration*

General Affairs Council on cohesion

g) *Ministry primarily responsible*

Ministry of the Interior and Kingdom Relations in close cooperation with the Ministry of Economic Affairs and Climate Policy

h) *Legal basis*

Article 175, third paragraph of the Treaty on the Functioning of the European Union (TFEU)

i) *Decision-making in the Council*

Qualified majority

j) *Role of European Parliament*

Codecision

2. Summary of the proposal

a) Substance of the proposal

This proposal is intended to tackle legal and administrative obstacles to cross-border projects in border regions. To achieve this aim, in cases where a joint project faces a cross-border obstacle, the Commission is proposing a mechanism that will enable one Member State to apply legal provisions from another Member State in the border region, rather than its own provisions. Cross-border legal obstacles might for example arise in relation to a cross-border tram project undertaken with Germany or Belgium.

The proposal concerns projects for items of infrastructure with an impact in a cross-border context and services of general economic interest (SGEI) provided in a cross-border context. The Commission offers two options for applying the legal provisions of a neighbouring Member State. First, a self-executing commitment can be concluded. Second, the Member State concerned can conclude a statement confirming that it will amend the relevant provision. That Member State will then follow the necessary legislative procedures to implement the amendments. It is not mandatory for Member States to opt for this mechanism. If a Member State decides not to use the proposed mechanism, however, it must opt for an existing way to resolve obstacles hampering the implementation of a joint project in cross-border regions. This may be an effective mechanism which a Member State has set up at national level or which it has set up formally or informally, together with one or more neighbouring Member States.

This Regulation will be applicable to cross-border regions, which are defined as the territory covered by neighbouring land border regions in two or more Member States at NUTS level 3.¹ In the Netherlands that means the COROP regions² situated along the country's land borders.³

The proposal concerns any kind of legal obstacle, which means any legal provision with regard to the planning, development, staffing, financing or functioning of a joint project that hampers the inherent potential of a border region when interacting across the border (article 3, paragraph 4) or the application thereof.

b) Commission's impact assessment

The Commission says that there are three options for tackling cross-border obstacles more effectively. The first option, which it ultimately proposes, is a Regulation; the second option it mentions is a recommendation, and the third a Directive. The Commission does not believe

¹ **NUTS**, *Nomenclature des Unités Territoriales Statistiques*, is the classification applied by Eurostat, the EU statistical office, for dividing up the European Union's territory. It was introduced in order to divide Europe into comparable regions and enable effective regional comparisons to be made for statistical purposes. The NUTS classification comprises three levels, which in the case of the Netherlands in principle correspond with the following territorial divisions: NUTS 1: national regions (*landsdelen*); NUTS 2: Provinces; and NUTS 3: COROP regions.

² The **COROP regions** were adopted in 1970 by the Regional Research Programme Coordinating Committee (*Coördinatiecommissie Regionaal Onderzoeksprogramma* or 'COROP').

³ In the Netherlands this means the following COROP regions: Oost-Groningen, Zuidoost-Drenthe, Noord-Overijssel, Twente, Achterhoek, Arnhem-Nijmegen, the entire province of Limburg, Zuidoost-, Midden- and West-Noord-Brabant and Zeeuws-Vlaanderen. This division does not coincide on the Dutch side of the border with the areas whose authorities are members of Euroregions situated along our borders with Germany and Belgium: Ems Dollart Region (EDR), EUREGIO, the Rhine-Waal Euregio, the Rhine-Meuse-North Euregio, the Meuse-Rhine Euregio, the Scheldemond Euregio and the former Euregio Benelux Middengebied (Central Benelux).

that a recommendation would be the most effective instrument because recommendations do not have binding force. Nor does it believe that a Directive would be the most effective instrument; although a Directive would be binding on the Member States as to the result to be achieved, it would leave them free to choose their own form and methods. The Commission believes that this could give rise to legal complexities and leave different systems in force on either side of a border. A Regulation would oblige Member States to establish a mechanism for resolving legal obstacles for each of their borders.

The Commission notes that some Member States have already established their own instruments together with one or more of their neighbouring Member States. In drafting the proposed Regulation, the Commission has taken account of these existing instruments.

This Regulation will enable Member States to use the (two-pronged) mechanism introduced in the Regulation or their own mechanism, provided that the latter is also effective in resolving legal and administrative obstacles in a cross-border context. Member States may also decide, with respect to a specific border with one or more neighbouring Member States, to join an existing effective mechanism set up formally or informally by one or more neighbouring Member States. The Commission notes that it is not opting for a 'one-size-fits-all' approach, but rather giving Member States the option of devising solutions that best suit the regional context.

3. The Netherlands' position on the proposal

a) Summary of Dutch policy in this area

'Growth at the borders, and no borders to growth.' This motto applies in many different ways to relations between, on the one hand, our country and our border regions, and on the other, our neighbours in North Rhine-Westphalia, Lower Saxony, Flanders and Wallonia. Cross-border opportunities in relation to the economy, the labour market, education, culture, transport, housing, services and security can be created and taken advantage of, for the benefit of citizens, businesses and institutions, by removing unnecessary cross-border barriers, putting in place the right basic conditions and, where necessary, lending such initiatives a helping hand.

In order to stimulate cross-border economic and employment opportunities, an action team was established in 2015, involving border municipalities, border provinces, the Association of Netherlands Municipalities (VNG), the entrepreneurs' association MKB-Nederland, a number of Euroregions and four ministries. The action team sought advice from experts in the border region (including experts from neighbouring countries) to determine what would be needed to achieve this aim. In January 2017 the Cross-Border Economy and Employment Action Team presented an agenda setting out 40 action points which constitute the main challenges that the border regions need to tackle in order to achieve **growth**.⁴

The agenda for action covers a variety of areas. None of the action points were aimed at

⁴ Parliamentary Papers, House of Representatives, 2016-2017, 32 851, no. 33.

amending legislation, or even suggested that applying the legislation of a neighbouring country could provide an appropriate solution. The action team did, however, recommend establishing more effective cross-border governance structures in partnership with neighbouring countries. Efforts to achieve this are now well under way. Firm, coordinated and supportive efforts by national governments as well as state/regional authorities in our neighbouring countries are indispensable. The letter to parliament of 20 April 2018 addresses these cross-border governance structures in greater detail.⁵

Political office holders from national, regional and local authorities on either side of the border will participate in the governance structures with the aim of helping cross-border initiatives and projects make further progress. If any legal or other obstacles arise in relation to these projects, these political office holders will be responsible for resolving them. In some cases solutions may be found in the Benelux Union's existing instruments. If those instruments are insufficient, however, an escalation mechanism could also be activated within the cross-border structures with our neighbouring countries. Within the relevant governance structure, the political office holders responsible for legislation would then reach direct agreements on the matter with their counterparts from the neighbouring country. Any legislative amendments would of course ultimately have to be effected by the responsible parliaments.

The government believes that it is essential to eliminate cross-border barriers and create more favourable conditions for taking advantage of cross-border opportunities; however, such action will not be sufficient on its own. The focus is on enabling citizens, businesses and institutions to pursue concrete cross-border initiatives in border regions. To this end, the government stated that it would support such initiatives where necessary and possible, in particular by reaching agreement with the appropriate authorities in neighbouring countries within the newly created cross-border governance structures, amending legislation, changing the way that legislation is implemented, making knowledge available and bringing partners together to facilitate cooperation.

The letter to parliament of 20 April 2018 also noted that we in The Hague must always remain alert to the impact that political policy choices in our country and in neighbouring countries have on the border regions. This also includes the policy choices that are elaborated in legislative proposals. Subsequently, the House of Representatives explicitly endorsed that policy approach in the motion submitted by member Harry van der Molen and others concerning the impact of policy on border regions.⁶ In the aforementioned letter to parliament, the government had already announced that it would consider in what way it could engage the expertise of external parties in identifying border-region impacts in a number of specific policy

⁵ Parliamentary Papers, House of Representatives, 2016-2017, 32 851, no. 38.

⁶ In the motion, the House called on the government 'to explore which legislative proposals could have a disproportionate impact on border regions, to conduct further analysis of a number of these cases and, based on the experience gained, to incorporate policy impacts on border regions in the integrated assessment framework for policy and legislation (IAK)'. The motion was passed on 5 June by a show of hands, with 145 House members in favour. See: <https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2018Z10410&did=2018D32053>

cases. In view of the motion submitted by Mr Van der Molen and others, interministerial arrangements will be agreed in order to ensure that, when developing policy and legislation, any impacts on border regions are given consideration at an early stage, in light of the application of the integrated assessment framework.

b) Assessment of and position on the proposal

The Netherlands supports the Commission's objective of resolving legal obstacles to cross-border projects. The Netherlands also agrees with the Commission that a number of effective mechanisms for this purpose already exist at intergovernmental, regional and local level.⁷ In this sense the Commission's proposal can also be regarded as affirming the course pursued by the government since it took office:

- central government pays attention to the potential impacts of new policy and legislation on border regions, and
- we are working in partnership with neighbouring countries on the formation of effective cross-border governance structures, not only to benefit new and existing projects, but also to detect, identify, mitigate and, where necessary, resolve any problems posed to border regions by new or existing legislation.

The Netherlands considers it essential that the negotiations do not result in any restrictions to the Member States' national competences in areas such as employment, social security and tax legislation.

The Netherlands believes that the Commission's choice of a Regulation as its instrument is not aligned with its aim. In the government's view, that aim – facilitating solutions to resolve cross-border legal obstacles in a way best suited to the regional context – could be achieved more effectively by means of a Directive. A Directive could commit Member States to a common goal (eliminating cross-border obstacles) while leaving them free to decide how to achieve it. This approach would maximise the scope for solutions best suited to the regional context, while ensuring via a best-efforts obligation that effective action is taken to resolve cross-border obstacles throughout the Union. If the intention is truly to maximise the scope for Member States to devise solutions best suited to the regional context, then a Directive, rather than a Regulation, would be the more obvious choice. The Commission's decision to opt for a Regulation would appear to make it harder to achieve this kind of flexibility, since it prescribes one particular type of solution: a mechanism to enable legal provisions from another Member State in the border region to be applied.

A Directive would fully respect and encourage effective intergovernmental, regional and local mechanisms, both existing and new, which would be entirely in accordance with the

⁷ In the explanatory memorandum to the proposal, the Commission explains that a number of effective mechanisms for cross-border cooperation already exist at intergovernmental, regional and local level. For more details, the Commission refers to its Communication of 20 September 2017 on Boosting Growth and Cohesion in EU Border Regions (COM(2017) 534). In this connection the Commission notes that at intergovernmental level the Nordic Council of Ministers and the Benelux Union have established processes to identify and address bilateral border barriers. At regional level, the Upper Rhine Conference and the Greater Copenhagen and Skåne Committee have developed institutionalised ways to identify local obstacles and organise a response.

Commission Communication on Boosting Growth and Cohesion in EU Border Regions. It would allow Member States to work with their neighbours to make their own decisions on how best to tackle cross-border problems, ensuring that those solutions best fit the regional context.

The proposed Regulation does not provide clarity on the conditions that Member States' own mechanisms must fulfil to allow them to be chosen over the proposed mechanism. Member States are, however, obliged to make their choice within a year. Since the government believes that this obligation is at odds with the supposedly voluntary nature of the proposal, it will endeavour to ensure that the instrument chosen to achieve the aim of the proposal is a Directive.

If the Council and the European Parliament agree to the choice of a Regulation as the appropriate instrument, article 4 of the proposed Regulation, as noted above, offers Member States the option of using their own mechanisms for resolving legal and administrative obstacles to the implementation of joint projects in cross-border regions. In that case the Netherlands' preferred option would be to use the cross-border governance structures currently being developed in partnership with its neighbours, in addition to the joint arrangements available in the Benelux Union and existing cross-border cooperation instruments at local level, such as the Baarle Joint Body (*Gemeenschappelijk Orgaan Baarle*).

The Government believes that a one-sided focus on cross-border obstacles of a legal nature is the wrong approach. As far as the Dutch context is concerned, such an approach disregards the existence of and the possible solutions offered by the Cross-Border Economy and Employment Action Team. It also disregards the options available within the context of the Benelux Union, as illustrated by the elimination of obstacles when the cross-border industrial estate in Maastricht and Lanaken, known as the 'Albertknoop', was established.

The government is critical of the proposal's breadth of scope. The broad definition of the term 'legal obstacle' could potentially bring any legal provision connected with the planning, development, staffing, financing or functioning of a joint project within the scope of the Commission's mechanism. The government will seek further clarification from the Commission and aim to ensure that the term is clearly delineated.

It is not clear from the Commission's proposal whether the intention is to bring national differences in employment and tax legislation within the scope of the Commission's mechanism. The same ambiguity applies to matters related to the minimum wage and pensions. As noted above, the government considers it essential that the negotiations do not result in any restrictions to the national competences of the Member States in areas such as employment, social security and tax legislation.

The government endorses the Commission's call to Member States last year, in its Communication 'Boosting Growth', to create mechanisms of this nature where they do not yet

exist, so that solutions can be developed that best suit the regional context. Deviating from or disappling national legislation will give rise to different legal regimes being applicable within and outside the border region which is at odds with the principle of equality before the law and gives rise to the risk of parties 'shopping' to find the area with the most favourable regulations. It is also unclear what the consequences would be if one Member State were to opt for its own mechanism while its neighbour opted for the Commission's mechanism.

The Commission's mechanism would also cause an increase in the administrative burden. For instance, it obliges Member States that opt for the mechanism proposed by the Regulation to set up national coordination points, whose procedures and tasks are regulated in further detail in articles 5-22. The Member States are not obliged to make use of the mechanism and therefore not obliged to establish national coordination points either, given that article 4, paragraph 1 allows them to use their own existing mechanisms for resolving legal and administrative obstacles to joint projects in cross-border regions, be they bilateral mechanisms established with a neighbour or multilateral mechanisms (such as the Benelux Union). In the government's view, the exception created by article 4, paragraph 1 demonstrates that the proposal is not a proportionate way of achieving the Commission's aim.

The draft Regulation does not make clear which aspects of infrastructure projects and services of general economic interest fall within the scope of the Regulation. The government believes that as a matter of principle, a decision by a municipality, province or national government of a Member State to designate an SGEI and, on the basis of article 14 TFEU, protocol 26 TFEU and article 106 TFEU, to organise this SGEI as it sees fit – subject to any basic conditions that may apply under the European Commission's rules for the 2012 SGEI package – should also be respected by a municipality or any other public authority on the other side of the border. For instance, the Netherlands considers the designation of the provision of social housing as an SGEI to be of great importance, but SGEIs have also been defined in relation to transport, healthcare and other areas. It is not clear whether this general principle, which is considered crucial by the Netherlands, is fully respected by the proposed Regulation.

c) Initial force field analysis

An initial assessment of the views of Member States showed support for the idea itself, i.e. of resolving border problems. There are many questions, however, about whether the proposal is the right way of doing this. Member States' questions focus in particular on the voluntary nature of the Commission's mechanism. The Commission emphasises that the use of the proposed Commission's mechanism is voluntary, but if a Member State decides not to use it, it must apply an alternative that has the same effect. The Member States also want the Commission to lay down clear parameters in the Regulation with which a Member State's own existing mechanism must comply. The Member States also have more general questions about the potential legal problems that the Commission's mechanism could entail. At the time of

drafting this BNC assessment, Sweden's national parliament had issued a 'reasoned opinion' saying that the proposal failed the subsidiarity test.⁸

In addition, the EP will of course be issuing a report on the proposed Regulation itself. The EP appointed Dutch MEP Matthijs van Miltenburg (D66/ALDE) as rapporteur in relation to the Commission proposal on 20 June. The timetable for this report is yet to be decided upon. The EP is expected to want to make its position on the Commission's proposal known later this year.

4. Assessment of competence, subsidiarity and proportionality

a) Competence

The government's assessment is positive. Under article 175 TFEU, the EU has the power to put forward proposals concerning specific policy on the regions and strengthening economic, social and territorial cohesion. This legal basis is also appropriate for resolving obstacles to regional and cross-border cooperation.

b) Subsidiarity

The government's assessment with regard to the subsidiarity of the proposal is positive. A number of Member States (including the Benelux countries) have undertaken individual, bilateral or even multilateral initiatives for resolving legal obstacles to cross-border cooperation. However, these mechanisms do not exist in all Member States or for all the borders of each Member State. For this reason, action at EU level does offer added value.

c) Proportionality

The government's assessment with regard to proportionality is negative. The government considers it important that the Member States have freedom to choose a mechanism for resolving legal and administrative obstacles in a cross-border context. It believes that the Commission's proposed course of action, a Regulation, is more far-reaching than is necessary to achieve its aim. Instead, a Directive would be the obvious choice of instrument. As noted in section 3b above, this is why the government is critical of the Commission's proposal to oblige Member States to choose between their own mechanism and the mechanism provided for by the Regulation.

5. Financial implications, impact on regulatory burden and administrative burden

a) Impact on the EU budget

No impact on the EU budget is envisaged at this stage. The Netherlands believes that the necessary EU funding should be found within the EU Multi-Annual Financial Framework 2014-2020 agreed by the Council and should be in keeping with a prudent approach to the development of the annual budget. The government's ambitions for the next MFF will play a key role in making an overall assessment of resources post-2020; the Netherlands does not want to run ahead of decision-making on the next MFF.

⁸ See: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20180373.do>

b) Financial impact (including on staffing) on central government and/or subnational authorities

The financial impact on central government and/or subnational authorities will depend to a large extent on the choice of mechanism. The mechanism proposed by the European Commission would lead to the establishment of a coordination point, which would have financial and staffing implications. The existing Benelux mechanisms and the plans to establish cross-border government structures in partnership with our neighbouring countries could limit the costs. In accordance with the rules on budgetary discipline, any budgetary impact must be incorporated in the budget of the ministry with policy responsibility.

c) Financial impact (including on staffing) on businesses and individual citizens

The Commission's proposed mechanism is intended to reduce costs for businesses and individual citizens by offering a solution in cases where legislation differs in border regions. Costs for businesses and individual citizens will also be reduced if, under the proposed EU Regulation, the decision is taken to opt for the existing Benelux mechanism and the cross-border governance structures being established with neighbouring countries, since this will eliminate the impact of differences in legislation.

d) Impact on regulatory/administrative burden of central government, subnational authorities, businesses and individuals

The proposal is intended to reduce the administrative burden on individuals and businesses. As noted above, it may lead to an increase in the administrative burden on the public authorities.

e) Impact on competitiveness

None.

6. Legal implications

a) Implications for national and subnational legislation and/or sanctioning policy (including the 'silence means consent' rule)

The implications for existing (policy-specific, general or constitutional) legislation could potentially be far-reaching, but cannot be estimated because the Regulation would entail disapplying or amending national or subnational legislation if there is a need to do so for the sake of a cross-border project. If it is considered desirable to obtain legal certainty and general assurance at the outset about amending or deviating from legislation, it would make sense to accompany this Regulation with implementing legislation, since the proposal opens up the possibility of foreign legislation being applicable and in fact replacing the applicable national or subnational legislation. The procedure provided for by the Regulation, namely concluding a self-executing commitment or a statement, will also require a prior Act of Parliament or other legislation before certainty can be obtained about the legislative amendment.

b) Delegated and/or implementing acts, including the Netherlands' assessment of these

Under article 7, paragraph 2, the Commission must adopt an implementing act on the functioning of the database on all commitments and statements to be established and managed by the Commission. The implementing act must also lay down rules on the forms to be used by the cross-border coordination points for submitting information on the implementation and use of the mechanism. Article 7, paragraph 2 refers to article 23, paragraph 2 of the proposal for the procedure to be followed in adopting the implementing act (the consultation procedure). The government believes that the examination procedure would have been more appropriate in this case. In the government's view, the proposed implementing act is the appropriate way of dealing with these matters, since these instruments are designed to ensure the uniform implementation of the regulation.

c) Proposed implementation period (directives) or proposed date of entry into force (regulations and decisions), with comments regarding feasibility

Those countries that do not currently have their own mechanism for tackling cross-border barriers will be particularly hard-pressed to establish their own effective mechanism within a year after the Regulation enters into force. In such cases, the freedom apparently offered by the Regulation will in fact be rather illusory and hamper the development of solutions best suited to the regional context, which is rather difficult to reconcile with the notion that the Regulation does not actually pursue a 'one-size-fits-all' approach.

It is proposed that the Regulation be applied one year after its entry into force. This period will be too short if implementing legislation is adopted (see (a)). A legislative procedure of this nature will take at least two years. If the cross-border governance structures that are currently being established are sufficient to comply with the Regulation, then a period of one year will be adequate.

d) Desirability of an evaluation/sunset clause

Five years after the Regulation's entry into force, the Commission must issue a report on its application. The government supports this reporting obligation, in order to assess the effectiveness and added value of the instrument and to examine any potential simplifications. Five years is a relatively short period, however, given that the Regulation will not apply until one year after its entry into force (although the Netherlands is aiming to extend this to two years).

7. Implications for implementation and/or enforcement

In the event of an obstacle that must be resolved on the basis of the Regulation, the relevant implementation authorities will have to amend their policies and enforcement practices. This will mean applying a different policy to a particular project than that which generally applies in the region in question (differentiation).

8. Implications for developing countries

None.