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From ECBM to CBFT: from solving obstacles to facilitating solutions, by Loth Van der Auwermeulen

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Abstract

With the proposal for a “*Regulation on Facilitating Cross-Border Solutions*” of 12 December 2023, the European Commission took another step in expanding the European framework for cross-border cooperation. In the future, the envisaged regulation would constitute an additional European instrument for cross-border cooperation within the European Union that could solve administrative and legal obstacles that private and public partners face today when executing cross-border cooperation.

Introduction

On 12 December 2023, the European Commission adopted a “*Regulation on Facilitating Cross-Border Solutions*” (“*CBFT Proposal*”). With this proposal, the Commission reboots its proposal for a “*Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context*” (“*ECBM Proposal*”) of 18 May 2018. With this ECBM proposal, the commission wanted to introduce a European Cross-Border Mechanism (“*ECBM*”). The objective was to remedy the legal and administrative obstacles that partners experience when cooperating across internal Union borders. It concerns mainly obstacles resulting from the existence of different national legal rules or procedures which, due to the territoriality of administrative law, in principle apply simultaneously to cross-border cooperation projects. The ECBM proposal received little support from Member States and ultimately did not result in a regulation. With the introduction of the Cross-Border Facilitation Tool (“*CBFT*”), the Commission is now making a new attempt to find support for the regulation of a mitigation mechanism that complements the current European cross-border cooperation framework.

That the Commission persists in seeking to expand the European framework for cross-border cooperation is not surprising. After all, the European Union attaches great importance to cross-border cooperation and therefore offers both legal and financial support to public actors who want to cooperate across national borders. Consider the financial support offered by the Union within the INTERREG structural funds, which were introduced in 1990 and have been steadily extended over the years. Another example of the Union's support for cross-border cooperation concerns the [EGTC Regulation No 1302/2013](#), which provides a legal framework making it possible to allocate legal personality to cross-border cooperation and to organise it through a uniform legal structure.

The many cross-border collaborations established with the financial INTERREG support or taking the legal form of an EGTC demonstrate that an expansion of the Union law framework is necessary to enable the collaborations initiated to stabilise and continue in the longer term. Indeed, the lack of a framework for conflicts of law in the implementation of cross-border cooperation is today a major stumbling block resulting in legal uncertainty on the part of the cooperating partners during the implementation of cross-border cooperation.

Parallel to the ECBM proposal, the Union initiated the [B-Solutions programme](#). This is a financial and administrative support managed by the Association of European Regions that aims to remedy legal uncertainty on an *ad hoc* basis by bringing actors involved in specific cross-border projects into contact with experts who work out possible solutions to specific obstacles. Although the B-Solutions programme offers an important contribution in terms of identifying, explaining and unravelling specific obstacles that arise, it does not result in a remedy mechanism that allows to solve the identified principles.

It is in the light of the above illustrated importance the Union attaches to cross-border cooperation and at the [formal request of the European Parliament](#) that the Commission is now reattempting to regulate such a remedy mechanism. This blog post briefly and exploratively analyses the proposed tool and compares it with the previously proposed ECBM by focussing on both instrumental and substantive choices made by the Commission in regulating an additional remedy mechanism for cross-border cooperation.

The CBFT-proposal: instrumental choices

A framework regulation making a clear distinction between direct obligations and guidelines

As in 2018, the Commission proposes to further develop the European framework for cross-border cooperation through a Regulation and to shape a rather broad framework that offers considerable margin of discretion to Member States. An important difference with regard to the ECBM proposal is that the current proposal makes a clear distinction between the direct obligations that the CBFT Regulation would impose on the one hand and the aspects to which a (wide) implementation margin

would apply on the other hand. For instance, the CBFT Regulation would in any case imply the obligation to nominate cross-border cooperation points and to ensure that cooperating partners receive a reply after an assessment of the addressed obstacles within a reasonable deadline.

The obligation of Member States to establish at least one coordination point was absent from the ECBM proposal, which only included an obligation to establish one if the Member States considered that one or more of their national borders did not have an effective mechanism in place that could solve obstacles during the implementation of the cross-border cooperation. The indisputable obligation to establish at least one coordination point put forward by the CBFT proposal no longer leaves the Member States room to question the need to establish or designate a coordination point. With regard to the design and organisation of coordination points, under the CBFT proposal Member States retain discretion similar to that granted to them by the ECBM proposal. For example, they may decide to designate separate authorities or to entrust an existing authority with the tasks of a coordination point.

Despite the clear obligation to proceed with the establishment of coordination points, the envisaged CBFT Regulation would create a rather broad framework for cross-border cooperation that would provide a considerable margin of implementation by Member States. In other words, like the ECBM proposal, the CBFT proposal primarily aims to introduce a uniform blueprint that is limited to establishing the broad contours for the State obligation to recognise the importance of cross-border cooperation and support its implementation to the best of its ability if cooperating actors identify obstacles. This finality raises questions about the suitability of a regulation, whereas a directive could presumably serve the same purpose.

The competence of economic, social and territorial cohesion as a legal basis

The proposed legal basis of the current proposal is also identical to that of the ECBM proposal: for the introduction of the CBFT, the Commission relies on Articles 174 and 175 TFEU on economic, social and territorial cohesion. Although this choice is not surprising, it raises questions about the Commission's progressive understanding of cross-border cooperation. During the legislative process of the EGTC Regulation, the question arose whether Article 114 TFEU did not contain a potential legal basis for cross-border cooperation. At the time, the link between cross-border cooperation and the internal market was rather uncertain. However, there is a real chance that the debate on this matter would have a different outcome today. For example, the ECBM proposal itself recognised the importance of cross-border cooperation in achieving the single market and more recently, the European Central Bank emphasised the narrow correlation between cross-border cooperation and the internal market. Even if the link between cross-border cooperation and the internal market is de facto less uncertain today than it was at the time the latter instrument was created, the CBFT proposal does not express this link. In other words: the Commission does not trigger the debate on the application of the principles inherent in the single market in the case of cross-border cooperation.

The CBFT-proposal: substantive choices

No surprising, but a sharpened scope

The substantive departure point of the CBFT proposal is similar to that of the ECBM proposal: Art. 1, 1 of the CBFT proposal states that the CBFT will apply to obstacles *“that hamper the establishment and functioning of any item of infrastructure necessary for public or private cross-border activities or of any cross-border public service provided in a given cross-border region and provided it fosters economic, social and territorial cohesion in the cross-border region”*.

Unlike what was the case for the ECBM proposal, the Commission explicitly emphasises that the application of the CBTF Regulation *“shall not affect any other Union legal acts, in particular those applicable to the non-judicial resolution of legal issues arising from cross-border obstacles and to the correct interpretation or implementation of Union Law”*. This clarification addresses potential concerns that cross-border cooperation projects could act *contra legem* through the application of this CBFT. The proposal further clarifies that the CBFT *shall be without prejudice to the coordination mechanisms established for social security and taxation.*” In other words, the CBFT would become an *ad hoc* safety net for obstacles that no existing legal framework can address. Limiting the scope of the proposed Regulation to obstacles for which no generally formulated solution exists is not new with regard to the ECBM proposal that allowed Member States to opt for existing ways to resolve obstacles resulting from cross-border cooperation. In fact, the current proposal only clarifies and specifies this substantive limitation.

Less procedure, more guidance

While the instrumental basis and scope of the CBFT proposal are similar to the ECBM proposal, in terms of content, the new proposal involves a very clear change of direction. The most striking substantive differences relate to the legal protection mechanism and the role of the coordination points.

i. The legal protection mechanism

Unlike the 2018 text, the CBFT text does not mention a legal protection mechanism for persons resident in a cross-border region. While the ECBM proposal provided for a right to legal redress before the courts for citizens who felt aggrieved by the application of the mechanism, the current proposal does not contain a legal protection mechanism following the application of the CBFT.

ii. The role of the national coordination points

Both the CBFT and the ECBM proposal put forward national coordination points as the focal point of the application of the proposed remedy mechanism. In both cases the national coordination points can only take remedial action when requested to do so by the cooperating actors. Nevertheless, in application of the CBFT, the national coordination points would play a significantly different role than would have been the case in application of the ECBM. This differentiation results from the fact that the CBFT proposal moves away from the focus on a detailed procedure to be followed by the coordination point. Moreover, the CBFT proposal broadens the remit of those same coordination points.

The ECBM proposal entailed a detailed procedure that could lead to three outcomes: a formal rejection of the request to remedy the obstacles raised, a statement, or a commitment. A rejection of the request would lead to the termination of the ECBM procedure. A statement involves a declaration to the cooperating parties that the competent authority would endeavour to resolve the identified obstacle. A commitment concerned a further reaching declaration that entailed an actual engagement that the competent authority would resolve the identified obstacle.

By contrast, the CBFT proposal focuses less on formal actions to be taken by the coordination points, but essentially defines how they can/should guide and inform cooperating actors who invoke certain obstacles. For example, the CBFT proposal explicitly defines that the coordination points act as single points of contact for the cooperating actors initiating a remedy procedure. They function as the *liaison* between these cooperating partners and the other coordination points (both at national and European level) on the one hand, and the competent authorities to resolve the identified obstacles on the other. In this capacity, the coordination points monitor the remediation process at the level of the competent authorities and inform the cooperating partners in this respect.

In addition, the CBFT proposal assigns an advisory task to the coordination points. It concerns a striking revision of the ECBM proposal. In contrast to the ECBM proposal, the CBFT proposal does not entrust the cooperating actors, but the coordination points with the task to formulate possible solutions to the identified obstacles. As a result, the burden on the shoulders of cooperating actors is much lighter than it was within the ECBM proposal that required cooperating actors to formulate not only the obstacles but also the possible mitigating measures. With this shift, the CBFT proposal takes into account the limited capacity of cooperating partners to carry out such in-depth legal analysis and puts the emphasis on developing expertise of the coordination points. Building the expertise of the coordination points has the effect that expertise from previous cases can be built upon in the development of possible remedies in subsequent cases. In addition, this approach is in line with the overall objective of creating an efficient network of coordination points to share knowledge and to strengthen capacities.

The fact that no longer the cooperating partners, but rather the coordination points, bear the responsibility for seeking solutions to the identified obstacles is a major trend change with regard to cross-border cooperation in general. Currently, Member States are only obliged to formally recognise and facilitate cross-border cooperation to the extent they deem it compatible with their constitutional structure. The CBFT Regulation would oblige them to entrust at least one authority with the task of substantively considering the identified obstacles and formulating possible solutions to them.

Conclusion

The CBFT proposal is in line with the historical support the European Union in terms of cross-border cooperation. Although the Commission's instrumental choices suggest that the CBFT would become an instrument similar to the ECBM, a substantive analysis of the new proposal quickly shows that this time the Commission attempts to switch from a procedural approach to a facilitative approach. Moreover, the Commission is introducing a '*learning network*' of national coordination points. Accordingly, behind the shift from solving to facilitating lies the valuable opportunity to build up expertise at the interstate level and in this way to exploit the **living lab function** of border regions. By no longer attempting to regulate everyone in a uniform way but providing a uniform framework that enables to learn from each other, the Commission takes a promising intermediate step in the ever-expanding European support of cross-border cooperation.

Posted by Dr Loth Van der Auwermeulen (Postdoctoral researcher, Hasselt)



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