

European Diversity and Autonomy Papers

EDAP 03/2007

Future Perspectives on Territorial Cooperation in Europe:

**The EC Regulation on a European Grouping of Territorial
Cooperation and the Planned Council of Europe Third
Protocol to the Madrid Outline Convention concerning
Euroregional Co-operation Groupings**

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Abstract

The aim of this paper is to describe, analyze and compare the recent legal developments regarding territorial cooperation that can be observed on the international and supranational level in Europe: the EC Regulation on a European Grouping of Territorial Cooperation adopted in 2006, on the one hand, and the planned Third Protocol to the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities concerning Euroregional Co-operation Groupings of the Council of Europe, on the other hand. Which future perspectives for territorial cooperation in Europe do these two new tools open and what could be the added value of having two (rather similar) instruments? These are just two of the questions standing behind this paper, entitled “Future Perspectives for Territorial Cooperation in Europe”, which-towards its end-will eventually come back to one of the most crucial determinants for the future development of territorial cooperation in Europe, i.e. the attitude of the national states towards CBC and their respective constitutional provisions.

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Key words

Territorial cooperation - European Union - Council of Europe - Local and regional authorities - Transfrontier region - European Grouping of Territorial Cooperation - Draft Protocol No. 3 concerning Euroregional Co-operation Groupings - Differences - Similarities.

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Future Perspectives on Territorial Cooperation in Europe: The EC Regulation on a European Grouping of Territorial Cooperation and the Planned Council of Europe Third Protocol to the Madrid Outline Convention concerning Euroregional Co-operation Groupings

Alice Engl

1. Introduction: Development, Structures and Functions of Territorial Cooperation

Territorial cooperation has become a European reality. European integration, in general, and some of its more evident products such as the Schengen accord, the common internal market and the introduction of the Euro, in particular, have fostered the development of numerous crossborder projects and the emergence of crossborder territories. However, territorial cooperation is a considerably diverse phenomenon characterized by a multitude of different forms and structures in regard to its implementation. This variety in forms of territorial cooperation-which shall be presented in the frame of this introductory section-is last but not least expressed by the various terms that are used for its denomination; for instance, crossborder cooperation, transfrontier cooperation, transnational or interregional cooperation (to mention but a few).¹

From a historical perspective, crossborder cooperation (CBC) in Europe emerged firstly in the late 1950s, when German and Dutch local communities inaugurated the first forms of CBC, and has subsequently seen two further waves of expansion-namely, in the 1980s and the 1990s-when the European Community started to allocate special subsidies for border regions in the

¹ The terms 'crossborder' or 'transfrontier' cooperation mean bi- or multilateral cooperation between adjacent local and regional authorities and are used simultaneously throughout the article. The term transnational cooperation covers a larger area and includes regional and local as well as national authorities, whereas the term interregional cooperation refers to the cooperation of non-adjacent regions. For further information, see Charles Ricq, *Handbook of Transfrontier Cooperation* (Council of Europe, Strasbourg, 2006 edition), 41-42, at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/transfrontier_cooperation/tfc_handbookTC2006_EN.pdf

frame of its newly emerged regional policy and when Europe's constellation changed due to the fall of the Iron Curtain.²

The emergence of territorial cooperation is conditioned by the changing nature of borders, on the one hand, and the interest and the value that international, national and regional (or local) actors are devoting to it, on the other hand.

In Europe, borders have changed from hard to soft borders or from barriers, which separate different political, economic, social and cultural systems, to zones of contact, where human, natural and financial resources can be shared and exploited together across the border.³

At the same time, the interest in promoting territorial cooperation has constantly increased on the national, regional and local, as well as international, levels. The prevailing incentives were (and still are) of a pragmatic nature,⁴ consisting - for instance - of an improvement of regional cohesion, a joint exploitation of regional resources and location economies, an improvement of infrastructure and communication, as well as cultural exchanges and joint initiatives in the fields of culture and tourism.

Transfrontier cooperation is, thus, a functional need- or problem-oriented horizontal cooperation serving concrete and pragmatic purposes and obtaining its legitimacy from practical benefits.

As such, it can adopt - as already indicated - various forms and structures, depending on the concrete needs of the involved local and regional entities, on the one hand, and on the room of manoeuvre of the respective regional and local actors and their respective competences (and, thus, from the national legal provisions of the respective state), on the other hand.⁵ The

² Derya Zeyrek, "Formen grenzüberschreitender Zusammenarbeit in Europa", in Almut Kriele, Urs Lesse and Emanuel Richter (eds.), *Politisches Handeln in transnationalen Räumen, Zusammenarbeit in europäischen Grenzregionen* (Baden-Baden, 2005), 55-64, at 55-56.

³ For more information about this classification of borders, see Remigio Ratti, *Théorie du développement des régions transfrontalières* (Fribourg, 1991); and Walter Ferrara and Paolo Pasi, "Introduzione: regioni transfrontaliere, cooperazione transfrontaliera ed euroregioni", in Paolo Pasi and Walter Ferrara (eds.), *Come funzionano le Euroregioni, Esplorazione in sette casi* (Istituto di Sociologia Internazionale di Gorizia, Gorizia, 2000), 1-12, at 2-3.

⁴ Although theoretically assumed, several case studies show that transfrontier cooperation cannot be characterized as an expression of a changed political awareness or as a manifestation of an increasing regional identity, but that pragmatic incentives for initiating cooperation across borders clearly prevail. See, in general, Kriele, Lesse and Richter (eds.), *Politisches Handeln in transnationalen Räumen ...*; and, in particular, Urs Lesse and Emanuel Richter, "Einleitung", in *ibid.*, 7-12, at 9-10.

⁵ As Peter Schmitt-Egner argues, transfrontier cooperation produces functional spheres of action (Handlungsräume), which are reconstructed through the competences of the involved actors. See Peter Schmitt-Egner, "Transnationale Handlungsräume und transnationaler Regionalismus in Europa: zur Theorie, Empirie und Strategie grenzüberschreitender Zusammenarbeit", in Kriele, Lesse and Richter (eds.), *Politisches Handeln in transnationalen Räumen ...*, 15-34, at 22.

forms of territorial cooperation, which include, for instance, Euroregions, Eurodistricts, Working Communities or town twinning, differ in terms of size, regulatory span, fields of action and consolidation or institutionalization, and range from sporadic information and consultation or selective cooperation to address specific issues or problems in areas like the economy, technology or culture, on the one hand, to extensive and long-ranging programmes and the creation of common institutions (like committees, associations, councils, working groups, etc.) or even a public-law entity, on the other hand (or - to express it in a different way - from loose cooperation to a weak institutionalization or a strong institutionalization).

At present, there exist more than 140 ‘transfrontier regions’⁶ but only a few of them have a public law status.⁷ The vast majority are based on private law regulations and often organized as ‘twin associations’, meaning that entities on each side of the border form an association, which are subsequently joined by a crossborder agreement.⁸ The actors involved in territorial cooperation are, consequently, local and regional political representatives, on the one hand, as well as chambers of commerce, regional development agencies and also educational institutions, interest associations or NGOs, on the other hand.

Furthermore, most of these ‘transfrontier regions’ bear the denomination ‘Euroregion’. The first Euroregion was founded in 1958 between municipalities of Germany and The Netherlands. This concept or ‘model’ was afterwards proliferated throughout Europe, especially during the 1980s and 1990s, when many Euroregions were created.⁹ The main drivers behind this proliferation have been an increasing exigency to tackle certain policy issues on a crossborder basis, on the one hand, and (as a consequence) the growing attention that both the Council of Europe and the European Union have devoted to crossborder cooperation, on the other hand (which will be further outlined in the following section). In fact, many Euroregions are closely involved in the implementation of the EU’s INTERREG programmes (which are outlined in section 2.2) or can even be regarded as implementation agencies of these programmes.¹⁰

⁶ Ricq, *Handbook of Transfrontier Co-operation ...*, 17.

⁷ See the table in Zeyrek, “Formen grenzüberschreitender Zusammenarbeit ...”, 58.

⁸ See Markus Perkmann, “The Rise of the Euroregion. A Bird’s Eye Perspective on European Cross-Border Cooperation”, published by the Department of Sociology, Lancaster University, at <http://www.lancs.ac.uk/fass/sociology/papers/perkmann-rise-of-euroregion.pdf>.

⁹ For a comprehensive list of Euroregions (and similar forms of territorial cooperation) and their respective founding year, see Markus Perkmann, “Cross-border Regions in Europe. Significance and Drivers of Regional Cross-border Co-operation”, 10(2) *European Urban and Regional Studies* (2003), 153-171.

¹⁰ See Markus Perkmann, “Euroregions: Institutional Entrepreneurship in the European Union”, in Markus Perkmann and Ngai-Ling Sum (eds.), *Globalization, Regionalization and Cross-Border Regions* (New York, 2002), 103-124, at 105, 107 and 117.

However, the level of integration of these Euroregions (or transfrontier regions) varies considerably from case to case, being conditioned by internal factors (such as historical aspects, geographical and demographic dimensions, as well as the relationship with the central state), on the one hand, and external factors (pertaining to the social and economic situation of the respective regions-namely, whether they are similar or complementary in regard to their economy and their social conditions), on the other hand.¹¹ Some Euroregions are quite consolidated and integrated, having a private or public-law status, such as the Region Sønderjylland-Schleswig (Germany and Denmark) or the Ems-Dollart-Region (Germany and The Netherlands), whereas others exist just formally as ‘paper tigers’ with no significant substance, such as the Danube-Drava-Saba Euroregion (Hungary, Croatia and Bosnia and Herzegovina).¹² Some Euroregions are rather small, involving local and regional authorities of two different states, such as the Euroregion Pro Europa Viadrina (Germany and Poland) and others are quite large, such as the Carpathian Euroregion (involving entities of Hungary, Poland, Romania, Slovakia and Ukraine), which in terms of geographical size is even larger than Hungary or Slovakia.

In any case, territorial cooperation enables (frontier) regions to balance the disadvantages stemming from their peripheral location and comprises thus a chance to turn a border region into an “EU-central region.”¹³ As such, territorial cooperation plays an increasingly significant role within the European integration process, mainly because of its importance for territorial, economic and social cohesion, which explains the respective political and legal support that both the Council of Europe and the European Union have provided so far.

2. Council of Europe and European Union: hitherto Existing Instruments for Territorial Cooperation

As already indicated before, the attention that both the Council of Europe (CoE) and the European Union (EU, formerly, the EC) began to devote to the issue of crossborder cooperation since the early 1980s can be seen as a response to practical matters and factors, like the increasing need to address certain policies, *inter alia*, through crossborder cooperation (for instance, environmental protection or transport), as well as the (then) European Community (EC) aim of creating a single European market and of reducing regional disparities. The CoE as well as the EU evolved to be the main

¹¹ Ferrara and Pasi, “Introduzione: regioni transfrontaliere ...”, 11.

¹² For further information on the Danube-Drava-Saba Euroregion, see Martin Klatt and Jørgen Kühl, “National Minorities and Cross-border Cooperation between Hungary and Croatia. A Case-Study of Baranya/Hungary and Osiječko-baranjska County/Croatia”, 6 *European Yearbook of Minority Issues* (2006/7), forthcoming.

¹³ Schmitt-Egner, “Transnationale Handlungsräume und transnationaler Regionalismus ...”, 21.

‘drivers’ of CBC on a European regional level and have accumulated a considerable respective ‘*acquis*’ in the course of the past decades. Before describing and analyzing their recent initiatives regarding CBC, I would like to briefly list the political and legal tools that they have developed so far, and to briefly analyze their different approaches.

2.1. The Council of Europe and its Instruments for Crossborder and Interterritorial Cooperation

The Council of Europe’s main instrument regarding CBC is the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (hereinafter “Outline Convention”),¹⁴ which was opened for signature in May 1980 and entered into force in December 1981. Currently, 34 states have signed and ratified it and a further three states have just signed it without yet ratifying.¹⁵

The Outline Convention was the result of long lasting discussions within the CoE, which started in 1966, when the CoE’s Consultative Assembly recommended that a committee of experts should elaborate a draft convention on cooperation between local authorities, and gained more substance in 1975, when the European Ministers for Local Government proposed the preparation of a European Outline Convention.¹⁶

The main aim of the Outline Convention was to fill in a legal gap-namely, to provide local, regional and national actors (and thus both already existing forms and possible future developments of CBC) with a general legal framework for transfrontier cooperation.¹⁷ The consideration of both the huge variety of regional and local forms of government in the various states and the principle of state sovereignty resulted in the particular structure of the Outline Convention, consisting of a set of 12 Articles that make up the ‘real’ treaty defining the main principles and minimum common standards, on the one hand, and of a series of appended model and outline agreements, which according to Article 3(1) “are intended for guidance only and have no treaty value”,¹⁸ on the other hand.

¹⁴ The full text of the Outline Convention as well as the Explanatory Report and the Chart of Signatures and Ratifications can be found at <http://conventions.coe.int/treaty/en/Treaties/Html/106.htm>.

¹⁵ Those states that have not even signed it yet are Andorra, Cyprus, Estonia, Greece, Monaco, Montenegro, San Marino, Serbia, the former Yugoslav Republic of Macedonia and the United Kingdom.

¹⁶ Explanatory Report to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, at <http://conventions.coe.int/Treaty/en/Reports/Html/106.htm>.

¹⁷ The CoE uses the terminology transfrontier cooperation. In this article, both of the terms crossborder cooperation and transfrontier cooperation are used simultaneously.

¹⁸ Art. 2(1) of the Outline Convention.

The most important aspects of the Outline Convention are, among others, the (generally-held) distinction made in Article 2(1) between possible forms of cooperation, which are concerted action, on the one hand (namely, exchange of information, consultation, discussion and coordination), and the conclusion of agreements or arrangements, on the other hand.

Secondly, Article 3 encourages the states to conclude bilateral or multilateral interstate agreements in order to facilitate cooperation between territorial communities and authorities. These agreements “may *inter alia* establish the context, forms and limits within which territorial communities and authorities concerned with transfrontier co-operation may act”¹⁹ (and would thus represent the crucial legal basis for CBC activities in concrete cases).

Furthermore, the Outline Convention stipulates that the states should undertake necessary adjustments or exceptions to their domestic law in order to reduce obstacles and thus facilitate transfrontier cooperation.²⁰

As Palermo and Woelk point out tellingly: “the most relevant consequence of the Convention is that it brings CBC into the domestic legal system of the contracting States thereby transforming it from an activity at best ‘tolerated’ into an explicitly mentioned ‘legal’ activity, which the contracting States have agreed to promote.”²¹

The Outline Convention retains the possibility of further extending and developing both the Outline Convention itself and the model arrangements and agreements,²² emphasizing thus the dynamic character of this legal document and the possibility to adapt it to new circumstances.

Consequently, the Convention’s machinery has already been extended by two additional protocols, each of them being a respective reaction to arisen needs and perceived terms and conditions. Since the entry into force of the Outline Convention, the CoE Committee of Experts on Transfrontier Co-operation had and has constantly monitored its implementation and had, thus, identified three main problems: “the absence of central governments’ express recognition of the local authorities’ legal competence to conclude transfrontier cooperation agreements, the legal nature of transfrontier

¹⁹ *Ibid.*, Art. 3(2).

²⁰ *Ibid.*, Art. 4.

²¹ Francesco Palermo and Jens Woelk, “Autonomy: the Problem of Irredentism and Cross-Border Cooperation. Cross-Border Cooperation as an Indicator for Institutional Evolution of Autonomy: the Case of Trentino-South Tyrol”, in Zelim Alan Skurbaty (ed.), *Beyond a One-dimensional State-an Emerging Right to Autonomy?* (Leiden, 2005), 277-304, at 283.

²² Art. 8 of the Outline Convention.

cooperation bodies and the legal force of the acts accomplished by these bodies.”²³

The need to address these problems resulted in the elaboration of an Additional Protocol,²⁴ which was opened for signature in November 1995 and entered into force in December 1998. Seventeen states have signed and ratified it so far and a further eight states have just signed it.

The main aim of this Additional Protocol is to reduce the legal obstacles to transfrontier cooperation by expressly retaining the right of territorial communities or authorities to conclude transfrontier cooperation agreements (Art. 1); by acknowledging the value that decisions taken jointly under a transfrontier cooperation agreement have under domestic law (Art. 2); and by stating that a transfrontier cooperation body set up through a transfrontier cooperation agreement may have legal personality (either of a public or a private law nature) (Art. 3).

In 1993, the Heads of State and Government proposed to focus also on the cooperation between non-adjacent regions, which so far had not been addressed within the Outline Convention and the Additional Protocol. Thus, the CoE adopted a second Protocol, which is Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities Concerning Interterritorial Co-operation (hereinafter “Second Protocol”).²⁵ It was opened for signature in May 1998 and entered into force in December 2001. So far, it has been signed and ratified by 15 states and eight states have signed it without yet ratifying.

The Second Protocol provides a legal basis for cooperation between non-adjacent local and regional authorities (i.e., interterritorial cooperation) and confirms “the right of territorial communities or authorities to conclude mutual agreements within the framework of interterritorial co-operation”²⁶ addressing fields of common competence. Article 5 states that all the

²³ Committee of Experts on Transfrontier Co-operation, Report on the Current State of the Administrative and Legal Framework of Transfrontier Co-operation in Europe (2006 edition), 9, at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/transfrontier_cooperation/tfc_current_state_tc_2006_en.pdf.

²⁴ The Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (hereinafter “Additional Protocol”). The full text of the Additional Protocol as well as the Explanatory Report and the Chart of Signatures and Ratifications can be found at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=159&CM=8&DF=2/15/2007&CL=ENG>.

²⁵ The full text of the Second Protocol as well as the Explanatory Report and the Chart of Signatures and Ratifications can be found at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=169&CM=8&DF=2/15/2007&CL=ENG>.

²⁶ Art. 2 of the Second Protocol, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/169.htm>.

provisions contained in the Outline Convention and in the Additional Protocol are also applied to the area of interterritorial cooperation.

Only states that have ratified the Outline Convention can become parties of the Additional and the Second Protocol and, as was mentioned above, not all CoE member states have yet ratified the Outline Convention (not to mention the two protocols, where the number of ratifications is even lower).

However, other CoE instruments and declarations are also devoted to transfrontier cooperation, of which I would like to mention, for instance, the Charter of Local Self-Government, Framework Convention for the Protection of National Minorities (FCNM) and some political declarations adopted between 2000 and 2005.

The main purpose of the Charter of Local Self-Government²⁷ is to promote the development of local and regional democracy in Europe, emphasizing also the importance of transfrontier cooperation,²⁸ whereas the Framework Convention is devoted to the protection of national minorities and includes as well their right to maintain crossborder relations with their kin-state.²⁹

The issue of transfrontier cooperation is also often addressed within the CoE's Conferences and Declarations-for example, in the frame of the Helsinki Declaration of June 2002, the Krakow Conference of 2-4 October 2003, the 14th Conference of Ministers responsible for Local and Regional Government in February 2005, the Third Summit of Heads of State and Government in May 2005, as well as the European Symposia on Frontier Regions.³⁰

Furthermore, the CoE also pursues training and assistance activities in order to enhance transfrontier cooperation-for example, by organizing conferences, seminars and meetings both on the national and the regional level, where various representatives of central and local authorities can participate in order to exchange experiences and information and in order to get familiar with CBC issues. Concrete examples are the Council of Europe's

²⁷ Opened for signature in October 1985 and entered into force in September 1988. So far, it has been ratified by 42 states and two more states have just signed it. The full text of the Charter as well as further information is available at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=122&CM=1&CL=ENG>.

²⁸ See, for example, Art. 10 of the Charter, which states that “[l]ocal authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.”

²⁹ See Article 17(1) of the Framework Convention, which states “The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage.” The full text of the Framework Convention is available at http://www.coe.int/T/E/Human_Rights/Minorities/.

³⁰ A brief description of all these declarations and conferences and their relevance for transfrontier cooperation can be found in Ricq, *Handbook of Transfrontier Co-operation ...*, 55-63.

assistance programme for the development of transfrontier cooperation in Central and Eastern Europe³¹ or the recent publication of a Practical Guide on Transfrontier Co-operation.³²

Finally, the CoE is also giving legal and specialist support to national, regional and local actors involved in transfrontier cooperation.³³

2.2. *The European Union and its Financial Assistance for Crossborder Cooperation*

Within the European Union, the topic ‘regional policy’, in general, and, within this, crossborder cooperation, in particular, became vital during the mid 1980s and, to a greater extent, during the 1990s, when national representatives took the first steps to developing a common European regional policy³⁴ and when the Committee of the Regions was established with the Treaty of Maastricht in 1992.³⁵ With these measures, the regions in Europe were step by step recognized as independent actors within the European Union and its legal framework. The main motives behind these steps were mainly of an economic nature-namely, the Community’s objectives of cohesion and of establishing a single market, which should be achieved, among others, through the promotion of the regions’ economic development (especially regarding the most underdeveloped regions, which are often the border regions situated at the periphery of a state). Thus, crossborder cooperation emerged as one of the tools for fostering regional development and cohesion.

On the other hand, the realization of the free movement of goods, services, capital and people led to a ‘defunctionalisation’ of borders.³⁶

However, it must be emphasized that EC law cannot directly intervene in the regional setting of the member states because it is still the member states that have the exclusive competence on the internal organization and distribution of powers between the various levels of governance.

³¹ More information on this programme is available in the Report on the Current State of the Administrative and Legal Framework of Transfrontier Co-operation, 12.

³² This Practical Guide was published in February 2006 and is available at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/transfrontier_cooperation/practical_guide_en.pdf.

³³ A list of assistance and cooperation programmes can be found at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/Assistance_and_Co-operation_Activities/default.asp#TopOfPage.

³⁴ This happened in the frame of the Single European Act, which was signed in February 1986 and entered into force in July 1987. See, in particular, Title V, “Economic and Social Cohesion”. Joanne Scott, “Regional policy: An Evolutionary Perspective”, in Paul Craig and Grainne De Burca, *The Evolution of EU Law* (Oxford, 1999), 625-652.

³⁵ The Treaty of Maastricht was signed in February 1992 and entered into force in November 1993.

³⁶ Ricq, *Handbook of Transfrontier Co-operation ...*, 64.

Nevertheless, the regional policy of the EC, providing, among others, financial support (and thus also a crucial incentive) for crossborder activities, plays an important role in stimulating the member states to promote crossborder cooperation of ‘their’ regions with regions of other states.

Until 2006, the most important Community initiatives and instruments regarding CBC have been Interreg, Phare, Tacis and Cards.

Interreg, which was launched for the first time in 1990, was the first (and up to now also the most significant) instrument of the EU to provide financial assistance to crossborder activities. For the first time, the Commission called upon the member states to elaborate joint programmes, which included local and regional authorities from different member states. The aim was to enhance crossborder cooperation and, consequently, to establish common administrative and institutional structures in order to plan and implement these programmes.³⁷

Since 1990, three Interreg programmes have successfully been launched and completed³⁸ and a fourth one has been operating since the beginning of 2007 and will last until 2013. Both the budget and the programme topics have increased over the last 15 years, since-from 1994 on-measures in the areas of culture, education and language have also been included and are thus financed by the programme. Regional crossborder structures involving regional and local authorities play a key role in planning, implementing and evaluating the various projects and initiatives financed through Interreg, thus characterizing the bottom-up approach of this instrument.

The second EU instrument relevant to CBC that I would like to mention is the Phare programme, established in 1994 as “Poland and Hungary: Assistance for Restructuring their Economies” (Phare),³⁹ with its special strand Phare-CBC. Its main objective has been to assist the candidate countries in strengthening their public administration, promoting convergence with EU law and fostering economic and social cohesion. In order to achieve this aim, the border areas of the candidate countries were supported by initiating CBC activities between them and regions of EU member states. Until 2006, two

³⁷ See Thomas Student, *Regionale Kooperation zwischen Integration und Konkurrenz. Zusammenarbeit an der deutsch-niederländischen Grenze im Rahmen der Ems Dollart Region und der Neunen Hanse Interregio*, (Baden-Baden, 2000), 95.

³⁸ These are Interreg I from 1990-1993, Interreg II from 1994-1999 and Interreg III from 2000-2006. More information about the three programmes is available at http://www.interreg.ch/index_e.php.

³⁹ Phare was expanded and subsequently included-in addition to Poland and Hungary-also the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and Croatia, as well as Bulgaria and Romania.

Phare programmes have been successfully concluded (the first from 1994-1999 and the second from 2000-2006).⁴⁰

Finally, also the Tacis (Technical Aid to the Commonwealth of Independent States) and Cards (Community Assistance for Reconstruction Development and Stabilisation) programmes partly aim at fostering CBC among the benefiting countries.

The Tacis Programme (launched in 1991) provides technical assistance to 12 countries of Eastern Europe and Central Asia (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan), aiming at the enhancement of the transition process in these countries. Like the Phare programme, it includes a crossborder strand in order to promote crossborder cooperation between neighbouring communities among these countries.⁴¹

The Cards programme operated since 2000 with the aim of supporting the Western Balkan countries (Albania, Bosnia and Herzegovina, Croatia, Serbia (including Kosovo), Montenegro and the Former Yugoslav Republic of Macedonia) throughout the Stabilisation and Association Process. Its objectives also include the promotion of closer relations and regional cooperation among the benefiting countries and between them and the EU member states.⁴²

By the beginning of 2007, all these instruments had been reorganized. Interreg is now part of the new objective European Territorial Cooperation, financed by the European Regional Development Fund (ERDF), whereas Phare and Cards have been replaced by the new Instrument for Pre-accession Assistance (IPA), which again includes a separate crossborder cooperation strand aiming at the promotion of CBC between regions or authorities of EU member states and of countries eligible for IPA.⁴³

⁴⁰ More information about the Phare programme is available at http://ec.europa.eu/enlargement/financial_assistance/phare/index_en.htm; and in Committee of Experts on Transfrontier Co-operation, "Similarities and Differences of Instruments and Policies of the Council of Europe and the European Union in the Field of Trans-frontier Co-operation", (2006 edition), 27 and 28, at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/trans_frontier_cooperation/tfc_SadowskiReport2006_EN.pdf.

⁴¹ More information about the Tacis programme is available at http://ec.europa.eu/external_relations/ceeca/tacis/.

⁴² More information about the Cards programme is available at http://ec.europa.eu/enlargement/financial_assistance/cards/index_en.htm.

⁴³ More information about the IPA programme is available at http://ec.europa.eu/regional_policy/funds/ipa/index_en.htm.

Tacis has been partly replaced by the European Neighbourhood and Partnership Instrument (ENPI), which also includes a component specifically promoting crossborder cooperation.⁴⁴

Besides these financial instruments, the European Commission and the European Parliament have also published some important documents regarding CBC.⁴⁵

2.3. A Comparison between the Two Approaches: Differences and Similarities

The brief outline of the various instruments of both the Council of Europe and the European Union shows that the two institutions are pursuing a different approach, stemming from their diverse natures and their diverse *modus operandi*, which shape their respective potential and interest in acting in the field of CBC.

Generally, practitioners and academic persons retain that the CoE is committed to the establishment of a legal framework and legal standards for crossborder cooperation and the general promotion of the idea of transfrontier cooperation, whereas the European Union is dedicated primarily to the financial and technical support of CBC initiatives.⁴⁶

However, this dichotomy between a 'soft' political and legal approach, on the one hand, and a more 'pragmatic' financial and technical support, on the other, needs to be further examined and confronted with the similarities that the two approaches possess.

Firstly, the motivation behind the CoE and EU measures and initiatives has to be considered, which, in both cases, was a response to practical factors and interests, as I have already outlined at the beginning of this article. However, the perception and the nature of these factors and interests differ in both cases. The CoE was eager to establish a legal basis or a legal framework for the already emerged and emerging Euroregions, whereas the European Union aimed at fostering cohesion and reducing regional disparities. These different interests obviously determined the respective approaches and

⁴⁴ More information on ENPI and its crossborder component is available at

http://ec.europa.eu/europeaid/projects/enpi_cross_border/index_en.htm.

⁴⁵ For example, European Commission, *A Practical Guide to Cross-border Cooperation* (European Commission, Luxembourg, 1992); European Parliament, *Cross-border and Interregional Cooperation in the European Union* (European Parliament Regional Policy Series, Luxembourg, 1996). Cf. Alice Engl and Carolin Zwilling, "Cross-border Cooperation between Historical Legacies and New Horizons", in Jens Woelk, Francesco Palermo and Joseph Marko (eds.), *Tolerance Through Law. Self-Governance and Minority Rights in South Tyrol* (Leiden, 2007), 161-176.

⁴⁶ Committee of Experts on Transfrontier Co-operation, "Similarities and Differences ...", 5 and 6. Palermo and Woelk, *Autonomy: the Problem of Irredentism ...*, 282-284.

measures undertaken, leading to the adoption of the different instruments outlined above in points 1.1. and 1.2.

The above description of these instruments already clearly shows that the CoE instruments provide ‘soft’ legal standards whereas the EU measures offer financial support for CBC activities.

Another difference that has to be taken into account is the geographical area of application of the various instruments. The legal documents of the CoE apply to all European states, which ratify them (also to non-member states of the CoE, which according to Article 10 are as well entitled to ratify the Outline Convention), whereas the EU instruments are geographically diversified, being tailored for EU member states, on the one hand, and the neighbours of the European Union, on the other hand.

However, it is possible to detect also some similarities between these various instruments, which I would like to outline briefly.

Firstly, both the CoE and the EU instruments are optional, meaning that the participation of the states is voluntary. If states decide to participate-in both cases-all the consequent measures must conform to the respective national law.

Secondly, none of the instruments supports a specific form of crossborder cooperation, leaving room for the involved actors to decide in which way they would like to cooperate (Euroregion, joint commission, working group, etc., although the most important form of CBC in both cases are Euroregions).⁴⁷

Thirdly, all the measures operate primarily at the local (i.e. municipal) and regional (or provincial) level, with the provision that the central authorities have to provide and guarantee the appropriate conditions to enable the local and regional authorities to exercise their functions.

Lastly, both institutions organize respective trainings, seminars and conferences in order to foster CBC on a practical level. Both these concrete activities and the other legal documents and programmes aim at reducing the existing obstacles to CBC and are dedicated to the common overall goal of ensuring stability, security and unity in Europe.

⁴⁷ Committee of Experts on Transfrontier Co-operation, “Similarities and Differences ...”, 35.

3. New Measures of the European Union and the Council of Europe: To Further Facilitate and Foster Territorial Cooperation?

In order to improve the effectiveness of CBC and to further reduce the obstacles thereto, both the European Union and the Council of Europe have endeavoured over recent years to develop new instruments, which should complement those that already exist. In July 2006, the EU (i.e., the Council and the European Parliament) adopted a new Regulation on a European Grouping of Territorial Cooperation (EGTC)⁴⁸ (hereinafter “the EC Regulation,” “the new Regulation” or “the EGTC Regulation”), whereas the member states of the CoE are still debating the elaboration of a Third Protocol to the Outline Convention, which would provide for the establishment of what has thus far been called Euroregional Co-operation Groupings (ECG)⁴⁹ (hereinafter “Draft Third Protocol” or “Third Protocol”). Before describing and comparing these two new instruments, I would like to point out briefly the most important motives or driving forces behind these initiatives (which follow the same pattern as earlier because they again represent a reaction to practical matters and needs).

Within the European Union, one of the main driving forces behind the new Regulation have been the recent Eastern enlargements,⁵⁰ which increased the EU’s diversity not only in cultural but also in economic terms, considering the fact that some of the new member states’ regions (especially the border regions) are economically much less developed compared to other (especially old member states’) regions.

Secondly, many regional and local entities still face problems when they try to cooperate with counterparts from another state. These problems or obstacles stem mainly from differences between the legal framework, the administrative structures and the financial arrangements of the national states and, consequently, the local and regional entities. Furthermore, many local and regional actors that do not have much experience with CBC activities often do not have enough knowledge regarding available tools and

⁴⁸ Regulation 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European Grouping of Territorial Cooperation, OJ 2006 L 210, 19-24.

⁴⁹ A preliminary draft of the Third Protocol to the Madrid Outline Convention on Euroregional Co-operation Groupings is available at [http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/Steering_Committee/LR-CT\(2007\)6_EN.pdf](http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/Steering_Committee/LR-CT(2007)6_EN.pdf)

⁵⁰ Both the enlargement of May 2004 with 10 new member states and the enlargement of January 2007 with two new member states. Further information on these EU enlargements is available at http://ec.europa.eu/enlargement/enlargement_process/index_en.htm.

appropriate measures.⁵¹ Such difficulties and such a lack of knowledge can, *inter alia*, impede the establishment of suitable cooperation structures and the implementation of EU-funded programmes. “Our experience with INTERREG has demonstrated the need for fully joint structures for managing such programmes. To assist programme partners in this regard, the European Commission proposed a new instrument—the European Grouping of Territorial Cooperation.”⁵² The motivation for the new EC Regulation was and is thus twofold: firstly, it aims at further enhancing the economic cohesion within the European Union by creating a new tool that enables (border) regions to enter into a closer cooperation with each other, in order to better exploit their inherent potential. Secondly, it has also been tailored for an effective implementation of the EU-funded programmes, especially within the new member states.

The main reason for the CoE’s recent initiative to elaborate a Third Protocol to the Outline Convention derives from the perceived need for an overall improvement of the CoE’s instruments regarding transfrontier cooperation. This perceived need stems mainly from two aspects. Firstly, the CoE also assessed that many regions still face considerable obstacles regarding CBC and, secondly, stated a need for harmonization of the heterogeneous forms of CBC that have emerged in Europe in recent decades. “Considering the shortcomings in the first two protocols concerning the public law prerogatives of transfrontier co-operation bodies, the differences in the member states’ legal systems, the increasing number of Euroregions, especially in the countries of central and eastern Europe, and the extreme diversity of transfrontier institutions all over Europe, the work started in order to harmonise the different forms and contents of the transfrontier co-operation bodies that are emerging all over Europe.”⁵³

The obstacles assessed, which require the creation of a new instrument, are in regard to both intuitions mainly the same. This similarity becomes more evident when comparing the following sentence of a CoE document, which states that “[a] new ... [instrument] was necessary as the bodies involved in the implementation of TFC [transfrontier cooperation] had been encountering problems due to differences in administrative and legal systems of particular countries”,⁵⁴ with the preamble of the new EC Regulation, which states that “[m]easures are necessary to reduce the significant difficulties encountered

⁵¹ See Assembly of European Regions, *Europäischer Verbund für Territoriale Zusammenarbeit - Anmerkung, 2*, at http://www.a-e-r.org/fileadmin/user_upload/MainIssues/RegionalPartnership/EGTC/EN-EGTC_Explanatory_Note_08-07.doc.

⁵² Statement of Danuta Hübner, Regional Policy Commissioner, in the frame of the Conference “Prosperity and Sustainability - Local Cooperation in the Baltic Sea Region”, held in Visby (Sweden) on 17 August 2006, available at <http://www.interact-eu.net/1177144/1177146/0/0>.

⁵³ Ricq, *Handbook of Transfrontier Co-operation ...*, 53.

⁵⁴ Committee of Experts on Transfrontier Co-operation, “Similarities and Differences ...”, 15.

by Member States and, in particular, by regional and local authorities in implementing and managing actions of territorial cooperation within the framework of differing national laws and procedures.”⁵⁵

3.1. The EC Regulation on a European Grouping of Territorial Cooperation

In July 2004, the European Commission adopted five regulations dealing with the 2007-2013 period of Structural Funds and its various instruments. This package of regulations also included a Regulation on a European Grouping of Crossborder Cooperation. This draft regulation was subsequently discussed and amended by enlarging, among others, its scope to territorial cooperation in general (which, as already stated in the introductory section, also includes crossborder cooperation as well as transnational and interregional cooperation). As a consequence, the regulation was renamed as the Regulation on a European Grouping of Territorial Cooperation, which was finally adopted on 5 July 2006.

The legal basis of this Regulation is Article 159(3) of the EC Treaty,⁵⁶ which allows the adoption of specific actions outside the Funds in order to ensure economic and social cohesion.⁵⁷

The added value of this new Regulation is clearly pointed out by the following statement: “the adoption of this binding regulation constitutes a major step for territorial cooperation, as it provides public actors at different levels (member states, regional and local authorities, mainly) with a strong legal tool for developing and implementing a territorial cohesion policy, at cross-border, transnational and interregional levels.”⁵⁸

In order to overcome the obstacles to territorial cooperation, the new Regulation provides for the creation of cooperative groupings on Community territory, called ‘European Groupings of Territorial Cooperation’ (EGTC).⁵⁹ Members of an EGTC can be member states, regional authorities, local

⁵⁵ Preamble of Regulation 1082/2006.

⁵⁶ See European Parliament, Committee on Regional Development, Report on the Proposal for a Regulation of the European Parliament and of the Council on Establishing a European Grouping of Cross-border Cooperation (EGCC), 21 June 2005, 20, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0206+0+DOC+PDF+V0//EN&language=EN>.

⁵⁷ Art. 159(3) of the EC Treaty states: “[i]f specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Community policies, such actions may be adopted by the Council acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions.” See the EC Treaty, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>.

⁵⁸ INTERACT, The EGTC and INTERREG/European Territorial Cooperation Objective Programmes, at <http://www.interact-eu.net/1177144/1177146/1178862/0>.

⁵⁹ See para. 8 of the Preamble of Regulation 1082/2006.

authorities and bodies governed by public law,⁶⁰ and must be located on the territory of at least two EU member states (Art. 3). Each prospective member shall notify its respective EU member state about its intention to participate in an EGTC. Within three months, the EU member state shall approve the member's participation in an EGTC. However, a member state can prohibit such participation if it considers that it is not in conformity with the Regulation or the respective national law or due to reasons of public interest or public policy (Art. 4). The latitude of judgment lies, thus, within the hands of the member states.

The recourse to this new tool of establishing an EGTC is optional, meaning that national, local and regional authorities are not obliged to use this form of cooperation. This clause was mainly inserted in order to take into account the various existing (and functioning) forms of crossborder cooperation and should guarantee their future existence. Thus, other structures and forms of cooperation (mainly based on bilateral treaties and similar agreements) that have developed over the last decades need neither be replaced by an EGTC nor are there any impediments to the establishment of other such forms of transfrontier cooperation in the future.

The responsibilities of an EGTC are codified in Article 7, which states that "the tasks of an EGTC shall be limited primarily to the implementation of territorial cooperation programmes or projects co-financed by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund."⁶¹ However, Article 7 retains that an EGTC can also carry out other actions of territorial cooperation, which are not funded by the European Union. The importance of this additional clause is twofold: Firstly, it should guarantee that EGTCs may continue to exist even after a possible termination of EU funding or - equally - that an EGTC may be created even without EU funding; and, secondly, it generally enlarges the scope and the field of action of an EGTC by not limiting its task just to the implementation of EU funds and programmes.

Another important aspect of the Regulation is that it opens principally also the possibility for entities of third countries to participate in an EGTC. The participation of such entities must, however, be legally based on and

⁶⁰ Bodies governed by public law are defined according to the second subparagraph of Art. 1(9) of the EC Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (OJ L 134, 30 April 2004), 114. The respective article, as well as a list of bodies and categories of bodies governed by public law, are reproduced at http://www.cor.europa.eu/document/activities/egtc/CoR_EGTC_Members.pdf.

⁶¹ *Ibid.*, Art. 7.

permissible under the legislation of the respective third country or an agreement between the EU member state and the third country.⁶²

Furthermore, EGTCs are vested with legal personality and it is left open whether this legal personality is of a private - or public-law nature. Article 1 states that “an EGTC shall have in each Member State the most extensive legal capacity accorded to legal persons under that Member State’s national law. It may, in particular, acquire or dispose of movable or immovable property and employ staff and may be party to legal proceedings.”⁶³ On an international level, an EGTC is treated as an entity of the member state where it has its registered office, which means that its acts are governed by the law of this member state.

Each EGTC is founded by a unanimous convention that specifies the name, the members and the territory of the respective EGTC, as well as its registered office and its objectives and tasks. The members of an EGTC consequently adopt a statute, which regulates the EGTC’s organs (which, according to Art. 10, should be at least an assembly and a director), their composition and competencies, as well as the decision-making procedure of the EGTC and its working language(s).⁶⁴

The statute shall be registered and officially published on the national level and also announced in the Official Journal of the European Union.

Since 1 August 2007, it has become theoretically possible to establish an EGTC. Practically, however, it might take some time until the first EGTCs are created. “The European Commission is aware of the difficulty to set up EGTCs ... still this year, but considers the possibility to encourage the setting up of EGTCs ... in a later phase, e.g. from 2009-2010 onwards.”⁶⁵ The process is stalled for two reasons. Firstly, most of the member states still have to adopt the appropriate provisions to ensure the effective application of the Regulation, such as drawing up a comprehensive list of EGTC tasks, or they still have to undertake the respective approximation of national laws (for example, enabling the state to participate in an EGTC).⁶⁶ Secondly, setting up an EGTC proves to be quite a complex and ‘labour-intensive’ process, because

⁶² See *ibid.*, para. 16 of the Preamble.

⁶³ *Ibid.*, Art. 1.

⁶⁴ *Ibid.*, Arts. 8 and 9.

⁶⁵ Assembly of European Regions, Project Fact Sheet, Information and Training Package on the European Grouping of Territorial Cooperation (EGTC), 2, at http://www.a-e-r.org/fileadmin/user_upload/PressComm/CommuniquésPresse/2007/Project_Fact_Sheet.doc.

⁶⁶ According to a table compiled by the Committee of the Regions, by mid-November 2007 only Bulgaria, Hungary, the United Kingdom and Portugal had adopted the respective rules or adapted their national legislation. This table is available at http://www.cor.europa.eu/document/activities/egtc/EGTC_State_of_play.pdf.

it requires a considerable amount of preparatory work in terms of political and legal assessments and feasibility studies.⁶⁷

Nevertheless, some border or transfrontier regions are already taking into consideration the establishment of an EGTC, such as the Euregio Meuse-Rhine, which would like to set up an EGTC for project management for four selected policy areas in order to assess whether the structure of an EGTC could overcome their legislative and organizational problems related to their present status as a ‘foundation’ under Dutch law.⁶⁸ Furthermore, the Greater Region, composed of Saarland and Rheinland-Pfalz (Germany); Lorraine (France); Luxembourg; and Wallonie, as well as the German community in Belgium (Belgium), have also declared their intention to set up an EGTC by 2009.⁶⁹ Finally, the autonomous region Valle d’Aosta, the regions Piemonte and Liguria (Italy) and the regions Provence-Alpes-Côte d’Azur and Rhône-Alpes (France) have also adopted a declaration of intent to create a “Euroregion Alpi-Mediterraneo” based on the structures of an EGTC.⁷⁰

Being a brand-new instrument, some efforts are required in order to gain the political support of the possible beneficiaries and to ensure its effective implementation.

The EU’s Committee of the Regions and the INTERREG Animation Cooperation and Transfer Programme (INTERACT) (which is funded by the European Regional Development Fund), especially, are undertaking numerous initiatives in order to foster the use of this new tool and thus the creation of EGTCs. The Committee of the Regions (CoR), for instance, has set up an Expert Group on EGTC, which should, *inter alia*, monitor the adoption and implementation of the provisions in the member states and facilitate the exchange of experiences and best practices regarding the establishment of EGTCs.⁷¹ Furthermore, the CoR aims to establish a register of EGTCs once some are founded.

⁶⁷ See the sample of a Roadmap on Setting-up an EGTC compiled by the INTERREG Animation Cooperation and Transfer Programme (INTERACT) and available on page 9 of the presentation on “Interactive Knowledge Transfer for INTERREG”, at <http://www.interact-eu.net/download/application/pdf/1380752>

⁶⁸ See the presentation “Euregio Meuse-Rhine and EGTC”, held during an INTERACT Needs Assessment meeting on 14 September 2007, at <http://www.interact-eu.net/download/application/pdf/1380752>.

⁶⁹ See the presentation “Preparing the Set-Up of an EGTC in the Greater Region”, held during an INTERACT Needs Assessment meeting on 14 September 2007, at <http://www.interact-eu.net/download/application/pdf/1380752>.

⁷⁰ This declaration of intent is available in Italian at http://www.regione.piemonte.it/piemonteinforma/scenari/2007/luglio/dwd/alpi_testo.doc.

⁷¹ Further information is available at http://www.cor.europa.eu/en/activities/egtc_expert.htm.

INTERACT, on the other hand, intends to develop an information and training package on EGTC matters and to publish an EGTC Handbook.⁷²

The Commission, on the other hand, will elaborate a report on the application of the EGTC Regulation (including proposals for amendments if appropriate) and will forward it to the European Parliament and the European Council by 1 August 2011.

Although no practical experience shows, yet, the impact of this new instrument and the functioning of such an EGTC, this new Regulation nevertheless represents a milestone regarding the EU's settings for crossborder cooperation. Thus far, within the European Union, no legal instrument had existed that was directly applicable in all member states and provided for such a concrete form of crossborder cooperation.

However, this EC Regulation is characterized by two important features: firstly, it is optional and, secondly, it is restricted by the limitations stemming from national law (since the final decision on whether an entity is entitled to participate in an EGTC is in the hands of the national state and is dependent on the respective national legislation). The member states have thus a considerable scope of interpretation and their respective interpretations will vary in terms of flexibility or restrictiveness.

3.2. The Council of Europe's Draft Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation

The need for further actions of the Council of Europe in the field of crossborder cooperation has already been indicated during the Conference entitled "The Enlargement of the European Union and its Impact on Transfrontier and Interregional Co-operation", organized by the CoE and the Republic of Poland in Krakow in October 2003, where it was noted that

*"[t]erritorial communities and authorities should be helped to develop their co-operation across the borders. A sound legal basis for the establishment of institutional forms of co-operation between neighbouring communities and regions should be developed at domestic and international level, having regard to the European Outline Convention on Transfrontier Co-operation ... and its First additional Protocol."*⁷³

The concrete discussions to extend the CoE's *acquis* regarding transfrontier cooperation by another instrument (and consequently also the drafting

⁷² See Assembly of European Regions, Project Fact Sheet ..., 2.

⁷³ Ricq, *Handbook of Transfrontier Co-operation* ..., 57.

process) started in September 2004, when the first proposal for a convention was submitted to the Committee of Experts on Transfrontier Co-operation. According to a CoE functionary it began “by chance more or less at the same time as the work on the EC Regulation.”⁷⁴

The aims of this new instrument are (as already pointed out earlier in this article) threefold: firstly, it should redeem the shortcomings of the Outline Convention and its current two protocols; secondly, it should further reduce obstacles to transfrontier cooperation, especially those stemming from the differences between national legal systems; and, thirdly, it should harmonize the different forms or structures of crossborder cooperation.⁷⁵

The concrete form of the new instrument was unclear in the beginning and it was discussed whether it should be realized as a Third Protocol to the Outline Convention or rather as a separate Convention containing a uniform law.⁷⁶

The idea of a separate Convention with a uniform law was, however, abandoned after some national delegations expressed some concerns in this regard.⁷⁷ As a consequence, the concept of a Third Protocol to the Outline Convention was further elaborated and respective drafts have been discussed. This Third Protocol is “intended to supplement the Madrid [Outline] Convention by instituting a harmonized status ... for associations of local and regional authorities so as to enable them to manage transfrontier co-operation as effectively as possible.”⁷⁸

⁷⁴ I received this information from a leading functionary of the CoE who furthermore declared that “[w]e [the experts of the CoE] came to know that the European Commission was ... working on a regulation on crossborder co-operation, when Commissioner Barnier expressed this intention in the Third Report on Social and Territorial Cohesion (February 2004). We suggested to the Commission to exchange ideas, given the similarity of the object of the two instruments, but the Commission declined the offer. We therefore ‘discovered’ the proposal for a Regulation on 14 July 2004 like everybody else.”

⁷⁵ See Committee of Experts on Transfrontier Co-operation, “Similarities and Differences ...”, 15.

⁷⁶ See, for example, the meeting of the Committee of Experts on Transfrontier Co-operation of March 2005, where a draft Protocol No. 3 to the Outline Convention concerning the establishment of Euroregional Co-operation Groupings is discussed, whereas in the meeting of September 2005 the discussions have shifted to a Preliminary Draft European Convention containing a uniform law on transfrontier groupings of territorial cooperation. Both meeting reports are available at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/diary/meeting_table_2005.asp#TopOfPage.

⁷⁷ These concerns can be traced in the reports of the March 2006 meeting of the Committee of Experts on Transfrontier Co-operation, available at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/Library/Transfrontier_Cooperation/lrctmeetingreportmar06_en.pdf and in the reports following the July 2007 meeting, available at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/Transfrontier_Cooperation/default.asp#TopOfPage.

⁷⁸ Ricq, *Handbook of Transfrontier Co-operation ...*, 53.

The most recent draft of Protocol No. 3, which was discussed during the October 2007 meeting of the Committee of Experts on Transfrontier Co-operation, contains the following main characteristics and provisions.⁷⁹

Following the pattern of the Outline Convention, the Draft Third Protocol consists of a set of articles containing the main provisions for the establishment of Euroregional Co-operation Groupings (ECGs) (especially the articles within Part II), which constitute the main part of the Protocol, and an Appendix with further provisions, to which the contracting states can revert voluntarily.

According to Article 14, the contracting parties have to undertake within 12 months of ratification the appropriate legislative, administrative or other measures in order to ensure an effective implementation of Part II of the Protocol. They furthermore have to inform their territorial authorities or communities about these measures (i.e., about the legislation enabling the setting up of ECGs).

The main feature of this new instrument (and at the same time its main difference to previous instruments) is that it provides-similarly to the EC Regulation-for the establishment of a concrete form of crossborder cooperation-namely, for the establishment of Euroregional Co-operation Groupings.

Members of such an ECG can be territorial communities or authorities, the respective member state of the CoE or other public or non-profit oriented private law entities (such as chambers of commerce or trade unions), as well as profit-oriented entities entrusted with public interest goals. Territorial communities or authorities shall, however, have the majority of voting rights in an ECG. Also territorial communities or authorities of third countries (i.e., non member states of the CoE) can become members of an ECG, provided that the ECG is established under the jurisdiction of a CoE member state and that it has its headquarters on the territory of that state (Art. 4).

An ECG is established by a written agreement between its founding members that specifies the name, the headquarters and the legal (private- or public-law) status of the ECG. Before concluding such an agreement or before acceding to an ECG, the respective territorial communities or authorities shall inform (according to the respective national law) the authorities of their member states of their intention thereof. The agreement will be registered

⁷⁹ The full name of the draft is Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECG), LR-CT(2007)8, at [http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/sub-committees/lr-ct/LR-CT\(2007\)13_EN.pdf](http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/sub-committees/lr-ct/LR-CT(2007)13_EN.pdf).

with the competent authority or court of the state where the ECG has its headquarters (Art. 6). The agreement also contains a statute, which lists the detailed provisions regarding the operation of the ECG—namely, the rules on membership, the ECG's duties, its governing bodies, as well as issues of budgets, financing and accountability (Art. 7). An ECG has legal personality and shall have the widest legal capacity granted in the domestic legal order under which it is established to similar groupings made of territorial authorities or communities. It shall have the right to have its own budget, staff and property. It is governed by the law of the state in which it has its headquarters (Art. 5).

The specific duties of an ECG are listed in the respective statute and they have to be in accordance with the competences of the members under the respective national law (Art. 8). Thus, the responsibilities of an ECG can vary from case to case, ranging from single issues to an overall crossborder cooperation comprising various policy fields, depending on the competences that are assigned to the participating entities according to national law.

The administrative supervision of the decisions and the acts of an ECG is undertaken according to the national rules where the ECG has its headquarters and in the same manner as the legality of acts of respective territorial communities or authorities is supervised in this state (Art. 12).

Article 15 of the Draft Third Protocol states that neither the applicability of already existing treaties between parties regarding transfrontier cooperation nor the future possibilities for parties to conclude treaties on this subject are affected. This provision ensures that already existing forms of crossborder cooperation, often based on bi- or multilateral treaties, need not be replaced by an ECG and maintains the possibility of the conclusion of future bi- or multilateral treaties dealing with crossborder cooperation and the establishment of other forms of transfrontier cooperation.

The Third Protocol can only be signed by states that have also signed the Outline Convention and, together with the instrument of ratification, the respective state can designate the categories of territorial authorities or communities or other entities to which the Third Protocol applies or, alternatively, which ones it intends to exclude thereof (Art. 16). However, it is worth to notice that the ratification of the Second Protocol is not a prerequisite for joining the Third one.

The Third Protocol will enter into force as soon as four states have ratified it (namely, three months after the fourth ratification).

At the time of writing this paper (December 2007), it was still difficult to assess how the final version of the Third Protocol will change compared to the

present version of the draft and when it will be opened for signature, as the discussions and the further elaboration of the draft were still ongoing. The 2008 meetings of the Committee of Experts on Transfrontier Co-operation might shed more light on the next steps and developments and it is likely that the final agreement on the Third Protocol will be taken within the year 2008.

3.3. A First Attempt to Compare the Two Instruments: Similarities and Differences

If two international or, respectively, supranational organizations - like the CoE and the EU - are elaborating (and adopting) nearly at the same time two new instruments regarding crossborder cooperation in Europe, it is quite an interesting undertaking to elaborate a comparison between these two instruments. Such a comparison should, among other things, contribute to answering the most crucial questions that come into one's mind when dealing with these new measures: what is the added value of having two instruments? Are these instruments a duplication of each other or rather complementary?

In order to compile a comparison, I would like to outline the most important similarities and differences between the EC Regulation, on the one hand, and the Draft Third Protocol, on the other hand.

At first glance, both instruments possess similar features and generally perform similar functions. They both aim to introduce a harmonized structure of crossborder cooperation in the form of 'groupings'.

This brand-new concept of groupings should (as is clearly emphasized in both documents), however, not replace pre-existing Euroregions or other forms of crossborder cooperation but rather provide a frame for the form of future initiatives of transfrontier cooperation. Existing transfrontier regions can, however, adopt the structure of such a new grouping, as future forms of cooperation can equally adapt other structures. Through this openness and flexibility, both instruments try to keep the balance between the need for harmonized or similar forms of cooperation, on the one hand, and the need for leaving enough room in order to adapt the form of cooperation to the respective conditions and needs of a border region, on the other hand.

At this point, however, the first difference that catches one's eye is the different notation of these new forms of crossborder cooperation, i.e., European Groupings of Territorial Cooperation in the EC Regulation and,

provisionally, Euroregional Co-operation Groupings in the Draft Third Protocol of the CoE.⁸⁰

Also the ‘legal nature’ of both instruments seems at first glance different: an EC regulation, which is as a rule prevailing over national law, versus a multilateral treaty, where the member states decide whether they ratify it or not. The special nature of the present EC Regulation, however, removes this difference “since the establishment of an EGTC is not only optional, but also fully dependent on the limitations following from national law.”⁸¹

Both forms of groupings are vested with legal personality and the same consequential legal capacities (own budget, property, staff, etc.) and both are established by an agreement or, respectively, convention, which includes a statute with further specifications (see above). The EC Regulation proves to be much more detailed in this regard, whereas the Draft Third Protocol contains all the respective provisions in the optional Appendix.

The provisions regarding membership differ, since an EGC can include (besides territorial communities or authorities, member states and public law bodies) also non-profit private law bodies (such as chambers of commerce), whereas an EGTC is limited to regional and local authorities, member states and bodies governed by public law and cannot, therefore, include private law entities. This openness for private law bodies of the Draft Third Protocol guarantees much more flexibility in terms of functional cooperation because it provides for the inclusion of important economic actors, which often represent project partners in the frame of EU-financed programmes.⁸²

The participation of entities from third countries is, in principle, allowed in regard to both kinds of groupings. The EC Regulation retains this possibility ‘just’ in the preamble with the following two conditions: firstly, the legislation of the third country or respective bi- or multilateral agreements must allow the participation (para. 16 of the preamble); and, secondly, that entities from at least two EU member states participate in an EGTC (Art. 3(2)). The Draft Third Protocol deals with this matter in Article 4, which retains just the condition that the EGC be established in a member state of

⁸⁰ The advantages and disadvantages of these new terms and of the fact of having two different new notations could be the subject of a separate research project and shall not be treated in this article.

⁸¹ European Committee on Local and Regional Democracy and Committee of Experts on Transfrontier Co-operation, Comparison of the Revised Draft Protocol Nr. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings and Regulation (EC) No 1082/2006 on a European Grouping of Territorial Co-operation, LR-CT(2007)9, 3, at [http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/sub-committees/lr-ct/LR-CT\(2007\)9_EN.pdf](http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/sub-committees/lr-ct/LR-CT(2007)9_EN.pdf).

⁸² *Ibid.*, 5.

the Council of Europe. The Draft Third protocol thus proves to be more flexible in this regard, since under the EC Regulation the establishment of a 'bilateral' EGTC between entities of one EU member state and entities of a third state is, for instance, not possible (whereas the Draft Third Protocol leaves this possibility open).

The abilities of the states to exercise control over the establishment of these groupings represents, again, an issue that can be perceived as different. The EC Regulation contains a clause that each member state has to approve the creation of or the accession to an EGTC or has the possibility of a prohibition thereof if it does not conform to the respective national law (Art. 4), whereas the Draft Third Protocol does not foresee such an explicit approval by the state but 'just' the requirement to inform the central state about the intention of establishing or participating in an EGC (Art. 5). A closer analysis of the Draft Third Protocol reveals, however, that the influence of the national state goes beyond what emanates from Article 5, because the state still has supervisory power over any actions undertaken, "with the effect that the central authorities can also prohibit in advance any action which might violate the constitution or laws of the state, in particular if the respective communities or authorities do not have the competence or treaty-making power to participate [in an EGC]."⁸³ Furthermore, as already pointed out in section 3.2., Article 16 of the Draft Third Protocol retains that each state can, in the course of the ratification process, compile a list of territorial authorities or communities, to which it guarantees the right to participate in an EGC or which it excludes from the scope of this Protocol. In the end, the EC Regulation could turn out to leave less room for manoeuvre for the national states than the Third Protocol (as EU law is generally more coercive than international CoE law), especially because it will be enforceable before the ECJ (an aspect to which I will return below).

A central difference between the two forms of groupings lies, however, in the tasks that are ascribed to them. The tasks of an EGTC are quite restricted, being predominantly focused on the implementation of territorial cooperation programmes co-financed by the EC and, thus, on economic and social cohesion (Art. 7). The tasks of an EGC are, by contrast, much more extensive, grounded on the general clause that an EGC shall perform the tasks that its members entrust to it (Art. 8 of the Draft Third Protocol), which opens the possibility for a fully-fledged transfrontier cooperation that is not just limited to social and economic matters.⁸⁴

⁸³ *Ibid.*, 7.

⁸⁴ *Ibid.*, 13.

Lastly, I would like to point out one more difference, which might play a crucial role in the future-namely, the issue of judicial control over the application of both instruments. Because of the nature of a regulation, the present EC Regulation will be subject to the ruling of the European Court of Justice, which may interpret its scope and whose decisions will be binding for the EU member states. Regarding the Third Protocol, being by contrast an international treaty, a national court represents the highest judicial instance for its interpretation and respective ruling. This substantive difference may play a crucial role in the future insofar as the ECJ might act as a motor for further extending and deepening the scope of the EC Regulation through the interpretations undertaken in its case law.

The crucial question in this regard is: what effect will the general principle of supremacy of EU law over national law have? Let us imagine, for instance, a case in which a local or regional entity insists upon its right to participate in an EGTC (guaranteed through the EC Regulation), whereas the respective national state counters that, according to the constitutional law, this entity has neither the right to conclude treaties with regions from other countries nor the right to establish transnational law institutions. On the grounds of these provisions of national constitutional law, the respective state could, in theory, prohibit the participation of the respective entity in an EGTC because its participation is not in conformity with national law (which, according to Art. 4 of the EC Regulation, is a justified reason for the prohibition of an EGTC). Whether such a case could or would represent a conflict between EU law and national law and how the ECJ would interpret and rule on it remains to be seen. However, if analyzed in this perspective, the limits posed by national law could prevail, at least in the countries (which are the majority) which adopt a dualistic approach in dealing with the relationship between domestic and EU law.

This brief comparison shows that the two instruments are not a duplication of each other but that they, besides considerable similarities, are also characterized by some remarkable differences. These very differences could represent the added value of having two similar instruments-an aspect that I would like to address briefly within my concluding remarks.

4. Concluding Remarks

The description of the extant accumulated *acquis* of both the Council of Europe and the European Union regarding territorial/sub-national cooperation across frontiers within Section 2 of this article has shown a kind of dichotomy that has predominated so far, with the CoE providing through its various instruments a legal basis for transfrontier cooperation, on the one hand, and the EU supplying the financial assistance for crossborder cooperation through its various funds and programmes, on the other.

With the adoption of the EGTC Regulation by the EU, which provides a sound legal basis for crossborder cooperation, this dichotomy has been clearly overcome and has thus created a new situation to which the CoE has had to react.

During the discussions on the Draft Third Protocol within the Council of Europe, it was consistently emphasized that the Draft Third Protocol should be compatible with the new EU Regulation and that it should guarantee that both the CoE and the EU member states should possess the same possibilities for creating new transfrontier cooperation bodies.⁸⁵ In the course of a seminar on the Legal Status of Cross-Border Cooperation Structures it was stated that the Third Protocol should be drafted “with a view to bridging the gap between EU and non-EU countries in the field of cross-border co-operation and across the EU external frontier and also to facilitating the implementation at national level of the EC Regulation on EGTCs.”⁸⁶ Now that the EC Regulation is already in force, it seems that there is still some discord within the CoE with regard to the means of proceeding that could lead to these aims. On the one hand, it is emphasized that the work on the Draft Third Protocol should be finished as soon as possible,⁸⁷ whereas, on the other hand, Germany, for instance, would be in favour of postponing the adoption of the Third Protocol for another two years in order to assess first the impact and the gaps of the EC Regulation through practical experiences and determine then the fields where additional legislation by the CoE is required. This way of proceeding would, according to the opinion of Germany, avoid duplications.⁸⁸

However, the comparison between the EC Regulation and the Third Protocol shows - as already pointed out earlier - that the two instruments are not a duplication of each other but possess some remarkable differences. The main differences concern the matters of membership in such a grouping, the participation of entities from third countries and the tasks of the respective grouping, where the Draft Third Protocol proves to be less restrictive than the EC Regulation. This could enhance and widen the scope of transfrontier cooperation by also including (non-profit) private law bodies and by assigning to an ECG a multiple set of tasks not limited to economic and social matters only.

⁸⁵ Meeting of the Committee of Experts on Transfrontier Co-operation, 5-6 February 2007, Meeting Report, 4, at [http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/Main_Bodies/Steering_Committee/LR-CT\(2007\)6_EN.pdf](http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/Main_Bodies/Steering_Committee/LR-CT(2007)6_EN.pdf).

⁸⁶ *Ibid.*, 15.

⁸⁷ *Ibid.*

⁸⁸ Committee of Experts on Transfrontier Co-operation, Comments on the Draft Protocol No. 3 to the Madrid Outline Convention on Euroregional Co-operation Groupings, 11 June 2007, 7, at [http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/sub-committees/lr-ct/LR-CT\(2007\)10_bil.pdf](http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/main_bodies/sub-committees/lr-ct/LR-CT(2007)10_bil.pdf).

A possibly widened scope of transfrontier cooperation and the provision of the same possibilities for non-EU member states to act in the field of crossborder cooperation represent at the moment the added value that the Draft Third Protocol has compared to the EC Regulation.

Nevertheless, many questions still remain open, such as: to what extent will the EU member states and their local and regional authorities make use of the possibility of establishing EGTCs? Might it be confusing to have two similar tools at the same time (EGTC and EGC), especially for states that are members in both organizations? Will the EU member states even ratify the Third Protocol, taking into account that their local and regional authorities possess already the possibility of creating an EGTC? And to what extent will the CoE member states ratify a Third Protocol, taking into consideration that just 17 and, respectively, 15 member states have ratified the two other Protocols?

These open questions indicate that many aspects remain unclear and impossible to assess at this point. Only practical experience, which will be gained in the course of the coming years, can provide the necessary information in this regard. This could again favour a postponement of the adoption of the Third Protocol, as has been suggested by Germany (see above).

Whether or not the project will be postponed, two important aspects nevertheless need to be taken into account.

Firstly, a further strengthening and coordination of the cooperation between the CoE and the EU in the field of crossborder cooperation is necessary on a multilevel basis - namely, already during the drafting and discussion phase of an instrument, as well as during its implementation process. The Congress of Local and Regional Authorities of the CoE and the EU's Committee of the Regions have already made a start in this sense by enhancing their cooperation in the field of CBC and thus acting as a preliminary stage in order to create a greater synergy between the two organizations.⁸⁹ However, the statement of the Head of the Department of Local Government and Transfrontier Co-operation of the Council of Europe clearly shows that the cooperation between these two organizations was quite insufficient, especially with regard to the drafting process of these new tools.

Secondly, in order to effectively implement and exploit the new instruments, further good will on the part of the member states is required. It is absolutely necessary to further demonstrate to them that transfrontier

⁸⁹ This was decided in Prague in September 2004. See Ricq, *Handbook of Transfrontier Co-operation ...*, 84.

cooperation is nothing ‘dangerous’ but something in line with their interests. For this purpose, the positive effects of territorial cooperation, such as crossborder development, job creation, cultural exchange etc., need to be further stressed. On the other hand, it should also be emphasized that the national state will always have the final control over CBC activities.

As the comparison between the EC Regulation and the Draft Third Protocol has shown, the good will of the national states will, among other things, ultimately determine the effectiveness and the results of both instruments, especially because national (constitutional) law proves to remain the crucial legal basis for the possibility of local and regional entities to engage themselves in territorial cooperation. The national legislative frameworks have to be further adapted to the special needs and particularities of the border regions in order to vest them with the respective competences that will enable them, firstly, to participate in a ‘cooperation grouping’ with legal personality and, secondly, to develop a fully-fledged crossborder cooperation. Therefore, further awareness-raising on the national level, as well as on the local and regional levels, is absolutely necessary. Otherwise, even the best-elaborated international instrument might become obsolete, if the national states oppose it or are not willing to undertake eventual changes with regard to their national law.

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