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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	9 October 2024
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2024) 670 final
Subject:	COMMISSION STAFF WORKING DOCUMENT SUBSIDIARITY GRID Accompanying the document Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing an application for the electronic submission of travel data ("EU Digital Travel application") and amending Regulations (EU) 2016/399 and (EU) 2018/1726 of the European Parliament and of the Council and Council Regulation (EC) No 2252/2004, as regards the use of digital travel credentials

Delegations will find attached document SWD(2024) 670 final.

Encl.: SWD(2024) 670 final



EUROPEAN
COMMISSION

Strasbourg, 8.10.2024
SWD(2024) 670 final

COMMISSION STAFF WORKING DOCUMENT

SUBSIDIARITY GRID

Accompanying the document

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing an application for the electronic submission of travel data (“EU Digital Travel application”) and amending Regulations (EU) 2016/399 and (EU) 2018/1726 of the European Parliament and of the Council and Council Regulation (EC) No 2252/2004, as regards the use of digital travel credentials

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Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
<p>The legal basis for the proposal for a Regulation of the European Parliament and of the Council establishing an application for the electronic submission of travel data ("EU Digital Travel application") and amending Regulations (EU) 2016/399 and (EU) 2018/1726 of the European Parliament and of the Council and Council Regulation (EC) No 2252/2004, as regards the use of digital travel credentials¹ is Article 77(2), points (b) and (d) of the Treaty on the Functioning of the European Union (TFEU). It provides that the European Parliament and the Council, for the purposes of paragraph 1 of Article 77 TFEU, shall adopt measures concerning the checks to which persons crossing external borders are subject (point (b)) and concerning any measure necessary for the gradual establishment of an integrated management system for external borders (point (d)).</p> <p>The legal basis for the proposal for a Council Regulation on the issuance of and technical standards for digital travel credentials based on identity cards² is Article 77(3) TFEU. It confers on the EU a competence to adopt provisions on, among other things, identity cards that are intended to facilitate the exercise of the right to free movement.</p>
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In accordance with Article 4 TFEU, the competence represented by these Articles is shared.
<i>Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU³. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU⁴ sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU⁵ sets out the areas for which the Unions has competence only to support the actions of the Member States.</i>
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁶:
<ul style="list-style-type: none"> - Has there been a wide consultation before proposing the act? - 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?
<p>The following consultation strategy has been undertaken to support the preparation of the proposals:</p> <ul style="list-style-type: none"> - consultations with Member States' relevant authorities (border authorities, travel document issuing authorities, policy makers), several European Commission services and EU agencies

¹ COM(2024) 670 final.

² COM (2024) 671 final.

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN>

⁵ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML>

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

(such as the European Border and Coast Guard Agency (Frontex), the EU Agency for the Operational Management of Large-Scale IT systems in the Area of Freedom, Security and Justice (eu-LISA), and the EU Agency for Fundamental Rights (FRA)) as well as industry and international organisations and associations (International Civil Aviation Organization, International Air Transport Association and World Travel and Tourism Council) through surveys, questionnaires and interviews;

- public consultation on a possible legislative initiative on the digitalisation of travel documents and facilitation of travel;
- a special Eurobarometer survey on the digitalisation of travel documents and facilitation of travel.

The explanatory memoranda of the proposals and the accompanying impact assessment⁷ contain a section on the principle of subsidiarity.

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 explanatory memorandum of the proposal for a Regulation of the European Parliament and of the Council establishing an application for the electronic submission of travel data ("EU Digital Travel application") and amending Regulations (EU) 2016/399 and (EU) 2018/1726 of the European Parliament and of the Council and Council Regulation (EC) No 2252/2004, as regards the use of digital travel credentials states:

"The current EU legal framework does not allow for the use of digital solutions for remotely verifying the authenticity and integrity of travel documents in border checks. Due to the nature of the problem, Member States themselves cannot effectively introduce a uniform format for digital travel credentials based on travel documents regulated at EU level and so facilitate cross-border mobility.

EU action would add considerable value in addressing the challenges related to security and travel facilitation. The current situation affects security at the EU's borders as well as the proper functioning of the external borders and overall Schengen area. While the external borders and the EU as a whole are placed under considerable strain, joint EU action would allow us to put in place uniform measures to improve integrated border management and reach a minimum level of digital maturity among all EU Member States.

The necessary amendments of the relevant parts of the Schengen acquis (most notably the Schengen Borders Code and the EU Passport Regulation) are only possible at Union level. Moreover, for reasons of scale, effects and expected impacts, the objectives can only be achieved efficiently and effectively at EU level."

The explanatory memorandum of the proposal for a Council Regulation on the issuance of and technical standards for digital travel credentials based on identity cards states:

"The current Union legal framework does not allow for the use of digital solutions in the context of the exercise of the right to free movement. Due to the nature of the problem and the need to ensure interoperability, Member States themselves cannot effectively introduce a Union-wide uniform format for DTCs based on identity cards, and therefore cannot facilitate the exercise of free movement on the

⁷ SWD(2024) 671 final

basis of such DTCs. Any national solutions would bear the risk of not being accepted in other Member States, and would raise questions regarding their compliance with Union law when used in the context of free movement.

This proposal aims to facilitate the exercise of the right to free movement by giving Union citizens the option to obtain and use DTCs based on their national identity cards. For reasons of scale and expected impacts, the objectives can only be achieved efficiently and effectively at Union level.”

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)?

The EU is committed to facilitating the free movement of persons within an area of freedom, security and justice. The shortcomings identified in the impact assessment are inextricably related to existing legislation, notably the Schengen *acquis* concerning passports and border checks, as well as EU legislation on identity cards. The set-up of an integrated and more uniform border management requires coordinated measures and a common approach at EU level. A common EU approach to digitalising travel credentials is still missing and results in problems across Member States. National measures are subject to the obvious limitation that their direct benefits are largely or exclusively confined to a single Member State (or several Member States in case of data exchange and other forms of cooperation). Because of their intrinsic cross-border nature, addressing systemic problems clearly requires action with an EU-wide dimension.

Moreover, the current EU legal framework does not allow for the use of digital solutions for verifying the authenticity and integrity of travel documents in the context of cross-border travel. Instead, the current rules provide, in a mandatory way, for a check of physical travel documents. Therefore, Member States themselves cannot effectively introduce a uniform format for digital travel credentials and facilitate cross-border mobility.

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

Yes, EU action regarding cross-border mobility has by definition a cross-border dimension.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty⁸ or significantly damage the interests of other Member States?

Without EU action, Member States would possibly develop (or not) their own national solutions for leveraging digital data for making border checks more efficient and effective, resulting in a fragmented landscape of technical implementations, different levels of digitalisation and security, which could lead to decreased security at the external borders as well as prolonged waiting times and less convenient procedures for individual travellers. Given that the external borders of the Schengen area are becoming smarter and more digitalised, new legal requirements for identification are being enforced. Furthermore, as further possibilities are emerging in the European digital identity framework, it is highly likely that Member States will digitalise travel documents within their own competencies, and several Member States are already leveraging the chip data from passports and identity cards for national purposes, while some have explicitly prohibited it.

A digital solution implemented by one Member State may not be interoperable with the one chosen in another Member State, thereby creating practical obstacles to the exercise of the right of free

⁸ https://europa.eu/european-union/about-eu/eu-in-brief_en

<p>movement, in particular where this situation should result in entry being refused to the EU citizen. Moreover, such fragmentation would severely jeopardize the aim of introducing a truly integrated management system for external borders.</p>
<p>(c) To what extent do Member States have the ability or possibility to enact appropriate measures?</p>
<p>The proposals envisage the introduction of digital travel credentials that travellers may use in the context of cross-border travel. Member States would be obliged to allow persons to use digital travel credentials for those purposes, after a transition period and, as far as the crossing of borders is concerned, once the common technical EU solution is ready to be deployed. Before such a date, Member States could opt-in and develop national solutions for the use of digital travel credentials at their external borders.</p> <p>Therefore, the proposals help Member States address the problems associated with increasing traveller volumes, while ensuring high(er) levels of security with added convenience for individual travellers. While the initiative requires regulatory and technical intervention, it is suitable for the attainment of the objectives and does not go beyond that which is necessary.</p>
<p>(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?</p>
<p>The identified problems are cross-border in nature and do not vary across national, regional and local levels across the EU.</p>
<p>(e) Is the problem widespread across the EU or limited to a few Member States?</p>
<p>The problems the proposals aim to address are widespread across the EU.</p>
<p>(f) Are Member States overstretched in achieving the objectives of the planned measure?</p>
<p>The need for a uniform EU approach was confirmed by the targeted consultation of Member States' representatives. All respondents said it was essential to ensure adherence to international standards on digital travel credentials (DTC). Most of the respondents thought their Member State would be successful in introducing DTCs for external border-crossings if a gradual transition period were to be provided for.</p> <p>The proposals have a limited burden on Member States, which is offset by the expected positive impact of the measures that consist in making border checks more effective and efficient, allowing also for a better use of resources at local level. The proposals mostly consist in improving existing provisions rather than creating new obligations and in making changes in national setups, taking into account differences in technological maturity and capacities.</p>
<p>(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?</p>
<p>Regarding the overall digitalisation of travel documents, most consulted stakeholders throughout the impact assessment and study expressed a positive sentiment towards the initiative, as highlighted during the strategic interviews, written questionnaire, and in-depth interviews as well as the Special Eurobarometer survey.</p>
<p>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)?</p>

Yes, the objectives can only be achieved by legislative acts at EU level establishing the common EU technical solution and amend or complement existing provisions on border checks and travel documents (passports and identity cards).

The adoption and uniform application of these rules throughout the EU cannot be achieved by Member States acting individually but can rather only be achieved by EU legislation. The mere application of soft measures does not go far enough to tackle the problems identified and thus does not meet the objectives fully.

For reasons of scope and effects, the objectives of the proposals would thus be best achieved at EU level in accordance with the principle of subsidiarity.

(a) Are there clear benefits from EU level action?

Yes. The adoption of rules on the digitalisation of travel documents and facilitation of travel can be best achieved by EU legislation. As the legal framework concerning travel documents and border checks at external borders are established by EU law, EU level (regulatory) action is needed to enable the use of digital travel credentials for the benefit of both travellers and border authorities.

(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?

EU action would add considerable value in addressing the challenges related to security and travel facilitation. The current situation affects the security at the EU's borders and the opportunity for EU citizens to better enjoy their right to free movement as well as the proper functioning of the overall Schengen area. While the external borders and the EU as a whole are placed under considerable strain by increasing traveller flows and security threats, joint EU action would allow to put in place harmonised measures to enhance integrated border management and to reach a minimum level of digital maturity among all Member States. Moreover, by setting up one common technical solution at EU level ('EU Digital Travel application') for the purposes of using digital travel credentials, as opposed to each Member State developing their own, the EU and its Member States can reap cost benefits (economies of scale) in addition to facilitating the use of digital travel credentials.

The proposals aim to facilitate the crossing of borders and the exercise of free movement as well as to increase security by introducing the possibility for travellers to use digital travel credentials.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

In the absence of a common reference architecture, there is a risk that each Member State will rely on different private contractors for the design, development and implementation of various tools. As a result, Member States' solutions would become incompatible with each other, digital fragmentation would increase and border control management across the EU would risk being negatively impacted. Moreover, depending on which Member States EU citizens and third-country nationals are travelling through, their travel experience might significantly differ (e.g. non-mutual recognition of the used digital travel credentials), forcing the traveller to use a variety of different digital tools, depending on which Member State he or she will be travelling to or through. This would increase the burden on him or her and the risk of mistakes and the potential for frustration.

These divergences and the lack of a common approach can increase the risk of fraud and reduce the ability to identify fraud cases, as opposed to a common digital solution used by all the Member States.

A possible failure of Member States to make concerted efforts to meet the Digital Decade targets can entail further fragmentation in the way each Member State manages its border control, thereby hampering its efficiency throughout the area without internal border controls. In addition, such differences can negatively impact the travellers' experience when travelling from one country to another.

(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)?

Even if, under the proposal for a Regulation of the European Parliament and of the Council establishing an application for the electronic submission of travel data ("EU Digital Travel application") and amending Regulations (EU) 2016/399 and (EU) 2018/1726 of the European Parliament and of the Council and Council Regulation (EC) No 2252/2004, as regards the use of digital travel credentials, Member States are obliged to allow persons to use digital travel credentials for the purpose of undergoing border checks, the proposal helps Member States address the problems associated with increasing traveller volumes, while ensuring high(er) levels of security with added convenience for individual travellers. While the initiative requires regulatory and technical intervention, it is suitable for the attainment of the objectives and does not go beyond that which is necessary. The benefits of the proposed EU-level action outweigh any potential loss of competence for Member States and their competent authorities.

As far as the proposal for a Council Regulation on the issuance of and technical standards for digital travel credentials based on identity cards is concerned, the loss of competence is very limited given that the digital travel document will be issued on the basis of identity cards already regulated at EU level.

(e) Will there be improved legal clarity for those having to implement the legislation?

The proposals aim to ensure legal certainty for travellers as well as for Member States' competent authorities by establishing a clear legal framework harmonising the content (technical specifications) and issuance of digital travel credentials in the EU and on their use at external borders and for exercising the right to freedom of movement.

3. Proportionality: How the EU should act

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 explanatory memorandum of the proposal for a Regulation of the European Parliament and of the Council establishing an application for the electronic submission of travel data ("EU Digital Travel application") and amending Regulations (EU) 2016/399 and (EU) 2018/1726 of the European Parliament and of the Council and Council Regulation (EC) No 2252/2004, as regards the use of digital travel credentials contains the following text on the proportionality of the legislative proposal:

"According to the principle of proportionality laid down in Article 5(4) TEU, there is a need to match the nature and intensity of a given measure to the identified problem. The problems addressed in this initiative call for EU level legislative action to enable Member States to adequately tackle them.

This proposal envisages the introduction of digital travel credentials that travellers may use for the purpose of undergoing border checks. Member States would be obliged to allow persons to use digital travel credential for this purpose, after a transition period and once the common technical EU solution is ready to be deployed. Before such a date, Member States could opt-in and develop national solutions for the use of digital travel credentials at their external borders.

Therefore, the proposal helps Member States address the problems associated with increasing traveller volumes, while ensuring high(er) levels of security with added convenience for individual travellers. While the initiative requires regulatory and technical intervention, it is suitable for the attainment of the objectives and does not go beyond that which is necessary.”

The explanatory memorandum of the proposal for a Council Regulation on the issuance of and technical standards for digital travel credentials based on identity cards contains the following text on the proportionality of the legislative proposal:

“The proposal does not go beyond what is necessary to achieve its objective, as it does not fundamentally alter the rules and provisions of Directive 2004/38/EC or those laid down in the Commission’s proposal for a Council regulation on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement. It simply adds a DTC based on physical identity cards. In particular, this proposal does not amend the substantive conditions for the exercise of the right of free movement and residence, but seeks instead to facilitate the exercise of that right.

In addition, the decision as to whether or not to obtain a DTC would be left to individual Union citizens. Those who decide not to do so would still be able to exercise their right to free movement using their physical passport or identity card only. However, they might not benefit from some of the facilitations available to Union citizens who also hold a DTC.”

Additional explanations as to the proportionality of the different policy options – including the policy options not retained – can be found in the impact assessment accompanying the proposals.

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?

The legislative proposals address the identified issues in the most appropriate and proportionate way to achieve the intended objectives.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

Yes. The proposals only contain common rules to the extent necessary to achieve the policy objectives and is limited to those aspects that Member States cannot achieve satisfactorily on their own.

The current EU legal framework does not allow for the use of digital solutions for verifying the authenticity and integrity of travel documents in the context of cross-border travel. Instead, the current rules provide, in a mandatory way, for a check of physical travel documents. Therefore, Member States themselves cannot effectively introduce a uniform format for digital travel credentials and facilitate cross-border mobility.

(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.)?
The objectives of the initiative can only be achieved by legislative acts establishing the common EU technical solution and amend existing provisions on border checks and travel documents (passports and identity cards).
(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?)
The proposals strike a balance between the regulatory autonomy of Member States and the need to tackle the problems identified. As it seeks to amend existing rules contained in EU law, limiting the proposal to a less stringent policy instrument is not possible.
(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>It is assessed that the proposals will result in financial, administrative and operational benefits to stakeholders compared to the status quo:</p> <ul style="list-style-type: none"> - increased effectiveness and efficiency of border checks, likely to lead to savings in resources needed to especially cover peak times of travel; - travel facilitation through shorter waiting times at border-crossing points; - the facilitation of the exercise of the right to free movement through the access to a digital travel document; - integration of digital travel credentials into other border systems and immigration processes; - carriers' liability and carrier applications. <p>The proposal for a Regulation of the European Parliament and of the Council establishing an application for the electronic submission of travel data ("EU Digital Travel application") and amending Regulations (EU) 2016/399 and (EU) 2018/1726 of the European Parliament and of the Council and Council Regulation (EC) No 2252/2004, as regards the use of digital travel credentials would have an impact on the budget and staff needs of eu-LISA (for preparatory activities, software and hardware acquisition, analysis and design, development and testing, data centre preparations, licence costs, operations and maintenance) and mainly one-time costs for border authorities of Member States (to increase server and storage capacity to temporarily store digital travel credentials submitted by travellers, develop the secure connection to the Traveller Router allowing integration into existing national border management systems, upgrades or procurement of hardware to process digital travel credentials and to support facial recognition as well as training of personnel).</p> <p>The costs of the initiative would be commensurate with the objectives to be achieved. A detailed estimation of the costs can be found in the impact assessment and LFS accompanying the proposals.</p>
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
No special national circumstances requiring a specific treatment of individual Member States have been identified during the preparation of the proposals or during the consultations undertaken to prepare the accompanying impact assessment.