



**A tool for the attribution and application of specific provisions
for the improvement of cross-border cooperation
(Action 3 of the IT-LV-LU Trio Presidency)**

*Input paper for the Informal Ministerial Meeting on Territorial Cohesion
under the Luxembourg Presidency*

Luxembourg, 26 November 2015

1. Setting the scene

The Trio Presidency of Italy-Latvia-Luxembourg has placed its programme in the fields of Territorial Cohesion and Urban Policy under the general theme of making the objective of territorial cohesion included in the Lisbon Treaty as well as the Territorial Agenda 2020 more operational. There is a window of opportunity for this kind of debate after the launch of the ESIF programs and right at the moment when the new Commission is taking up its work under the slogan of “A new start for Europe”.

The starting point is 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), **the attribution and application of specific provisions for the improvement of cross-border cooperation (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-sized Cities for the development of Europe (Action 5).

The Presidency believes that cross-border cooperation, as well as transnational cooperation and macro-regional strategies play a crucial role in achieving territorial cohesion.

A new European Regulation should therefore be initiated under Article 175 TFEU in combination with Article 174 to develop actions leading to the strengthening of economic, social and territorial cohesion in order to facilitate cooperation and to overcome existing obstacles.

Objectives of the Luxembourgish Presidency

The Luxembourg Presidency believes that a new tool – a “Tool for the attribution and application of specific provisions in cross-border regions” as described in Chapter 3 of this note – may prove a useful addition in the European legal toolbox, available for actors involved in cross-border cooperation projects on a voluntary basis, like already existing instruments.

The Luxembourg Presidency is confident that subsequent Presidencies will continue the work. The Presidency imagines that the Regulation giving a legal basis to this tool could be considered separately or in the framework of the preparation of the legislative package for Cohesion policy post-2020.

This note wants to give evidence on the need for such a tool (Chapter 2), describe its possible structure and functioning (Chapter 3), and formulate some issues that are still to be resolved from a legal and a political point of view (Chapter 4). The Ministers are invited to discuss the questions for debate and to give their opinion (Chapter 5).

As a first step, the incoming Luxembourg Presidency organised an expert workshop on 19 May 2015 in Luxembourg. The next step was to put the topic on the agenda of the meeting of the National Territorial Cohesion Contact Points on 9 September 2015 in Luxembourg. The preliminary debate offered a first exchange on the topic at the intergovernmental level and provided some initial conclusions. The Luxembourg Presidency also held a workshop at the OPEN DAYS 2015 to exchange views and experiences with local and regional stakeholders. The debate at the meeting of the Directors-General responsible for Territorial Cohesion on 20 October 2015 focused on the first draft of the dedicated section in the Luxembourg Presidency Conclusions and indicated paths for taking the issue forward.

2. The need to develop cross-border cooperation and cohesion in border regions

Why set up a discussion on specific provisions for the improvement of cross-border cooperation?

For many years, European countries have politically cooperated, carried out actions across borders in cooperation, and implemented cross-border projects. Interreg programmes and European Territorial Cooperation have existed since 1990 at the EU level. Considering all the projects achieved, much positive progress was made. The possibility to create adequate structures as, for example, the EGTC is another achievement.

However, there remains a big potential to go further “beyond spending” and to reach the next level in cooperation. Although cross-border regions are acknowledged as laboratories under the objective of territorial cohesion (included in the EU Treaty since 2009), this type of region cannot benefit from specific provisions allowing for legal “experimentation” or “innovation” under laboratory conditions. Obstacles are particularly apparent when cooperation becomes more operational and integrated across the borders, as in the case of public transport, planning, waste management and waste water disposal, business parks, and social as well as health services (for example the Cerdanya cross-border

hospital). These are precisely the type of cross-border services that can bring immense benefits to communities in more sparsely populated border regions.

Many obstacles can be solved within existing legal frameworks by arrangements between actors; other obstacles could be solved through the mutual recognition of the regulatory framework on both sides of the border or would require changes in national legislation within the present EU legal framework. In many cases, these arrangements suffer from a lack of legal certainty and are thus not viable in the long term.

According to EU objectives, such obstacles should not exist within the EU. Overcoming these obstacles, therefore, appears to be more important than ever in order to unleash under-used cross-border development potentials and thereby contribute to the Unions' objective of creating jobs and growth. Cross-border cooperation serving European integration and territorial cohesion should be at the heart of EU priorities.

What would be the objective of a new European Regulation?

Economic, social and territorial cohesion can be facilitated by improving cross-border cooperation in functional regions. Cross-border areas within the EU constitute key territories to promote overall harmonious development. **The objective of an EU Regulation would then be to provide a tool to overcome existing regulatory as well as other legally rooted obstacles and to facilitate a better implementation of cross-border operational projects.**

The proposed new European tool would allow actors involved in a cross-border project to find an appropriate solution to their obstacles and in the process suggest it, on a voluntary basis, to the competent authorities. Often actors involved in cross-border cooperation projects are local authorities, local operators or service providers, and they are the ones directly affected by obstacles related to differences in legislation and standards. They are also usually in the best position to design and propose solutions.

The proposed tool is tailor-made to address a well-specified obstacle in a project or strategy and is bottom-up. This does not exclude that national actors (or regional actors having policy competences) benefit from the proposed specific legal framework. The tool should only be applicable to concrete strategies and projects, which could not be implemented without a common approach. A further limitation is to restrict the use of the tool to those local and regional authorities that dispose of the relevant policy competences to implement such a project. For instance, in relation to a cross-border tramway only municipalities with policy competence in the area of transport could use the tool and suggest a solution for obstacles related to this tramway. On the contrary, municipalities without policy competence in the area of healthcare provision could not use the tool to suggest a solution in this field.

It must also be stressed that local and regional authorities would not be legislating or gaining new legislative powers. The tool only offers these authorities the opportunity, on a voluntary basis, to ask their Member States to consider a particular regulatory or legal solution to a cross-border problem that they are facing. The solution that is found could only take into consideration laws or standards

already applying to the project in at least one of the concerned Member States, including the possibility of a mix of laws or standards (provided that consistency is assured). Simply put, the objective is to *pull legal provisions onto the other side of the border*. These arrangements must in all cases be approved by the Member States (see Chapter 3).

Do we have the necessary evidence to assess shortcomings and obstacles?

To assess the contribution of cross-border cooperation to territorial cohesion, we need evidence on the effectiveness of cross-border integration (e.g. flows of cross-border workers and trade, cross-border use of public services, cross-border clusters, etc.) and the potentials lying in this integration. This evidence is generally lacking. Only in a few cross-border regions, local stakeholders have succeeded in building cross-border observation systems. Moreover, data on cross-border flows is rarely collected or published. Therefore, we need, as a supporting action

- at the local and regional level, to develop cross-border data and observation systems, allowing to measure the current situation, potentials and outcomes of integration, with the support of Interreg programmes in their areas of priorities;
- at the cross-border level or at the scale of macro-regions, to develop cooperation between national statistical institutes and administrations in charge of territorial cohesion so as to coordinate actions;
- at the EU level, to mobilize the European Commission (DG REGIO, Eurostat) and EU-wide networks (ESPON, Interact, etc.) to coordinate and capitalise such initiatives.

Are existing instruments not sufficient?

A range of legal tools already exist within the EU. The European Outline Convention on Transfrontier Co-operation (known as Madrid Convention) that was created by the Council of Europe in 1980 for the first time offered local and regional authorities the opportunity to conclude agreements on cross-border cooperation projects within their competence, provided that the Convention has been ratified by their States. However, States themselves cannot be partners of agreements based on the Madrid Convention.

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 entities.

However, these tools do not address the existing legal framework. The Presidency underlines this point: The EGTC regulation is a big achievement, but is not sufficient in itself to overcome all legal and regulatory obstacles in cross-border cooperation that are faced by local authorities as well as EGTCs themselves. The new tool is a necessary complement to EGTCs, but it is not an alternative to them. EGTCs, however, may play a crucial role in implementing the tool as representatives of local and regional authorities.

Some obstacles could certainly be solved only through an **intergovernmental agreement**. However, there is a lot of experience that points that the negotiation and ratification of such agreements are rather demanding, take time and face a high risk of failure as, in principle, countries tend to avoid the

creation of precedence without a clear legal framework. Furthermore, local cross-border projects of the scale mentioned in our examples may not be considered as important enough or as numerous enough to be the subject of an intergovernmental negotiation. Moreover, local actors cannot contribute to or participate in these negotiations.

Mutual recognition of law in the European Union

Basically, the European Regulation would provide Member States with the opportunity to allow the conclusion of specific local agreements between competent authorities to define the common provisions needed for a cross-border project or initiative. However, defining a legal or regulatory standard for a specific project means that legal certainty has to be ensured, and that courts have to be competent to apply foreign laws.

Since the *Cassis de Dijon case*¹, 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 laws of another member state in its territory, for the functioning of a specific cross-border project/service. Mutual recognition would thereby reach another dimension: in the case of a trial, the national court would have to apply the law of another Member State. This is why the legal solution proposed to the member states should also contain procedures to potentially ensure cooperation between courts.²

Actually, this issue is already a subject within the EU. 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 the Member State in which the EGTC is headquartered would have to apply the law of this other country in the case of a trial.

In addition, with article 39 of the Directive 2014/24/EU on public procurement, an EGTC is able to determine the applicable law for public procurement by choosing between that of the Member State where it has its registered office (which is currently the only possibility) and that of the Member State where the EGTC is carrying out its activities. In the case of a trial, the competent court of the Member State where the EGTC has its registered office may have to apply the law on public procurement of another Member State. Applying the law of another Member State is thus not something new in Europe. The development of cross-border, interregional and transnational cooperation naturally leads to further integration within the EU and to the use of the principle of mutual recognition in fields other than goods.

¹Case 120/78, 1979 decision of the Court of Justice of the European Communities, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein

² 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 is required to search for the content of foreign law and has to interpret it as its foreign counterpart would do.

3. Towards a European tool for the improvement of cross-border cooperation

The discussions during the preparation phase of the Luxembourg Presidency showed that we have to care about terminology. The choice of terminology for the different steps and the responsibility of different actors must be very clear, and must not lead to any confusion or misunderstandings.

It is proposed to use, as a working approach, the following terminology:

- **Legal framework** means the applicable laws, regulations and other rules that apply at a certain moment in a certain territory. We make the distinction between existing legal framework and amended legal framework.
- **“Tool for the attribution and application of specific provisions in cross-border regions”** or simply **“tool”**: describes, in a general manner, all components as described further down.
- **Regulation**: The EU level would set up a **“Regulation on a European Cross-Border Convention on specific provisions in cross-border regions”** (ECBC), hereafter **Regulation**, as regards the establishment and functioning of the Conventions. The Regulation itself would not include specific provisions.
- **Convention**: The potential beneficiaries draft a **“European Cross-Border Convention on specific provisions in cross-border regions”** (ECBC), hereafter **Convention**. The Convention contains the specific provisions.
- The **specific provisions** under an ECBC determine the application and implementation of all sorts of rules in cross-border regions: existing laws and regulations, technical standards, as well as different sorts of soft legislation.

EU-Level	Creates the EU Regulation.			
Member States In their function as legislator	Pass national implementation laws.		Approve the Convention.	
Potential beneficiaries		Identify concrete provisions to apply and implement in a specific way to achieve projects and strategies. Draft and sign a Convention containing the specific provisions.		Apply the Convention in order to implement their project or strategy.



It is up to each Member State to determine which level or institution will be competent to approve Conventions (central administrations, federal entities, regions, etc.). The term ‘Member State’ should thus be understood in this sense.

At the EU level, a regulation creates this new tool and makes it available for interested actors of cross-border cooperation. It would be based on article 175 TFEU, to achieve the objectives of economic, social and territorial cohesion as specified in article 174 TFEU. It should be compared in its process of approval to the existing EGTC tool.

The European Regulation would give Member States the *opportunity to agree on specific provisions*; the European Regulation would not create these provisions and would not specify them either. It could exclude certain themes from its scope, as does the EGTC Regulation.

Member States pass, if necessary, implementing laws, as they did for the EGTC Regulation.

The potential beneficiaries, local authorities in their function as operators or service providers, shall

- a) identify the legal provisions or standards to be adapted in order to allow the efficient implementation of a cross-border project or a strategy;
- b) draw up a “European Cross-Border Convention on specific provisions in cross-border regions” (ECBC) containing the detailed list of the specific provisions they want to apply to their case, indicating also the geographic scope these should apply to;
- c) Address this to the competent Member State authorities. It is this document that shall be approved by the Member States.
- d) After approbation by the Member States, the requested specific provisions are deemed granted to the beneficiaries under the requested conditions and being part of the amended legal framework.

Member States approve the Convention and thereby agree to the application and implementation of the listed specific provisions. The adoption of specific legal provisions by Member States (or parts thereof where applicable) should be inspired by the procedures for the establishment of an EGTC. The European Regulation on the new tool should provide for a uniform process of approval. Contacts between the approbation authorities are crucial.

During the approbation process, **Member States** involved would have to examine the proposed solutions, potentially suggest amendments, and eventually adopt or reject it. The perspective of such approbation procedures should also fine-tune the policymaking of Member States towards border regions and cross-border relations.

The application of the tool should not be an additional administrative burden for Member States. In any case, this procedure would be simpler than an intergovernmental agreement.

Common features with the EGTC Regulation

The concept of this tool for specific legal provisions in border regions presents some similarities with the EGTC Regulation, which has existed since 2006.

	European Grouping for Territorial Cooperation (EGTC)	European Cross-border Convention on specific provisions in border regions” (ECBC)
Legal Framework	EU EGTC Regulation	EU ECBC Regulation
Name of the tool	European Grouping for Territorial Cooperation [Name]	European Cross-border Convention on specific provisions in cross-border regions [Name],
What is content to be agreed under for the tool	<ul style="list-style-type: none"> • Name, • seat, • purpose • organisational structure, • etc. 	<ul style="list-style-type: none"> • Purpose, • Thematic field, • delineation of the area, • rules, (legal) provisions to be applied in the defined area (application of the rules of one side of the border on also on the other side, or agreement on compromise rules) • timeframe for the application of the rules etc.

4. Political safeguards and pending issues

- a) The application of this tool must be *voluntary*. This is a core principle of the proposal.
- b) This new instrument should not replace bilateral intergovernmental agreements.
- c) Potential beneficiaries (local and regional authorities and other bodies which are eligible for membership in an EGTC) must have the competences for implementing the project or strategy for which they request specific legal provisions. A potential beneficiary, whose objectives and project tasks would lie outside its competence, cannot be allowed by the concerned Member State to apply the Tool.
- d) Potential beneficiaries do not legislate. They ask for the application of existing laws or standards from a neighbouring Member State, which in turn this Member State allows them to apply.
- e) That means also that Member States do not lose any sovereignty, as the tool cannot be applied without the approval of the competent Member State authorities.

- f) Border regions are not exterritorial areas. Nevertheless, policy should apply more flexibility in order to develop border regions and strengthen territorial cohesion. It is important to consider that the instrument is not meant to create new barriers. Overcoming obstacles at one border does not imply moving the border (or moving the obstacles). Obstacles are supposed to be overcome for the benefit of all, not moved at the expense of other citizens. This tool should only create win-win situations.

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 respective 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).

- g) This tool aims at facilitating cross-border cooperation and solving legal or regulatory obstacles linked to the implementation of cross-border projects. What is the appropriate scale for 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?
- h) Should the application of the tool be linked to the existence of an EGTC, which would then be a strong signal for sustainable cross-border cooperation? An alternative could be the existence of an EEIG, or a similar legal structure based on European law.
- i) What control mechanism should be built into the tool that allows the Member States to assess the implementation of "foreign" law on their territory – as in the way of mutual recognition? Should there be an exit option?
- j) Should there be a time limit and what could be the appropriate time limit for the validity of such a solution? Should the possibility be provided to invalidate the Convention (as long as it is adequate and technically possible)?
- k) How to assess in each Member State the effectiveness of the Tool to solve a cross-border obstacle? Should the European Regulation provide for some minimal requirements in this process?
- l) Addressing cross-border issues with third countries. The tool would solve many obstacles at internal borders of the EU. However, cross-border cooperation is also very developed with third countries within Europe.
- m) Should the tool be applicable for outermost regions? On basis of article 349 TFEU, European outermost regions can benefit 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, 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 unable to compete with European standards. This situation clearly limits the potential of further local development.

5. Starting the debate

The Luxembourg Presidency considers this outline as an input for discussion at the European level. A structured debate and feedback from the Ministers on the following questions is welcome:

- 1) Do you see the need and the added value of a framework regulation opening the way for a “European Cross-Border Convention on specific provisions in cross-border regions” (ECBC)?
- 2) Do you think the tool is correctly “designed” to address the existing needs and provide an added value?

Annex

to the Issue Paper on Action 3:

Example I:

When establishing a public cross-border daycare centre in country A for children from countries A and B, and staffed with childcare assistants from countries A and B, the amended legal framework applicable to the daycare centre should be composed of standards applying in both countries, thereby allowing childcare assistants from country B to work in this particular cross-border daycare centre in country A under the standards of country B, in line with a former or later job in country B. The amended legal framework should also allow the daycare centre to receive national subsidies from country B as if it were located in country B.

Much depends on whether there is one operator for this (that of country A) or two operators and on who the employer is. Specific provisions could be: recognition of staff certified in country B by country A, contribution to social security and pensions from workers from country B as if they were actually working in country B, and similar fiscal treatment; moreover, legal certainty should be provided with a clear indication of the applicable laws in terms of liability and in reference to the case of epidemics. Country B could also acknowledge the daycare centre as eligible to receive national subsidies (as if it were located in country B). This would only apply to this specific project of a cross-border daycare centre (“applicable territory” strictly limited within the daycare centre).

N.B.: The EGTC Regulation does not allow this recognition. If validated by the involved Member States, an EGTC can employ people under different laws, but this does not change the legal framework related to professional certification and the eligibility for national subsidies).

Example II:

Let's consider a tramway network existing in a border area of country A: when extending a tramway line across the border into country B, the standards applying to the extension should normally be the ones of country B. However, the standards could be that different from those of country A that this difference may prevent the realization of the cross-border line.

Operators are city A' in country A, and city B' in country B. In the case where the main part of the tramway network is in country A, a simple and effective solution would be for the involved local authorities to propose to their Member States A and B to apply the standards of country A in country B, only for the construction and operation of this specific tramway line in the specific cross-border area. Country B recognises that standards applying in country A also guarantee an acceptable standard of passenger safety.

In the applicable territory (tramway line and tramway stations in country B representing an extension of a line mainly located in country A), the possible provisions would be that country B recognises the application of the standards of country A for the construction, certification and operation of the tramway (thus, the railway is built and the network operated as if located in country A, in relation to technical equipment, crash norms, registration procedures, power supply, signaling equipment, etc.).

Of course, these provisions would be adapted to a specific context in country B: for instance, the signaling equipment of country A would be used for the tramway drivers, but the signaling equipment for car drivers in country B would remain unchanged.

N.B.: The EGTC Regulation does not allow for these provisions, because it does not change the legal framework. Moreover, in this example, specific provisions would only apply for cross-border tramway line(s). Another tramway operating only in country B, far away from the border, would remain subject to the standards of country B.

Example III: the Hospital of Cerdanya

This example allows to better understand the difference between the EGTC and the discussed tool ("ECBC"). As members of this successful EGTC, the French Government and the Region of Catalonia were able to build a cross-border hospital, located in Spain, for the inhabitants of both the French and Spanish regions of Cerdagne/Cerdanya. The EGTC was a useful tool to jointly build this hospital, and now to operate it successfully.

However, the EGTC does not change the legal framework: The cross-border hospital only operates under the legal framework of one country. Even if some obstacles were solved through administrative solutions (and thus sometimes without legal certainty, for example how to recognise a French person born in this cross-border hospital located in Spain as actually born in France), the existing legal framework still creates a problem for French staff employed by the French National Public Health Authorities to work in this cross-border Spanish hospital. In the event of medical malpractice, in France the French staff would be covered by their national insurance structure, but within the EGTC it is unclear whether the EGTC, their French employer or a private insurance would cover them.

In the case of the radiology department activities, which are implemented in Spain by the French Hospital of Perpignan through teleradiology: which law applies, which court is competent?

According to EU Regulation No 593/2008 of 17 June 2008, wage earners can demand the application of most favourable rules, but nothing is really defined today to secure labour relations and explain clearly to French workers (especially medical practitioners) what is the legal framework they are working in.

By using the ECBC tool, the EGTC Hospital of Cerdanya could propose to France and Spain to agree on a clear solution proving legal certainty: for actions conducted by the EGTC in its Spanish hospital (the territorial limit, depending on the precise content of the convention, could be only the Spanish hospital or the whole territory of action of the EGTC) and with its staff from both countries, an ECBC containing specific provisions could recognise the application of French law on the liability of French workers, with the specification of the competent courts (Spanish or French). Moreover, legal certainty could be provided to administrative solutions (certification of births and deaths, and transportation of corpses. In reference to the transport of corpses, an international agreement is being negotiated between the two governments; the proposed tool would allow the EGTC to directly suggest a solution, with a faster implementation.