

**TOWARDS A NEW COMMUNITY LEGAL INSTRUMENT
FACILITATING PUBLIC-LAW-BASED
TRANSEUROPEAN COOPERATION
AMONG TERRITORIAL AUTHORITIES
IN THE EUROPEAN UNION**

Summary position paper

1. Background

Europe already has a long-standing tradition of cooperation between regional and local authorities on opposite sides of its national borders. Whilst cross-border cooperation in particular is already decades old, transnational and interregional cooperation has also become increasingly important over the past 10 to 15 years in the context of EU programmes.

Most cross-border cooperation 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, cooperation strategies and even joint structures.

Experience has shown that the following are the key factors in the development of joint structures for cross-border cooperation:

- Joint structures should only be set up in response to a need for more extensive and deeper cooperation. They are not a first step within the framework of cooperation.
- Joint cooperative structures with decision-making powers should guarantee the equal representation of partners on both sides of the border.
- A practical solution tailored to a region's needs must be sought for each different form of cooperation 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 remedy this situation, there is currently no single EU-wide legal instrument, which can be applied directly in all Member States for cross-border, interregional or transnational cooperation.

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 cooperation, 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).

Structures for interregional and transnational cooperation, which in recent times have largely been established in the context of INTERREG B and C programmes, are generally still not legally binding in nature. There is a lack of instruments for legal cooperation capable of providing solutions to this problem.

Summing up the above, in the past strategic, long-term cross-border cooperation at regional and/or local level has largely been rooted in private law. There are currently only three special-purpose associations concentrating on general cross-border strategic cooperation 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

cooperation based on public law in the domain of interregional and transnational cooperation.

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 cooperation under public law

Naturally, not all forms of cross-border cooperation require a detailed legal basis. For example, partnerships exist that are based on exchanges of experience and they function extremely well without any legal barriers.

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 cooperation. 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 designed to promote all forms of cooperation 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. The value added of cross-border cooperation based on public law

Long-term cross-border, transnational and interregional forms of cooperation and networks generate considerable European, political, institutional, economic and socio-cultural value added. These forms of cooperation provide our 'Europe built from the bottom up' with a structure and, in so doing, are very efficiently supplementing the activities of national, international and supranational institutions.

A public law basis for cross-border cooperation means:

- A guarantee that cooperation can take place in the future at any time, in any place, on any topic and in any form;
- that cooperation does not depend on changing majorities or opinions at government, political and/or administrative level;
- that there is full scope for long-term strategic cooperation;

- that regional and local authorities in joint structures are responsible for the democratic monitoring of the practical implementation of cross-border cooperation;
- binding forms of cooperation involving social partners and citizens;
- joint, binding decisions taken by the cooperating parties, followed by their implementation;
- that tasks/responsibilities may be delegated to local and/or regional forms of cooperation;
- that the basis of cooperation is not the lowest common denominator (each participant can only work within the framework of their respective national authority); instead full cooperation is possible;
- that this full cooperation also includes the management of EU programmes;
- that the decentralisation of EU programmes becomes possible because regional and/or local cooperation 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 cooperation under public law is subject to supervision under that same public law.

5. Can this value added be achieved using an improved legal instrument or special solutions for EU programmes?

The Madrid Outline Convention, the Nordic Agreement, and bilateral/trilateral inter-state treaties, conventions and agreements have been both useful and helpful, effectively paving the way for the first binding forms of cooperation. However, they contain such a range of different regulations and undertakings that it would take a great deal of time to harmonise these agreements – indeed, they could only be partially harmonised by 2007 – with a view to creating fairly equal conditions of departure for cross-border cooperation within the EU.

The current solutions provided by EU law such as the 'European Economic Interest Grouping' (EEIG) and 'European Cooperative Society' (SCE) are mainly aimed at economic forms of cooperation and private/public partnerships based on private law. Substantial changes and adjustments to them would also be needed if they are to pave the way for a suitable basis for the inclusion of regional and local authorities and their Europe-wide cross-border cooperation in any simple way. Cooperation under public law cannot be achieved on this basis.

By the same token, it seems rather inappropriate to create an EU legal instrument that is specifically tailored to cooperation in the context of INTERREG programmes:

- It could not be applied to other EU cooperation programmes outside INTERREG without any changes having to be made;
- If INTERREG is replaced by another instrument (as is currently the case with territorial cooperation in the Third Cohesion Report), another new EU legal instrument would need to be created;
- If EU cooperation programmes were discontinued, the legal instrument for continuing cross-border, interregional and transnational cooperation would be lacking;

- There would be a danger of duplicated structures being created: for a legal instrument suitable only for INTERREG would create structures for cooperation that would compete with the existing decentralised and often successful structures for cross-border cooperation (e.g. Euregios and similar structures, which already manage INTERREG programmes).

Improvements to existing legal instruments or a special solution for EU programmes cannot generate the desired value added. Consequently, a far-reaching, new legal solution is required.

6. A new EU legal instrument (ex novo) for cross-border cooperation – solution to the problems

There is a clear need (especially with regard to cross-border cooperation) for a new 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. The legal instrument should be suitable both for long-term strategic cooperation (e.g. re strategies and programmes) and for cooperation on projects. This would generate the highest value added both for European integration and for decentralised cooperation between regional and/or local authorities.

A new instrument under Community law would 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.

Such an instrument must be firmly rooted in the legal fundament of the EU. There are two alternatives:

- Article 159 (III) of the Treaty on European Union (Title VII Economic and Social Cohesion, amended by the Treaty of Nice).
- Article 308 of the Treaty on European Union (permits activities that are not covered by the treaty regulation) and, in the case of a single application, Article III-117 (III of the European Constitutional Treaty, article on economic, social and territorial cohesion).

The new EU legal instrument should be implemented using an independent EU regulation, as this is the only way of creating a new law (ex novo) that can be applied immediately and without extremely time-consuming transitional processes (i.e. no EU directive). The regulation would set the general rules for decentralised cooperation between regional and/or local authorities on the basis of public (EU) law for all forms of cooperation (cross-border, interregional and transnational) and for both strategic, long-term cooperation and project cooperation at any time, in any place, on any topic and in any form. This would prevent cooperation from being limited solely to the legal responsibility attributed to regional and/or local authorities in their respective national contexts, enabling it instead to be far more comprehensive.

Thanks to forms of cross-border cooperation, the members of regional and/or local bodies are able to make binding decisions which are implemented on the other side of the border in keeping with the respective lines of authority and structures. This

bypasses the numerous inter-state agreements that have continued to limit cooperation to the lowest common denominator based on the respective responsibilities of territorial authorities.

Two 'ex-novo' legal instruments are proposed:

- the **'European Special Purpose Association'** ('Syndicat européen de coopération à vocation spécifique' in French or 'Europäischer öffentlich-rechtlicher Zweckverband' in German), which is known by its abbreviation ESPA. It is primarily geared towards long-term, strategic cooperation (including EU programmes) and is mainly suited to general cross-border strategic cooperation as well as project cooperation (cross-border, interregional and transnational).
- the **'European Public Law Agreement'** ('Accord européen de droit publique' in French or 'Europäische öffentlich-rechtliche Vereinbarung' in German) known by its abbreviation EPLA. This is not as 'heavy' as a special purpose association and is more suited to less intense and more closely targeted forms of cooperation. The EPLA should also provide several options for legal solutions that can be applied to cooperation.

These two solutions allow each regional/local authority to choose the public law solution that suits their capabilities and means and the development stage of their cooperation, be it cross-border, interregional or transnational cooperation. Existing forms of cooperation and agreements will not be excluded. Via the ex-novo legal instrument, the EU is creating the basis and stating the conditions under which a special purpose association can be set up or a public law agreement can be concluded and registered under EU law at national level. The EU regulation does not go into detail, but merely describes the general requirements that have to be met. This will allow flexibility to suit the different conditions applying across the whole of Europe.

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 cooperation.

Amongst other problems, the legal instrument will solve:

- The issue 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.

For example, a member of a special-purpose association can implement joint decisions on behalf of and under instruction from the special-purpose association or of a member on the other side of the border.

This new EU legal instrument, with its specific solutions, will not only ensure that general decentralised cross-border cooperation takes place between regional authorities, but will also provide for the joint development, management and

monitoring of EU programmes at regional and/or local level. While neither national bodies nor EU institutions may be members of a decentralised cooperation structure under public law, with the new EU legal instrument, centralised, public law cooperation structures can conclude a European Public Law Agreement (EPLA) with these important programme partners covering the development, administration and implementation of EU programmes. This agreement would, under public law, regulate relations between the decentralised cooperation structure responsible for programme administration, the respective national bodies and the EU (e.g. an agreement concluded regulating the definition of tasks, obligations, legal relations between the programme partners, responsibility, liability, and administrative and financial management).

According to evaluations of INTERREG, the best programmes in the EU involving actual cross-border decentralised structures, joint accounts, genuinely cross-border projects, joint management, joint financing and joint liability have demonstrated that this is possible and works well.

7. Conclusion

The proposed legal solutions based on an EU regulation take into account the needs and wishes of the European Union as well as those of local and regional authorities. They are consistent and flexible enough to ensure that decentralised cooperation between regional and/or local authorities on the basis of public law will be an important instrument for European integration in the future. The EU regulation offers regional and/or local authorities the chance to make use of this instrument. However, there is no obligation to do so.

Since it is likely that Article 308 of the Treaty on European Union (requiring unanimity) will need to be selected as the legal basis, the support of all participants, especially in the Member States, will be needed before this legal instrument can actually be implemented.

