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## Building Legal Provisions to Overcome Obstacles to Cross-border Cooperation

*Luxembourgish Presidency of the EU Council*



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# 1. CONTEXT

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The Trio Presidency of Italy-Latvia-Luxembourg has decided to take as the starting point of its common program in the fields of Territorial Cohesion and Urban Policy a discussion about the way in which the European Union's objective of territorial cohesion is implemented (Action 1) and to follow up this discussion by a number of concrete measures to strengthen Territorial Cohesion in Europe.

These concrete measures are divided into four further actions that support the implementation of territorial cohesion through discussing a territorial perspective and vision of Europe for 2050 (Action 2), legal provisions for the improvement of cross-border collaborations (Action 3), a recognition of Territorial Cohesion and Cohesion Policy in a broader policy context at the EU level (Action 4), and highlighting the role of Small and Medium Cities for the development of Europe (Action 5).

## Focusing on Action 3: legal provisions for the improvement of cross-border collaborations

Action 3 is especially led by the Grand Duchy of Luxembourg. As part of the preparation for its presidency of the EU Council (second half of 2015), on 19<sup>th</sup> May 2015 the Grand Duchy held a seminar devoted to the obstacles to cross-border cooperation and the tools and policies envisaged to remove these obstacles.

The Mission Opérationnelle Transfrontalière (MOT) has been commissioned by the Grand Duchy to provide support in the preparation of this seminar and produced a document entitled "*Preparation of the Luxembourgish Presidency of the EU Council – Cross-border Cooperation: Obstacles to Overcome*". It presented the results of a questionnaire devoted to cross-border cooperation obstacles and some recommendations to build an appropriate European legal tool to overcome legal obstacles. The whole approach was discussed at the technical level during the 19<sup>th</sup> May seminar in Luxembourg.

The current document is a sequel to the previous step. Designed to provide further information about the development of legal provisions to overcome legal obstacles to cross-border cooperation, it presents an overview of the 19<sup>th</sup> May discussions, as well as some more specific legal obstacles, in order to draft a vision of a possible European tool.

## Why set up a discussion on legal provisions for the improvement of cross-border collaborations?

For years, countries within Europe have politically cooperated, carried out actions of cross-border cooperation and implemented cross-border projects. At the EU level, INTERREG programs and European territorial cooperation exist since 1990. Very positive progress was made, considering all the projects achieved.

However, the results are still not sufficient. Whereas cross-border regions are acknowledged as laboratories for the objective of territorial cohesion, included in the EU Treaty since 2007, cross-border development is still hampered by obstacles.

According to EU objectives, such obstacles should not exist within the EU. Overcoming them appears then to be more important than ever, in order to unleash a strong cross-border development potential. Cross-border cooperation serving European integration and territorial cohesion should be at the heart of EU priorities.

## 2. TECHNICAL DISCUSSIONS

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On 19<sup>th</sup> May 2015, the incoming Luxembourg Council Presidency organized a seminar preparing a political debate on voluntarily applicable specific legal provisions for border regions. Focus was set on overcoming borders, strengthening cooperation and deepening integration. The target audience of the workshop was composed of policymakers, scientific researchers and stakeholders from all sectors at the European, transnational, national, regional and local levels.

All the presentations made during this seminar are available on the following website: <http://www.dat.public.lu/eu-presidency/Events/Workshop-2/index.html>

The seminar was divided into three main sessions, whose discussions are presented below.

### Issues and rules hampering cross-border cooperation

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**Jean PEYRONY** (MOT) presented the results of a survey on cross-border impediments and obstacles that was commissioned by the incoming Luxembourgish Presidency. Please refer to the corresponding document for more details: *“Preparation of the Luxembourgish Presidency of the EU Council – Cross-border Cooperation: Obstacles to Overcome”*.

This presentation was followed by a panel discussion and questions from the audience.

**Julija JAKOVLEVA** (Ministry of Environmental Protection and Regional Development of Latvia) presented the different existing possibilities of doing cross-border cooperation at Latvian borders, especially with INTERREG and other ETC programs since 2004, but also with bilateral commissions and agreements, NGO cooperation, Euroregions and EGTC (no existing EGTCs yet at Latvian borders). Latvian border authorities cannot do cross-border cooperation without an intergovernmental agreement, but such agreements exist, for instance since 1996 there is a cooperation agreement and, since 2005, a joint development strategy, for cities of Valga and Valka. Some borders stay in people's minds.

**Alfonso ALCOLEA MARTINEZ** (Committee of the Regions of the EU) acknowledged that EGTCs solve the problem of the governance, but do not change the law. Moreover, EGTCs have only one VAT number, which makes difficult for them to work in more than one country... Some EGTCs open offices elsewhere and ask for a VAT number, which is an operational solution, but a failure of the EGTC tool.



**Alexandra DEIMEL** (Federal Chancellery of Austria) explained that Austria is very concerned by cross-border cooperation, especially because more than 75 % of Austrians are living less than 60 km of a border. She also presented examples of concrete projects of cooperation (Bodensee, Agglomeration scheme Rheintal, Centrope – Discussions on schools, universities, infrastructural needs; Lower Austria implemented projects on cross-border health with South Moravia, and a hospital in Gmünd is welcoming Czech patients).

**Alice ENGL** (European Academy of Bolzano) explained that in fact EGTCs do not change the law, and that there is a need for specific provisions to take in consideration the difficulty of Italian civil servants to cross the border because of needed administrative work. It appears also important to discuss about possible mistakes that should be avoided. Finally, it should also be noted that the EU has no competency on many fields that the EGTC wants to address.

The audience then asked some questions, claiming to take in consideration that a new European legal tool should be implemented on a voluntary basis, that it should also take in consideration the experimentation issue. A participation raised the climate change issue, which was not present in questionnaires received by the MOT.

## The need for empirical observation in support of planning for cross-border territories

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**Olivier DENERT** (MOT) presented a work the MOT is conducting for the French Government, the animation of a working group on cross-border statistical observation with statistical institutes of countries around French European borders.

**Daniel SVÄRD** (Öresund Statistical Observatory) presented the work of cross-border statistics within the Öresund Region (SE/DK).

**Volker SCHMIDT-SEIWERT** (BBSR, Germany) presented cross-border observation issues at German borders.

*(Please refer to the presentations for more details, by clicking the link above).*

There was then a discussion between the previous speakers and **Brigitte BACCAÏNI** (CGET – France) and **Gyula OCSKAY** (CESCI – Hungary).

The main subjects were about showing the need for available cross-border data: for instance, the definition of the best geographic area for a legal tool could be facilitated with available appropriate cross-border data. Poland also published a study about statistical data of cross-border cooperation.

The main problem of it is the funding of such programs. For instance, in Öresund, there is no more financing from INTERREG (end of a project). The Upper-Rhine Department (France) also explained that it is collecting data and geographical information, metadata, etc. It has not anymore funds to

continue its work, but would like to give the chance to the existing system to continue working at the regional level. An important way of thinking would be to prove the costs of non-cooperating.

Finally, the link between cross-border monitoring and improvement of cross border public policies was illustrated: for instance, a cross-border healthcare observatory between France and Belgium was set up in the 2000's to have a better vision of the needs, obstacles and perspectives of cooperation at this border. As a result, a pioneering project ("*Transcards Santé en Thiérache*") was developed in the small region of Thiérache at the beginning of 2000's, to experiment a cross-border area, where patients and doctors were able to go on each side of the border.

This first experience has made easier the conclusion of a French-Belgian bilateral agreement about healthcare issues. It was also a kind of prototype for the creation of several organized cross border areas on medical care. Today, the French-Belgian border is one of the most integrated cross-border areas within Europe when regarding health care.

As a conclusion, one of the most important conditions for cross-border cooperation and organization of efficient cross-border public policies is a better cross border observation, which has to be taken into account much stronger within European policies. The Luxembourgish presidency is an important opportunity in European agenda to connect issues about observation and obstacles overcoming.

## Thematic workshops

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This third and last session consisted in three thematic workshops (that took place simultaneously) addressing different sectors:

- A) Spatial planning, mobility, environment
- B) Labor market, economy, innovation
- C) Health care, social affairs, education

### Spatial planning, mobility, environment

For the Luxembourgish presidency, there is a need to provide specific legal provisions. The mix of three topics does not make the discussion easy. There are different scales.

For spatial planning, there is no need of more legal provisions. It is however necessary to foster and boost cooperation. The different languages may be an obstacle (need to translate the documents and make them accessible). The communication remains important (inform your neighbor and regions).

For environmental issues, there is a need of new legal provisions concerning waste treatment and water management, in particular in cross-border urban areas. The theme of energy should be also taken into account. In rural areas, the transboundary nature parks show good examples of integrated policies (e.g.: Transboundary Biosphere Reserves recognized by UNESCO is a tool for cross-border management).

Concerning mobility, there is a real potential within cross-border agglomerations but concrete obstacles still remain. In some cases, the EGTC can be used to coordinate transport infrastructure (i.e.: between France, Monaco and Italy). In smaller cross-border conurbations, the citizens pay different prices when using public transport and that's why they cannot feel that they belong to a common space.

In local cross-border agglomerations, it takes long time to achieve full integration. With an older cross-border cooperation on west European borders, the projects are more advanced there than on eastern borders (in Strasbourg/Kehl, the bus line is being replaced by a tram; in Frankfurt/Slubice, it took 10 years to have a bus line).

More integration means also to speak the language of the neighbor, the recognition of qualifications, and more generally to eliminate system differences.

There is a need of new legal provisions to help cross-border agglomerations to become more integrated.

### Labor market, economy, and innovation

The labor market is already quite integrated; a lot of projects are already achieved. Some participants said that cross-border innovation (clusters ...) requires simplification (e.g. state aid rules), others consider that there is no legal problem. A specific legal framework adopted thanks to a treaty has been proposed during the workshop at the scale of the Great Region (LU-FR-DE-BE).

Existing legal tools, such as EGTCs, are not perfect but they help to cooperate. These tools are not always used as they should be or as they could be. It is up to the member states to implement them properly (for instance, the issue of EGTCs' staff), the UE has fulfilled its duties. It is not always easy to put a cross-border topic on the agenda. Raising awareness requires knowledge gathering, developing integration index...

Regions have to develop their own specific cross-border cooperation.

### Health care, social affairs, education

This workshop examined the existing tool between France and Belgium ("the ZOAST", Organized Zone for Access to Cross-border Healthcare), and discussed about its potential generalization across the EU. France and Germany are already thinking about providing such a solution at their common border. This solution is especially interesting, because it combines, on a local territory, national and regional actors. It is a matter of synergies and money saving in urban areas, and also of accessibility to doctors in rural ones.

One of the lessons from the ZOAST case is that examples showing the value added of a potential European tool are very important to convince people of its utility, and also to make the political decisions possible.

Regarding cross-border education, the EGTC Lille-Kortrijk-Tournai experience (French-Belgium border, first EGTC implemented in Europe) in cross-border apprenticeship training shows that there is a need for political pressure to change the legal framework. More generally, on this topic (educational matters, vocational training) bilateral diplomacy is necessary to find operative solutions.

Other ideas were expressed in this workshop, such as the idea to make compulsory for member states to provide citizens with information about possibilities on the other side of the border, in terms of public services.

Then, the question of the area of application of a European legal tool was addressed, especially to determine whether it should only be available for EGTCs, or if it was necessary to go further. The general opinion was pointing out the utility of such a tool for an EGTC, but this tool would also be more

useful if potentially useable by other structures, such as local and regional authorities, to take in consideration other territories.

## Conclusions and closure

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**Jean-Claude SINNER** (Department of Spatial Planning and Development of Luxembourg) presented some conclusions of the day. If cross-border action was at the beginning considered as a wishful thinking, it also became serious with penal liability of doctors, showing the need for such legal provisions to be implemented. It is important to consider not only obstacles and good practices, but also legal framework. Concerning cross-border observation, it appeared as really needed in the context of ETC programs. How can you define results, when you don't have the observation tool? Then, the concept of defining the cost of non-cooperation seemed interesting to convince of cross-border cooperation utility. Finally, the idea of developing the "ZOAST" tool in the whole Europe was quite convincing.

**Nathalie VERSCHELDE** (European Commission – DG REGIO) closed the day, expressing her sincere thanks to Luxembourg to have taken this topic on-board. She reminded that INTERREG program was there to help starting projects; local authorities are then legitimate to continue funding. In terms of cross-border cooperation, there is still a lot to be done: obstacles, unreasonable burdens, etc. These obstacles are more a reality in borders that have benefited from INTERREG for a long time than in others, where cooperation is not yet developed. More should be done for border regions. In the name of territorial cohesion, DG REGIO has to play a role to foster a debate with stakeholders, citizens and member states. All NUTS 3 regions represent one third of the EU population. This is why DG REGIO will contribute to this debate, collecting more information and looking at solutions. A study will be launched during the summer of 2015, for 18 months. In September, a public consultation will be launched by the European Commission and citizens will be proposed to respond to it. Key stakeholders will then be invited to discuss aspects of the questionnaire. The Commission also thinks that the lack of cross-border data is an issue, cross-border programs are asked to respond to the need for measuring their impact, and it is complicated and difficult to quantify. Political will is needed to take this issue seriously. Political deciders must actually decide. The European Commission intends to engage the member states with regions and associations to make a difference within a few years.



## 3. FOCUS ON THREE CONCRETE LEGAL OBSTACLES

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During the 19<sup>th</sup> May seminar, which was preparing the Grand Duchy of Luxembourg presidency on overcoming obstacles to cross-border cooperation, the MOT presented the results of a questionnaire, showing concrete cross-border legal obstacles on EU borders (available in the first document "*Preparation of the Luxembourgish Presidency of the EU Council – Cross-border Cooperation: Obstacles to Overcome*").

The following obstacles were presented and discussed:

- Lack of compatibility of national healthcare systems in cross-border areas;
- Impossible implementation of cross-border projects because of different legal frames;
- Lack of legal certainty for cross-border facilities and shared services;
- Differentiated economic development along the border, due to different national framework conditions;
- Difficult cross-border economic development of European outermost regions because of EU standards.

For all of these obstacles, the possible solutions had in common to implement a European tool facilitating local agreements between local, regional or national authorities of concerned states.

Before going further in examining such a tool, it seems now important to focus on three more examples of concrete cross-border projects, which could have benefited from European legal provisions, to be more easily and rapidly implemented.

Some of these obstacles were discussed during an international conference about cross-border public services at German borders, organized by the German Federal Ministry of the Interior, the 30<sup>th</sup> June and 1<sup>st</sup> July 2015 in Berlin.

## Cross-border facilities: the example of a French-German crèche

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In some cross-border areas, facilities often can be done only in a cross-border way, otherwise the population would not attain critical size. EGTC and local agreements can be settled to support the management, but they do not solve problems of functioning. For the 19<sup>th</sup> May, the MOT presented the example of the cross-border hospital of Cerdanya (French-Spanish border), which despite being an EGTC, has not solved yet the issue of legally safeguarding medical activities of French hired staff working in the hospital located in Spain.

Another example may be interesting in understanding the need of defining a legal framework to a cross-border facility: a cross-border French-German crèche, located in France. This crèche is the result of a cross-border cooperation project between the cities of Strasbourg (FR) and Kehl (DE) and the building construction received funding from INTERREG program. The project consists in having a common facility, allowing taking care of children from both countries, with child care workers also from both countries.

In addition to cross-cultural difficulties (different ways to care for the children in France and in Germany, parents wanting to have their “national” method applied), there are legal difficulties of two kinds. The first one is that German child care workers cannot automatically work in France (issue of qualifications recognition). The second one is that being located in France, this crèche is not eligible to subsidies from Baden-Wurttemberg Land as it would be in Germany, even if this is a cross-border project.

**Basically, using a European legal tool, both municipalities of Strasbourg and Kehl could have been able to suggest their states a potential agreement to provide this crèche a solid legal framework to function. This potential agreement could indeed have authorized child care workers recognized in Germany to work in this particular cross-border crèche, and made it accepted as a beneficiary of state subsidies from Baden-Wurttemberg Land (almost for half its functioning).**

## Cross-border tramways

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Still between Strasbourg and Kehl, another example is very interesting while considering the use of a new European legal tool: the extension of a tramway line of Strasbourg tramway network to the City of Kehl.

Developed at the end of 1990's, Strasbourg tramway network is in 2015 the longest in France (60 kilometers, capacity of 300,000 passengers per day). On the other side of the Rhine, in Germany, Kehl is part of Strasbourg suburbs, and the bus line which is crossing the Rhine is one of the busiest of the whole Baden-Wurttemberg Land. Extending a tramway line to the center of Kehl was then a natural project, not only symbolic for cross-border cooperation, but also useful for citizens.

Among all legal processes needed and problems faced, the project was difficult to implement just because of different technical standards applying in Germany for tramways. If today a new bridge across the Rhine is being built for the tramway, new legal difficulties will appear: the whole Baden-Wurttemberg transportation system has an integrated pricing, which is not shared with the Strasbourg transportation area and makes difficult to have a real cross-border integrated pricing.

**In such cases, a local solution would have been to apply in Germany French technical standards, only for this particular tramway line, and also consider it as an integrated part of Strasbourg pricing system. With an adapted European legal tool, involved municipalities of Strasbourg and Kehl could have suggested this solution to their member states.**

## Cross-border trains

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Between France and Italy, regions of PACA (FR) and Liguria (IT), with the Principality of Monaco, have thought of implementing a cross-border train service without load changes between France and Italy (now, all passengers have to change train at the Ventimiglia station).

Within all difficulties to solve to implement such a cross-border service, the rolling stock is one of the major difficulties. Indeed, today there is no rolling stock available to do this cross-border service. Rolling stock doing cross-border service has to be approved by each country (France and Italy) to operate in their territory.

Licensing rolling stock can be very long (~4 years) and demand exchanges back and forth between national certification authorities and manufacturers. When the procedure has to be conducted simultaneously in two countries, costs became unaffordable for regional authorities responsible for organizing cross-border regional transport. The manufacturer has indeed to pass the cost of licensing rolling stock on the final customer, and the purchased quantity is too small to make it affordable for regional transport authorities (the manufacturer would not easily find other clients for regional transportation rolling stock licensed in France and Italy).

**With a European legal tool, involved regional authorities could suggest their member states to agree on recognizing the licensing of one country legal to operate rolling stock on a particular portion of the other country railway network, provided that it is for a cross-border regional service. Considering that Italian standards are more constraining than French ones (fire safety standards are more strict in Italy, due to more tunnels), a special agreement could authorize in France the circulation of Italian licensed rolling stock for a regional cross-border service (only in a predetermined path), provided that Italian authorities check predefined minimal requirements of rolling stock to operate in France in cooperation with French experts (communication systems, electrical supply, etc.).**

## 4. DRAFTING A EUROPEAN LEGAL TOOL

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Considering concrete obstacles presented above and during the 19<sup>th</sup> May seminar, it becomes possible to draft outlines of a European legal tool.

### What kind of legal provisions are we talking about?

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Different legal tools already exist within the EU. Thanks to the Madrid Convention of the Council of Europe (1980), local authorities can make agreements on cross-border cooperation projects within their competency, provided that the Convention has been ratified by the States concerned. Since 2006, the European regulation on the EGTC (European Grouping of Territorial Cooperation) allows EU member states and/or their public authorities to create cross-border legal structures.

**The goal is not to reinvent these existing tools, but to propose a new tool aiming at overcoming obstacles still present.**

Indeed, existing tools are not sufficient to overcome all legal obstacles hampering cross-border cooperation. EGTCs do not change the law. Local authorities and EGTCs are facing legal obstacles. If many obstacles can be solved within existing legal frameworks or through changes in national legislations, new provisions at the EU level may create a useful additional tool, available for actors involved in cross-border cooperation projects **on a voluntary basis**, like already existing instruments.

**At the EU level, a regulation could create this new tool, and make it available for interested actors of cross-border cooperation. It would be based on the article 175 of the Treaty on the Functioning of the EU, to achieve objectives of economic, social and territorial cohesion of article 174 TFEU.**

### What would be the objective of a new European regulation?

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Economic, social and territorial cohesion can be facilitated by improving cross-border cooperation in functional regions. Cross-border areas within the UE constitute key territories to promote overall harmonious development. **The objective of a new EU regulation is then to provide a tool, allowing overcoming existing legal obstacles, to easily and rapidly implement cross-border operational projects.**



The tool would be used by local and regional public actors, who are the ones facing obstacles to cross-border cooperation, in order to find a legal solution to implement their project. They would design a solution. This legal solution would use existing law or standards of member states concerned and would define a specific legal framework applicable to a specific cross-border project. Then, involved member states would have to examine the solution, possibly amend it, in order to adopt or reject it.

Thus, a European regulation allowing member states to agree on a common legal framework applicable to a specific cross-border project would be a great possibility to **strengthen potentialities for cooperation and then improve competitiveness and cohesion of cross-border areas**.

Basically, the following steps are identified:

- 1) **The European Union provides a new tool available for public authorities involved in cross-border cooperation, with a European regulation, directly applicable in any member state once adopted.**
- 2) When facing a legal obstacle in implementing a cross-border cooperation project, involved local authorities can identify their needs to make the project achievable. They can use the European regulation to suggest to their member states a specific legal framework (using already existing law of member states implied) applicable to this very specific project.
- 3) Member states have to examine the suggested solution, possibly amend it, discuss it, and eventually adopt it or reject it.
- 4) Once the suggested solution adopted, the cross-border project can be implemented within the defined legal framework.

**Step 1 is the topic for discussion under Luxembourgish presidency. Some provisions applicable to steps 2, 3 and 4 are provided for in the regulation; they should then also be discussed from this point of view.**

## Why would this new European regulation work efficiently?

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Having a new regulation would allow bringing a new European tool to solve legal cross-border obstacles. It should neither be regarded as miracle tool, nor as the only, absolute tool for cross-border cooperation. On the contrary, this should be viewed as a **complementary tool, supplementing the EGTC and the Madrid framework agreement**. It would offer new possibilities, facilitating projects by providing them a legal framework adapted to their cross-border nature.

Basically, all cross-border legal obstacles can be solved by an intergovernmental agreement, which takes time for negotiation and ratification, and which only implies national governments<sup>1</sup>. The most important advance of this new European tool would be to provide a legal framework allowing local and regional authorities, involved in cross-border cooperation projects, to suggest operational solutions, to overcome legal obstacles they meet. Local and regional authorities would then have the initiative in suggesting operational solutions, and member states would have to examine this.

By supporting cross-border joint local initiatives, this tool would allow a faster and easier implementation, with a procedure also enabling inter-European dialogue between concerned member states.

## What would not be permitted by this new regulation?

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The European regulation **would allow using specific local rules in a cross-border context; it would not create these rules and would not contain them either**. This tool would not be an instrument of cooperation between states; it would rather be focused on restricted local cross-border areas. The precise area of application of a local agreement permitted by this tool has to be defined (geographic area linked with a precise cross-border project, possibly time limit).

**It is also important to consider that the instrument does not aim at creating new barriers. Overcoming obstacles at one border does not imply moving the border (or move the obstacle). Obstacles are supposed to be overcome, not moved at the expense of other citizens. This tool should only create win/win situations.**

### Addressing constitutional issues

This is why this new regulation **has to respect the principle of equality of all citizens before their national law** (present in a majority of EU member states' constitutions). Applying the law or the standards of another member state for a specific cross-border project, instead of the concerned national law (e.g. to extend a tramway line), justifies itself when considering a territorial specificity (and thus not questioning equality of citizens before the law).

Finally, this regulation **does not allow border local authorities to legislate**. They can only ask their member states to consider a legal solution to a cross-border problem they are facing. **The legal solution found could only take in consideration law or standards already applying to the project in concerned member states** (and possibly chosen between them). These derogations/arrangements have then to be approved by member states involved. Moreover, to ensure a strict respect of member states' sovereignty, it appears necessary to provide for the possibility of suspension of each local agreement made by each member state involved. Of course, in case of legal

<sup>1</sup> Possibly involving federative governments in federative states

action, courts would have to enforce legal solutions provided for in the local agreement during the period it has applied.

### **Single market and public procurement procedures: a legal obstacle solved thanks to European jurisprudence**

Sometimes cross-border cooperation faces difficulties to implement projects, because of needed public procurement procedures. For instance, between France and Germany, two public structures (SYDEME – FR and EVS – DE) are cooperating in waste management. Bio-waste is treated in one part and converted into compost and biogas, whereas non-recyclable waste is treated in another part and converted into heat and electricity. This allows making economies of scale and ensuring efficient use of public funds.

However, the respect of public procurement procedures is a legal obstacle to implement such cross-border projects within Europe: if two border municipalities would have to wait for the end of both public contracts, cross-border projects would be almost impossible to realize. This is why they used a recent jurisprudence of the Court of Justice of the European Union (CJEU), which in 2009 basically recognized the possibility for local authorities (in Germany, which is transposed to a cross-border situation) to cooperate in order to ensure a common mission of public service, and thus entrust another local authority for the waste management without prejudice to the public procurement procedures (Case C-480/06, Commission of the European Communities against Federal Republic of Germany, Court's judgement of 9<sup>th</sup> June 2009).

**This shows that a new European legal tool will not solve everything, but what is of member states competency. Other obstacles, such as those coming from EU legislation, will still have to be solved thanks to a change in legislation or a positive jurisprudence.**

## **Why would this tool be used by local and regional authorities?**

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Basically, cross-border legal obstacles could be solved thanks to an intergovernmental agreement. However, the negotiation of such agreements takes time, as well as their ratification. Furthermore, local cross-border projects may not be considered as enough important or too many to be the subject of an intergovernmental negotiation. Moreover, local actors do not control these negotiations.

This is why the potential new European tool would allow actors involved in a cross-border project to find a legal solution to overcome their problem and suggest it to competent authorities. Often, actors involved in cross-border cooperation projects are local authorities, they are the ones concerned by legal obstacles. **They can be considered as being in the best position to build an operational solution.** Representing different sides of the border, **EGTCs or equivalent cross-border public bodies would also be able to design legal solutions and propose them to the different member**

**states concerned.** Sometimes local cross-border cooperation can also be developed by national actors, and they should also be able to elaborate solutions.

## What would be the process when using this tool?

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### The EGTC regulation: a model for the new regulation?

A new European regulation that would create a tool to overcome obstacles to cross-border cooperation has to be compared with the existing EU tool, the EGTC, in its process of approval.

In creating an EGTC, potential members (who are local authorities and their groupings, states, etc.) adopt a convention and statutes, and transmit it to their member state for approval. Member states have six months to approve or not the participation of the member to the EGTC, on the basis of the convention. A member willing to take part into an EGTC, whose tasks would be outside its competency, may be prevented to do so by the concerned member state.

The European regulation about the new tool could provide for a similar process of approval. Of course, in this new regulation, **local or regional authorities would not deliberate on a convention** they have no competency to implement themselves. **They could however deliberate on a commonly elaborated solution, in order to submit it to their member states.** This solution would be designed by them to overcome a specific legal obstacle linked with the implementation of a project for which they have competency.

**Concerned member states would then have to examine this solution, possibly amend it and decide together whether to adopt it or not. It is up to each member state to determinate which level or institution will be competent to approve it inside the state (federated state, region, etc.) and which particular procedure should be followed. In any case this procedure would be simpler than an intergovernmental agreement.**

## What are the issues of mutual recognition?

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Basically, the regulation would be comparable to a framework agreement, allowing concluding specific local agreements between competent authorities to define the legal framework of a cross-border project. However, **defining a different legal framework for a specific project means that legal certainty has to be ensured, and that courts have to be competent to apply a foreign law.**

Since the *Cassis de Dijon case*<sup>2</sup>, mutual recognition by member states of their respective laws is ensured for goods. With this new regulation, a member state would potentially have to apply the standards or law of another member state in its territory, for the functioning of a specific cross-border project<sup>3</sup>. Mutual recognition reaches then another dimension: in case of a trial, the national court would have to apply the law of this other member state. This is why the legal solution proposed to the member states should also contain procedures to possibly ensure cooperation between courts<sup>4</sup>.

Actually, this issue is already a subject within the EU. Indeed, since 2013, EGTCs headquartered in one member state can hire staff based in another country with the law of this other country. It means that the competent court of member state in which the EGTC is headquartered would have to apply the law of this other country, in case of a legal proceeding.

## In which areas should the tool be used?

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A new European regulation would be taken under article 175 TFUE, then to facilitate achievement of economic, social and territorial cohesion. By definition, local authorities do not have competency on national law, though they could propose their member states legal solutions to manage a cross-border project. Does that mean they will suggest solutions in every possible area?

**An easy limitation is to restrain the use of the tool by local authorities to projects they have competency to implement.** For instance, a cross-border tramway should be managed by municipalities, thus they could use the tool and suggest a legal solution. On the contrary, municipalities, which would not have competency in providing health cares, could not use the tool to suggest legal solution in this field.

## Should specific provisions be written for outermost regions?

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On basis of article 349 TFUE, **European outermost regions can beneficiate from specific measures in European legislation, to take into account their geographic situation.** When speaking about cross-border cooperation, they have to deal with third states (Brazil, Suriname,

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<sup>2</sup>Case 120/78, 1979 decision of the Court of Justice of the European Communities, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein

<sup>3</sup> Dr. Joachim Beck (University of Applied Sciences Kehl, Germany) analyzed this matter of mutual recognition in BECK, J. (2015). Cross-border Cooperation and the European Administrative Space – Prospects from the Principle of Mutual Recognition. *International Public Administration Review*, 13(2), 9-36.

<sup>4</sup> In some member states, the court may already have to apply foreign law when necessary. For instance, in France, well established jurisprudence even says that the judge has to apply this foreign law, interpreting it as its foreign counterpart would do.



Caribbean states, Madagascar, The Comoros, etc.). **Cross-border cooperation often presents for them a high potential of economic development**, however they have to deal with countries, which cannot compete with European standards. This situation is limiting potentialities of further local development.

If it seems complicated having an agreement with these third states on legal provisions adapted to cross-border cooperation projects, it would instead be useful for these projects to benefit from further derogations to EU law. Thus, when a local authority in an outermost region tries to develop a specific cross-border project, using this tool could be useful to develop a specific legal framework adapted to the considered cross-border development project. The local authority could suggest a legal solution to its member state, and also discuss it with the European Commission (whether involving EU competency).

More concretely, when a specific cross-border project is planned by a local or regional authority from a European outermost region, European or national law could be amended by specific waivers asked by the involved authority.

For instance, it is today not economically viable to refine Guyanese gold in French Guiana, it is thus refined in Europe. However, the critical mass needed could be reached with gold mines from both French Guiana and Surinam. It would though imply a movement of goods across French-Surinamese border. Provided that local economic development is generated, more favorable conditions to goods movement could be negotiated.

Maybe similar provisions could be negotiated to goods trade between Guadeloupe, Martinique and their neighbors, if that allows these territories to develop economic activities, taking advantage of the opening of a third set of locks in the Panama Canal and a French highly qualified workforce.

## 5. DISCUSSING THE CONTENT

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These legal provisions are to be discussed during NTCCP meeting (9<sup>th</sup> September 2015), in order to prepare the DG meeting for Territorial Cohesion (20<sup>th</sup> October 2015). Presidency conclusions will be presented at the Informal Meeting of Ministers responsible for Territorial Cohesion (26<sup>th</sup> November 2015). The following questions aim at launching discussion. This document also examines it and offers ideas for achievable solutions.

### Solving the scale issue

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The drafted tool aims at bolstering cross-border cooperation and solving legal obstacles, linked with the implementation of cross-border projects. What is the scale definition of cross-border cooperation? Could a solution be implemented for a project managed by two municipalities, even if they do not share a border? What is the most relevant territorial dimension? How should this be defined in the tool?

### Solving the player issue

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Many different actors take part into cross-border cooperation projects. They can be public local, regional and national authorities, EGTCs and other cross-border groupings, or private profit and non-profit players. Moreover, this tool has to take into account the differences between member states, when federal ones have more competencies at the regional level, and centralized ones have more state administrations directly involved into cross-border cooperation projects. Among these players, who will be authorized to use the tool?

### Addressing the process issue

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Using the tool means defining a procedure to follow in each member state to propose a legal solution to a cross-border obstacle. Should the European regulation provide for some minimal requirements in this process? Furthermore, to ensure the member state sovereignty, how the regulation can provide for a procedure for each member state to terminate the application of the legal solution found?

### Addressing cross-border issues with third countries

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The new tool would solve many obstacles at internal borders of the EU. However, cross-border cooperation is also very developed with third countries within Europe (and not only with outermost regions). If it seems important to include specific provisions for outermost regions, on the basis of article 349 TFUE, how could this tool also apply for cross-border cooperation projects between the EU and a third country?

## Assessing the found solution

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How to assess implemented solutions? Should such a procedure be provided for into the European regulation? Does that imply a time limit for the validity of found solution?

