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Legal status of cross-border co-operation structures – past, present and prospects

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The legal status of cross-border co-operation and the necessary instruments for co-operation are a quite complicated subject. I will try to explain it as plainly as possible from the point of view of the Association of European Border Regions and in relation to the needs of border regions. It's not my task to present the position of the European Union or of the Council of Europe.

As regards the legal status of cross-border co-operation following questions arise:

- Why is the legal status so important?
- Is there a need for legal instrument?
- What was actually the situation until the adoption of the regulation on the European Grouping for Territorial Co-operation – EGTC (e.g. the Madrid Outline Convention of the Council of Europe, bilateral agreements etc.)?
- Which are the improvements resulting from EGTC?

1. Background

Not all forms of cross-border co-operation require a detailed legal basis (e.g. partnership with exchange of experience, town twinning etc.). The development of cross-border co-operation as far as to the establishment of stable structures is always a process. Most cross-border co-operation in Europe developed out of activities and / or initiatives organised by individuals or particular groups of people based on specific cases. Regular contacts were established as a result, which in turn led to specific working agreements, projects, concepts, co-operation strategies and even joint structures. Experience has shown that the following are the key factors in the development of joint structures for cross-border co-operation:

- Joint structures should only be set up in response to a need for more extensive and deeper co-operation. They are not a first step within the framework of co-operation.
- A practical solution tailored to a region's needs must be sought for each different form of co-operation and often also for every geographical situation.

Cross-border, interregional and transnational cooperation were all extended and deepened by the new political reality that emerged during the late 1980s, during the 1990s and then in the new millennium, by the creation of the EU's internal market and the shifting of EU-internal borders to become the Union's new external borders, by political changes within the countries of Central and Eastern Europe, and increasingly by close ties with these nations, their association with and finally membership of the European Union in 2004.

EU regional policy has played an important role in accelerating the development of cross-border cooperation, especially via the INTERREG initiative and later through Phare CBC, Tacis CBC (and to some extent MEDA and CARDS). The EU supports numerous programmes and projects aimed at tackling problems that hamper European integration at borders. Specifically in cross-border cooperation, joint structures have been established at regional and/or local level at almost all borders inside the EU, including in the new Member States and beyond (Euroregions and similar structures).



Despite the fact that cooperation between regional authorities across the whole of Europe is constantly deepening, the vastly different national competences, structures and legal systems are still the most common and largest barriers to cooperation.

2. Current legal instruments aimed at simplifying cross-border, interregional and transnational cooperation

Despite many political attempts to improve this situation, there was no single EU-wide legal instrument, which could be applied directly in all Member States for cross-border, interregional or transnational co-operation.

Efforts to find legal solutions have mainly concentrated on cross-border cooperation as this is the area with the most urgent need. Examples include:

- The Nordic Agreement (1977) on cross-border cooperation between municipalities;
- Multilateral inter-state agreements such as the Madrid Outline Convention of the Council of Europe and its Additional Protocols, which however cannot be implemented directly, but rather provide a framework which must be applied by bilateral/trilateral inter-state agreements;
- Bilateral agreements such as the Benelux Agreement, the German/Dutch Anholt Agreement or the Karlsruhe Agreement (each based on the Madrid Outline Convention), which facilitate cooperation in cross-border regional and/or local structures and the implementation of cross-border programmes based on public law;
- Numerous conventions, treaties, agreements and protocols at bilateral and trilateral level, which include national and/or regional or local authorities. These often contain declarations of goodwill on friendly neighbourly cooperation, partnerships and more. They also allow for recommendations to be made, but do not confer decision-making powers on cross-border structures.
- Regional and local agreements, which have led to the formation of many border and cross-border 'working communities' (Euregios and similar structures) on the EU's internal and external borders;
- Project-specific co-operation, mainly facilitated through direct bilateral regional and/or local agreements and, in some cases, through European and national legal instruments (e.g. European Economic Interest Group (EEIG), mixed economy companies).

Remark of AEBR:

Although bilateral / trilateral interstate agreements between Austria / Italy, Italy / France, France / Spain and Spain / Portugal have been already adopted they are hardly used for the establishment of co-operation under public law or adequately for the development of cross-border structures. The main reason is that the Madrid Outline Convention leaves the states much room for interpretation while implementing the Convention through bilateral / trilateral agreements, e.g. as regards the respective provisions on the location, majority situation, management and the tasks. This, in turn, clearly indicates that the Madrid Outline Convention can't create uniform legal conditions for the regional / local partners of a state or on both sides of the border.



Summing up the above, in the past strategic, long-term cross-border co-operation at regional and / or local level has largely been rooted in private law. There are currently only four special-purpose associations concentrating on general cross-border strategic co-operation along the Rhine operating under public law.

Cooperation under public law is easier to achieve at project level (joint water provision, joint waste disposal, a shared national park or nature reserve) because projects have limited content and authority and are therefore easy to monitor.

There are no forms of co-operation based on public law in the domain of interregional and transnational co-operation.

The main barriers to joint cross-border cooperation are the different national structures of authority, administrative structures and legal systems, which may permit or prevent regional and/or local authorities from participating directly in cross-border cooperation and, accordingly, in the management of programmes. This, in turn, has consequences for the current level of centralisation and/or decentralisation of the management of joint EU programmes.

3. Growing need for opportunities for co-operation under public law

At the same time, it must be said that cross-border cooperation between regional and local authorities is now of key importance, extending far beyond the provision of information and exchanges of experience. European integration is heightening the need for guaranteed co-operation. Cross-border cooperation should not be seen primarily as national foreign policy, but rather as European domestic policy. Regional and/or local authorities used to have to engage in wearying exchanges with their respective national authorities in a bid to ascertain whether or not cooperation was possible, and if so under what circumstances and to what extent, but nowadays, the willingness to engage in practical cooperation is firmly established.

Over the past 15 years, EU programmes have been particularly instrumental in substantially boosting awareness of subsidiarity and partnership between local, regional, national and European players. Efforts are no longer centred on what cross-border activities local and regional authorities may engage in, but rather securing cross-border cooperation in the long run by providing both political and legal guarantees at national and European level.

4. Added-value and need of the EU's legal instrument

From the beginning on the AEBR was involved in the elaboration of the Madrid Outline Convention of the European Council. It demanded this Convention and provided essential contents for it.

AEBR elaborated the basic study 'Transeuropean cooperation between territorial authorities' for the Committee of the Regions and the study 'Towards a new community legal instrument facilitating public-law based transeuropean cooperation among territorial authorities in the European Union' for the European Commission. Both studies served as basis for the development of the 'European Grouping for Territorial Cooperation' (EGTC). It was clearly stated that the hitherto existing legal instruments facilitating cross-border, interregional and transna-



tional cooperation are either not available, do not suffice or are not effective enough. A clear *added value* for a new EU legal instrument on cooperation across borders was determined.

From the point of view of AEBR a legal basis for cross-border co-operation means:

- A guarantee that decentralised co-operation can take place in the future at any time, in any place, on any topic and in any form (normally states are not involved);
- That co-operation does not depend on changing majorities or opinions at governmental, political and / or administrative level;
- That there is full scope for long-term strategic co-operation;
- That regional and local authorities in joint structures are responsible for the democratic monitoring of the practical implementation of cross-border co-operation;
- Binding forms of co-operation involving social partners and citizens;
- Joint binding decisions are taken by the co-operating parties, followed by their implementation;
- That tasks / responsibilities may be delegated to local and / or regional forms of co-operation (the national states has further on the competence);
- That the basis of co-operation is not the lowest common denominator (each participant can only work within the framework of their respective national authority); instead full co-operation is possible;
- That this full co-operation also includes the management of EU programmes;
- That the decentralisation of EU programmes becomes possible, because regional and / or local co-operation structures have a basis in public law and can assume liability and undertake management tasks;
- That a common place of jurisdiction is possible, as are shared headquarters, joint finances and equal authority to appoint and dismiss staff, etc.;
- That a structure for co-operation under public law is subject to supervision under that same public law.

A clear *need* (especially with regard to cross-border cooperation) for a EU legal instrument that provides a new basis under public law for cross-border cooperation and generally allows all forms of cooperation, including EU support programmes and projects can be determined. The legal instrument should be suitable both for long-term strategic cooperation (e.g. re strategies and programmes), and for cooperation on projects.

A new instrument under Community should create a homogeneous legal basis that could be applied directly in all EU Member States for decentralised trans-European cooperation (on a cross-border, interregional and transnational basis) at regional and/or local authority level. Treaties concluded by the EU with its immediate neighbours on the Union's external borders could enable such a legal instrument to be applied there as well (foreseen in the regulation).

The new instrument 'European Grouping for Territorial Cooperation' (EGTC), created by the Commission in agreement with the Member States, is a new instrument, which is certainly



not perfect and still improvable, but it is the first European legal basis for territorial cooperation. Important is, that:

- it is optional,
- Member States are free to delegate management of cross-border programmes to an EGTC,
- Regional/local partners are free to run cross-border projects as an EGTC,
- other existing instruments for cross-border cooperation remain possible (e.g. based on Madrid Outline Convention),
- if EGTC is chosen, the whole Regulation applies.

The new EU legal instrument will not create a new administrative level, but instead will be an instrument designed to solve existing problems in cross-border co-operation. Neither does the legal instrument deal in the first instance with competences for cross-border structures, but with the execution of necessary tasks. The sovereignty of a state ends at the border just as the sovereignty of the neighbouring state. None of them has a cross-border competence. However, as cross-border tasks and problems must be addressed and solved, cross-border structures like Euroregions are needed as an instrument for the execution of urgent tasks.

Amongst other problems, the legal instrument should solve:

- The issues of implementing sovereign rights on the other side of a border without impinging on national competencies;
- Issues of financial liability vis-à-vis external parties (e.g. national governments and the EU);
- Issues of liability vis-à-vis internal partners (liability of members for joint decisions and undertakings);
- The issues of having a single legal personality and authority to appoint and dismiss staff, of headquarters, place of jurisdiction, and so forth.

While the EGTC solves the issues of the financial liability vis-à-vis external and internal partners as well as the legal personality, it hasn't addressed yet the first important point - the implementation of sovereign rights on the other side of a border without impinging on national competencies. However, this problem has been solved in the German-Dutch Agreement and the Treaty of Karlsruhe based on the Madrid Outline Convention, although it hasn't been actually intended by the Madrid Outline Convention. The implementation through bilateral interstate agreements goes in this case beyond the legal framework. In this way, the German-Dutch Agreement makes it possible that a member of a special-purpose association implements joint decisions on behalf of and under instruction from the special-purpose association or of a member on the other side of the border.

5. Content of the EGTC and membership

The EU-regulation fixes the nature of the EGTC, e.g. composition, establishment of an EGTC, acquisition of legal personality, applicable law, tasks of the EGTC and its bodies, budget, liability, liquidation etc.



Members of the EGTC can be regional and local authorities as well as bodies governed by public law as well as associations consisting of such bodies. States (especially those without regions) can become members. Members should come from at least two Member States. To establish an EGTC, a decision of the possible members to create such a grouping is necessary. Then, a convention and statutes have to be drafted. The Member States are to be notified and have to receive a copy of the draft convention and statutes. The agreement of the Member States may include an *ex-ante* control concerning the regulation, national law including powers and duties as well as public interest and public policy (*ordre public*). This control cannot take more than 3 months and has to be in line with corresponding national rules. In case of non-acceptance, an explicit explanation of the reasons is necessary. The member states are obliged to report within one year to the European Commission how they have implemented the regulation.

Remark of AEBR: An EU regulation must be implemented by the EU member states and if necessary the national law must be adapted adequately. If – as in this case – a regulation on decentralised cross-border co-operation is adopted that allows the member states to forbid co-operation, which actually is the aim of the regulation, due to its incompatibility with the national law, then it undermines the intention of this EU regulation. It can be expected that the European Court of Justice will soon deal with arguments related to this EU regulation.

After the approval of the Member States, the final convention and the statutes are agreed. The statutes shall be registered and published in the Member States where the office of the EGTC is registered. In addition, the concerned Member States and the Committee of the Regions as well as the Official Journal of the EU have to be informed, with the request to publish a notice with key information on the EGTC.

The contents of the convention, which has to be agreed unanimously by the members, are as follows:

- Name, registered office
- Territory
- Objectives and tasks, duration and dissolution
- List of members
- Applicable law
- Financial control arrangements
- Procedures for amendments

The contents of the statutes, which also have to be agreed unanimously, are as follows:

- ALL provisions of convention and:
- operating provisions of organs
- decision-making procedures
- working language(s)
- functioning (recruitment, personnel contracts)



- financial contributions and other financial issues
- liability
- independent external audit body
- procedures for amendments

6. Competences and benefit of an EGTC

The EGTC gets legal personality on the day of national registration/publication through national authorities. The EGTC has extensive legal capacity (property, employ staff, legal proceedings). The EGTC can act as Managing Authority for EU programmes and sign grant letters.

What can the EGTC do?

- Carry out TASKS given by its members (Remark of AEBR: The EGTC will be used at the German-Dutch border for the execution of tasks assigned to it by the states. It goes already beyond the EU regulation).
- Act within confines of tasks given,
- limited to cooperation in cohesion field,
- Primarily implement cooperation programmes or
- cooperation projects (ERDF, ESF, CF),
- "Other" cooperation actions with EU funding,
- "Other" cooperation actions without EU funding,
- ONE member may be empowered to execute the EGTC's tasks.

What can EGTC not do?

- Exercise of powers conferred by public law to safeguard general interest of State,
 - Police,
 - Regulatory powers,
 - Justice,
 - Foreign policy,
- Actions outside EU funding if restricted by MS to ERDF-like actions

Remark of AEBR: In some European border regions there are joint police stations, co-operations in rescue etc. already.

An EGTC can act by its organs (assembly, director, additional organs as per statutes). There is full liability of the organs towards third parties, even outside tasks.

An EGTC can manage public funds. To this end, the assembly approves an own annual budget (running costs, operational costs). The EGTC can manage both EU and national funds and is controlled in line with relevant EU rules and national rules.



There is an on-going control by the Member States. Activities of the EGTC can be prohibited for reasons of public policy, security, health, morality or interest or if the EGTC acts outside the tasks laid down. In such cases, members may withdraw from an EGTC.

The regulation also contains also clauses regarding the general liability of the EGTC as such, the liability of members, liquidation, insolvency, cessation of payments and jurisdictions.

It is important that the Member States fix national implementation rules and inform the Commission about them. Within 5 years, a report on the EGTC should be presented with proposals for amendments.

7. Statement of AEBR

AEBR welcomes the creation of the EGTC. This is finally a European legal instrument for territorial cooperation, even if still can be improved in future. AEBR assesses the practical benefit of the EGTC as follows:

- The EGTC can be applied in many cross-border and also large interregional and transnational projects (e.g. infrastructure, environmental projects etc.)
- The EGTC will be used by several cross-border structures for general cross-border cooperation (without EU funding programmes).
- It can't be estimated to which extent the EGTC will be used for future cross-border funding programmes of the EU. The reason is that usually a decentralised cross-border co-operation at regional / local level takes place without the involvement of the national state. However, in EU programmes the involvement of states is indispensable, alone for the reason that the national co-financing is needed. It can't be expected that the states would accept voting them down by the majority of the regional / local level. Majority votes are possible in an EGTC.
- The EU-programmes that have up to now been working in the framework of an agreement between the regional / local level and the states on both sides of the border will prefer to continue this way (while approving the agreement).
- As regards interregional and transnational cooperation on programme level, the EGTC will therefore certainly not very often be applied due to the fact that they will continue their work on the basis of previous agreements, which will be improved. Given that an EGTC has a fixed office, joint finances and is subject to national control etc., it is a too "difficult" legal instrument for those forms of cooperation (beyond the project level).



Annex: Definition of a Euroregion:

Organisation

- amalgamation of regional and local authorities from both sides of the national border, sometimes with a parliamentary assembly;
- cross-border organisations with a permanent secretariat and experts and administrative staff;
- according to private law based on national associations or foundations from both sides of the border according to the respective public law;
- according to public law based on international treaties which also regulate the membership of regional authorities.

Method of working

- development and strategic-oriented co-operation, no measures based on individual cases,
- always cross-border-oriented, not as national border region, no new administrative level,
- hub for cross-border relations; citizens, politicians, institutions, economy, social partners, organisers of cultural events etc.,
- balancing between different structures and powers on both sides of the border and with regard to psychological issues,
- partnership co-operation, vertically (European, governmental, regional, local) as well as horizontally beyond the border
- implementation of cross-border decisions at national level and according to procedures applicable on both sides of the border (avoidance of competence and structural power conflicts),
- cross-border participation of citizens, institutions and social partners in programmes, projects and decision-making processes,
- direct initiatives and the use of own resources as preconditions for help and support of third parties,

Content of cross-border co-operation

- definition of fields of action according to joint interests (e.g. infrastructure, economy, culture),
- co-operation in all areas of life: living, work, leisure time, culture etc.,
- equal emphasis on social-cultural co-operation as on economic-infrastructure co-operation,
- implementation of treaties and agreements and concluded at European level between countries to achieve cross-border practice,
- advice, assistance and co-ordination of cross-border co-operation, particularly in the following fields:

Economic development
Transport and traffic
Regional development
Environmental protection
and nature conservation
Culture and sports
Health affairs
Energy
Communications

Tourism and leisure
Agricultural development
Innovation and technology transfer
Schools and education

Social co-operation
Emergency services and disaster prevention
Waste disposal
and Public security.