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**TERRITORIAL COOPERATION
BETWEEN
SUB-NATIONAL AUTHORITIES:
LEGAL INSTRUMENTS
IN EUROPEAN PERSPECTIVE**

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ABSTRACT

The phenomenon of territorial cooperation between local and regional authorities has gradually evolved from the perspective of a merely factual phenomenon to a legally recognized form of relation at sub-national level. The attempt to find legal solutions and the definition of common rules have been hardly implemented due to the differences among national legal orders. The Council of Europe and the European Union have recently adopted new legal instruments in order to create suitable standard frameworks in this field. This study, considering the state of the play about the legal tools adopted for territorial cooperation, intends to evaluate the degree of legitimation for local and regional authorities in particular after the entry into force of the Regulation (EC) No 1082/2006 establishing a European Grouping of Territorial Cooperation (EGTC). In this view, a peculiar attention is drawn on the interaction between levels of government in order to estimate the potential affirmation of a “sub-national right to territorial cooperation”.

As a general and essential background, the development of a wider European territorial dimension represents a key-concept and a cross-cutting issue. Different methodologies have been utilized for this research. The literature available on the topic has been useful to identify some preliminary concepts such as the differentiation between the competence to deal with territorial cooperation and the law applicable to the consequent sub-national transfrontier relations. The direct analysis of the most important legal sources outlines the evolution and the current situation about the different legal instruments for territorial cooperation, trying to sum-up the “law of territorial cooperation”. In conclusion, the clear improvement of sub-national prerogatives has to be underlined. However, despite the innovative European legal framework, the national supervision on the activities of regional and local communities and the equilibrium between central and sub-national authorities in case of foreign actions is still a sensitive question. Territorial cooperation demonstrates that legal rules are necessary to recognize the phenomenon, but their implementation needs a mature system of multilevel governance and fair cooperation in order to deal with such a complex phenomenon.

CHAPTER I

PRELIMINARY NOTIONS TO THE LEGAL ANALYSIS OF TERRITORIAL COOPERATION

1. Introduction

1.1. Frame and purposes of the study

For the purposes of this research, territorial cooperation could be considered as a new concept comprehending different forms of so-called transfrontier or cross-border relations between sub-national authorities and should be generally intended as every kind of relation or activity between sub-national territorial communities, belonging to different States, concerning the geographic area covered by these communities. Main interest of this study is related to the role of public actors or, in a broader sense, to the exercise of territorial public functions across borders in Europe.

Territorial cooperation is a controversial phenomenon and a manifestation of a legal reality *in fieri*. Transfrontier activities between local and regional subjects have been developed in several ways, both through informal and formal instruments. In particular, the formal solutions are different in their legal nature and make reference to different normative sources. Despite the importance of cooperation for territorial communities, the national systems have not autonomously advanced a coherent legal support in order to give a clear frame of reference for sub-national transfrontier activities, but the most relevant legal frameworks have been set up at European level. The Council of Europe represents the first institution devoted to the elaboration of a common standard framework for territorial cooperation with the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities (adopted in Madrid in 1980) and its three additional protocols. More recently, the European Union, after a long experience of regional

policies, has adopted the Regulation (EC) No 1082/2006 establishing a European Grouping of Territorial Cooperation (EGTC), drawing a new approach to sub-national transfrontier relations.

The rather slow development of common legal rules in this field demonstrates the difficulty to find suitable and shared solution. In particular, the acknowledgement of a form of sub-national foreign power has always been, and still is, a sensitive issue for national systems.

Within this panorama, the basic hypothesis of this work consists in the affirmation that, after the progressive evolution and implementation of legal instruments for territorial cooperation, a fundamental “European territorial *acquis*” does exist and sub-national authorities have, if not a proper right, at least a recognised capability to territorial cooperation. The wide-range analysis about various aspects of territorial cooperation, both at European and at national level, focuses on the progressive acknowledgement of territorial cooperation as an indispensable method of governance. In particular, the main objective is to highlight and demonstrate that, despite the formal position of sub-national authorities has not changed from a strictly legal point of view, however these authorities have new possibilities and means to undertake transfrontier relations.

This study takes into consideration different legal aspects about territorial cooperation between regional and local authorities in Europe, covering issues like the legitimation of sub-national authorities as well as the legal nature of the agreements between foreign local and regional subjects. The identification of some preliminary concepts is necessary in order to have a clear focus on the topic concerned. First of all, it is of a fundamental importance to highlight that the phenomenon of territorial cooperation in Europe shows some distinctive peculiarities if compared with other experiences worldwide. In particular, the European experience is characterised by a high level of institutionalization of transfrontier relations at sub-national level, while other examples, such as cross-border cooperation between Canada and the US, are distinguished by the major presence of private actors or, anyway, by a modest involvement of sub-national public institutions¹.

¹ See I.K. BLATTER, *Debordering the World of States: Towards a Multi-Level System in Europe and a Multi-Polity System in the North America? Insights from Border Regions*, in *European Journal of*

The following survey concerns activities and relations which are usually identified in different ways, such as cross-border, transfrontier, interregional, transnational, interterritorial and territorial cooperation. However, all these terms shall necessarily be associated to activities at sub-national level. Furthermore, in the optic of this work the word “territorial” is intrinsically connected to the sub-state level. Thus, territorial cooperation represents a binomial whose inherent components refer to peculiar relations developed by sub-national actors within the respective territories. Far from pretending to be exhaustive, this research concerns both the state of the play of the various instruments that have been developed for cooperation between sub-national authorities or communities and a general evaluation on the role of legal factors about the regulation of this complex subject at European level. Moreover, the increasing legitimation for sub-national authorities to engage in transfrontier relations and the evolution of a distinctive European territorial dimension are important key-elements in this work.

Like almost every social and institutional aspect, territorial cooperation is a very intricate matter and involves also a multi-sided legal approach. Anyway, bearing in mind the importance of legal aspects, it is fundamental not to forget the role of non-legal or soft-law factors, mainly with regard to the implementation of sub-national cooperation. The long experience of transfrontier relations between sub-national authorities shows how legal aspects are extremely complex. Many juridical complications and ambiguities surround the systematic profile of territorial cooperation. Namely, different branches of law are involved in this topic, such as international law, Community law and national legislations, each of them applying different schemes in order to display suitable and feasible legal solutions for the creation of sub-national transfrontier relations and activities. And, as just mentioned, even the contribution of so-called soft-law factors is essential for an effective and efficient implementation of institutional cooperative phenomena.

The analysis about the evolution of these legal and meta-legal tools is a primary object of the study. In fact, the examination of the legal instruments of territorial cooperation generates a better comprehension of the mechanisms and functioning concerning this broad and yet non-systematized phenomenon. A special

International Relations, 2001; 7, p. 180.

attention shall be necessarily drawn to the comparison between the European Union and the Council of Europe's legal attitudes towards territorial and transfrontier cooperation in order to evaluate the impact of these extra-national legal system on the national legal orders, mainly with regard to the development of the potential rights of sub-national communities to build up and extend autonomous transfrontier activities. In particular, the core of the research considers the normative aptitude of the European Union and Council of Europe to give implementation to the sub-national capability to the exercise of foreign powers beyond a discretionary involvement of the State. Namely, from the state perspective, the undertaken of sub-national foreign activities, as territorial cooperation is, implies a high degree of potentially reverse effects: on the one hand the possible reference of sub-national authorities to a foreign national law generates some weaknesses of the central authorities about the control towards territorial communities; on the other hand the presence within the national borders of a foreign public authority determines ambiguities with regard to the law applicable to the relations between the own and foreign territorial authorities. These are only brief and general examples about the complexity of the legal aspects concerning territorial cooperation, but other legal questions are related to, in particular, the establishment of transfrontier structures.

Behind the issue related to the concrete methods for implementing transfrontier activities of territorial communities, another relevant crosscutting reflection concerns the functions and tasks of legal disciplines in regulating this kind of relations. In this sense, it is appropriate to point out that distinctive areas of the law are bound with the problematic questions presented by transfrontier/territorial matters. The way through which territorial communities approach territorial cooperation and the way they exercise their powers and competences, represents a multi-dimensional argument in the legal field, mainly in the area of public law. Different aspects of this legal branch are involved. However, not only public law, but also private law has played and still plays a relevant role, having a broad application in the relations between sub-national foreign subjects.

Thus, this work is not to be considered as a mono-thematic approach towards territorial cooperation in Europe by giving account of the *status materiae* from the perspective of one legal discipline. Namely, it is not an attempt to reconstruct the

discipline of territorial cooperation from a static point of view for the simple reason that the nature of territorial cooperation as such needs a multi-dimensional approach. In fact, since its very beginning, the analysis has started, from the concrete observation of the phenomenon and the related practical solutions trying to observe the effects of different legal instruments on it.

About the impact of legal instruments on territorial cooperation, it is necessary to precise that the aim of this study has a double objective. On the one hand, the attention is directed towards the implementation and interaction of the legal solutions available for the cooperative activities between sub-national communities and towards the evaluation of the possible improvement of sub-national powers in this field. On the other hand, the survey focuses on the capacity of the European Union and the Council of Europe to have a substantial impact on the legal framework of territorial cooperation. More precisely, this last assumption is related to the function of the two “super”-national subjects to shape the operative legal instruments for sub-national subjects. From another point of view, an interesting question is whether the legal solutions adopted for territorial cooperation affect, or in some ways shape, the role of the actors involved. With other words, the point is whether the instruments of territorial cooperation, in particular the recent legal documents adopted by the European institutions, enlarge the competences' attributions of sub-national authorities, thus shaping the national legal orders.

Among the legal tools for territorial cooperation, the entry into force of the EC Regulation on a European Grouping of Territorial Cooperation (EGTC) is peculiar in regard to the last question. Namely, it is possible to wonder if the new Community discipline has some effects on the role of sub-national authorities with regard to the State's supervisory attitude. In fact, according to some interpretations, the EGTC Regulation could represent an instrument for an autonomous sub-national approach to territorial cooperation, much more innovative than other European provisions. An issue of this kind, however, could be suggested not only by this new legal instrument, but even in general, by the comprehensive analysis of the other several tools available for territorial cooperation. In fact, the gradual but progressive evolution of new solutions and the escalating debate about territorial cooperation have brought to its current acknowledgement. More generally, this work is far from

challenging a theoretical approach to the study of territorial cooperation, rather it aims at analysing the effective development of practical solutions from a legal point of view².

1.2. Methodological note

This study is basically divided into two parts, which correspond respectively to a theoretical and to a practical approach. Namely, the second and the third chapter present a conceptual analysis about the background of territorial cooperation, while the fourth and the fifth chapter consider the development of different experiences regarding the legal instruments for territorial cooperation. The reasons of this “structural” choice reside in the fact that, although quite extensive, the presentation of some basic notions, such as the terminological issues or the overview concerning the European territorial dimension, are fundamental and functional conditions in order to comprehend the progressive development of the various means adopted as legal solutions for territorial cooperation. This subdivision of the work seems to be quite helpful in order to delineate, on the one hand, some basic achievements about the theoretical framework of the topic concerned. In fact, as far as territorial cooperation has originally developed as a mere factual phenomenon, it has currently a relevant conceptual background. On the other hand, the analysis about the instruments that have been developed for cooperation gives the idea of a progressively evolving phenomenon, thus, underlining the dynamic aspect of cooperation between sub-national authorities.

This distinguishing between the conceptual/static part and the concrete/dynamic part is not the only key available for the interpretation and the

² See J. GRIX, *Towards a theoretical approach to the study of cross-border cooperation*, in *Perspectives. Review of Central European Affairs*, 2001-2002, n. 17, p. 5 *et seq.*, who approaches both sides of cross-border cooperation, the formal and informal one, and their interaction within European integration. Grix intends the formal integration as a sum of “deliberate actions by authoritative policy-makers to create and adjust rules, to establish common institutions and to work with and through those institutions”, while “informal integration consists of those intense patterns of interactions which develop without the intervention of deliberate governmental decisions, following the dynamics of the market, technology, communication networks and social exchange [...]”. Nevertheless, any reference to formal or informal cooperation further in this work does not deal with this definition. Namely, this study does not regard the formation of communication networks and social exchange outside governmental issues, rather it concerns the exercise of public power in the field of cross-border cooperation. In this regard, the mention of informal actions is seen as those exercised outside from proper legal instruments.

analysis of territorial cooperation. In fact, other cross-cutting issues are spread within the study. In particular, the relation between levels of government, the impact of super-national legal orders and the development of suitable principle for the multilevel governance represent a sort of constant presence.

The analysis of the different aspects that have been taken into consideration and the following drafting have been conducted through the study of the literature available on the topic and through the examination of various legal texts. Moreover, the (brief) working-experience at the Committee of the Regions and at the Congress of Local and Regional Authorities of the Council of Europe has been extremely useful in order to favour a more aware comprehension of the argument concerned. These experiences have conferred an added value to the personal reflections about territorial cooperation. In particular, it has been observed that the legal acknowledgements need a constant political will in order to be implemented. Moreover, the effective application of the new instruments such as the European Grouping of Territorial Cooperation (EGTC) or the European Cooperation Grouping (ECG) require a persistent action both at European and at national level for their extensive application and development.

2. Terminology

2.1. A complex and multiple terminology

As far as this study aims to give some clarifications about essential concepts, the analysis of territorial cooperation imposes a digression on the terminological aspect in this sense. One of the first difficulties related to the study of the argument concerned emerges in relation to the semantic approach. Moreover, it is better to specify in advance that this semantic approach knows also some variations depending on the language concerned³. Thus, the following digression doesn't have an all-comprehensive intent with regard to the various possible linguistic differences.

³ As an example, the English terms “cross-border” or “transfrontier” could be easily translated with the same meaning of the French “transfrontalière”, the Italian “transfrontaliera” or the German “grenzüberschreitend”, while the French neologism created by Levrat “transfrontière” is not easy to translate into English.

As already mentioned, territorial cooperation is a multiform phenomenon and has different terms of identification. The use of the adjective “territorial” is quite new and derives mainly from the EU's experience⁴. The term “territorial cooperation” is applied in this survey as a general and major “container” in order to individuate various transfrontier activities between sub-national authorities. Thus, it necessarily implies the concept of activities or relations that overcome national borders.

At the time of writing the term “territorial”, used as adjective for cooperation between sub-national entities, is not a common or conventional indicator for every kind of cross-border activities yet. Since it is a new and general concept related to the European Union's approach, this is not the same for the Council of Europe's system or for the various national legislations involved. However, the expression “territorial cooperation” will be utilized in the course of this work for the reason that it seems the best conventional way and the less confusing manner to analyse and identify the object of the present research. In any case, some cautions have to be applied when using the term territorial cooperation. Namely, it doesn't represent the sole term to distinguish the phenomenon. In fact, among a quite large amount of adjectives, it has been only recently utilised in official documents and it is still a non-harmonized concept, while the most part of the documents considered, in particular those not pertaining to the EU sphere, deals with other adjectives. To be precise, “territorial cooperation” doesn't necessarily imply a peculiar legal connotation, especially for the case it is not linked to the EC Regulation on the European Grouping of Territorial Cooperation (EGTC), rather it aims to categorize a specific phenomenon, which take place in various forms. In this sense, an expression originally born as a typical EU concept, could identify a broader European phenomenon.

What it is called “territorial cooperation” is originally known as transfrontier or cross-border cooperation. The first relations between sub-national authorities begun, quite understandably, for reasons that were functional to proximity, thus, they were essentially and factually cross-border. Transfrontier cooperation traditionally identifies, as well, the same kind of relations as a form of cooperative neighbourhood

⁴ See A. Papisca, *L'avvento del Gruppo europeo di cooperazione territoriale, GECT. Nuovi orizzonti per la multilevel governance democratica*, in A. Papisca (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, Venezia, 2009, p. 15.

along the same border. After a first phase, cooperation between sub-national authorities knew also a more complex way to develop common actions, namely not necessary bounded to the contiguity of the territory. Different terms have been applied without a really clear distinction. The use of different expressions has not been harmonised or conventionally established, neither from a substantial nor from a legal point of view. As a result, after a long experience, the structure of cooperation across the national borders is, still nowadays, far from being well framed both from the legal and from the lexical point of view. Up to now, a middling amount of legal solutions have to be added to a huge informal praxis, which is not based on strictly normative documents. Moreover, these different forms of cooperation – legal and non-legal – are not framed or determined by uniform concepts, so that the identification of a precise type of cooperation is not easy. With regard to this situation, the choice to use the comprehensive expression of territorial cooperation has, rather than a theoretical ground, a reason of convenience.

Trying to outline the most general features of territorial cooperation, it has to be said, firstly, that it represents a dynamic process, rather than a static phenomenon, which is characterized by relationships among local communities or authorities, mostly located along land or maritime borders⁵. Actually, the very first term used in informative, political and legal documents is, more intuitively, “cross-border” or “transfrontier”. The image of cross-border cooperation is, at a first glance, instinctual and it doesn't apparently appoint a very complex concept. However, several different relations have been developed in the panorama of cross-border cooperation and various instruments have been used to legitimize this kind of activities across the borders. However, the issue of terminology is not a superfluous problem, indeed, and requires to be shortly examined. The adjective “cross-border” is not the only one that has been used for identifying cooperative activities between local public or private subjects as members of different States, such being straddle at least one frontier. It has to be observed that territorial issues have marked, and still mark, not only the EU field, but even other geo-legal fields, such as the Council of Europe (CoE). The increasing role of this topic at European level, has progressively brought to a

⁵ See MISSION OPÉRATIONNELLE TRANSFRONTALIÈRE (MOT), *Practical Guide to Transfrontier Co-operation*, Council of Europe, 2006, p. 9. MOT, founded in 1997, is a network composed of at least 30 groups of delegated elected by local authorities or communities locate along French borders and involved within the development of cross-border projects regarding metropolitan, rural and natural areas.

rationalisation of the terms. In this sense, it has not been found a shared conceptual identification for transfrontier/cross-border cooperation, but some expressions have prevailed over other terms and a slow systematization of the semantic approach has begun.

The concept of territorial cooperation is the newest linguistic expression, however the use of other terms needs also to be taken into consideration during this study, as long as many documents made, and still make reference to these various terms. In particular the word “transfrontier” has been used for the first European common legal framework in the Madrid Outline Convention adopted by the Council of Europe in 1980 and has been used by subsequent international treaties on the matter. Nowadays “transfrontier” cooperation is the main general term utilized within the CoE's terminology and is still inserted in the upcoming documents⁶.

Regarding the terminology firstly used in the EU's documents⁷, the development of several kinds of cooperation has highlighted the existence of different basic terms: *transfrontier cooperation*⁸, *inter-territorial cooperation*⁹, *transnational cooperation*¹⁰, *cross-border cooperation*¹¹, *interregional cooperation*. According to the studies promoted by the Committee of the Regions, the mentioned

6 As we will see, the CoE's documents also utilise the term “inter-territorial” cooperation when dealing with relations between non contiguous territorial communities. However, on the basis of a general analysis of the documents concerned, it is possible to say that the major general term used by the CoE is that of “transfrontier cooperation”.

7 Primarily, it is useful to remind the terminology used by the Committee of the Regions. This Institution, even if not affected with mandatory powers, is deeply interested in the development and implementation of territorial cooperation, mainly among territorial communities such as municipalities and regions.

8 See COMITÉ DES RÉGIONS, *La coopération transeuropéenne entre collectivités territoriales*, cit., p. 34, where the term “transfrontier cooperation” is intended as that associating at least two territorial neighbouring powers (regional or local communities), which stand on geographically continuous areas along a common border.

9 *Ibid.*, p. 35: “Inter-territorial cooperation draws bilateral, trilateral or multilateral collaborations, which are widely and essentially structured among local and regional communities, not necessarily linked by strict geographical neighbourhood”; for instance, let's think to twin cities. It is to mention that the term “interterritorial” is often used as synonym of “interregional”.

10 *Ibid.*, p. 36-39. The concept of “transnational cooperation” is mainly developed in regard to the promotion of a more integrated territorial development between contiguous geographical areas or groups of regions and, in some ways, along, at least, two EU Member States or contiguous third countries. The original tri-partition between transfrontier, interterritorial and transnational saw the addition of another element, namely the so-called *cooperation among European associations of regional and local communities*. Associations formed by local or regional communities cover activities and interventions representing a supplementary and complementary form of transfrontier, interregional or transnational cooperation, which are distinguishable, case by case, on the basis of the different activities and subjects involved. However, this last form has not a peculiar value for this survey.

11 Mentioned in Article 265 TEC.

concepts have, even with some distinctions, something in common. Since cooperation is often qualified as bilateral, trilateral or multilateral, this doesn't denote a peculiar characteristic of differentiation. An element of distinction, rather, is considered with regard to the geographical position of the actors of cooperation. In particular, this difference has traditionally been observed in the geographical contiguity or non-contiguity. Another differential element concerns the development of some types of EC programmes, which are specifically elaborated only for determined scopes¹². However, the implementation of Community programmes do not individuate an autonomous category of cooperation, rather they fit into the already mentioned forms, depending on the modalities and territorial extension involved in the cooperation¹³. In any case, as the further chapters demonstrates, the programmes developed under the Community initiative have played a fundamental role in the development of territorial cooperation.

After the entry into force of the Regulation (EC) 1082/2006 on a European Grouping of Territorial Cooperation, a new terminological element has to be added to the previous categories of cooperation. In particular, the concept of territorial cooperation has been rationalized in a well-defined legal instrument and aims at comprehending, without replacing, cross-border, transnational and interregional cooperation. The introduction of this new term has been mainly fostered by the Committee of the Regions (CoR) and by the European Parliament (EP) as a new overall term in order to identify different existing transfrontier relations. At a first glance, the notion of territorial cooperation seems to be much broader and more vague than the previous ones. According to our opinion, the reasons justifying the adoption of the new concept at Community level are twofold. On the one hand, the development of the EU's approach related to regional policies and cohesion policies brought to an official territorial policy. On the other hand, there is an attempt, coming from the EU institutions, to give a major uniformity to the phenomenon of cooperation between territorial communities. The effective realization of this attempt remains, however, quite difficult because new instruments and new approaches to

12 For example, the INTERREG Initiative and subsequent modifications, which will be widely analysed further.

13 INTERREG, INTERREG II A and INTERREG III A are a model of transfrontier cooperation; INTERREG II C and INTERREG III B deal with transnational cooperation; INTERREG III C is qualified as interregional cooperation.

territorial cooperation do not substitute the traditional concepts of cooperation and, therefore, need to coexist with them¹⁴. Thus, the imposition of an official and conventional terminology is not easily enforceable, in particular when the legal references and soft law-documents are also quite confusing and still linked to the original expressions.

In this regard, it is interesting to observe that at the EU level the term cross-border is mentioned in the English version of TEC at Article 265, paragraph 1, as modified by the Amsterdam Treaty¹⁵, whereas in other legal and non-legal documents the use of the other terms – transfrontier, inter-territorial, transnational – is preferred in order to indicate a precise type of cooperation and avoiding the reference to the general term “cross-border”¹⁶. As observed, the attempt of a legal harmonization through the new Regulation on EGTC did not lead to a semantic uniformity yet.

Moreover, it has to be kept in mind that the terminology concerning transfrontier relations between territorial communities has been originally shaped by the semantic distinctions drawn by the Council of Europe (CoE)¹⁷. This institution, as it is possible to observe from different documents, makes a major use of the term *transfrontier* in order to highlight common activities among authorities or subjects separated by one or more borders. Nevertheless the expression *cross-border cooperation* is substantially recognised as a synonym. In addition to this, the

14 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC – Bruxelles, 2007*, p. 17. In this regard: “[...] the practitioners consulted during the writing of this study did not seem overly enthused by the new name, and most of them announced that, for now, they would continue to use the terminology they employed before, unless they were to form an EGTC”.

15 Art. 265, par. 1 TEC: “The Committee of the Regions shall be consulted by the Council or by the Commission where this Treaty so provides and in all other cases, in particular those which concern cross-border cooperation, in which one of these two institutions considers it appropriate”.

16 A terminological curiosity coming from the comparison of the different official EC languages points out that the adjectives “transfrontier” and “cross-border”, used with some semantic undertone, are translated in French respectively with “transfrontalière” and “transfrontière”, whereas they correspond in Italian to the only term “transfrontaliera”. This brief digression represents a banal example, but symptomatic, to doubt the real effectiveness and usefulness of such a kind of terminological distinctions.

17 The term “transfrontier cooperation” is the only one which is drew in the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, signed in Madrid on the 21st of May 1980 and entered into force on the 22nd of December 1998. The adjective “interterritorial” comes out in the Second Protocol to the Madrid Outline Convention, approved in 1998. Within the CoE, *transfrontier cooperation* is meant as an activity “between territorial communities or authorities in a geographical area that spans a border between two countries. It concerns frontier zones”, while *interterritorial cooperation* is represented by “relations between non contiguous territorial communities or authorities located in different countries”, see C. RICO, *Handbook of Transfrontier Co-operation*, Council of Europe, Strasbourg, 2006, p. 40, available at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/transfrontier_cooperation/tfc_handbookTC2006_EN.pdf.

reference to *interterritorial cooperation* has been introduced in order to deal with cooperation between geographically non contiguous communities. Furthermore, the development of new legal instruments within the CoE has quite recently introduced the concept of “*euro-regional cooperation*”¹⁸ with regard to the potential future implementation of the so-called Euroregional Cooperation Grouping (ECG).

All the mentioned expressions, referring to relations across the national borders, do not certainly contribute to a simplification and to a better understanding of the whole issue. In addition, they contribute neither to an easier individuation of the kind of activity involved, nor to a legal categorisation of cooperation.

Furthermore, another semantic dichotomy among the terminology of the CoE – which is, apparently, less formalistic – and that of the EU, more tortuous and complex, remains open. Namely, both institutions have a different terminological approach referring to the general terms “transfrontier” or “cross-border”, which could be substantially considered as synonyms. The CoE applies the term “transfrontier” in the field of cooperation between contiguous territorial communities or authorities belonging to different States and separated by a common border. The Committee of the Regions, and the other EU institutions, make use of the adjective “cross-border” in order to indicate the cooperation among contiguous regions of different States in the view of the implementation of Community initiatives programmes¹⁹. In this sense, the terminology of territorial cooperation within the EU is in a peculiar relation with the regional policies of the Community.

Conclusively, this brief report on terminology describes a very complex semantic panorama about territorial cooperation. The purpose of the present work doesn’t consist in the personal suggestion of a semantic systematization, even if a major uniformity would be desirable, in particular between the EU and the CoE. Concerning the further development of this work, the option suggested at the beginning of the paragraph will be followed. Namely, the term “territorial cooperation” will be used as a general and most updated terminological designation for the phenomenon under analysis. However, the utilization of other terms, such as

¹⁸ See the Third Protocol to the Madrid Outline Convention.

¹⁹ See Committee of Experts on Transfrontier Co-operation, *Similarities and differences of instrument and policies of the Council of Europe and the European Union in the field of Transfrontier Co-operation*, Council of Europe, 2006, p. 10, available at http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/transfrontier_cooperation/tfc_SadowskiReport2006_EN.pdf.

“cross-border” or “transfrontier”, should not be considered as a mistake or as inaccuracy. In fact, the analysis of the earlier instruments of cooperation requires the references to those terms.

2.2. *Does a semantic distinction legally matter?*

While it is possible to delineate some basic common understandings in relation to the terminological aspect of territorial cooperation, there is still some confusion. This confusion, in particular, has some grounds in the misunderstanding of theoretical concepts. In fact, there is a general incorrect mixing up of two different elements: the description of cooperation as a factual phenomenon and the legal instruments related to that phenomenon. The different terms related to territorial cooperation are used to designate several elements: material phenomena, governance's means and legal instruments. However, there is not a real legal consequence in this differentiation affecting the instruments of cooperation between sub-national subjects. With other words, there is no bi-univocal correlation between the expressions used for a determined phenomenon and the related legal aspects: i.e. cross-border cooperation, as a form of cooperation between contiguous territorial communities, is not identified through typical legal instruments or binding legal means.

In particular, the geographical distinction between contiguous and non-contiguous territories, which seems to be considered as one of the most important distinctions among different types of cooperation, is not understandable from the legal perspective. As N. Levrat explicitly explains, the element of contiguity or non-contiguity (an the related terms) does not qualify a different kind of cooperation in legal terms²⁰.

The fact that cooperation between contiguous authorities seems to be something different in nature is only an appearance due to a quantitative development of the phenomenon²¹, but it doesn't have a qualitative impact on the

20 See N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, Paris, 1995, p. 145 *et seq.* To be precise, Levrat proposes this evaluation in relation to the geographical criteria of cooperation and not within a dissertation about the semantic approach. Anyway, it seems to be appropriate to quote this relevant statement even in relation to the terminological issue, which is really connected to the geographical approach.

21 Cooperation between contiguous territorial community is, actually, the most common and therefore

legal solutions for the implementation of cooperation. In fact, for quite easily comprehensible reasons, cooperation between physical neighbours is numerically more developed than cooperation between non-neighbours.

In this sense, it is possible to give conventional definitions in order remark the geographical difference. However, such a distinction has no relevance from a strictly legal point of view, because it does not change the legal dimension for sub-national authorities to act outside the respective national borders. Namely, this evaluation concerns the same actors of the cooperation, i.e. the sub-national authorities, and there is no substantial legal difference if cooperation is played between communities along a common frontier or not. Maybe the political reasons for the establishment of cooperation are different, but not the process of legitimization for sub-national authorities or the legal instruments applied for transfrontier activities. What makes a relevant difference are, instead, the procedures and the means used to set up the cooperation. Therefore, the creation of different terminologies is quite confusing for the understanding of the effects and the consequences related the instruments used and the solutions proposed.

Thus, the most utilized terms (cross-border, transfrontier, transnational, Euroregional, inter-territorial, territorial), do actually have some significance and some conventional meanings, but not in legal terms. Anyway, trying to select the most common and general words to utilize during this legal study in addition to the term “territorial cooperation”, it is possible to consider the adjectives “cross-border” and “transfrontier” as the most suitable ones because of their broad, comprehensive and self explaining meaning. It is necessary, however, to keep in mind that they generally are used with a specific geographical connotation. In order to find a general and non-confusing term, N. Levrat proposes the French word “*cooperation transfrontière*”, instead of the traditional adjective “*transfrontalière*”.

This new term has the privilege not to have been abused or confused and to draw clearly the concept of a “cooperation that crosses a national border”, without necessarily been connected with the idea of geographical contiguity²². Actually, this French term doesn't have a proper English translation. But, as far as we agree with

the number of relations is quantitatively higher in comparison to cooperation between non-contiguous communities.

²² *Ibid.*, p. 152 *et seq.*

the proposed interpretation, we suggest to use the newest concept of “territorial” in the same sense. Anyway, the utilisation of “cross-border” and “transfrontier” has to be considered suitable together with the main category of “territorial”.

2.3. *Why to choose the term “territorial”?*

Despite the substantial legal indifference regarding the semantic approach towards cooperation across borders, a common term of reference is recommendable for two reasons. The first reason concerns the practical utility of having a common term of reference. The second has a more theoretical implication, thus, residing in the need to find a unique concept for the constituent factors (institutional subjects and geographical space) involved in common territorial transfrontier activities that concern an individuated geographical space, notwithstanding the presence of borders²³.

Occasionally some documents report the expression “trans-european cooperation”, but the word has not become a common term of reference²⁴. “Territorial” officially compares only in EU documents: the official texts of the cohesion policy 2007-2013 foresee a “Territorial cooperation objective”, the Regulation No 1082/2006 creates the instrument of the “European Grouping of Territorial Cooperation”, the Lisbon Treaty explicitly introduces the concept of “territorial cohesion”. Other *soft-law* documents mention the term. Using a concept that mainly concerns the EU level, could be perceived as partial or limited point of view. However, according to our opinion, “territorial cooperation” could be a suitable concept for a conventional uniform terminology. The following observations intend to clarify this choice.

Of course, it is quite patent that the word “territorial” doesn't have a peculiar descriptive attitude in order to individuate the phenomena that take place in form of transfrontier relations between sub-national authorities. In fact, it has more general and “neutral” implications. The first meaning of territorial cooperation doesn't

23 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, Madrid, 2008, p. 47.

24 Some institutional studies utilizes the mentioned expression, for example see COMMITTEE OF THE REGIONS, *The Status quo of Transeuropean Co-operation between Territorial Authorities and the Future Steps that contribute to realise a New Model of European Governance*, study developed by J. Gabbe, Th. Stumm, Gronau, 2001.

remind *prima facie* to presence of a border, thus, it doesn't evoke the primary aspect of this kind of relations, which is, in fact, the overcoming of a national border. In this sense, the term suggested by N. Levrat – *cooperation transfrontière* – has both a strong descriptive and theoretical ground. On the same trend, other terms have been proposed in order to replace the different terminology in use for having a unique standard semantic references. One concept that has been used is “cooperation beyond borders (cbb)”²⁵, which describes a non-temporary transfrontier activity between public or semi-public subjects acting outside the state intergovernmental law. As far as this and other similar expressions have a strong theoretical and descriptive ground, they reveal their limitation of being proposed only within the academic sphere or, at least, by external observers: they do not derive from the active subjects dealing with cross-border relations. From a certain point of view, this occurrence could be considered as positive, insofar as these kind of terminology is created by competent and “neutral” subjects. Moreover, the terms proposed have the nature of general collectors and they are not limited to a geographic scope. However, according to our opinion, it is quite difficult to introduce one of these terms in the concrete praxis of transfrontier cooperation in order to propose it as a general conventional denomination for the phenomenon under analysis. With other words, the alternative terms that has been mentioned are somehow outside the development of the concrete phenomenon, they are not part of it.

On the contrary, the adjective “territorial”, as the partner of “cooperation”, derives directly from the concrete experience and from the long experience of interaction between the daily praxis and the legal instruments. “Territorial cooperation” is the product of a complex and complicated process, that hasn't reached an end yet. Of course, it is necessary to be aware that the expression has been developed only at EU level (thus, not by the Council of Europe or by the national or sub-national levels) and that at the moment it's not going to replace the other existing terms, such as cross-border, transnational or interregional. However, it reflects and summarizes the newest approach towards cooperation across the borders

25 See J. MAIER, *European Grouping of Territorial Cooperation (EGTC) – Regions' new instrument for 'Co-operation beyond borders'. A new approach to organize multi-level governance facing old and new obstacles*, 2008, <http://www.cor.europa.eu/pages/EventTemplate.aspx>, p. 5 *et seq.* Cbb is defined as "any concerted initiative or action going beyond national state borders, in which public authorities or semi-public organisations are regularly involved and which is not exclusively part of actions of states acting within intergovernmental law".

that is typical of the European dimension²⁶. A fundamental change has shaped the approach to transfrontier cooperation: the main attention has shifted from the essential role of the national borders to the concept of territory. With this meaning, however, the neologism “territorial cooperation” doesn't eliminate the presence of borders. The frontier is no more explicitly mentioned, but it is somehow gobbled up and assimilated as element of territorial cooperation without being the protagonist. The legal instruments have, as well, carefully followed this attitude in order to correspond to a phenomenon, which is characterized by a strong variety, but which also requires some general standards and common references.

The expression “territorial cooperation” permits also to update the public-law notion of “territoriality”, which is traditionally bound to the national borders. According to the traditional doctrine, the principle of territoriality “means that regulative activities normally 'end' at the borders of the institution empowered to do so”²⁷. Thus, when referred to cooperation, the territory and the regulative powers play a more dynamic role.

3. Territorial cooperation as an object of study

3.1. The development of territorial cooperation beyond the State

Territorial cooperation started in the form of *de facto* cross-border or transfrontier cooperation, which represent the mostly common expressions for this subject. In fact, the development of this phenomenon spread out for reasons related to the geographic contiguity of territorial communities. Many academic disciplines have dealt with the theme of cooperation across the borders in Europe. Namely, this phenomenon has its origin in the need to find solutions to practical common problems, including environment, water supply, natural disasters, waste management, transports, work-, social- and minority-issues. Since a long time

26 “Cooperation, which was originally cross-border, and is now territorial, is an intrinsic and distinct factor of European integration”, see COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, Study carried out by GEPE under the supervision of Prof N. Levrat, Bruxelles, 2007, p. 55.

27 See COMMITTEE OF THE REGIONS, *The Status quo of Transeuropean Co-operation between Territorial Authorities and the Future Steps that contribute to realise a New Model of European Governance*, cit., p. 11.

politicians, practitioners and scholars – economists, sociologists, political scientists and, maybe more gradually, lawyers – get involved in the matter. Numerous interests are concerned with activities across the borders, for the simple fact that problems do not strictly follow the border-lines to be solved, rather they need common solutions in order to give a practical and effective response²⁸. In this regard, an appropriate question is whether territorial cooperation could represent an autonomous object of study or whether it is formed by the sum those disciplines to which it is related case by case. Albeit not necessarily persuasive, the possible answer deals with the capacity of territorial cooperation to constitute a fundamental way to find common solutions to problems and, in this sense, an essential component dealing with issues that are common to entities belonging, at least, to two different States. Analysing the phenomenon of territorial cooperation requires to focus the attention on its concrete subjects and objects. Starting from the second element, territories are primary recipients of transfrontier activities, as well as tasks of European integration²⁹. In this regard the principal subjects which are responsible for specific territories are public bodies, invested by determined competences to exercise proper powers within these territories. Moreover, several times the territorial concern and the power-exercise display a necessary trans-border involvement.

Dealing with questions or problems that are settled “across the national borders”, the existence of an international dimension is undoubted, even if restricted at local or regional level. However, such geographically-limited and locally-concerning problems have been rather very relevant for the central authorities in terms of national foreign policy. According to this statement, a major role in the development of territorial cooperation has been carried out, even beyond the action and the powers of single States³⁰, by sub-national actors, supported by the progressive encouragement of supranational and international organisations. The

28 See F. PALERMO, J. WOELK, *Cross-Border Cooperation as an Indicator for Institutional Evolution of Autonomy: The Case of Trentino-South Tyrol*, in Z.A. SKURBATY (eds.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?*, Leiden/Boston, 2005, p. 278.

29 In this introductory digression the concept of European integration has to be intended in a broad and non-legal sense, thus comprehending the EC and the Council of Europe levels. Being aware that these institutions have different tasks, powers and objectives, it can be argued that both persecute, albeit in different ways, a general intent of European integration.

30 See J. MARKO, *Beyond the Nation-State: Problems of Regionalisation in Western and East Central Europe*, in R. KICKER, J. MARKO, M. STEINER (eds.), *Changing Borders: Legal and Economic Aspects of European Enlargement*, Frankfurt am Main, 1998, p.70.

development of sub-national activities outside the respective national territories has covered a kind of nebulous space regarding the definition and attribution of powers. In fact, transfrontier activities emerged in alternative to the traditional unitary action of the State in the foreign context. Therefore, while non-state entities have been progressively becoming the main actors of territorial cooperation, as the further analysis will reveal, an indisputable assumption cannot forget the essential relation with the State and the national legal order. Even after a substantial evolution of cross-border sub-national relations, it is possible to argue that borders are far away from disappearing³¹, rather they continue to sign the visible boundary of national constitutional orders. However, while territories were once exclusive prerogative of the national public power, legitimate territorial approaches are growing even beyond the concept of sovereignty³², thus creating a multi-dimensional figure of territorial cooperation.

Being traditionally an univocal function of the States, territories seem to achieve some degree of self sufficiency as actors within a necessarily compound and multi-player system of powers. In this regard, historically and legally unambiguous notions – such as sovereignty, territory, State, constitutional order, legal power, exercise of competences – become necessarily dynamic in the perspective of an integrated and multilevel system of institutional subjects, such as regions, local communities, EU, etc., which are lawfully legitimated or informally devoted to take actions dealing with the territorial dimension. These territorial effects of policy dynamism can be interpreted with the expression of “transnational governance ‘above’ and ‘below’ the State, as a “construction of new, alternative spaces of policy-making”³³. The involvement of sub-national authorities within a foreign context arises a first theoretical issue, which concerns the legitimacy of such activities. In fact, the traditional legal theory has developed the paradigm *State-sovereignty-legitimacy* as a linear and innate phenomenology of the exercise of public powers

31 *Ibid.* p. 74 : “Borders are not disappearing, they are being reproduced and multiplied. There is no withering anyway neither of states nor borders, but the ‘one to one match between state and borders’. What is being challenged, thus, is the one-dimensional concept of the nation-state.”

32 See J.B. HARGUINDÉGUY, *La frontière en Europe: un territoire? Coopération transfrontalière franco-espagnole*, Paris, 2007, p. 10 and J. ANDERSON, *The shifting stage of politics: new medieval and postmodern territorialities?*, in *Environment and Planning D: Society and Space*, no. 14(2) 1996, p. 135.

33 See T. CHRISTIANSEN, K.E. JØRGENSEN, *Transnational governance ‘above’ and ‘below’ the state: The changing nature of borders in the new Europe*, in *Regional & Federal Studies*, 2000, Vol. 10/2, p. 70.

outside the national borders. The principle of the State-unity in the international context is a cornerstone of public international law. But new dynamics of manifestation of public powers seem to partially alter the above mentioned paradigm with the inclusion of other categories. In particular with regard to territorial cooperation, it will be observed how other forms of foreign relations could be developed in alternative to the State international relations. Namely, it is a fact that sub-national authorities develop foreign activities. But foreign activities of sub-national actors have progressively gained legitimacy and emerged from a non-defined praxis to a new legal rationalization. Moreover, notions like *subsidiarity* and *governance* (instead of government), if not fully substituting the traditional expression of statehood, have introduced the space for different and advanced conceptions of power-exercise. Territorial cooperation represents a tangible example of an effective and practical demonstration of such theoretical statement. Thus, traditional juridical key-terms are useful for the analysis of cross-border phenomena in Europe, for the reason that they represent a parameter for the study of nowadays evolving forms of governance. It is quite superfluous to spend many words about the fact that concepts like *Nation-State* and *sovereignty* have lost the prominent legal position they had in the past. So far, other legal elements like *legitimacy* and *subsidiarity*, *efficacy* and *efficiency* increased their role among public lawyers³⁴. A very relevant field of investigation consists in the attempt to evaluate the potential accountability deficit within the growing exercise of transnational regulatory power³⁵.

3.2. A legal approach to territorial cooperation

Although transfrontier relations gain a growing importance, there is not a common classification or systematization of the phenomenon from a legal perspective yet³⁶. Nowadays territorial cooperation is a miscellaneous ensemble of praxis, good neighbourhood-relations, legal documents and non-binding agreements.

34 See R. SCHOBEN, 'New governance' in the European Union: a cross-disciplinary comparison, in *Regional & Federal Studies*, 10:2, 2000, p. 42.

35 See B. KINGSBURY, N. KRISCH, R.B. SEWART, *The Emergence of Global Administrative Law*, in *Law & Contemporary Problems*, 2005, p. 16.

36 See Comité des Régions, *La coopération transeuropéenne entre collectivités territoriales*, Bruxelles, 2001, p. 26.

Since the late Fifties a numerous amount of transfrontier structures has been created at regional and local level. However, it is difficult to find common features, as most of the time they differ in size, competences, financing means and juridical status³⁷.

Despite the huge variety of legal components concerning territorial cooperation, some basic factors represent fundamental notions for its comprehension as a form of sub-national capability. With regard to the general context of territorial cooperation, the first two main legal aspects concerning relations between foreign sub-national authorities are the following: the rules about the legitimacy/capacity of sub-national authorities to develop territorial cooperation and the rules applicable to the cooperation between foreign sub-national authorities. In this sense, it is important to distinguish the two mentioned legal elements, in order to understand the peculiarity of the matter and its multidimensional legal nature.

Concerning the first issue – the law founding sub-national competence to deal with territorial cooperation – it is worth to anticipate that it is necessarily connected to the national constitutional systems and to the powers of sub-national entities within the respective national legal order: a very clear and detailed analysis has been developed by N. Levrat and will be briefly mentioned further on³⁸. The second issue – the law applicable to the relations or agreements of territorial cooperation – could derive both from national laws and from super-national contexts. In general, the law applicable to transfrontier relations between sub-national subjects has a more dynamic character, because new legal forms and instruments for cooperation are still under development. What is important to keep in mind is the possibility that such relations could have effects not only between the subjects of cooperation, but also towards third parties, mainly other institutional subjects and individuals, which also concern the law applicable to territorial cooperation.

Beside those fundamental elements, the legal analysis of territorial cooperation between sub-national actors involves other cross-cutting issues. In particular, as far as it is an undoubted fact that sub-national actors get involved in

³⁷ See J. GABBE, V. VON MALKUS ET AL., *Cooperation between European border regions: review and perspectives*, Baden-Baden, 2008, p. 45-49, where a very complete list of transfrontier structures is individuated. Between 1958 and 2007 around 130 cross-border subjects have been established in order to foster common programmes and projects. Gabbe and Malkus identify specific problems in the functioning of these bodies mainly due to “inability to convert [their] ideas into concrete projects, since frequently political problems and jurisdictional difficulties still need to be overcome”.

³⁸ N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, Paris, 1995.

transfrontier activities, the existence of a correspondent capability in legal terms has not to be taken for granted. With other words, an essential question concerns whether sub-national entities are entitled to develop cross-border activities³⁹ according to some codified legal parameters. And, in case of a positive answer, the further question concerns the correct individuation of such legal parameters. Moreover, in addition to the last enquiry, another point is relevant for a legal approach to territorial cooperation. Namely, the dynamic between national and supranational legal orders to develop suitable legal tools and the subsequent involvement of sub-state authorities are very current arguments.

Within this scenery, approaching territorial cooperation from a legal point of view seems to be, however, still quite a challenge, firstly, because *ad hoc* legal instruments do not often appear as the favourite tool to carry on transfrontier activities⁴⁰. The second reason is represented by the difficulty to find shared common legal measures among the actors of cross-border activities. As strictly legal tools often lack flexibility, most of the times flexible and non-codified instruments are preferred. The models of partnerships and working communities, which do not generate true legal obligations between the contracting parties, offer a good example in order to demonstrate the clear intention of public authorities to cooperate, but at the same time their intention to recur to soft structures for cooperation. In any case, the progressive development of sub-national relations shows the necessity of clearer and suitable legal frameworks for sub-national authorities in order to undertake long-term structured activities. Devoted to an objective of public advantage, the definition of common legal instruments for territorial cooperation is, thus, considered to incorporate some added value⁴¹ in comparison to the sum of distinct actions taken by single actors. In this regard, the concept of “added value” has to be analysed at the same time with the development of legal instruments, in order to have a whole image of the efficiency and efficacy of the measures provided.

39 For such an hint of reflection see F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, Padova 1999, p. 1.

40 *Ibid.*, p. 180: “[...] il faut bien comprendre que développer des structures transfrontalières n’équivaut pas à créer des strates administratives ou entités juridiques nouvelles [...]”.

41 See J. GABBE, V. VON MALKUS et al., *Cooperation between European border regions: review and perspectives*, cit., p. 26-27, where several aspects of added value are mentioned, such as European, political, institutional, socio-economic, socio cultural. From another point of view the question arises, whether it is also possible to speak about a legal added value. The ongoing research will try to find a satisfying answer.

The legal analysis is also relevant to other two topics, such as the individuation of the most appropriate institutional level to implement territorial cooperation and the impact of public powers in relation to European integration and territorial management. These two issues are, then, deeply connected to the concepts of subsidiarity and multilevel governance (MLG). As both aspects seem to be quite overused, however, they couldn't be left aside from the analysis of territorial cooperation in Europe, since directly dealing with the exercise of competences and public powers.

In this sense, what could be a typical political/sociological topic concerning power exercise and multilevel governance, has also great relevance for the legal analysis⁴². In particular, the role of peculiar juridical concepts is relevant for this legal approach. Namely, the effects of normative regulation, the attribution of competences, the legitimacy of public authorities to exercise these competences, the role of supranational powers with regard to their influences on the national legal orders, the autonomy-rights of sub-national communities, the coincidence of territories with State-borders, and similar themes, are decisively linked with the legal factors of territorial cooperation.

By the way, it seems of extreme interest to understand if and how the European Union and sub-national entities, respectively, have the power to regulate the territorial phenomenon or to enact transfrontier activities beyond the State exclusive right to sovereignty. A positive or negative answer is full of symptomatic consequences, given the fact that cooperation between sub-national authorities is currently a consolidated reality.

As already mentioned, territorial cooperation is a complex and fragmented phenomenon. In this regard, it is however quite hard to clarify the cause-effect

⁴² The concept of *governance* is used with reference to the "institutional" definition given by the EC *White Paper on European Governance*, where it is meant as "rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence". Apart from this definition, other academic definitions are structured on a different conception of networking and social phenomena. See R.A.W. RHODES, *Foreword*, in J.M. KICKERT, E.H. KLIJN, J.F.M. KOPPENJAN (eds.), *Managing Complex Networks*, London, 1997, p. XI-XIII. The meaning of an institutional aspect of *governance* is dealing with the idea of authoritative bodies (such as States, regions or local authorities) as primary actors among socio-political phenomena, rather than homologous actors as other private subjects. The legal meaning subtended regards the capacity and legitimacy of public authorities to enact public regulatory powers as instrument of government, which is rather different from the self-capacity of private organizational structures to shape socio-economic realities.

connections between the fragmented reality of cooperation and the complex system of legal means. With other words, it seems superfluous to explain if the existence of a complicated reality is the cause for a non-systematized legal background or *vice versa*. Thus, given the existence of a variegated dimension, the importance of a legal approach to territorial cooperation consists mainly in the definition of clear paths for the legitimate construction of sub-national transfrontier relations. The already mentioned capability to exercise public institutional competences represents the first pre-condition in this sense. Secondly, the function of a juridical approach is connected to the possibility of creating legal instruments and conditions, which can efficiently consent the development of transfrontier relations and find practical regulatory solutions. Moreover, although the existence of legal tools for territorial cooperation is not always considered as essential, sub-national authorities, in some ways, often show a need to refer to certain legal sources in order to build up legitimate and transparent activities⁴³.

3.3. *Borders still matter*

Dealing with the field of territorial cooperation in Europe requires to dedicate few words about the “silent” constituent element of this matter, i.e. the national border. In fact, the concept of border (or frontier) represents a necessary assumption in the analysis of cross-border/transfrontier phenomena. However, despite its essential and connotative role, “the border” is often an omitted argument within the analysis of territorial cooperation. In this sense, the study of such a vast theme is more and more oriented towards the investigation about integration and cooperation and the presence of borders is, quite paradoxically, viewed as an imperative but negligible factor. In any case, despite the progressive European integration, the function of borders seems to be still a remarkable issue. Namely, the analysis of effective and potential instruments of territorial cooperation is based on the existence

43 See COMITÉ DES RÉGIONS, *La coopération transeuropéenne entre collectivités territoriales*, Bruxelles, 2001, p. 181. As this last issue could be intended as exclusively political, it is to say that it has also legal implications. Namely, the question of the legitimacy of transfrontier cooperation is a core element of the action taken by sub-national actors, since they often need to find a justification for the power-exercise, which is not only to be connected to the State-transferred powers, but to the validity of the legal ground *per se*.

of invisible lines of separation. These lines have precise legal implications, which denote the existence of national territorial realities.

The term “border”, while having a multidisciplinary attitude⁴⁴, is politically and geographically considered as a dividing line between territories. Synonyms like frontier, boundary, edge, etc., entail in their ontological essence the idea of limit and end, which outline the presence of “something different” outside this border⁴⁵. Namely, what is “outside” the line doesn’t belong to what is “within”⁴⁶. In general terms, the space surrounded by the same line entails something which is, for different reasons, considered as homogeneous. This is true, for instance, in mathematics as well as in economics, geography and political science⁴⁷. Traditionally, the concept of territorial borders is strictly connected to the constitution and perception of a collective identity⁴⁸ and, mainly with reference to the European historical process, to the formation of the State⁴⁹. From a legal point of view, the affirmation of the national power is directly related to the concept of territory: namely the legal order

44 D. NEWMAN, *Boundaries, Borders and Barriers: Changing Geographic Perspectives on Territorial Lines*, in M. ALBERT, D. JACOBSON, Y. LAPID (eds.), *Identities, Borders, Orders: Rethinking International Relation Theories*, Minneapolis, 2001, p. 137-151. See also M. CACCIARI, *Nomi di luogo: confine, in Aut aut*, 299-300, 2000, p. 73-79.

45 See S. GADAL, R. JEANSOULIN, *Borders, frontiers and limits : some computational concepts beyond words*, available at the website <http://www.cybergeog.eu/index4349.html>. According to these authors the term “border” contains two main aspects, respectively that of political frontiers and structural frontiers. The first concept indicates “the outer line of a surface or a totality of surfaces on which a political, economic, social system exerts its sovereignty. Its layout is a decision or a totality of decisions that have been taken by this territorial system and is the result of force reports, confrontations or negotiations with neighbour systems”, while structural frontiers “have a determinist character in that they are the result of adjustments of a society to a territory in the course of time, i.e. the result of relationships that a society maintains with the space and constraints that exert natural objects. The location, the nature, the form of frontiers are determined by the nature of spatial structures and dynamics of a territory and the geo-historical inheritance. It results from the conjugated action of the society and the ecosystem.”

46 With reference to the ancient Greece, the dichotomy of inclusion/exclusion was found between the *pòlis*, where the application of the *nòmos* was granted, and the spaces outside its borders, which were identified as barbarous territories. In these terms, people who was not recognised as citizens were treated differently and defined with the status of *bàrbaros*.

47 Such an assertion is only partially valid for the legal science, mainly in relation to the citizenship’s principles. Namely, while recognising the concept of a legal order effective on a certain territory within determined borders, even the concept of “personal” right is known, which finds its application independently from the legal meaning of national frontiers. A concrete example is given by the existence of two Peoples – such as Roma and Jewish – representing groups that are not bound to a specific territory and, therefore, outside the “logic” of the State.

48 See D. PALANO, *Lo spazio politico: territori, confini, potere*, in A. AGUSTONI, P. GIUNTARELLI, R. VERALDI, *Sociologia dello spazio, dell’ambiente e del territorio*, Milano, 2007, p. 60-61.

49 See R. TUCK, *The Making and Unmaking of Boundaries from the Natural Law Perspective*, in A. BUCHANAN, M. MOORE, *States, Nations and Borders*, Cambridge, 2003, p. 143-170. Traditionally and almost conventionally, the beginning of the modern European Nation States’ concept and that of sovereignty are identified with the Peace of Westfalia of 1648, which put an end to a series of religious wars in Europe.

of a certain State is valid and effective, *in primis*, on a determined and delimited space⁵⁰. Thus, the existence of frontiers draws the visible element of the internal and external authority which is traditionally identified in the national entitlement of power and in the legitimacy of the State as international subject. In this sense the State represents the legal subject entitled to the genuine and rightful use of power, rules and supremacy on its territory⁵¹. According to the political theory, such a self-legitimizing body is acknowledged as concept together with the notion of modern State, whereas other ages saw the existence of even different centres of power⁵². As the sovereign political power is a condition of the contemporary legal orders, the legitimated existence of a juridical and administrative system is, in some ways, dependent from the identification of borders, which are the non-visible materialization of the conceptual relation between natural and political (human) space⁵³. But, while the last assertion could be always true for a “classical” theory of the State, it does not conserve its absolute validity, for instance, after the creation of organizations like the European Union, or, in other terms, with the development of phenomena such as the economic globalization⁵⁴.

The connections between political space and natural space bring numerous problematic issues. One of the biggest questions related to the legal analysis is, as briefly mentioned above, the validity of the norms. In this regard, the core of such a

50 P.J. TAYLOR, *The State as Container: Territoriality in the Modern World-System*, in N. BRENNER, B. JESSOB, M. JONES, G. MACLEOD (eds.), *State/Space: A Reader*, Boston-Oxford, 2003, p. 101-114. See also T. CHRISTIANSEN, *Borders and Territorial Governance in the New Europe*, in R. KICKER, J. MARKO, M. STEINER (eds.), *Changing Borders: Legal and Economic Aspects of European Enlargement*, Frankfurt am Main, 1998, p. 79.

51 We do not forget that the traditional theory of the State considers its three main constituents in sovereignty, people and territory. A dissertation about the contextual subsistence of these elements as necessary condition for the State's existence will bring to an endless theoretical investigation on the political nature of the European Union.

52 Such a reference is particularly referred to the Middle Ages, where the exercise of power was not really connected to a centralized body, but different subjects of power created a legal pluralism. Under these circumstances a cohabitation of different legal orders took place. Such a proliferation of juridical systems needs to be linked to different social groups or intermediate communities existing on the same territory. For a very deep and detailed analysis of the European legal orders across history see the recent publication of one of the most important Italian scholars of the history of law, P. GROSSI, *L'Europa del diritto*, Roma-Bari, 2007, p. 15. See also J. LÉVY, *Europa. Una geografia*, Torino, 1999, p. 82.

53 Being aware of the important and deep theoretical analysis on the matter of territory, power, State, and legal orders (see Weber and Schmitt first), it has been deliberately chosen not to handle with such authors for the main reason that it will lead away from the core of the present study. The very brief mention of those concepts and the respective historical phenomenon is considered as a necessary condition for the introduction of the study and from a theoretical perspective.

54 See D. NEWMAN, *Boundaries, Borders and Barriers: Changing Geographic Perspectives on Territorial Lines*, cit., p. 138.

topic concerns whether a juridical norm – coming from a source, which is recognised by a legal order – needs, or not, a determined national space to be valid⁵⁵. As far as the national territory is, conventionally and traditionally, an essential element of each normative effect⁵⁶, nevertheless this statement is not always and univocally true. Namely the territorial space is not originally constituted as a normative element, rather shaped and established by the political will and the borders represent a non-natural constituent of the territory⁵⁷. According to this view there is a strict connection between the crisis of concepts such as State and sovereignty and the new dimension of territories⁵⁸. The relevance of public entities like the European Union⁵⁹ and the progressive role of sub-state units determine a pluralistic dimension of the normative spaces, which are not inevitably thought as unique prerogative of the State⁶⁰.

Thus, on the one hand it is true that the State hasn't lost its significance and its political and legal legitimacy⁶¹; however, on the other hand, supranational and sub-national subjects gain significant weight. Certainly, up to now, the formal entitlement for the use of public powers comes from the State. But it is also acknowledged that such a statement has been partially overlapped by the formal attribution of competences and normative powers to non-State entities, as well as by the put into place of informal or soft-law praxis. One of the most interesting

55 See N. IRTI, *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, 2006, p. 37, where the relation between norm and space/territory is not considered as essential. Namely “the certainty of the law subsists in its procedural legitimacy, while is passed in conformity with rules on the legal production of norms. The legal system does not need, as such, any means with parts of the earth surface” (our translation).

56 The mention about the so-called personal rights or personality principles seems to be, at this moment, quite superfluous.

57 *Ibid.* p. 54.

58 G. TOTZBERGER, *Visioni spaziali transnazionali in Europa: contesti e significati diversi*, in R. MASCARUCCI (cur.), *Visioni, territori d'Europa*, Roma, 2004, p. 91, while highlighting the declining importance of national borders, stresses the idea of “functional regions”, which should be based on homogeneous characteristics.

59 See A. BADINI, *Sovranità ed interessi nazionali nel cammino dell'Europa*, Torino, 1994, p. 40-47.

60 S. ORTINO, *Il nuovo Nomos della Terra. Profili storici e sistematici dei nessi tra innovazioni tecnologiche, ordinamento spaziale, forma politica*, Bologna, 1999, p. 128, affirms that “[...] sovereignty is dissolving itself into fragments that follows similar and, at the same time, differing vectors such as internationalism, regionalism and localism” (our translation).

61 By the time of writing the nowadays global status would bring to the opposite statement. Namely, for trying to face a deep financial crisis, as well as a non-stable Middle-East situation, etc., the role of international and supranational organisation, such as the UN and the EU, seems to be un-influent at all. But, single and individual States show their will to reclaim their “natural” role of international subjects within the international arena, thus proving the complete legitimacy and entitlement of their interventions.

examples is the so called process of “regionalization” and “localization” within the European Union⁶². In addition, similar approaches, such as the self-government of local and regional communities, are also a priority for the Council of Europe.

As the historical perspective demonstrates, the territory has not to be considered only as a conceptual element of the State, rather as a dynamical function which witnesses the erosion of certain borders and the creation of other frontiers⁶³. So, if we look at the European situation, not only State-borders matters, but also other lines such as regional, local or supranational frontiers in relation to multi-centric – political and normative – systems of reference. From this point of view, it is possible to argue that, if we do not conceive borders only as a state peculiarity⁶⁴, it is easier to comprehend the conceptual and, at the same time, potentially effective existence of multiple, moving and dynamic borders, which take the form of their system of reference, thus determining every single time a different territory⁶⁵.

But the evolution of the role of “meta-state” elements (both public subjects and territories) has not eliminated the legal and political significance of State borders. Namely, if sub-national authorities claim on their role in managing cross-border activities, those authorities have still formally to cope with the respective national constitutional orders and the derived attributions or competences. In these terms, while different types of borders can develop – both being created or

62 See L. CHIEFFI, *La dimensione statale tra integrazione europea e disarticolazione del sistema delle autonomie*, in L. CHIEFFI (cur.), *Regioni e dinamiche di integrazione europea*, Torino, 2003, p. 16.

63 See D. NEWMAN, *Boundaries, Borders and Barriers: Changing Geographic Perspectives on Territorial Lines*, cit., p. 138: “[...] the function and the the role of the lines that divide states have undergone significant change, as transboundary movement is eased and as political and economic interaction takes on new super-state and inter-state dimensions, in many cases ignoring the states altogether. While some boundaries are being opened up to movement and becoming more permeable, many countries are creating their own new fences of separation in an attempt to establish their own sovereign rights as part of a process through which national and/or ethnic groups attain self-determination as ethno-territorial conflicts are resolved. The geographical differentiation of boundaries is such that, at one and the same time, some fences are being destroyed while others are being erected”.

64 T. CHRISTIANSEN, *Borders and Territorial Governance in the New Europe*, cit., p. 80 and 96, underlines the double issue of the current relevance of State borders as well as the progressive changing of political realities, which is characterised by “[the] emerging structure of new borders and meso-regions [...]”.

65 A brief example will better explain the statement. Namely, speaking with traditional categories, it is possible to observe only a mono-dimensional border/territory reality, which is that of national frontiers and national territories. But, it is also possible to notice, quite easier, that States are often divided into other units or territorial/administrative entities and, more subtly, single parts of different States form a territory which is homogeneous for peculiar reasons, thus identifying areas such as the Euroregions. In this regard, the intent is not directed to show the existence of territorial bodies in alternative to the State. Rather, it is relevant to observe the simultaneous and multidimensional contextual presence of diversified systems and multi-faced views to the territorial approach.

eliminated – national frontiers are still relevant. By the way, if the principle of sovereignty does not completely lose its effects, it would be interesting to discover ways of territorial cooperation adopted by sub-national authorities that materially go over the implications of national borders⁶⁶.

Conclusively, it is possible to argue that approaching transfrontier issues normally remains far from a theoretical and abstract dissertation on concepts, thus being structurally connected to everyday matters. Nevertheless, the principal aim of this dissertation about the notion of border was the attempt to draw some key-elements for the interpretation and analysis of territorial cooperation as a complex and dynamic phenomenon, which – sometimes unwilling – touches ancient and composite theoretical issues.

66 J. MARKO, *Beyond the Nation-State: Problems of Regionalisation in Western and East Central Europe*, cit., p.74 remembers that “[...] for the sake of theoretical construction of political ‘unity’ and the actual practice of group-formation, the epistemological code of identity/difference and the normative question of inclusion/exclusion will never be overcome so that the notion of a ‘order without borders’ is simply illusory. [...] What is being challenged, thus, is the one dimensional concept of the nation-state. The ‘real’ problem hence is the question of how to overcome the exclusionary function of borders in both the traditional concepts of state and nation multiplied through the nation state model, in particular the question of the conceptualisation of further European integration on different ‘regional levels’, namely the sub-national, supra-national and the continental level and how to create a post-national territory?”. Moreover, M. KEATING, *Europe, the State and the Nation*, in J. McGRAY, M. KEATING (eds.), *European Integration and the Nationalities Question*, London and New York, 2006, p. 23, argues about the idea of rethinking the principle of sovereignty, keeping attention to concepts such as cultural and regional diversity. In these terms the territories could follow a functional transformation in order to foster local communities’ opportunities.

CHAPTER II

THE ACTORS OF TERRITORIAL COOPERATION

1. Territorial cooperation as a typical sub-national activity

1.1. About territorial communities and cooperation within the context of “decentralization” and “Europeanization”

As already said in the previous chapter, territorial cooperation (or whatever it is denominated) between sub-national communities is really not a new fact. Although it is a rather recent field of study for lawyers, it represents a reality since the end of the 1940s¹. After the Second World War various community-twinning with a high symbolic value, rather than with structured programs, have been set up². As often happens, factual reality has anticipated well defined political paths and codified legal instruments. In these terms, cross-border cooperation between territorial communities has found its ground in the actual necessity to establish foreign relation between non-state territorial foreign subjects. This type of relation has been firstly established without specific legal basis, but quite informally in order to build up mutual trust and good partnership mainly after the disastrous armed conflict. With regard to this kind of cross-border activities, two different aspects need to be taken into consideration.

¹ The mentioned timeframe is certainly useful to have an idea of the development of cross-border relations across contemporary age. Nevertheless, as far as territorial cooperation represents a quite basic need of communities, it seems that, in some ways, it has “always” existed as a matter of fact. Surely, what has begun with the increasing political and legal awareness of the phenomenon is a will of systematization, better comprehension and development of suitable legal and political instruments for granting an effective and easy cooperation.

² See M. ROUSSET, *L'action internationale des collectivités locales*, Paris, 1998, p. 5. In particular it was the case of French communities, which were dealing with foreign communities. This happening was quite unusual as local communities touched a field – the foreign relations – that was a typical peculiarity of state prerogative.

On the one hand there is a progressive expansion of transfrontier activities directly run by sub-national entities in shape of informal agreements or organisations of local and regional authorities³. These organisations, like the Council of European Municipalities and Regions (CEMR)⁴, represent a kind of centralizing gathering which has been especially formed for approaching common problems or just to develop para-diplomatic relations.

On the other hand, a promoting role of international/supranational organisations has encouraged the development of transfrontier cooperation, both with hard-law and soft-law instruments. A good example of soft law approach are the EU sectoral policies with territorial and spatial significance⁵, which, even if not directly concerned with territorial cooperation as a main subject, nevertheless affect transfrontier relations among sub-state entities and, more generally, create a sort of sub-national “soft foreign policy”⁶.

A very frequent statement asserts that the process of integration at European level is accompanied by a progressive affirmation of regional/local identity⁷. Namely, this twofold process seems to be essentially interrelated: the more European integration gets further, the more local purposes obtain relevance. As far as those

3 It is the case of the Council of European Municipalities and Regions (CEMR), which has been originally founded in Geneva in 1951 by a group of European majors, see http://www.ccre.org/presentation_en.htm.

4 This organisation has been first set up in 1951, originally as Council of European Municipalities (CEM).

5 See O. SYKES, D. SHAW, *Investigating Territorial Positioning by Sub-state Territories in Europe*, in *Regional & Federal Studies*, 2008, Vol. 18/1, p. 56.

6 *Ibid.*, p. 61: “The notion of spatial positioning and allusion to local and regional authorities conduction of their own ‘foreign policy’ can be conceptualized [...] as instances of territories (territorial systems) interacting with their system environment and seeking to shape and use the European integration process as an arena of transnational learning in order to foster regional development via external (transnational) cooperation”.

7 K. SODUPE, *The European Union and Inter-regional Co-operation*, in F. ALDECOA, M. KEATING (eds.), *Paradiplomacy in Action: The Foreign Relations of Subnational Governments*, London, 1999, p. 58. Differently from the quoted bibliographical reference, the term “European level” is related both to the EU as to the Council of Europe. As most of the academic literature is dedicated to the phenomenon of regionalism and local government at the Community level, nevertheless it is also useful to make a general reference to a broader concept of Europe, namely taking also into consideration the role of the Council of Europe in fostering and developing the prerogatives of local authorities. A good example is given by the Preamble of the European Charter of Local Self-Government, which states at the 8th *alinea*: “Aware that the safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power.” Moreover, the Council of Europe had a pioneer role in order to deep the powers and the related autonomy of local and regional communities; see M. ROUSSET, *L’action internationale des collectivités locales*, cit., p. 8; see also M. KEATING, *Europeanism and Regionalism*, in B. JONES AND M. KEATING (eds.), *The European Union and the Regions*, Oxford, 1995 p. 4.

sub-national subjects do not have, indeed, an explicit constitutional recognition within the EU legal order, nevertheless regions and local authorities have challenged the so called “European regional blindness”⁸. As the “regional concern” increasingly inhabits the debate at EU level, a parallel question is even compelling at international level within the Council of Europe. In fact, the establishment of the Congress of Regional and Local Authorities of the CoE corresponds to the same (or similar) requirement for sub-national authorities to gain a more relevant acknowledgement both at national and at European level.

Whereas the major role of regional and local authorities within the respective States has been identified with partially different phenomena like “federalism”, “regionalism”, “decentralization”, “devolution” or “local self-government”⁹, the function of sub-national public entities has, in fact, increased at national and European level. Being aware that the previous concepts imply different constitutional structures¹⁰ with considerable theoretical variations, their common denominator

8 S. WEATHERILL, *The Challenge of the Regional Dimension in the European Union*, in S. WEATHERILL, U. BERNITZ, *The Role of Regions and Sub-National Actors in Europe*, Oxford and Portland, 2005, p. 1-31, approaches critically the issues of regional blindness within the EU legal order. As this phenomenon involves a formal disregard towards the “internal territorial and constitutional arrangements of the Member States” (p. 1), not only in the Treaties but also in relation to the responsibility of States for the EC law implementation, however in several circumstances regions and sub-national entities practically assume an active position in the EU. Let’s think, for example, to the fact that “regions are subject to obligations imposed by EU law, which are commonly directly enforceable” (p.3) and to the functions, even if advisory, of the Committee of the Regions (p. 19). See also O. PORCHIA, *Indifferenza dell’Unione nei confronti degli Stati Membri e degli enti territoriali: momenti di crisi del principio*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, Napoli, 2006, p. 269-286.

9 See M. KEATING, *The New Regionalism in Western Europe*, Cheltenham, 1998, p. 51.

10 M. CALAMO SPECCHIA, *Le variabili istituzionali del “multilevel system of governance”: tendenze devolutive in alcune esperienze dell’Europa occidentale*, in L. CHIEFFI (cur.), *Regioni ed enti locali dopo la riforma del Titolo V della Costituzione fra attuazione e ipotesi di ulteriore revisione*, Torino, 2004, p. 99-150, clearly highlights a distinction among the terms devolution, decentralization, federalism and regionalism. Very interesting is the analysis of the phenomena related to “devolution” and “decentralization”. Being linked by a tight correlation, the two terms are not synonyms. Namely, principally with reference to the UK, the concept of devolution implies the creation of “constitutional autonomies” grounded on the institutionalization of national identities, such as Scotland or Wales. For a clear definition of “federalism”, see J. KINCAID, *Introduction*, in A.L. GRIFFITHS, *Handbook of Federal Countries 2002*, Montreal-London-Ithaca, 2002, p. 4-5. See also, R.L. WATTS, *Federalism, Federal Political Systems, and Federations*, in *Annual Review of Political Science*, 1998-1, p. 117-137; A. GAMPER, *A Global Theory of Federalism: The Nature and Challenges of a Federal State*, in *German Law Journal*, 6 No.10 (1 October 2005), p. 1297-1318. While the concept of *federalism*, as constitutional structure and method of governance, implies division of powers and competencies that are shared by the so called Federation and the constituent units, the notion of *regionalism* involves a transfer of competencies and functions from the State to peripheral structures or units of government, which possess a certain degree of constitutional autonomy; see M. CACIAGLI, *Regioni d’Europa: Devoluzioni, regionalismi e integrazione europea*, Bologna, 2006, p. 13. The notion of *decentralization* is also conceptually and legally different. In this regard Kincaid (see *Ibid*, p. 9) explains that “[d]ecentralization involves a central power possessing authority to decentralize or devolve functional

could be broadly individuated in the attribution of formal competences or in the exercise of functions to sub-national subjects. In this regard it is of primary importance to verify the nature of such competences in relation to transfrontier activities. With other words, it could be interesting to comprehend whether the progressive role and attribution of powers to sub-national authorities have a real impact on the development of territorial cooperation.

At a first glance, this seems quite an easy question to answer. Namely, while the process of globalization is widening and opening new ways of exercising powers, the role of regional and local actors is earning political consensus¹¹. But, more than consensus, the progressive importance of sub-national actors is dealing with the possibility to exercise powers and to take autonomous decisions. This process of decentralization¹² has affected, even if differently in relation to the single constitutional structure, quite every State within Europe. Such a banal statement has been mentioned just to remember the pluralistic dimension of political and legal State-structures as well as the different level of decentralization and the multiform reality of sub-national actors, having a direct impact on the development of cross-

and administrative responsibilities to lower levels of government. The authority to decentralize, however, also includes the authority to *recentralize* power. Decentralization is concerned with administrative efficiency and functional efficacy in an otherwise unitary system". For an interesting analysis of the phenomenon of regionalization, see also A. GAMPER, *Die Regionen mit Gesetzgebungshoheit*, Frankfurt am Mein, 2004, p. 72: "Der Regionalismusbegriff bezieht sich jedenfalls nicht auf Regionen im Sinne eines nach technischen oder naturwissenschaftlichen Kriterien charakterisierbaren Gebietes (z.B. Arbeitsmarktregion, Verkehrsregion, Klimaregion, Montanregion), sondern auf Einheit, die zwar territorial dimensioniert sind, jedoch im unauflöslichen und wesensimmanenten Bezug zu derdort ausässigen Bevölkerung, ihrer Kultur, Sprache, Geschichte und Ethnie stehen." Referring to the concept of "local self-government", the idea is that emerging from the European Charter of Local Self-Government of the Council of Europe; Art. 3, par. 1 affirms that "local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population".

11 The merger of the mentioned two figures of globalization and localization is identified with the term "glocalization". Maybe often abused, this neologism is of a very clear efficacy in easily conveying the idea of a complex and bi-directional process. See B. HOCKING, *Patrolling the 'Frontier': Globalization, Localization and the 'Actorness' of Non-Central Governments*, in F. ALDECOA, M. KEATING (eds.), *Paradiplomacy in Action. The Foreign Relations of Subnational Governments*, London, 1999, p. 19.

12 As mentioned above there are different concept dealing with the power exercise by sub-national authorities. However, the notion of "decentralization" can be used as general term in order to individuate the phenomenon in a broader meaning, thus having a more "neutral" connotation; see M. CALAMO SPECCHIA, *Le variabili istituzionali del "multilevel system of governance": tendenze devolutive in alcune esperienze dell'Europa occidentale*, cit., p. 99-150. Namely, "decentralization indicates a general formula, but differently graduated from a maximum (conferring of primary normative power [...]) to a minimum (attribution of administrative functions or merely executives competences) of allocation of traditional State-functions among the centre and the periphery" (our translation).

border relations. In any case, it is rather challenging to demonstrate how competences-delegation, tasks-attribution and the respective exercise affect transfrontier cooperation among territorial communities belonging to different States. Certainly, the progressive enlargement of sub-national competences to deal with transfrontier matters has been anticipated by a huge praxis, which demonstrates the significance of *de facto* activities. And this is even particularly true for frontier communities. While States are mostly concerned with the national foreign policy or international relations, which seems to be more relevant for the whole State, peripheral communities increase their capacity to deal with matters that do not really engage State concern. In these terms, sub-national entities have progressively increased their typical know-how with “familiar” aspects of cooperation. This means that communities along the same border, sharing common aspects of everyday life, often develop common strategies which are better improved by decentralized public actors¹³.

Bearing such situation in mind, it is possible to argue that the development of transfrontier cooperation between territorial communities has been generated from three different and complementary factors. Firstly, an horizontal and direct cooperation between sub-national authorities spread out across frontiers in form of different kind of partnership. Secondly, territorial communities obtained progressively more power of action from their respective States. Thirdly, the progressive recognition of territorial/transfrontier cooperation by the European Union and the Council of Europe, which made those local and regional authorities a decisive element of their policies, promoted and stigmatized these developments¹⁴.

In general terms, it is possible to outline two main types of cooperation between sub-state communities¹⁵. On the one hand, common activities of regions or

13 M. ROUSSET, *L'action internationale des collectivités locales*, cit., p. 14, speaks about “pouvoir d’expertise” and “capacités techniques” within the different sectors covered by public local services. Actually, these common strategies of cross-border cooperation have been developed starting from those twinning-relations that generated partnership and mutual trust. See also EUROMOT, *Manifeste pour la coopération transfrontalière en Europe*, Avril 2008, p. 5.

14 According to this perspective, a brief reflection has to be pointed out. Namely, at EU level the local actors do not have the same attention as regional actors. Actually, there is not even an intention to find out a common definition of “local government”, which only compares in the European Charter of Local Self Government of the CoE. On the contrary, within the CoE filed the regional level hasn't found its collocation yet, as far as the hypothesis of a Charter on regional self-government fell through.

15 M. CACIAGLI, *Regioni d'Europa: Devoluzioni, regionalismi e integrazione europea*, cit., p. 76.

local authorities are realized among these subjects, not necessarily geographically contiguous, in order to create a sort of shared “lobby” to give weight to their main interests or to find joint solutions. A clear example is given by the Conference of European Regions with legislative power (REGLEG)¹⁶ or by the Association of European Border Regions (AEBR), whose main aim is to achieve a more active role of these regions at European level. On the other hand, cooperation takes the form of specific activities or agreements between geographically contiguous or non-contiguous foreign territorial communities. This type of cooperation can be bilateral or multilateral, depending on the number of authorities participating in it, and its principally directed to find common solutions to everyday problems.

As both the forms of cooperation could be intended, in some ways, as “across borders”, thus being a sort of potential (or real) means of doing actions outside State borders, nevertheless only the latter can be considered as typically cross-border¹⁷, for the simply reason that it involves everyday activities that “cross a frontier”. Given this latter distinction, it is also possible to verify the practical manifestation of different solutions that could be generally intended as “territorial cooperation”, because dealing with the peculiar territorial level of the sub-national subjects involved.

1.2. The concept of sub-national authorities

As the term suggests, *sub-national* authorities are territorial political entities *below* the State. Trying to give an exact definition of sub-national authorities is quite a hard challenge, mainly due to the fact that very diversified factors should be considered. This study will not attempt to find the best way to delineate the concept concerned for any other purpose except for the analysis of the instruments of cross-border activities. To begin with, it seems appropriate to underline how the term “sub-national” could be considered as a general container for reasons of convenience, even if identifies a kind of non-technical term, mainly for two reasons.

¹⁶ See the official website at <http://www.regleg.eu/>.

¹⁷ See K. SOUPE, *The European Union and Inter-regional Co-operation*, in F. ALDECOA, M. KEATING (eds.), *Paradiplomacy in Action. The Foreign Relations of Subnational Governments*, London, 1999, p. 62. The Author distinguishes among two types of organizations: the former, which can be intended as traditionally cross-border, refers to actors along the same frontier; the latter, instead, is called transregional and does not concern only strictly contiguous cross-border subjects.

Firstly, the term encompasses several subjects having their respective legal and political identity, both in regard to the different constitutional models of State they refer to and to the level of government they concern¹⁸. Namely, on the one hand, we recognise political entities like *Länder* (Germany), *Regioni* (Italy), *Régions* (France and Belgium), *Comunidades Autonomas* (Spain), etc. From the other hand, within the same country there are different tiers of government below the State, which are at least identified by a second tier (normally known as a regional level) and a third tier (in general corresponding to a municipality level)¹⁹.

Secondly, as the adjective “sub-national” evokes concepts such nationality and nation, its general use seems to be quite imprecise if considered in its exact meaning. According to this last assertion, the adjective “sub-state” suggests more accuracy²⁰. Nevertheless, it is quite common, among scholars, to identify those public subjects as “sub-national”.

Another brief clarification needs to be suggested with regard to some differentiations between Western and Eastern Europe. Since the States of Western

18 N. LEVRAT, *L'Europe et ses collectivités territoriales. Réflexions sur l'organisation et l'exercice du pouvoir territorial dans un monde globalisé*, Bruxelles, 2005, p. 53, proposes different approaches of analysis. Referring to the territorial organisation of power it is possible to observe four models on the European territory: a “French model”, a “German model”, an “Anglo-Saxon model” and a “Scandinavian model”. A classification according to the State-type refers to three main State-categories: unitary States, regional States and federal States, in relation to the distribution or sharing of legislative power and the representation within the national central power. This last criterion, according to the author, denotes the existence of federal States in Europe – Germany, Austria and Belgium – while the others can be considered unitary States with more or less accentuated decentralization of power, thus originating the model of regional States. See also other academic studies as A. DELCAMP, J. LOUGHLIN, *La décentralisation dans les États de l'Union européenne*, Paris, 2003 and J. LOUGHLIN, *Subnational Democracy in the European Union. Challenges and Opportunities*, Oxford, 2001.

19 This brief description has only an explicative aim, as the system of government within each State is generally more complex and diversified. In Italy, for example, the Constitution (Art. 114) recognises the existence of several autonomous entities, which constitute the Italian Republic beside the State: *Comuni*, *Province*, *Città Metropolitane*, *Regioni*. The German Constitution (Art 28 GG) makes references to *Länder*, *Kreisen*, *Gemeinden*. The French Constitution dedicates an entire Title to the territorial communities (*collectivités territoriales*) mentioning (Art. 72): *communes*, *départements*, *régions*, *collectivités à statut particulier*, *collectivités d'outre-mer*. The Spanish Constitution, under the Title “*De la organización territorial del Estado*”, refers to (Art. 137): *municipios*, *provincias*, *Comunidades Autónomas*. The Portuguese Constitution refers to “*autarquias locais*”, which comprehend (Art. 236): for the continental territories *freguesias*, *municípios*, *regiões administrativas*; for the autonomous regions of Azores and Madeira only *freguesias* and *municípios*.

20 See M. CACIAGLI, *Regioni d'Europa: Devoluzioni, regionalismi e integrazione europea*, cit., p. 18. The author considers the concept of sub-national even an error if used to indicate the political unity which is just at the first lower level below the State. The best term to use would be, in fact, “sub-state” because of its disaffection from the concept of nation, which doesn't necessarily correspond to the political connotation of the State. Aware of this quite subtle clarification, this study will consider these two terms a synonyms. Namely, as the core of the research is focused on the instruments of territorial cooperation, the aim is to try to simplify the surrounding concepts and terms.

Europe know a longer historical process of decentralization, Eastern Europe is approaching the phenomenon after the communist experience. As those countries are mainly settled as unitary central States, a progressive role of local self government is phasing out²¹.

Moreover, if there is a progressive involvement of sub-national actors at EU and CoE levels, several difficulties and divergences about the classification and definition of the terms “region” and “local government” plugged up the agreements on clear standard concepts.

Until this point of the analysis, what emerges is the extreme diversity of variables regarding the classification of sub-national authorities. As a general consideration, it is possible to think about the sub-national authorities like the representative subjects of territorial communities, therefore expressing a democratic legitimization. Although quite broad, the last statement figures out a general characteristic that associates different levels of governments, even if they could be better individuated through general territorial categories like “region” and “local government”. Furthermore, approaching the concept of government-tiers should even require to distinguish the experiences within those categories indeed, but the simplification of the term “sub-national” is helpful, in particular when dealing at European level or when discussing general issues.

Since the above-mentioned categorization alludes to a varying reality, it comprehends, at least, two common factors that are functional to explain the peculiarity of those public subjects: namely, territoriality and legitimization. The latter, in particular, entails different aspects: firstly, it is related to the political/representative legitimization and, secondly, it is linked to the legal attribution of functions and competencies (either own or transferred). For reasons of completeness, it is worth to observe that sometimes the actors of transfrontier cooperation could be also entities, which do not exactly correspond to the traditional concept of sub-national authority. Namely, in some cases, territorial communities act jointly, for instance in form of association of municipalities, and other so-called

21 See P.H. RUSSEL, *The future of Europe in an era of federalism*, in S. ORTINO, M. ŽAGAR, V. MASTNY (eds.), *The changing faces of federalism: Institutional reconfiguration in Europe from East to West*, Manchester, 2004, p. 4-20 and J. ROSE, J. TRAUT (eds.), *Federalism and Decentralisation. Perspectives for the Transformation Process in Eastern and Central Europe*, Hamburg, 2001.

public law bodies²² take part in cross-border cooperation. Insofar as they are not considered as “stranger” subjects, these entities are also a sort of projection of the territorial communities and they are concerned with the public interest: thus they could also be considered, quite a-technically speaking, a kind of sub-national subjects.

With reference to territorial cooperation, the activities of sub-national authorities should promote the interests of their communities, so that there is a sort of correspondence between the representative authorities and the represented communities. Thus, these two terms – sub-national authorities and territorial communities – will be used as synonyms for general allusions to the sub-state actors of territorial cooperation²³. In fact, what really matters for the present analysis is the potential or effective feasibility for sub-state subjects – any kind they are – to put into practice transfrontier cooperation.

About the activities in which these entities are concerned, the functions of sub-national authorities are usually analysed by dividing them principally with regard to the degree of recognised autonomy (meaning competences) they have. With other words, the attribution of competences is, formally and legally speaking, a precondition for the legitimisation to undertake the correspondent activities. According to the national legal orders, the existence and the garde of autonomy are set down either by constitutional provisions or by the law. Thus, the very first level below the State is, in general, constitutionally entitled to the exercise of own powers, while the tier corresponding to the so-called local government is more concerned with the exercise of administrative functions or delegated powers. If such differences can have a substantial value for the legal analysis of these entities *per se* and within the respective national systems, however they are not so relevant with regard to the study of territorial cooperation. Concerning this last aspect, it will be interesting to evaluate the capacity of sub-national actors to develop cross-border activities *within* or *beyond* the existence of a specific power to develop cross-border relations, rather

22 Actually the legal meaning of “public law body” could differ according to the national legislations or even to the EC law. What is important to notice, however, is that also other organisms, which are not traditional sub-national authorities could be actors of cooperation when legitimized by the law as entities dealing with the public interests. Normally such structures are also somehow connected to the territory they refer to for the transfrontier activities.

23 Surely, the two terms do not totally correspond. Namely, there are sub-national authorities which cannot be considered as territorial communities, as the case of the Belgian linguistic communities (*Communauté flamande, Communauté française, Communauté germanophone*).

than to draw and stigmatize the distinction of their legal nature within the national systems.

As the national and European political debate demonstrates, the category of regions is, if compared to the so-called municipalities, the most controversial. Not referring to the legitimacy of its existence, indeed, but in relation to their prerogatives within each single State, and on their international dimension and transfrontier relevance. Namely, the regions, individuated as the territorial unity directly below the State²⁴, represent the sub-national institutional subjects that are mostly involved in cross-border activities, for the specific reason that such entities have more detailed formal competencies, financial resources, political interests and regulatory powers. However, it should not be forgotten that even local authorities, within their tasks and interests, play a role in cross-border relations.

Hence, being aware of the constitutional, legal and political diversification, regional and local authorities will be both considered within the general concept of sub-national entities as real or potential actors of territorial cooperation. From this point of view, different aspects need to be considered by dealing with transfrontier cooperation between sub-national authorities, keeping in mind that the development of foreign activities outside the national borders is concerned. Namely, the relation between the national legitimation of such power-exercise, the attribution of competencies and functions, the existence of national and international legal instruments for territorial cooperation and the influence of the European institutions are the most relevant key factors concerning this research.

24 See ASSEMBLY OF EUROPEAN REGIONS, *Declaration on Regionalism in Europe*, Strasbourg, 1997, p. 4. The Declaration has been adopted in December 1997 during the 4th meeting of the Assembly in Basel. Art. 1 provides for the concept and definition of "region": "1) The region is the territorial body of public law established at the level immediately below that of the state and endowed with political self-government. 2) The region shall be recognised in the national constitution or in legislation which guarantees its autonomy, identity, powers and organisational structures. 3) The region shall have its own constitution, statute of autonomy or other law which shall form part of the legal order of the state at the highest level establishing at least its organisation and powers. The status of a region can be altered only in cooperation with the region concerned. Regions within the same state may have a different status, in keeping with their historical, political, social or cultural characteristics. 4) The region is the expression of a distinct political identity, which may take very different political forms, reflecting the democratic will of each region to adopt the form of political organisation it deems preferable. The region shall resource and staff its own administration and adopt insignia for its representation. Although the reported definition is quite broad, some scholars do not agree with it, mainly because considered too restrictive when applied to the European regions. See K. SOUPE, *The European Union and Inter-regional Co-operation*, cit., p. 59.

1.3. Sub-national authorities and territorial cooperation: a question of legitimacy

It has already been anticipated that foreign activities of sub-national subjects are, in theory, a sort of exception to the unitary dimension of the State within the international context. Being aware of the complexity of the sub-national dimension, it is possible to evaluate the position of these various and multiple subjects in relation to territorial cooperation. In this regard the distinction between the local and regional tiers and between different kinds of regions is not necessary. Namely, what is mostly relevant is the existence of public and *non-sovereign* legal entities (according to the traditional doctrine of sovereignty) which have own legal personality, which are established within the State, but which are distinct from the central national authority.

The exact hierarchic position or the exact function of sub-national subjects in relation to the respective central authorities is a question concerning each national constitutional order, while the analysis of territorial cooperation considers the competences attributed to each sub-national authority in order to determine, in general, their capacity to act legitimately. In this sense, the panorama of regionalism, decentralization, and similar processes, has to be considered as a background of the development of territorial cooperation and the scenery where sub-national authorities exercise and develop their competences. In fact, while the concept of non-sovereign public legal entities remains quite static according to the legal traditional principles, the increasing role of sub-national authorities is somehow connected to the development of their competences and their capacity to act outside the national borders²⁵.

There is certainly an obvious observation to repeat, which deals with the fact that the theoretical attribution of competences to sub-national authorities represent the essential and preliminary condition of their actions, while the number or the the specific subjects concerned to these competences represents the concrete and effective form of the action. In this sense, the untouchable unity of the sovereignty principle finds a theoretical balance in the perspective connected to the prerogative of sovereignty and the exercise of its functions. In this sense, the action of sub-national authorities outside the national borders does not hinder the prerogative of

²⁵ See C. TOMUSCHAT, *Component Territorial Units of States under International law*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, Napoli, 2006., p. 31-58.

the sovereignty of the State, but participates to the respective functions. These functions are necessarily exercised according to the inner distribution of powers and attributions and, therefore, allocated also to sub-national subjects even if with fundamental limitations, such as the unity of the foreign policy and international relations. But, as far as sub-national interests and attributions are concerned, the theory of sovereignty is not dismissed by the sole existence of sub-national foreign relations²⁶.

Moreover, according to the analysis of N. Levrat²⁷ the distinction among the different sub-national authorities doesn't affect the legal nature or the juridical issues concerning the legitimacy and the instrument of territorial cooperation. This is because sub-national authorities are supposed to have (more or less wider) attributions which confer them an own capacity to act. The extension or degree of such attribution could influence the effective praxis of acting, but not the theoretical possibility to exercise the own legitimate attributions in form of foreign relations. The focal point is the capability for these non-sovereign entities to employ legitimately such attributions even outside the national borders.

In general terms, the development of sub-national territorial cooperation is part of the question related to the legal basis of the so-called sub-national foreign power within the national legal systems. Namely, the consolidated praxis of cooperation and the evolution of sub-national actors' attitudes needs to find a national legal justification.

In these terms, national legal systems, for a long time, didn't consider territorial cooperation, in the sense of transfrontier activities between sub-national actors, as a subject-matter in the need of an explicit codification. In particular, this omission was related to the mentioned question of sovereignty and to principles concerning international relations. However, some general legal justifications for

26 The concept is explained by F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 73.

27 See N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 143. The Author, in his analysis, uses the concept of *collectivités publiques infra-étatiques (CPIE)*, which doesn't have a strict connection to the territory in order to comprehend also communities that do not really have a territory of reference (the example is related to the Belgian linguistic Communities) and which do not imply a link or a relation of sub-ordination to the State. Our use of the term sub-national authorities (as a synonym of territorial communities), aware of its less preciseness in respect to the definition of Levrat, is somehow connected to the common use and understanding of such terms.

these transfrontier activities could be only conceived throughout a flexible conception of the different legal systems. In this regard, almost every national legal system shows some reactions or some solutions towards the general issue of the exercise of sub-national foreign power.

2. Looking for legitimation from the national perspective

2.1. Territorial cooperation as a form of sub-national foreign relation: the capacity to act outside the national borders

One first condition for a valid legal relation is the legitimacy of the act sealing that relation. Furthermore, a valid legal act is only put into practice by legitimate subjects, entitled to exercise the power or the faculty concerned. Such a general statement should be considered with regard to the capacity of sub-national authorities to create valid and legitimate relations of territorial cooperation. In this respect, N. Levrat²⁸ spends an entire part of his work to justify the theoretical legal grounds for founding the validity of transfrontier relations between sub-national authorities²⁹. Concerning these institutional subjects, it is worth to remember that it is the national law which confers them the legal personality and the legal capacity. In particular, the legal capacity, namely the capacity to act legally, has its equivalent according to public law in the notion of competence. Thus, the national rules conferring the competences to sub-national entities determine the extent and the limits of their capabilities.

The practice of transfrontier cooperation implies that the actions of sub-national authorities have, in general terms, transnational effects³⁰. This means that a certain measure of power-exercise doesn't exclusively affect an inner element of one State, but generates mutual relations among foreign territorial communities. As a

28 N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 181 *et seq.*

29 *Ibid.*, p. 181: "Le droit qui fonde la validité d'une relation juridique [...] est nécessairement lié au droit qui confère la personnalité juridique, et plus précisément au droit qui détermine la capacité juridique. Ainsi [...] pour les collectivités publiques infra-étatiques, ce sera nécessairement au sein de l'organisation de l'État, donc du droit national, qu'il faudra chercher à identifier la capacité des CPIEs d'entreprendre des relations transfrontières".

30 Of course, this field of action is not a part of the concept of territoriality as intended in international law, see I. BROWNLIE, *Principles of public international law*, Oxford, 2008, p. 109 *et seq.*

consequence, in fact, different juridical orders get necessarily in touch³¹. Approaching such an argument, thus, implies to take into consideration the effective powers that sub-national entities have in order to develop this kind of activities and the respective legitimation.

Looking at the different constitutional structure of the European States, the legitimacy to deal with foreign affairs is usually a prerogative of the State³², which owns the capacity to engage with other international subjects and has the consequent responsibility according to international law. But, since this statement could be considered generally valid for what concerns the traditional matter of foreign affairs within the frame of international law, external relations are currently put into practice even by sub-state subjects. In particular, transfrontier activities seem to be performed not only for a political claim of autonomy; rather for functional and practical needs which are often concerned with territorial or economical competitiveness³³ and with everyday problems. As a matter of fact, the existence of a “sub-national foreign power” within the European national legal orders has been recognised³⁴. However, outside the framework of the traditional concept of international relations and international law³⁵, sub-national actors need to find, not only a political³⁶, but even a legal justification regarding this kind of foreign power-exercise.

31 See H. COMTE, N. LEVRAT, *Aux coutures de l'Europe. Defis et enjeux del la coopération transfrontalière*, Paris, 2006, p. 16.

32 See J. MONAR, *Regional external relations: Problems and Potential*, in R. HRBEK (Hrsg.), *Außenbeziehungen von Regionen in Europa und der Welt*, Baden-Baden, 2003, p. 39 *et seq.*

33 R. HRBEK, *Rahmenbedingungen und Faktoren für die Außenbeziehungen von Regionen*, in R. HRBEK (Hrsg.), *Außenbeziehungen von Regionen in Europa un der Welt*, Baden-Baden, 2003, p. 12 and 14, refers to the “funktionale Notwendigkeiten und Bedürfnisse”; see also P. DELOIRE, *Guide européen du cadre territorial. L'art e la manière d'utiliser l'Union européenne*, Paris, 1996, p. 139 *et seq.*

34 The reference to a “sub-national foreign power” widens the notion of “regional foreign power” in the sense to comprehend a broader range of institutional subjects, also related to the local level of government. However, the “substance” of this concept is not essentially damaged and could be referred to the definition given, among other scholars, by E. GIZZI, *Il potere estero regionale*, in *Quaderni regionali*, 1981, p. 90-91, as “the ability to create, with subjects belonging to other States, agreements, accords, declarations and other similar acts that produce effects on the legislative and administrative policy of regions and, often, even generate legal obligations”, see F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, Padova 1999, p. 14.

35 According to this different conceptual framework, the existence of a sub-national foreign power is quite different from the treaty making power, which is a peculiar prerogative of the States and, concerning the federal States, eventually attributed to the constituent unites within their fields of competence.

36 See H.M. TSCHRIDI, *Chancen und Probleme regionaler Außenbeziehungen aus der Sicht der Politischen Praxis*, in R. HRBEK (Hrsg.), *Außenbeziehungen von Regionen in Europa und der Welt*, Baden-Baden, 2003, p. 45 *et seq.*

The general concept of “sub-national foreign power” is quite broad and could be considered as the general container of territorial cooperation. An example will clarify this statement. If territorial cooperation comprehends the relations between sub-national authorities belonging to different States concerning the establishment of activities with a determined territorial dimension, the category of “sub-national foreign power” concerns also other elements, such as the relations of sub-national actors with the EU, their participation in the international arena, for example of the Council of Europe, the implementation of Community and international legal acts, etc.

First of all, it could be currently considered as accepted that such sub-national foreign relations, although they undoubtedly have international aspects, do not fall under the rules of international law. A simplified explanation is related to the fact that transfrontier cooperation between sub-national entities neither is decided by the State, nor is chargeable to the State in terms of international responsibility. In this sense, the principles of international law cannot serve as justification for the creation of sub-national transfrontier cooperation.

Considering the positive dispositions, actually, it is quite difficult to find in national constitutions or general laws on sub-national communities specific norms, which concern territorial cooperation specifically, thus entitling sub-national communities to develop territorial, cross-border, transnational or international cooperation. Of course, it has to be remarked that constitutional provisions of different States, in particular federal or regional countries, confer to the constituent units a so-called *treaty-making power*. According to this occurrence, the fact that some legal orders provides for a competence of sub-national units to act abroad could bring to the idea that where such provisions are not foreseen the sub-national authorities of that State are not entitled or justified to establish cross-border relations with other foreign sub-national entities. Actually, the capacity of sub-national authorities falling outside the field of international law has not to be considered as necessarily connected to such a *treaty-making power*. Namely, different scholars affirm how such a treaty-making power is basically concerned with international law, whereas cross-border cooperation conceives a different space and a kind of

autonomy in relation to the traditional dynamics of international law³⁷. According to this point, it is possible to affirm that there are some extra-national actions with legal effects that are not relevant for international law. However, having such actions an international aspect, it is not possible to say that they are not allowed just because they do not follow the principles of international law or because they are not explicitly foreseen within Constitutions or legislations. Namely, the national rules conferring (or eventually omitting to confer) the “treaty-making” competence do not cover the entire field of public relations with international dimension. “*Il doit donc exister un espace, ou à tout le moins un interstice dans lequel se situent vraisemblable les relations qui font l'objet de notre recherche*”³⁸.

The field of territorial cooperation doesn't usually constitute a matter of competence *ex se* for sub-national authorities³⁹. Instead it is generally composed of a set of procedural means and tools determined by public or private law within the domain of transversal matters like environment, transport, culture, etc. In fact, as already mentioned above, the instruments of cooperation between foreign sub-national actors are various and deriving from different sources, which aren't limited to a unique applicable law. And, in general, the legal effects depend and vary according to the legal instrument used. For instance, it is quite easy to observe that transfrontier agreements related to the establishment of informal relations do not create legal obligations, while agreements on the basis of public or private law, normally generate different, but enforceable and binding relations.

According to what has been said, territorial cooperation can be considered, if not a form of competence, an expression of sub-national foreign power that is exercised throughout different – legal and non-legal, national and non-national – means and that should be considered as legitimate according to the respective national systems. Thus, concerning a set of potentially different instruments, the core of the issue goes to the potential legitimation for sub-national authorities to use such devices. In this regard, two different aspects are relevant and necessarily interrelated:

37 See N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 203: “En effet, ces normes ne réglementent que l'accès par certaines CPIEs au droit international, sous certaines conditions particulières, mais ne sauraient empêcher ces CPIEs de développer d'autres formes de relations hors du droit international, si cela est possible”.

38 *Ibid.*, p. 205.

39 See R. TONIATTI, *Potere estero e politica economica delle Regioni: il nuovo assetto istituzionale e le ragioni dell'economia territoriale*, in *Le Regioni*, a. XXIX, n. 5, ottobre 2001, p. 924.

the formal entitlement of power-exercise, with the respective limitations, and the “material” manifestation of this power.

In addition, it is necessary to mention that the legal evolution concerning a “sub-national foreign power” has been mainly developed with regard to the so-called “regional foreign power”, referring to the first sub-national level of government “below” the State. However, with reference to what has been said above and to the further analysis, it will be quite clear that the development of a broader “sub-national” foreign power is open, in particular if we look at the newest common instrument of territorial cooperation within the European panorama.

2.2. The development of sub-national foreign power: comparative perspectives

The previous paragraph has introduced a general analysis about the idea of territorial cooperation as a form of sub-national foreign power. Some steady elements have been pointed out, namely: the development of a consolidated praxis of cooperation between sub-national foreign subjects and a mutual engagement; the existence of a sub-national dimension of foreign power doesn't necessary hamper the principle of State's sovereignty; the exercise of sub-national foreign powers is not (exclusively)⁴⁰ a matter of international law. Such premises lead to the necessary assumption that foreign activities of sub-national authorities are somehow permitted (or tolerated) within their respective national legal systems.

The following analysis will take into consideration the development of national mechanisms for sub-national authorities to exercise foreign powers according to the respective constitutional and legislative systems. As already said, despite the lack of specific provisions about territorial/transfrontier cooperation, the existence of a certain degree of autonomy attributed to sub-national actors has left the space for the legitimization of the action of sub-national subjects outside the national territory. This process is visible, even if with some distinctions, both in federal and regional States, but also in unitary countries. It is true that the traditional constitutional provisions about the treaty-making power for constituent units of

⁴⁰ A different observation can be made with reference, for example, to a treaty concluded between a unit of a federal country and another State. But this is not the case considered within this survey, in particular because the conclusion of treaties about transfrontier cooperation between States and sub-national entities of composed countries is rather unusual.

federal States seem to present a sort of codification for the sub-national foreign power, while the situation of territorial authorities in regional and, in particular, in unitary States is different. However, as it has been already said, the treaty-making power doesn't represent the unique source of legitimization in this sense and regional as well as unitary systems demonstrate that other constitutional solutions are possible.

Currently, almost every legal system has developed mechanisms for the possibility for sub-national actors to develop foreign activities, both formally and informally. This is the result of a combined dynamic process between the provision of explicit norms and the flexible interpretation of legal principles. In this sense, also traditional unitary countries, like France, have progressively developed clear solutions for sub-national authorities in order to deal with foreign relations. In these terms, the existence and the awareness of a consolidated praxis brought to a progressive reaction of the national constitutional systems in the direction of a feasible coordination between central and sub-national authorities. In addition, the analysis of the positive legal elements in a comparative perspective demonstrates that a distinction between federal and regional systems is quite obsolete in this regard, as far as the development of feasible solutions for sub-national authorities doesn't necessarily have a direct correspondence in the federal or regional structure of the single countries⁴¹. Moreover, also the configuration of unitary countries, with the due distinguishing, shall not be over-estimated in the sense of showing a high differentiation in comparison to composed legal systems. In this case, the relations between institutional subjects should not be considered from the point of view of the vertical repartition of competences between central and sub-national authorities, but from the point of view of the possibility recognized to sub-national authorities to deal with foreign activities.

Furthermore, a comparative analysis of different national systems is particularly interesting in order to examine the dynamics between central and sub-national authorities in this field and, in particular, the limitations and conditions imposed to or arranged between the State and territorial communities.

41 This reasoning is borrowed by F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 23-25 and 66 *et seq.*

The following comparative analysis of different countries will, anyway, keep the (almost) traditional distinction between federal, regional and unitary countries for expositive reasons.

a) Federal countries

Although the regulation of the sub-national foreign power in federal countries is generally associated with the provisions of a treaty-making power for the federated entities, the exercise of sub-national foreign power shows different dynamics in relation to each single legal systems.

The German Constitution (*Grundgesetz*) entails explicit provisions about the foreign power of the *Länder*⁴². As far as Article 73, paragraph 1 confers the exclusive legislative competence to the Federation (*Bund*) about foreign affairs like foreign policy, diplomatic relations and defence, it doesn't cover every foreign relation and leaves space for the *Länder's* activities⁴³. The explicit provision about the sub-national foreign power is stated in Article 32 GG, which draws a balanced repartition of the treaty-making power between the *Bund* and the federated units⁴⁴. In fact, according to this provision, the conduct of relations with foreign States is the concern of the Federation, but before the conclusion of a treaty affecting the special interests of a *Land*, this *Land* must be consulted in sufficient time. Moreover, the *Länder* can conclude treaties with foreign States within the limits of their legislative competences and with the consent of the Federal Government. Apparently clear, this disposition could be interpreted in different ways and it seems to cover only the field of international agreements without considering other foreign relations or activities. However, other interpretations are inclined to perceive Article 32 GG as encompassing all foreign relations instead of the unique acts of international law⁴⁵.

42 See B. FASSBENDER, *The weight of tradition and the challenges of political, economic and legal convergence: The status of the German Länder in International and European law*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, cit., p. 339-357; and also A. KATZ, *Staatsrecht*, Heidelberg, 2003, p. 130.

43 See F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 26.

44 D. FLORENZANO, *L'autonomia regionale nella dimensione internazionale. Dalle Attività promozionali agli accordi ed alle intese*, Padova, 2004, p. 248.

45 *Ibid*, p. 252-253. A part of the international literature on the topic do not consider the federated entities of federal countries as international subjects because only the federation should have international personality. According to this opinion, the international agreements concluded by federated entities with international subjects (i.e. foreign States) should be considered as stipulated by the Federation as a whole. See, in this regard, R. QUADRI, *Diritto internazionale pubblico*, Napoli,

Namely, besides traditional international relations, the *Länder* develop other forms of foreign relations, which seem to be all the more so legitimated by and included within this general constitutional provision. In any case, the Article remains literally undefined and open to more than one interpretation. In this regard, the vague constitutional text has been completed throughout a collaboration between *Bund* and *Länder*, in particular with the Lindau Agreement of 14 November 1957. With this act the German *Länder* have recognized to the Federal Government a general power for the conclusion of international agreements, while the Government has given guarantees to consult the *Länder* in case the agreements concern their competences. With other words, the German case abandons a sort of “geometric model” following a division of the international competences on the base of the internal competences and favours a “participative/cooperative model”⁴⁶. In this regard, the principle of cooperation between the Federation and the constituent units gives a peculiar characterization to the normative texts and fills it with living constitutional ingredients. Article 24 GG seems to operate in this sense affirming that the *Länder* may, with the approval of the Federal Government, transfer part of their sovereignty to transfrontier institutions insofar as they are responsible for the exercise of state competences and for the implementation of state functions. In this regard, the general principle of cooperation is also applicable within the relation between the Federal Government and the federated entities. An overall evaluation about the German system brings to the conclusion that explicit rules about the foreign power of sub-national authorities are shaped by the concrete implementation according to the political dynamic between the institutional subjects involved. Thus, according to the constitutional system, the possibility to develop territorial cooperation seems to be not difficult indeed.

The case of Austrian federalism is quite different. In fact, the text of the Austrian Constitution (*Bundes-Verfassungsgesetz*), in particular at Articles 10-15, but also in other provisions, has a strong centralized structure regarding the repartition of the competences between *Bund* and *Länder*, which have only few enumerated

1989, p. 427 *et seq.*; B. CONFORTI, *Diritto internazionale*, Napoli, 2006, p. 14; I. BROWNLIE, *Principles of public international law*, Oxford, 2008, p. 59. However, other interpretations admit the existence of the international personality of sub-national entities, although it is not equivalent to that of States. See also A. ANZON DEMMING, *Sovranità, processi federalistici, autonomia regionale*, in *Giurisprudenza Costituzionale*, N. 6, 2007, p. 4999 *et seq.*

⁴⁶ *Ibid.*, p. 252.

competences of executive and integrative nature⁴⁷. After the reform of 1988, Article 10, paragraph 1, No 2 states that the matter of foreign affairs, including the political and economic representation abroad, in particular the conclusion of international treaties, pertains to the executive and legislative competence of the Federation with the exception of the *Länder's* competence according to Article 16, paragraph 1. This disposition confers to the *Länder*, within the limits of their competences, a treaty-making power with States bordering on Austria or with their territorial entities. However, the rest of Article 16 provides a complex mechanism of information and approval from the Federal Government which has a clear prerogative on the conclusion of the international agreement. A faculty of substitution in favour of the central authority is also foreseen as well as its supervision on the implementation of the treaties concluded by the *Länder*. Although the provision gives strong guarantees for the Federation, allowing an almost apparent foreign power to the *Länder*, it has been never applied yet: this means that, despite the provisions of the Constitution, Austrian *Länder* haven't concluded any international treaty with foreign States yet. Thus, the development of an autonomous sub-national foreign power took place in the form of non-institutionalized and non-formalized actions or throughout private law acts⁴⁸, or, in any case, without the adoption of an international treaty by the Austrian *Länder*. With reference to the specific case of transfrontier cooperation, the relations with foreign sub-national authorities emerging from an informal level are framed by international treaties concluded by the Federation. A clear example in this sense is given by the Vienna Treaty between Italy and Austria on transfrontier cooperation between territorial communities. Thus, as far as sub-national foreign activities increase consistently⁴⁹, they are rather based on a public international legal ground as granted according to the Austrian Constitution. On the contrary, these foreign relations are established on an informal ground or, more interestingly, through private law instruments that should not follow the repartition of the

47 See A. GAMPER, *Il potere estero dei Länder austriaci*, in *Diritto pubblico comparato ed europeo*, 2/2004, p. 689 and A. GAMPER, *Die Regionen mit Gesetzgebungshoheit*, cit., p. 362 *et seq.*

48 In this sense, Article 14 B-VG affirms that the dispositions contained in Articles 10-15 have no incidence on the status of the Federation or of the *Länder* as subjects of private law.

49 The participation of Austrian *Länder* working communities is an example of transfrontier cooperation without formal obligations. See, for instance, the participation to the Argealp, a working community between the alpine regions. It has also to be remarked the existence of *Länder's* offices in Brussels as a form of lobby towards the EU institutions.

competences as foreseen in Article 17 B-VG⁵⁰. This constitutional settings has created some difficulties with regard to the implementation in Austria of the Regulation (EC) No 1082/2006 which provides for the possibility of sub-national authorities to engage in territorial cooperation through the establishment of common structures with legal personality.

The Swiss Constitution of 1999 attributes to the Cantons the right to conclude treaties with foreign States on matters that lie within the scope of their powers (Article 56). The same provision continues by saying that such treaties must not conflict with the law or the interests of the Confederation or with the law of any other Cantons. The Canton must inform the Confederation before concluding such a treaty. Moreover, each Canton may deal directly with lower ranking foreign authorities. In other cases, the Confederation shall conduct relations with foreign states on behalf of a Canton. Despite this constitutional provision, Article 62 of the Federal Law of 21 March 1997 states that the Cantons shall inform the Confederation before concluding a treaty. Within this procedure, the central authorities shall verify the conformity of the treaty with the federal law and with the interests of the Confederation as well as the rights of the other Cantons. In case of a violation of such principles the competent authority proposes to the Federal Council to compose the question with the Canton. In the eventuality of a negative solution, the case is submitted to the Federal Assembly and it is, practically, solved on a political base⁵¹. Thus, the Swiss constitutional dynamic about the foreign power of the Cantons cannot take place, in principle, without the intermediation of the Confederation in order to safeguard the federal interest⁵².

50 See F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 38-39.

51 Although Article 56 of the Constitution and Article 62 of the Federal Law of 21.03.1997 show patent contrasting aspect, it is possible to find an “conciliatory” interpretation according to Article 54 establishing that foreign relations are responsibility of the Confederation. Even if it is possible to separate the substantial application of the two constitutional disposition, it is also true that foreign relations of the Cantons contrasting with general policies or specific laws of the Confederation seem to be, at least, inopportune.

52 See, Y. LEJEUNE, *La surveillance des relations internationales conventionnelles des collectivités fédérées*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, Bruxelles, 2008, p. 126.

The last case about federal countries is about Belgium⁵³. The Constitution of this peculiar federal country establishes that the King manages international relations, without prejudice to the ability of Communities and Regions to engage in international co-operation, including the signature of treaties, for those matters within their responsibilities as established by the Constitution and in virtue thereof (Article 167, paragraph 1). In fact, Community and Regional Governments have the power to conclude in matters that concern them, treaties regarding matters that are in the scope of the responsibilities of their Councils (Art. 167, par. 3). In case of a treaty involving different fields of competences – i.e. belonging to Communities, Regions or to the State – a specific law is adopted according to Article 4 Const. Other laws rule the procedures, coordination and control from the central authority with regard to the conclusion of international treaties by the Regions or Communities, mainly for safeguarding the national unity abroad⁵⁴. In comparison to the other federal countries, the Belgian sub-national authorities are granted an easiest way to conclude international treaties. In fact, the Belgian federal authority can oppose the conclusion or the execution of a treaty emanating from a Community or a Region only if there are some legal or constitutional irregularities. In particular, no federal intervention is needed in order to authorise a Community or a Region to deal with a foreign State or with an international organisation⁵⁵. This is mainly due to the peculiar political situation of Belgium and its linguistic/regional organisation, which induce to a consensual management of the foreign policy. For these reasons, the recourse to international treaties by Communities and Regions is quantitatively higher than in other federal systems, even if several foreign activities are developed without the conclusion of treaties, like the presence of Belgian sub-national authorities in

53 As a general references, see W. PAS, *The role of the Belgian Regions and Communities in International and European law*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, cit., p. 312-337.

54 The law of the 5 May 1993 provides that Communities and Regions shall inform the King about the negotiations. Furthermore, the law of 8 August 1980 disposes that the King can suspend the negotiations or reject the already concluded treaties for a series of enumerated reasons, i.e. in case of violation of the international obligations of the Belgian State. From the same point of view, the Federation has the power to substitute Communities or Regions. See F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 43-44. About the development of foreign activities without the conclusion of international treaties, the participation of the Province Limburg to the Euregio Maas-Rhein could be an example.

55 See Y. LEJEUNE, *La surveillance des relations internationales conventionnelles des collectivités fédérées*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, cit. p. 126-128.

different experiences of transfrontier cooperation (Gran Region SaarLorLux-Rheinland Pfalz-Wallonien, Euregio Maas Rhein, Euregio Scheldemond or the more recent Lille-Kortrijk-Tournai Eurométropole franco-belge)⁵⁶.

This brief presentation of the constitutional development of sub-national foreign powers in federal countries shows how written constitutional provisions are often influenced by other complex mechanisms depending on the political relations between the centre and the federated units. In particular, a comparison between Austria and Belgium demonstrates that where the positive provisions do not allow or complicate the exercise of sub-national foreign relations, these find alternative paths other than the treaty-making power. Moreover, the most desirable solutions seem to invoke a system of cooperation or consensual arrangement in order to adapt substantial and procedural provisions to effective and practical needs.

b) Regional countries

One first difference between federal and regional countries concerns the legal rationalization of sub-national foreign powers within the constitutional text or within other legal acts. Traditionally, regional States do not recognise a regional foreign power. However, due to the progressive development of regional *de facto* foreign activities, some national constitutions have recently recognised, if not a treaty-making-power, at least an explicit capacity of the regions to act abroad. If the starting point is different in comparison to federal countries, some common aspects could be found. In particular, it has to be observed that the exercise of a sub-national foreign power corresponds quite rarely to the constitutional written provisions. Thus, multi-layer legal system react, in different ways, to find adaptations to the living conditions of the exercise of foreign relations.

With regard to the Spanish system, the Constitution affirms at Article 97 that the Government shall conduct foreign policy and at Article 149, paragraph 1, third point, that the State has exclusive competence about international relations. There is no reference in the Constitution to foreign powers of Self-governing Communities, although they are granted a peculiar autonomous status⁵⁷. However, the issue

⁵⁶ F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 44-45.

⁵⁷ J.A. DEL VALLE-GÁLVEZ, *Spanish regionalism in International and European law*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, cit., p. 291-312.

concerning sub-national foreign relations has been pointed out from the very beginning of the existence of Self-governing Communities after the evolution of the Spanish constitutional system. To be precise, transfrontier relations across the border with France and Portugal have been developed since the 19th century, but they have been conducted through the establishment of bilateral governmental commissions⁵⁸. Although no provisions about the foreign relations of Self-governing Communities have been included in the Constitution, a progressive sub-national involvement in this sector is patent. In particular, two factors are rather relevant, one concerning the legal rationalization and one concerning the practice. On the one hand, several competences or rights of participation are foreseen by the various Statutes of Autonomy with regard to the conclusion of international treaties by the State⁵⁹. On the other hand, Self-governing Communities and other sub-national entities are effectively involved in transfrontier cooperation. In this regard, it is true that the subject is often covered by international treaties (for example the Bayonne Agreement between Spain and France concerning transfrontier cooperation between territorial communities, adopted on 10 March 1995). However, several experiences have been realized without an inter-state covering agreement⁶⁰. In this regard, the recourse to alternative ways other than the traditional international treaty have permitted to bypass the legal implications related to the lack of clear constitutional dispositions. In this sense, the concentration of the power between the State and the Self-governing Communities is heading towards an homogenisation of the praxis, while explicit constitutional provisions do not play a very leading role. Thus, a

58 See J.B. HARGUINDÉGUY, *La coopération transfrontalière franco-espagnole face à ses contradictions*, in *Études internationales*, Volume 35, numéro 2, juin 2004, p. 307-322.

59 These competences range from the participation within the formation of some international treaties to the right of consultation of the Communities, to the right of information from the central Government in case the treaty concerns any competence of the Communities, to the executive competence of treaties concluded by the Government. See F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 54. About the Spanish system see also C.G. SEGURA, *La actividad exterior de las entidades políticas subestatales*, in *Revista de Estudios Políticos*, n^o 97, Enero-Marzo 1996, p. 235-263, and S. BELTRAN GARCIA, *La cooperación transfronteriza e interterritorial: un clásico renovado*, in *Revista d'Estudios Autonomics i Federal*, n. 4, 2007, p. 215 et seq.

60 Transfrontier cooperation has taken place both at municipal and at regional level. Some examples of cooperation at local level are: “Consortio Bidasoa-Txingudi”, based on an inter-administrative agreement between French and Spanish municipalities; “Eurocité basque Bayonne/Saint-Sébastien” based on a protocol between the France district Bayonne-Anglet-Biarritz and the Spanish province of Guipuzcoa. Examples of cooperation at regional level are the Euroregion Catalogne/Midi-Pyrénées/Languedoc-Roussillon, the Pyrenees working-community. Moreover, several projects have been developed through the EU Structural Funds.

principle of cooperation between national and sub-national institutions has been considered by the Constitutional Court as implicit within the system of relations among the tiers of government also with reference to the international relations and deriving from the right to self-government (Article 2 Const.). A general constitutional principle, then, seems to guarantee a reasonable guiding-factor to balance a reasonable praxis⁶¹. In particular, the Spanish Constitutional Court has recognised the existence of a sub-national foreign power of action⁶², especially with reference to the development of the European Community dimension⁶³.

The Italian case presents some similar aspects. However, differently from Spain, explicit provisions about the regional foreign power have been introduced in the Constitution quite recently, namely with the reform of 2001⁶⁴. According to the modified wording of Article 117, paragraph 9, Regions (and Autonomous Provinces), within their field of competences, may establish agreements with foreign States and arrangements with territorial entities belonging to foreign States, in the cases and forms provided for by state laws⁶⁵. This provision, despite its vague content⁶⁶, confers

61 See F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 63.

62 Following decisions of the Constitutional Court have acknowledged the existence of a foreign capacity of action for Spanish Self-governing Communities: 125/1984, 153/1989, 54/1990, 17/1991, 76/1991, 80/1993, 175/1995, 148/1998.

63 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 134-139. In particular, the exercise of these foreign powers is submitted to some fundamental conditions, which are the ground for its validity and for its constitutionality, namely: the respect of the competences attributed to the Self-governing Communities and the respect of the state exclusive competences in the field of foreign relations and international affairs. For a further analysis in this field see C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *La acción exterior de las Comunidades Autónomas. Balance de una práctica consolidada*, Madrid, 2003.

64 Constitutional Law No 3/2001. See in this regard G.F. FERRARI, G. PARODI, *Stato e Regioni di fronte al diritto comunitario e internazionale*, in G.F. FERRARI, G. PARODI (cur.), *La revisione costituzionale del Titolo V tra nuovo regionalismo e federalismo. Problemi applicativi e linee evolutive*, Padova, 2003, p. 429-479 and F. PALERMO, *Il potere estero delle regioni*, in T. Groppi, M. Olivetti, *Regioni ed enti locali nel nuovo titolo V*, Torino, 2003, p. 165-175.

65 Paragraph 9 of Article 117 has to be read in connection with paragraph 3 of the same article, which enumerates the matters falling under the concurrent competence of State and Regions, also comprehending international and European Union relations of the Regions. Moreover, paragraph 5 states that, regarding the matters that lie within their field of competence, the Regions and the Autonomous Provinces of Trento and Bolzano participate in any decisions about the formation of community law. The Regions and Autonomous provinces also provide for the implementation and execution of international obligations and of the acts of the European Union in observance of procedures set by state law. State law establishes procedures for the State to act in substitution of the Regions whenever those Regions should fail to fulfil their responsibilities in this respect.

66 See D. FLORENZANO, *L'autonomia regionale nella dimensione internazionale. Dalle Attività promozionali agli accordi ed alle intese*, cit., p. 259-260. The author presents an analysis regarding the interpretation of the constitutional text. In particular, some concepts need to find a clarification such as the process of adoption of agreements and arrangements between foreign subjects, the legal meaning

an undoubted foreign power to the Italian Regions⁶⁷, even if an exact classification of the foreign regional activities falling under the constitutional provision is difficult. Furthermore, the conditions for the exercise of this power depends on the content of the covering state law. The relative discipline is contained in the Law No 131 of 5 June 2003⁶⁸. Article 6 of this law introduces two distinct procedures with regard to the establishment of arrangements with foreign territorial entities or agreements with foreign States. The first procedure introduces the duty for the Regions of a previous communication to the Government's Presidency- Department for the Regional Affairs and to the Foreign Ministry that can propose their observations within the following thirty days. In case of agreements with foreign States, the duty of communication has to be observed towards the same authorities which verify the legitimacy and the political opportunity and confers the full powers to conclude the act⁶⁹. In any case the Foreign Ministry can always submit to the Region or to the Autonomous Province concerned questions of opportunity regarding those foreign activities that will be examined by the Council of Ministers. The issue concerning the “political opportunity”, thus, should not theoretically be intended as an arbitrary interference within the substantial competences of the Regions, rather as a supervision concerning the unity of the national foreign policy. However, the national supervision is not immune from the exercise of discretionary interventions in order to limit regional foreign actions⁷⁰. The *ratio* of these procedures is directly connected to the cooperative principle and tries to find a balance between the foreign power attributed to the Regions and the exclusive competences of the State about the foreign policy, as also confirmed by the Constitutional Court. In particular the Court highlighted that

and the differences between 'agreements' and 'arrangements', the role of state law and the determination of the exact competences of the Regions.

67 See F. MARCELLI, *Attività internazionali*, in ISSIRFA-CNR, *Estratto dal Quinto Rapporto sullo stato del regionalismo in Italia*, 2008, p. 2, available at www.issirfa.cnr.it.

68 This law contains the dispositions for the implementation of the Constitutional Law of 18 October 2001, No 3 that modifies the V Title of the Constitutions on Regions, Provinces and Municipalities.

69 The agreements shall comply with the following categories: executive agreements, agreements that implement international treaties that are legitimately in force, technical-administrative agreements, programmatic agreements aiming at promoting the economic, social and cultural development of Regions and Autonomous Provinces. Moreover, these agreements shall comply with the Constitutions, Community law, international obligations, Italian foreign policy and the fundamental principles established by state law in case of matters falling under the concurrent legislative competence of State and Regions.

70 See F. PALERMO, *Il potere estero delle Regioni dopo la riforma del Titolo V*, in G. AVOLIO, F. PALERMO (cur.), *La riforma del Titolo V, parte seconda, della Costituzione italiana*, Bolzano/Bozen, 2004, p. 171.

the regional foreign relations need to be developed within the guarantees and the coordination of the State⁷¹. The current formulation of Article 117 and the respective procedure, anyway, could be considered as the explicit normative result of the previous evolution of the regional foreign power in the Italian system and seems not to introduce an innovative contribution. Namely, despite the lack of an original constitutional disposition, Regions have developed several foreign activities, which have been the occasion for litigation with the State to the Constitutional Court. Thus, starting from a simple tolerance of these activities by the State, the legitimation of regional foreign relations has been progressively acknowledged by the Constitutional Court through the interpretation of the previous version of the Italian Constitution already before the reform of 2001⁷². The following modification of the Constitution does not demonstrate an effective improvement, rather it represents a necessary recognition of activities that have already been developed. In particular, the limitations for the Regions remain, practically, the same that had already been underlined by the Court, namely: no interference with the national foreign policy and no legal or financial responsibility for the State⁷³. As far as the exercise of a non-well-defined foreign regional power has a constitutional and jurisdictional legitimation and as far as this power-exercise is necessarily conditioned by the duty of information and the supervision of the central authorities, the maturity of the Italian regional system could be evaluated with regard to the degree of fair

71 Judgement No 238 of 19 June 2004.

72 See F. PALERMO, *The Foreign Policy of Italian Regions: Not Much Ado About Something?*, in *International Spectator*, Vol. 42, No 2, June 2007, p. 199. Some of the most relevant judgements of the Italian Constitutional Court in this regard are: No 179/1987, 250/1988, 564/1988, 737/1988, 739/1988, 924/1988, 256/1989, 276/1991, 472/1992, 124/1993, 204/1993, 251/1993, 290/1993, 26/1994, 212/1994, 332/1998, 427/1998. A further issue, then, is represented by sub-national transfrontier relation enacted within the Community legislation, in particular under the legislative framework of the Structural Funds and the INTERREG Initiatives. Here, the Court has considered that regional foreign relations need to follow the Community procedures as provided within the respective Regulations. The regional activities in the context of Community Initiatives develop the implementation of Community legislation which is directly applicable and which doesn't need a national covering disposition, as the judgement No 258 of 8 July 2004 explains.

73 *Ibid.*, p. 201: "In sum, the constitutional reform and its enactment law simply formalise the previous situation, in terms of both content and procedure. The real innovation is the regional treaty-making power with other States, a rather symbolic provision [...]. Moreover, the enactment law for the constitutional reform limits the regional treaties [...] thus excluding all treaties of a political nature[...]. Nor has constitutional adjudication changed after the reform. The Constitutional Court continues to rule based on the principle of fair cooperation between Regions and State, meaning that Regions have the duty to inform the State of (potentially) every external activity they carry out and that the State cannot prevent Regions from exercising their foreign policy without providing that it is in conflict with national foreign policy".

cooperation between levels of government. However, this cooperative attitude seems to lack in the praxis and Regions could more easily develop several activities which do not consist in agreements or formal arrangements according to the procedures set down in state law⁷⁴. In this regard, the development of specific instruments for territorial cooperation, mainly at Community level, is going to create a gap between the mentioned national legislation and other instruments.

c) Unitary countries

One of the most interesting examples about the development of a sub-national foreign power within unitary States is represented by the French system. Certainly, handling about a non-composed country, it is important to remember the substantial differences occurring in comparison to federal/regional countries, in particular with regard to the quality and the degree of sub-national autonomy. The national unity of the French State has been traditionally against a self-sufficient foreign action of territorial communities. Namely, according to the French Constitution the powers concerning the conclusion of international treaties and the management of foreign policy are prerogatives of the central authorities. However, the progressive development of decentralization, in particular after the constitutional reform of 2003⁷⁵, has speeded up the debate about the “*action à l'étranger*” within one of the strongest centralized countries in Europe. Likely to the experiences in regional countries, the progressive acknowledgement of sub-national foreign relations represents the recognition of already effective activities⁷⁶. Excluded any kind of treaty-making power, the foreign relations of French territorial communities should be considered as “every juridical relation, formalized or not in a contractual form,

⁷⁴ See D. RINOLDI, *Regioni italiane e cooperazione interregionale nell'ordinamento comunitario*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 1994, p. 87 et seq.

⁷⁵ The current version of Article 1, paragraph 1 of the French Constitution recites: “La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. *Son organisation est décentralisée*” (Italic is our). It is important to highlight that one of the most important acts related to the decentralisation has been the Law No 82-213 of 2 March 1982 concerning the rights and freedoms of municipalities, departments and regions (better known as “*loi de décentralisation*”).

⁷⁶ Despite the lack of an explicit legitimation for territorial communities to deal with foreign relations, there are several experiences of transfrontier cooperation developed by French Regions. One example is given by the Region Rhône-Alpes, which has undertaken different agreements with other foreign regions, such as Catalogna, Baden-Württemberg and Lombardia, in order to create the base for cross-border projects. Also the Region Provence-Alpes-Côte d'Azur has been involved in different experiences of transfrontier cooperation.

undertaken on the basis of a deliberation of a local representative body and aiming at establishing collaboration with territorial communities belonging to foreign States and not necessarily geographically contiguous”⁷⁷. In this sense, the foreign relations of territorial communities have emancipated from an exclusive legitimation based on private law. The jurisprudence of both the Council of State and the Constitutional Council have recognised the existence of a sub-national foreign activity. Basically, this foreign activity has been acknowledged according to the general principle of “free administration” of territorial communities enshrined in Article 72 of the Constitution⁷⁸. The further academic distinction between legislative/political competences and administrative competences has introduced a substantial difference between the foreign activities of territorial communities and the state competences about foreign policies, thus giving a legal and constitutional ground for this “regional foreign action”. The prerogative of a sub-national free administration, also concerning foreign relations, and its categorisation as administrative act have avoided the violation of the state competence about foreign policy and, consequentially, the unconstitutionality of the related acts⁷⁹. Moreover, the progressive evolution of decentralization and the increasing recognition of transfrontier cooperation at European level, has brought to a positive recognition of sub-national foreign actions within the “*Code Général des Collectivités Territoriales*”⁸⁰, which knew several modifications concerning the foreign actions of territorial communities. The current version of the code provides an apposite chapter concerning the decentralised cooperation (Articles L1115-1 to L1115-7). The most important principle is affirmed in the first article, which states that “territorial

77 See M. CALAMO SPECCHIA, *L' "action à l'étranger" degli enti territoriali francesi tra interno e diritto europeo: alcune note di teoria e di metodo*, in *Diritto pubblico comparato ed europeo*, 2/2004, p. 666. In particular, the French system tends to make a conceptual distinction between transfrontier cooperation and decentralized cooperation. The first activity concerns all the neighbourly relations among territorial communities across the French frontier, while the second activity concerns all international relations between French territorial communities and other foreign sub-national authorities for common objectives (also dealing with humanitarian or economic aids for underdeveloped areas). Moreover, the French system adopts some different provisions about the territorial communities situated in the European continent and the so-called Oversea Territories. Within this paragraph only the first group is taken into consideration.

78 The principle of free administration is connected in the praxis with the existence of a so-called “local public interest”, which is also an important parameter within the decentralized administrations. See M. ROUSSET, *L'action internationale des collectivités locales*, Paris, 1998, p. 30 *et seq.*

79 *Ibid.*, p. 667.

80 The General Code of Territorial Communities has been adopted in two different sessions. The legislative part has been adopted in 1996 (Law No 96-142), while the regulatory part has been adopted in 2000 (Law No 2000-318).

communities and their groupings may, within the respect of France's international obligations, conclude conventions with foreign local authorities in order to manage actions of cooperation or for development's aid". Specific mechanisms for the State's information and for the involvement of the State's representative within each territorial community are provided⁸¹. Moreover, Article 1115-4 recognises and implements the creation of European instruments of transfrontier/territorial cooperation and allows, therefore, the participation of territorial communities, within the limits of their competences and of the State's international obligations, to a body or legal person established under a foreign law. This participation is allowed only under the condition of the presence of, at least, another territorial authority belonging to a Member State of the European Union or of the Council of Europe. The participation shall be authorised by the State's representative within the territorial community concerned. In particular, the General Code authorises specifically the participation to European transfrontier structures such as the European District, the European Grouping of Territorial Cooperation (EGTC) and the Euroregional Cooperation Grouping (ECG). As it has already been mentioned above, some conditions are foreseen, namely: the respect of the competences attributed to each territorial community; the respect of the national foreign policy; the authorisation of the State's representative *in loco*. Furthermore, due the fact that also States can be potential members of an EGTC, the General Code introduces a specific provision in order to avoid the possibility for French territorial communities to adopt any convention with foreign States except in the case of an EGTC. The quite rapid integration of European instruments in the national legislation on territorial communities demonstrates that, despite the traditional unitary state structure and the prudent approach towards decentralization, proper solutions for the development of sub-national foreign actions are feasible irrespective of the different national legal structures. In particular, the case of France is quite peculiar. Namely, the acknowledgement of a sub-national foreign power, even if not corresponding to a traditional treaty-making power, has been accepted without excessive complications. The result is a linear and quite simple codification of the power to conclude

⁸¹ The procedural references are established in Articles L2131-1, L2131-2, L3131-1, L3131-2, L4141-1, L4141-2. Moreover, Articles L1115-6 and L1115-7 introduce the constitution of a national commission of decentralized cooperation and the possibility for the Council of State to adopt decrees when necessary.

conventions with other sub-national authorities. Concerning other relations that are not developed in the form of conventions, it seems that they are allowed as far as respecting the mentioned substantial limitations related to the attributed competences and the France's international obligations.

Of course, the basic distinction between composed and unitary countries resides in the fact that sub-national authorities of unitary states do not have any kind of international capacity to conclude treaties. And this is a quite banal observation. However, as far as also sub-national authorities within composed countries have developed alternative instruments for foreign relations, rarely recurring to treaties, the progressive acknowledgment of these “special” powers presents everywhere some common paradigms.

This brief presentation of the French system shows how foreign actions of sub-national authorities are intrinsic to each kind of constitutional order and do not necessarily depend on the structure of the State. In particular, once a phenomenon is well assessed in the praxis, the national legal orders need to find some solutions to cope with that phenomenon. In this regard, also other unitary States recognise the capacity of sub-national authorities to deal with foreign relations, in particular territorial cooperation. This trend is visible in the centralized countries of Eastern Europe, where the young democratic constitutional systems are developing important experiences of regionalism and decentralisation⁸². For example, the Hungarian Constitution states in Article 44/A that the local representatives bodies may, within their competences, cooperate with local authorities in other countries and affiliate themselves with international organisations of local bodies. This constitutional provision has some positive and negative elements. On the one hand, the explicit mention to a certain degree of local foreign power represents a constructive factor and is in line with the European approach; on the other hand this disposition seems to be too general and, therefore, not really encouraging local communities. However, within this scenery, the lack of a well-established praxis of sub-national foreign relations and the recent changes of the constitutional structure have fostered a clear

⁸² A huge literature is available about the local reforms in Central and Eastern Europe. See, among others, A. COULSON, A. CAMPBELL (eds.), *Local Government in Central and Eastern Europe: the rebirth of local democracy*, London-New York, 2008; A.M. BÍRÓ, P. KOVÁCS, *Diversity in action: local public management of multi-ethnic communities in Central and Eastern Europe*, New York, 2001.

awareness about the importance of territorial cooperation and a rapid implementation of the European instruments within the ordinary legislation.

The last example aims at demonstrating that non-controversial phenomena of sub-national foreign relations are possible even without clear explicit constitutional or legislative provisions. Namely, the Finnish Constitution, establishing the general principle of municipal and regional right to self-government doesn't specify any capacity of sub-national authorities to deal with foreign relations. Also the Finnish Local Government Act nothing says about this argument. However, sub-national communities are involved in foreign relations⁸³. In this case, it is possible to speak about a *soft* development of foreign relations, concerning local capabilities and mainly dealing with European regional programmes⁸⁴. Thus, foreign relations are mostly based on informal grounds or, in any case, without the undertaken of specific obligations and, therefore, positively respected by the central authority within a non-defined framework. Conversely, where the involvement in foreign activities is more structured, it seems to be mainly connected to EU or international instruments.

2.3. Observations after the comparative analysis

It can be considered as evident that foreign activities of sub-national authorities are something different from traditional international relations between States and do not, in principle, hamper national foreign policy. Moreover, it is evident as well that transfrontier or territorial cooperation represents a part of sub-national foreign relations in a correlation of *species* to *genus*, for the simple reason that the category of foreign relations comprehends a broader range of actions (it has already been mentioned the example of the regional representation in Brussels or the regional involvement within the Community legislative process). Thus, as a part of a broader category, territorial/transfrontier cooperation finds its national legitimacy within the process about the development of sub-national foreign powers; a process

83 Some examples are represented by the presence of sub-national authorities in different structures for transfrontier cooperation such as the Euregio Karelia, the Bartents Regional Council, Kvarken Council, etc. Moreover, Finnish sub-national authorities have a common representation's office in Brussels; see COMMITTEE OF THE REGIONS, *Study on the Division of Powers between the European Union, the Member State, and Regional and Local Authorities*, cit., p. 118.

84 In particular, several relations towards the Russian border are managed within the European Neighbourhood Policy and the related funding resources.

that often differs from the written normative provisions. From the point of view of the positive rationalisation within the different national legal systems, two basic approaches can be observed. On the one hand, some systems provide for explicit dispositions about a treaty-making power (Germany, Belgium, Switzerland) or other forms of sub-national foreign powers, both in the Constitution (Italy, Hungary) or in ordinary legislative acts (France). On the other hand, some legal orders don't have explicit provisions with the consequence of a non-prohibition of these relations⁸⁵. As a further general remark, it is possible to observe that almost every national system presents peculiar developments that partially differ from a strict adherence to the written provisions about the regional foreign power but, at the same time, fall within a wider conformity to the general principles of the respective legal system (for example, the cases of Italy and France before the adoption of written texts are emblematic). In this regard, sometimes the explicit provisions are adopted as a consequence of a long process of acknowledgement coming from jurisdictional authorities or from an administrative praxis.

Although submitted to different national procedures, the exercise of sub-national foreign powers, when enacted with formal actions or acts, is always conditioned by two main limitations: the respect of the international obligations of the State concerned and the conformity to the competences attributed to the sub-national authorities. The supervision of the central authority is, then, determined by procedural dispositions and effectively implemented throughout the degree of cooperation between levels of government as far as partially linked to political factors.

Given this, it is patent that the basic legitimation concerning the exercise of sub-national foreign powers and, thus, of transfrontier activities derives from the substantial competences conferred to sub-national authorities according to their respective national law. In particular, this mention of the "substantial competences" concerns the peculiar fields of subject-matters that these authorities can deal with in their respective interests. With other words, these competences are related to specific

⁸⁵ The problem regarding the consequences of non-explicit provisions concerns the possible contrasting interpretations about the "normative silence". Namely a double outcome is possible: either a prohibition or a permission. However, it seems quite misleading to interpret the lack of explicit provisions about sub-national foreign relations as a prohibition of those relations. In fact, the huge praxis and the progressive development of different foreign activities show that they are, at least, tolerated.

sectors like, for example, environment, culture, transports, etc., and do not depend from a specific constitutional or legal provision about transfrontier cooperation. Namely, the eventual explicit entitlement to deal with transfrontier activities is not a real subject-matter, but an entitlement to exercise of substantial competences abroad. The fact that the legitimation for sub-national subjects to develop transfrontier activities doesn't necessarily depend from the existence of an explicit regional foreign power is also visible from the observation of the local actors. Namely, differently from the regional subjects, local authorities are typically excluded from the treaty-making-power dispositions and they are hardly explicitly provided with general foreign powers. However, even from the analysis of the praxis, also local actors are involved in territorial cooperation for what concerns their field of competences⁸⁶. This kind of activities at local level has been mainly developed through informal activities or through instruments of private law, like associations or cooperatives, without the implication of specific public-law-based provisions about transfrontier relations⁸⁷. Thus, this brief example clarifies additionally that the phenomenon of territorial cooperation is not univocally bound with the existence of written provisions about sub-national foreign powers, but that it is rather linked to the foreign development of inner substantial competences.

In this sense, the exercise of foreign competences is somehow a mirror image of the inner competences. Regarding to this, some authors have proposed the notion of “implicit competence”. This concept aims at founding a sub-national general competence in foreign relations which is not based in any explicit national provision, but which shall be considered as inherent to the existence of sub-national entities. In particular the concept shall be true for the *species* of territorial/transfrontier cooperation, due to the traditional absence of national explicit disciplines⁸⁸. According to our view after the previous comparative analysis, the notion of implicit competence is only partially valid. Namely, it could be considered correct and innovative for the part concerning the principle that the grounds for sub-national

86 See, for instance, the activities of transfrontier cooperation between the cities of Strasbourg (France) and Kehl (Germany) and the creation of the Eurodistrict Strasbourg-Ortenau: http://www.espaces-transfrontaliers.org/affiche_terri.php?affiche=territoire/terri_doc_ag_sk.html.

87 See R. DICKMANN, *Il Gruppo Europeo di Cooperazione Territoriale (GECT)*, in *Foro Amministrativo: Consiglio di Stato*, n. 10, 2006, p. 2911.

88 N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 248.

foreign activities are entailed within the sub-national attributions. However, speaking about a “general implicit competence” could be quite misleading. In fact, it seems more reasonable to assert that the legitimacy of sub-national foreign relations and, thus, of territorial cooperation is justified on the basis of the inner competences and formally implemented through specific procedures. The idea under this concept is that the possibility to develop foreign relations shall not be considered as a subject-matter, rather as a procedure concerning the “modalities for the exterior exercise of some inner competences attributed to sub-national authorities”⁸⁹. Furthermore, the pretended implicit nature shall be negated for two reasons. Namely, the attribution of the inner sub-national competences is explicit. Secondly, their exercise abroad is limited, at least, by the necessary respect of national foreign policy. Thus, if no positive provisions define sub-national foreign powers, they shall be determined *a contrario* through their limitations, which become conditions of validity. In this terms, it is possible to affirm, that a legitimation to deal with foreign actions is granted to sub-national authorities as a form of valid exterior exercise of the inner competences.

3. Fundamental components of territorial cooperation

3.1. The source of the legitimation for territorial cooperation

According to the previous observations, it is possible to speak, in general and non-technical terms, about a foreign competence – intended as *capability* – of territorial communities. In this regard, the statement of N. Levrat has to be quoted: “*La compétence est donc [...] le fondement juridique de la validité des accords de coopération transfrontière. C'est en déterminant la compétence – son origine, sa nature et sa portée – que l'on pourra connaître la nature et la portée des normes contenues dans les accords de coopération transfrontière dont la validité découle de ladite compétence.*”⁹⁰

⁸⁹ See F. PALERMO, *Il potere estero delle regioni. Ricostruzione in chiave comparata di un potere interno alla costituzione italiana*, cit., p. 68.

⁹⁰ N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 235 *et seq.* develops and interesting consideration about the role of international law and the State in the legitimation of transfrontier cooperation. Namely, reasoning *a contrario*, it is possible to conclude that international law plays a kind of negative role denying the

The basic principle is that the national legal orders found the legitimacy for sub-national authorities to develop transfrontier cooperation. Of course, the issue of the external power of territorial actors is substantially concerned with the functional attribution of competences between the various tiers of government in each country; namely, where the constitution or the national law establish that certain matters are competence of the sub-national authorities, normally those authorities can exercise such powers even in a foreign context. In these terms, it is possible to wonder if there should be at least some positive national legal provisions conferring the right to sub-national authorities to develop territorial cooperation or if this conferral is somehow superfluous.

On the one hand, constitutions of unitary States, while delegating competences to territorial administrations, do not traditionally lay down specific powers for territorial cooperation⁹¹. On the other hand, federal legal orders allow a treaty-making power to the constituent units within the limit of their competences, while regional States do not always provide for such an attribution of powers⁹². As this attitude of the States assumes quite a different form within federal or regional systems⁹³, a common feature regards the constant presence of limitations to this sub-national power⁹⁴ that sees the persistent attention of the State's supervision. But, as already remembered, such a treaty-making power within federal countries is

recognition of transfrontier relations between sub-national communities within its sphere. Moreover, the States, aware of the existence of this kind of transfrontier relations, seemed to have at least tolerated them and, consequently, they lost their right to prevent the development of transfrontier cooperation.

91 According to this view, however an important role of sub-national authorities has to be taken into consideration. Namely, considering the French unitary State, local and regional communities played a key-role within the transformation (but not the overtaking) of the traditional structure of the unitary central State; see M. CALAMO SPECCHIA, *L' "action à l'étranger" degli enti territoriali francesi tra interno e diritto europeo: alcune note di teoria e di metodo*, cit., p. 666.

92 In this case the distinction between Italy and Spain is emblematic.

93 See F. PALERMO, J. WOELK, *Cross-Border Cooperation as an Indicator for Institutional Evolution of Autonomy: The Case of Trentino-South Tyrol*, in Z.A. SKURBATY (eds.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?*, Leiden/Boston, 2005, p. 285 *et seq.* The authors highlight very clearly the differences between federal and regional systems. While constitutions of federal States (like Germany, Austria and Belgium) originally provide a partial treaty-making-power for the constituent units, which are bound to the limitation related to the own competences, regional States (like Italy and Spain) do not really lay down apposite provisions concerning the external relations of Regions. Nevertheless, regional authorities has progressively developed external relations, whose legitimation is the result of a cooperation with the central State and the following approval of the constitutional courts.

94 *Ibid.* p. 288: "Also the controlling power of the central State is provided for both in the federal and the regional systems, in order to guarantee a consistent foreign policy of the whole state as well as its international liability".

normally connected to the frame of international law. And, since the existence of a further space for foreign relations has been underlined, such space is available for sub-national authorities without being basically conditioned by the unitary or composite structure of the State. Namely, as the validity to develop transfrontier relations is connected to the competences assigned to the sub-state authorities, is not necessary to find the ground for an *ad hoc* transfrontier competence, but to look at the already existing competences. “*Ainsi donc, l'étendue de la capacité serait bien définie par référence aux compétences dont disposent les CPIEs [collectivités publiques infra-étatiques] en droit interne, mais dans le limites qu'imposent le respect des relations juridiques particulières qu'entretiennent les CPIEs avec les individus d'une part, et avec leur Etat national d'autre part.*”⁹⁵ Thus, the internal relations between the State and the sub-national entities will define the range and the limits of the competences and the further procedures, but it will not prevent the potential feasibility of territorial cooperation.

If transfrontier cooperation gets its legitimation from the internal attributions of sub-national authorities, it is possible to draw a kind of mirroring between the domestic and foreign powers of territorial communities. Moreover, the existence of limits is related to the internal constitutional structure of each State. In relation to this last aspect, then, some interpretative obstacles remain within the definition and distinction of each matter of competence, which could have some undetermined dimension. In this cases, when the definition of the respective attributions of the State and of other sub-national authorities is concerned, a concerted solution is recommendable in order to avoid the recourse to the competent jurisdictional authority. Namely, *soft* mechanisms of coordination and cooperation among tiers of government, especially within composed States, are a fruitful component of sub-national activities. Conversely, sometimes the legitimation of a sub-national foreign power has been stigmatized by constitutional courts within litigation proceedings between central and sub-national authorities⁹⁶. In this regard, an emblematic example

95 N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 254.

96 The Italian *Corte Costituzionale* has already drawn a differentiation among foreign affairs, which are a State's prerogative, and “merely international activities” and “promotional activities”, which are allowed within the field of regional competences and, therefore, legitimizing cross-border activities (see judgements n. 170/1975, 123/1980, 223/1984, 187/1985, 179/1987, 564/1988, 238/2004).

is represented by a quite recent statement⁹⁷ of the Italian constitutional jurisprudence about the possibility for Italian sub-national authorities to put into practice cross-border agreements in application of the EU legislation⁹⁸, which is directly applicable without a previous consent of the central government. To be more precise, the Italian Constitutional Court confirmed that those kind of agreements among foreign sub-national authorities, while being a manifestation of international relations, do not have the quality of international treaties, since they are not legally binding for the State, but only for the single sub-national entities⁹⁹. In this occasion, in fact, an autonomous management of external power has been recognised to territorial entities by the EC law.

Since this kind of power do exist, even if with different constitutional dynamics, both in unitary as in composite States, it can be generally identified with every form of connection or cooperation, either formal or not, between sub-national territorial entities, which creates a kind of legal relationship¹⁰⁰. Namely, what denotes the “legal effects” of binding two foreign territorial communities is not given necessarily by a formal structure; rather by the the mandatory nature of the agreement and the respective law applicable. In this regard, transfrontier activities have to be distinguished into legal and political and into formal or informal.

As general observation, the national legal orders in Europe delineate a multi-faceted and varied set of situations concerning the practice of territorial cooperation as a manifestation of foreign power¹⁰¹. But, of course, the recognition of the legitimacy for sub-national authorities to establish transfrontier relations is only one part of the legal analysis, which also comprehends the legal nature of the agreements between these authorities, the law applicable and the legal consequences. Thus, the evaluation of the national competences has to be examined in the dynamic with other legal pluralistic and transnational elements.

97 Judgement n. 258/2004, with a comment of R. DICKMANN, *La Corte costituzionale ed il “potere estero” delle Regioni e delle Province Autonome*, in *federalismi.it*, n. 16/2004.

98 It deals about the application of Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds and, in particular to the agreement within the context of the INTERREG III A program.

99 See R. DICKMANN, *La Corte costituzionale ed il “potere estero” delle Regioni e delle Province Autonome*, in *federalismi.it*, n. 16/2004, p. 8.

100 See M. CALAMO SPECCHIA, *L’ “action à l’étranger” degli enti territoriali francesi tra interno e diritto europeo: alcune note di teoria e di metodo*, cit., p. 666.

101 See COMITÉ DES RÉGIONS, *La coopération transeuropéenne entre collectivités territoriales*, cit., p. 181.

In these terms, a partially conclusive reflection could be done. On the one hand, the feasibility of territorial cooperation mirrors the legal capacity recognised to territorial authorities by each respective State in form of different substantial competences; on the other hand, territorial cooperation embodies a new type of “experimental law”¹⁰², where different legal orders arrange own mechanisms and where the traditional constitutional conception of strict separation of competences should (preferably) leave the space for new forms of cooperation among levels of government. As a consequence, if normally the notion of autonomy appears like an absolute¹⁰³ concept, it reveals its relativity with regard to the possible establishment of concerted strategies of cooperation as a procedural methodology to deal with complex powers. Such an approach seems to gain importance not only within the different national constitutional orders, but also in the the EU and international perspectives.

3.2. The legal nature and the law applicable to the agreements of territorial cooperation between sub-national territorial authorities

Cooperation of whatever kind is established through an agreement between the subjects involved. The agreements concerning territorial cooperation could have a very different nature and very different objectives. In the previous paragraphs the issue about the capability of sub-national authorities to enact territorial cooperation has been taken into consideration. Substantially speaking, the legal source of the sub-national competence to deal with transfrontier relations is something different from the legal aspects concerning the agreements between foreign sub-national authorities in order to establish and rule their relations of cooperation. Namely, as the first element founds the conditions of legitimacy for each sub-national actor within the respective national legal order to establish transnational foreign relations, the second element concerns the legal nature and mechanisms about the agreement of cooperation between foreign sub-national communities¹⁰⁴. This is the interpretation

102 This expression is borrowed from F. PALERMO, J. WOELK, *Cross-Border Cooperation as an Indicator for Institutional Evolution of Autonomy: The Case of Trentino-South Tyrol*, cit., p. 288.

103 With reference to the word itself, autonomy (*autòs nòmos*) means “self-ruling”, “self-governing”, basically, independent of others.

104 See N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 259.

proposed in this survey for the theoretical analysis of the legal aspects of territorial cooperation. However, other academic contributions identify basically three models in order to describe the mechanisms of territorial cooperation, namely: non-regulated cooperation; regulated cooperation, which is provided by an international covering agreement; cooperation regulated by Community legislation¹⁰⁵. This subdivision is certainly correct, but is not really clear in order to underline the different legal components of transfrontier relations between sub-national authorities. Namely, according to our opinion, the distinction between the law concerning the legitimation of the subjects involved in cooperation and the legal aspects concerning the relations between those subjects is fundamental in order to understand the complexity of the legal factors involved in territorial cooperation.

From a general point of view, sub-national cooperation can be set up in different forms, namely through *informal praxis* or *formal agreements*. Furthermore, formal agreements could have another declination in case they set up a common structure with or without legal personality/legal capacity. The model of informal praxis doesn't imply a real legal concern about the nature of the agreement as far as it does not create legal obligations between the parties¹⁰⁶. However, it is not the matter concerning the existence of a real covenant or not, rather, in the case of informal accords there are no legal responsibilities or liabilities and the agreement is not jurisdictionally enforceable, having only political commitments. In this sense, informal relations are basically taken out of a context of legal implications. About formal agreements, then, it is possible to observe that some of them generate legal obligations, whereas other agreements create only political implications, in particular when the parties share only common general interests rather than concrete objectives. The further analysis, however, concerns agreements with legal connotation. In this regard, two legal aspects could be observed. On the one hand, a first element deals with the legal nature of the agreement between sub-national authorities which founds the cooperation and anticipates the following common activities; in particular, the analysis about the legal nature wants to highlight the

105 See M. PERTILE, *Il GECT: verso un organismo di diritto comunitario per la cooperazione transfrontaliera?*, in *Diritto del commercio internazionale: pratica internazionale e diritto interno*, cit., p. 120-122.

106 See M. AUDIT, *Les conventions transnationales entre personnes publiques*, Paris, 2002, p. 49 et seq.

private-law or public-law character of the agreement and its source, namely the legal instrument providing this kind of agreement. On the other hand, the second element concerns the legal regime and the normative provisions applicable to these peculiar relations.

With reference to the legal nature of the agreement, it could be potentially based on private or public law. The praxis knows the use of both the two forms¹⁰⁷. Given the fact that public international law is not relevant in this respect, the recourse to one or the other discipline have different effects, both from a substantial and jurisdictional point of view. The peculiarities of territorial cooperation between sub-national public subjects imply that the recourse to private-law agreements (i.e. contracts) is, although practicable, quite limiting for mainly public purposes¹⁰⁸. Of course, the agreements concluded through private contracts are used in particular with regard to economic activities or for other typically private services and, more generally, when public subjects decide to act as private subjects. However, the objects of territorial cooperation are typically broader and less defined than private objectives, due to their correspondence to the public (constitutional or administrative) competences of sub-national entities¹⁰⁹. In these terms, the scopes of territorial cooperation seem to be better satisfied through public-law agreements. Namely, although more recent than the parallel category in private law, the general notion of public-law agreement has been acknowledged in various national systems in Europe and also developed at Community level¹¹⁰. Thus, agreements or conventions for territorial cooperation should preferably be established through legal models based in public law. In particular, the existence of a convention or agreement between public bodies doesn't exclude the binding legal nature of the act. This possibility is also provided by the attachments to the Madrid Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities adopted

107 See L. CONDORELLI, F. SALERNO, *Le relazioni transfrontaliere tra comunità locali in Europa nel diritto internazionale ed europeo*, in *Rivista Trimestrale di Diritto Pubblico*, 1986, p. 381 *et seq.*

108 See J. ROBERT, *Public Relations at Borderlines*, Grounau, 1998, p. 15.

109 See N. BASSI, *Gli accordi fra soggetti pubblici nel diritto europeo*, Milano, 2004, p. 233 *et seq.* See also N. FALCON, *Le convenzioni pubblicistiche. Ammissibilità e caratteri*, Milano, 1984, p. 189: “the private contractual model, due to its compensative nature, is not wide enough in order to easily and comprehensively rule cases and relations that are tightly bound to public and also constitutional powers of the entities concerned” (translation is our). Other contributions concerning this subject are: G. GRECO, *Accordi amministrativi tra provvedimento e contratto*, Torino, 2003.

110 See N. BASSI, *Gli accordi fra soggetti pubblici nel diritto europeo*, cit., p. 250 *et seq.* Regarding the national systems, the authors refers in particular to Italy, France, Germany and Spain.

by the Council of Europe, which foresees a series of model-agreements available for different objectives of cooperation. Beside private contracts, the Convention introduces some examples that are identified as “public-law contracts”, which mainly deal with transports and communications, energy-distribution, natural reserves, crafts, civil defence, trade fairs and marketplaces, social infrastructures and tourism. This exemplification demonstrates how the matters ruled under a public-law agreement concern the competences of sub-national authorities and, therefore, are better enshrined within the theoretical categories of public law, which has not a deterrent function towards the binding legal connotation of the agreement. Thus, in order to establish the legal obligation it is only necessary that the parties involved show their will of mutual commitment with regard to the established objectives. In particular, the public character of the agreement is really identified on the basis of these objectives, which are basically related to proper constitutional or administrative powers¹¹¹.

In case a formal agreement foresees the constitution of a structure with legal personality, this body has typically its headquarters within a determinate national territory chosen with the consent of the actors involved in cooperation. Beside the fact that this entity could be a private-law or public-law legal person, its functions are regulated by the national law of the State where the headquarters is situated¹¹².

The other important element for the legal analysis of territorial cooperation, which has already been mentioned above, concerns the legal regime and the normative provisions applicable to the established transfronter relations. In particular, this legal regime could depend on different and variable factors, namely: the decisions taken within the agreement between the actors of cooperation about the

111 *Ibid.*, p. 308-318.

112 C. FERNÁNDEZ DE CASADEVANTE ROMANI, *L'aménagement par l'État de la coopération transfrontalière des collectivités territoriales*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, Bruxelles, 2008, p. 20, identifies the minimum common elements of a structure of cooperation. These elements are typically enshrined in the statutes: a) name of the organisation, place of the headquarters, duration and the law governing the structure; b) geographic area covered by the structure; c) specific objectives and scopes attributed to the organism by sub-national authorities participating as members; d) composition of the deliberative and managing organs, modalities of representation of the sub-national members and rules about the designation of their representatives; the legal regime concerning the relations between the structure and the sub-national authorities involved; e) the functioning rules, in particular the legal regime about the management of staff; f) the budget and auditing rules; g) financing of the activities; h) the rules related to the modification of the original conditions, for the new memberships or withdraws as well as related to the dissolution of the structure.

law applicable to their relations, the international or Community legal rules about transfrontier cooperation, the rules derived from the common legal disciplines regarding international relation (in particular in case of international private law). Thus, the law applicable to each transfrontier relation shall be determined case by case, in relation to the instrument or to the kind of legal cooperation chosen¹¹³. In this sense, it seems that the regime about the law applicable is one of the most complex issues of territorial cooperation because it is bounded to several factors. For example, in the eventuality a common structure with legal personality under a certain national law is established, it is quite understandable that this national law will be applicable. However, the linkage to a certain national law rises some problems of coordination with the foreign sub-national authorities. In particular, the necessity to have clear rules about the law applicable to transfrontier territorial relations has stimulated the development of common instruments for cooperation in order to find some coherent and attractive solutions¹¹⁴.

3.3. The different perspectives of the Council of Europe and of the European Union about sub-national authorities

In the previous paragraphs two important elements have been pointed out: the concept of sub-national authorities and their legitimation to practice transfrontier relation. Those aspects are both fundamental for the development of territorial cooperation and for a better legal awareness of this phenomenon. The dimension of national legal orders and their relationship with territorial communities has been highlighted. Now the perspectives of the “super”national institutions have to be taken into consideration in order to give a complete overview about the different contexts in which sub-national authorities play an increasing role and are influenced by.

The development of territorial/transfrontier cooperation, supported by the European Union and the Council of Europe, seems to be directly proportioned to the improving relevance of sub-national actors within these two frameworks.

113 See N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 178.

114 See H. LABAYLE, *L'Etat e la coopération transfrontalière. Éléments de synthèse*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, cit., 169 et seq.

Furthermore, two aspects need to be highlighted: on the one hand the contribution of European institutions for the development of sub-national questions is undoubted; on the other hand, the different approach of the EU and of the CoE has to be kept in mind. In fact, the approach to territorial cooperation is conditioned by the different legal nature of the two systems.

With regard to the EU, its supranational nature has brought to a potential development of sub-national actors even in a sort of independent dynamic. In fact, although the well known “legal regional blindness” of the European Community, regional and local authorities anyway attempt to become actors in their own right¹¹⁵. Conversely, the activities of the CoE, although interested in the development of democracy and local government, are essentially distinguished by its international structure¹¹⁶.

The concrete example of cooperation's legal instruments is emblematic in order to comprehend the role of European institution towards the implementation of the role of sub-national institutions. Namely, the Madrid Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities and its Protocols, as the main CoE's legal tools regarding transfrontier relations, and the EC Regulation on the European Grouping of Territorial Cooperation, as the newest EU provision about the implementation of cooperation beyond the borders, represent the most important common legal frameworks for territorial cooperation. These two instruments reveal each institution's legal nature and the consequent effect on sub-national local actors. In fact, as we will better examine within the next chapters, the Madrid Outline Convention is an international agreement between States as contracting parties. Thus, before the setting up of a transfrontier cooperation's arrangement, the Convention provides that States could require a “covering” agreement, previous to the setting up of the cooperation among the single sub-national communities¹¹⁷. As the Convention, in its quite undetermined set of rules,

115 See S. WEATHERILL, *The Challenge of the Regional Dimension in the European Union*, in S. WEATHERILL, U. BERNITZ, *The Role of Regions and Sub-National Actors in Europe*, Oxford and Portland, 2005, p. 19.

116 See G. WINKLER, *The Council of Europe. Monitoring Procedures and the Constitutional Autonomy of the Member States*, Heidelberg, 2006, p. 347 *et seq.*, and p. 461 *et seq.*

117 See D. FLORENZANO, *Gli atti pattizi delle Regioni italiane nell'ambito delle attività di cooperazione transfrontaliera alla luce del rinnovato quadro costituzionale*, in *Diritto pubblico comparato ed europeo*, 2/2004, p. 680-681. An appendix to the Madrid Outline Convention provides for several models with general clauses for inter-state agreements, which, anyway, do not have treaty value; see

strictly requires a conformity to the inner national constitutional orders, it leaves much space to the discretionary choices of States¹¹⁸. On the contrary, the EC Regulation on EGTC is directly applicable within the territory of the European Union, thus legitimizing the creation of transfrontier structures among sub-national authorities according to the discipline of the Regulation and without a previous agreement among States.

Since a digression about the the legal peculiarities and the distinctions between an international and a supranational legal order seems to be quite unproductive if conducted in theoretical terms, the functional effects on the sub-national actors and on the regional phenomenon are, nevertheless, significant. In general, the academic literature tends to separate the analysis about the EU from the analysis concerning the CoE. Of course, the two systems are radically different and have also different involvements towards sub-national issues. However a comparative reflection on their impact on sub-national subjects and territorial cooperation could be interesting in the perspective of this research, as both the institution give a huge emphasis to the increasing role of territorial communities¹¹⁹ in the field of transfrontier relations.

Starting from the CoE, it is quite clear that its first and general aim, besides the major objective related to the respect of human rights, is to achieve better conditions of local democracy, dialogue, reconciliation, good governance and capacity building among the States of a *great Europe*¹²⁰. In this regard, a clear example of the CoE's concern about regional and local democracy and related issue is represented by the adoption of the European Charter of Local Self-Government in

the CoE official website at

<http://conventions.coe.int/treaty/EN/Treaties/Html/106-1.htm>

118 *Ibid.* p. 681 *et seq.*, where Florenzano highlights the option of non-interference chosen by the Convention towards the contracting States; on this basis, the Italian ratification law (no. 948/1994) provides for a previous coverage agreement among Italy and other neighbouring State before the setting up of any transfrontier agreement or arrangement.

119 See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Similarities and differences of instrument and policies of the Council of Europe and the European Union in the field of Transfrontier Co-operation*, Council of Europe, 2006, p. 7.

120 See J.L. DE CASTRO, *The Other Dimension of Third-Level Politics in Europe: The Congress of Local and Regional Powers of the Council of Europe*, in F. ALDECOA, M. KEATING (eds.), *Paradiplomacy in Action. The Foreign Relations of Subnational Governments*, London, 1999, p. 97, CONSEIL DE L'EUROPE, *Construire ensemble l'Europe du droit*, Strasbourg, 2005, p. 5 *et seq.*, and COUNCIL OF EUROPE, STEERING COMMITTEE ON LOCAL AND REGIONAL DEMOCRACY (CDLR), *Administrative and territorial reforms creating territorial communities or authorities at different levels*, Strasbourg, 17 December 2002, p. 7.

1985, which symbolizes one of the most significant efforts of the Council for the development of genuine forms of democracy. Looking at the European Union, then, the qualification of its objectives is a much more complex matter. From an exclusively economic and functional perspective to a value-oriented semi-autonomous system, the Union evolved as supranational system in a direction that brought to the consideration of the EU as a constitutional order¹²¹. Within this context, the idea of the role and participation of the Regions in the EU changed significantly throughout the process of European integration. If the CoE objectives aren't, of course, less important than the integration of the European Union, the ways and methods of reaching them and the legal means utilized are substantially different.

Regarding the general form of the CoE's acts, two ways are usually practised: international agreements, with binding legal effects for the contracting parties, or declarations/recommendations/resolutions, with a value of so-called soft law. Like in several other international organisations, the intergovernmental method is the procedure to adopt normative acts. And this is a quite linear modality (if not from a political point of view, at least from a legal perspective), if considered in regard to its legal effects. This *modus operandi* is clearly visible even with reference to the sub-national collectivities, to their legal status and to the regulatory effectiveness within the CoE's Member States. Of course, a political recognition of local and regional authorities has been developed and fostered by the Council, mainly after the establishment of the Congress of Local and Regional Authorities (CLRAE)¹²². In

121 Summarizing the evolution of the EU and its constitutional dynamics is, of course, not possible. The academic literature on this topic is countless. *Ex multis*, see J.H.H. WEILER, *The Constitution of Europe*, Cambridge, 1999; J.C. PIRIS, *L'Union européenne a-t-elle une constitution? Lui en faut-il une?*, in *Revue trimestrielle du droit européen*, n. 4, Oct.-Déc. 1999, p. 599 *et seq.*; J.H.H. WEILER, *Federalism and Constitutionalism: Europe's Sonderweg*, Jean Monnet Working Paper no. 10/2000; G. DE BÚRCA, J. SCOTT, *Constitutional Change in the EU*, Oxford, 2001; D. CURTIN, I. DEKKER, *The Constitutional Structure of the European Union: Some Reflection on Vertical Unity-in-Diversity*, in P. BEAUMONT, C. LYONS, N. WALKER (eds.), *Convergence and divergence in European Public Law*, Oxford, 2002, p. 59 *et seq.*; A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, Bologna, 2002; G. ZAGREBELSKY (cur.), *Diritti e Costituzione nell'Unione europea*, Roma-Bari, 2003; R. TONIATTI, F. PALERMO (cur.), *Il processo di costituzionalizzazione dell'Unione europea. Saggi su valori e prescrittività dell'integrazione costituzionale sovranazionale*, Trento, 2004; F. PALERMO, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Padova, 2005.

122 The CLRAE was established in 1957, originally as the Conference of Local Authorities in Europe. It became later Conference of Local and Regional Authorities and “[i]n 1994 the Congress of Local and Regional Authorities succeeded the Conference as a Council of Europe consultative body. Being intended to genuinely represent both local and regional authorities, it comprises two chambers:

fact, this body has a consultative role¹²³, which shows the increasing importance of the sub-state levels of government. However, although this important expression of consultative opinions, the legal acts are effective and binding only among States, as subjects of international law¹²⁴.

Evaluating these last assertions about the CLRAE, its role seems, indeed, not so different from that of the Committee of the Regions of the EU. According to the TEC Treaty¹²⁵, this entity has a consultative role, as well. But, even if regions and local authorities are not considered as direct interlocutors of the European institutions and primary actors within the European decision-making process, anyway their status is progressively abandoning the traditional “international legal indifference”¹²⁶ towards territorial communities. Namely, since the idea of sub-national communities as real subjects of the EU system could be even refused, it is a fact that they can be direct recipients of the EC legal acts that are directly applicable or, in some cases, responsible for the implementation of directives. Anyway, whatever complicated and experimental, a regional active dimension within the EU represents a true reality¹²⁷.

According to what has been said, it is clear that the CoE and the EU have different perspectives in the approach to sub-national authorities and, as it has been highlighted, differing legal effects. But, at the very end, not only legal impacts *ex se* are to be taken into consideration. Rather, the capacity of legal means to reach the objectives of the system involved, either international or supranational, is relevant in order to evaluate the system's efficacy itself.

the Chamber of Local Authorities and the Chamber of Regions”, see the CoE official website at http://www.coe.int/t/congress/presentation/default_en.asp.

123 Art. 1 and Art. 2 of the CLRAE Statutory Resolution set down the nature and the function of the Congress. In particular, Art. 2 affirms that, in addition to its consultative role, aims of the Congress, among others, are: to ensure the participation of local and regional authorities in the implementation of the ideal of European unity; to submit proposals to the Committee of Ministers in order to promote local and regional democracy; to promote co-operation between local and regional authorities; etc.

124 The major CoE's legal acts about local government and democracy are, in fact, international conventions, like the European Charter of Local Self-Government, the Madrid Outline Convention on Transfrontier Co-operation, Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

125 See Art. 263 *et seq.*

126 See M. PLUTINO, *La partecipazione delle regioni alla formazione della decisione politica comunitaria*, in L. CHIEFFI (cur.), *Regioni e dinamiche di integrazione europea*, Torino, 2003, p. 49 ss.

127 See F. PALERMO, A. SANTINI, *From NUTS to Constitutional Regions: Addressing EU Regions in the EU Framework*, in R. TONIATTI, F. PALERMO, M. DANI (eds.), *An Ever More Complex Union. The Regional Variable as a Missing Link in the EU Constitution?*, Bolzano, 2004, p. 3-26. See also M. KEATING, *Europeanism and Regionalism*, in B. JONES AND M. KEATING (eds.), *The European Union and the Regions*, Oxford, 1995 p. 3-22.

In this perspective, a compared analysis of territorial cooperation within the areas of the EU and the CoE could be an interesting benchmark to see the implementation of praxis and rules, even with regard to the fulfilment of the respective objectives. In these terms, it is possible to speak about the “prescriptive capacity” and the limitations of the two legal systems in relation to the other levels of government, such as the national and sub-national tiers¹²⁸.

3.4. Territorial cooperation “before” and “after” the adoption of EGTC Regulation

So far, a general reflection on some essential key-concepts has been presented. What has clearly emerged is that territorial cooperation represents a factual phenomenon first, and then a legal reality. In particular, the praxis and the instruments for territorial cooperation evolved progressively and the two main supra-national legal tools – the CoE Outline Convention and the EC Regulation on the EGTC – are not the exclusive ways of founding transfrontier relations and activities between sub-national authorities.

However, such legal instruments seem to give those collectivities two principal benefits: on the one hand, a set of rules that, even if not always optimal, draws a general framework of positive references; on the other hand, a sort of “own and proper” legitimacy for the exercise of (what has been called) foreign powers, which traditionally have created some friction with the belonging States.

For sure, the most relevant happening within the last few years in the field of territorial cooperation is the adoption of the EC Regulation on the EGTC. As far as the main characteristics of this normative act will be widely analysed in the forthcoming chapters, only a brief consideration will be developed in this paragraph.

The EGTC Regulation provides for a legal tool that is not exclusively thought for sub-national authorities. Namely, according to the Article 3, the membership of such a grouping could be formed by Member States, regional authorities, local

128 See F. PALERMO, *Premessa. Verso il diritto costituzionale integrato dell'incompletezza*, in R. TONIATTI, F. PALERMO (cur.), *Il processo di costituzionalizzazione dell'Unione europea. Saggi su valori e prescrittività dell'integrazione costituzionale sovranazionale*, Trento, 2004, p. 4-5. The scenario of a multi-level system could suggest an idea of a hierarchical sovereignty and normativism. On the contrary, MacCormick suggests a conception that identifies “the legal order in the complex interaction of overlapping legalities, which characterises contemporary European legal order” as a “plurality of interacting systems, 'distinct, but interesting'”, see S. DOUGLAS-SCOTT, *European Union Law: A Constitution for Europe*, Harlow, 2002, p. 279.

authorities, bodies governed by public law and associations consisting of such bodies; members coming from at least two Member States¹²⁹. But, as several documents coming from different sources highlight, this instrument is peculiarly thought for facilitate cross-border activities among regional and local authorities. Such an observation, then, is even more decisive if examined together with the main legal effect of regulation, i.e. the direct applicability.

Thus, although the EGTC Regulation provides for different limitations (regarding the scope, the members and the competences of an EGTC), which are directly connected to the constitutional order of Member States, it is possible to make an hypothesis about a new impulse of this instrument towards territorial cooperation, first, and, also, on the external powers of sub-state authorities. In fact, despite some restrictions, this normative act lays down provisions that allow sub-national authorities belonging to different Member States to create a cross-border legal entity without a previous agreement between those States.

In these terms, the adoption of the EGTC Regulation should be seen as a turning point within the legal management of territorial cooperation. As the legal instrument has been set up, two following consequences will be examined: the technical-legal functioning and application of its rules, and the political will to proceed to its implementation¹³⁰. While the Regulation itself affirms that it won't substitute the other existing instruments, it is quite clear that it has currently become the most interesting and controversial one.

129 See http://www.interact-eu.net/the_egtc_regulation/68.

130 In this sense “the European Commission must report on the application of the Regulation by August 2011, including the proposal for amendments if necessary”, see http://www.interact-eu.net/the_egtc_regulation/68.

CHAPTER III

THE EUROPEAN TERRITORIAL DIMENSION

1. European governance in a post-sovereignty constitutional context

1.1. The governance's perspective and the EU multilevel governance

Issues related to institutional governance are always complex as far as they are linked to the exercise of powers in a multi-dimensional system. In these terms, the governance's perspective is also linked to the European approach to the territorial dimension. The concept of governance within the European context is usually seen in connection with its most famous adjective, namely “multilevel” governance (MLG). These themes are normally and obviously collocated more within the frame of the European Union than in the area of the Council of Europe, because MLG is a typical phenomenon and a typical conception of the EU system¹. Therefore, much space in this chapter is going to be dedicated to the multi-level approach within the EU. However, despite this comprehensible observation, the concept and the vision of a multilevel approach to governance could be seen in a wider sense, thus embracing also other “levels” outside the European Union. This is the reason why the role of the Council of Europe has been mentioned in this chapter. Of course, as mentioned several times, we are aware of its peculiar international nature. In any case, and in particular with regard to territorial cooperation, the CoE has a fundamental role concerning the development of governance's mechanisms. From another point of view, the analysis of MLG, as developed within the EU system, could be a positive model in order to suggest, with the due differentiations, feasible mechanisms of institutional cooperation/coordination applicable in a wider context.

¹ A broad approach to the general issue about the multilevel system of rights is given by P. BILANCIA, E DE MARCO (cur.), *La tutela multilivello dei diritti. Punti di crisi, problemi aperti, momenti di stabilizzazione*, Milano, 2004.

The intention to open this chapter with some observations about a governance's perspective finds its reasons in the evolution of European constitutional dynamics. Moreover, as a general concept, the governance's perspective is conceived as a theoretical background for the analysis of the European territorial approach and development of an European territorial dimension, which saw a progressively wider importance.

Generally speaking, the objects of such an approach, namely territories, have assumed a varying connotation in relation to the institutional interventions. Thus, the territories' passive attitude of being targets of European, national and sub-national actions has modified their configuration, together with the development of both the European and the sub-national dimensions. According to the aforementioned dynamic process, it is possible to see how rigid schemas and inflexible political or legal solutions are not to recommend as practicable formulas. And this statement is also relevant for the analysis of transfrontier phenomena. The background of a compound, multi-layered and poly-centric legal order find his basis in the flexible conception of governance, indeed.

This study will not attempt to propose a theoretical definition of governance. Even if there are different approaches to it and even if diversified identifications of governance have been proposed, a general characteristic of this concept shows some peculiarities concerning the power exercise, which is non-exclusively-governmental and extremely versatile. In these terms the political essence of governance is the counterbalance of a non-necessarily-hierarchical system of public law².

According to such a view and with reference to the territorial approach, the Council of Europe and the European Union have disparate methods of governance. Namely, while the CoE fosters a process of good governance within its Member States and especially tries to promote the democratic development of local communities, the EU represents an integrated system of multilevel governance³. Of course, the MLG does not embody a prescriptive "ought to be" of the EU supranational order. However, it demonstrates a sort of "way of being" of the European integration, with all its limits and obstacles as well.

² See R. SCHOBEN, *'New governance' in the European Union: a cross-disciplinary comparison*, cit., p. 41.

³ See G. MARKS, *Structural Policy in the European Community*, in A.M. SBRAGIA, *Euro-politics. Institutions and Policymaking in the "New" European Community*, Washington D.C., 1992, p. 191 ss.

This typical characteristic of the EU is concretely embodied in the territorial approach and the related aims are pursued through the development of an institutional territorial involvement. Namely, the supra-national institutional dimension has progressively changed from the idea of “structural spaces” to “functional territories” and, more recently, to a so-called “institutional regionalism”. In these terms, the territorial and transfrontier matters have become a benchmark in the perspective of the MLG's method and of the subsidiarity principle. Moreover, the Community system suggests and concretely fosters one of the most important methods of the advanced federalist systems, which is, precisely, the implementation of cooperation between the different entities or levels of government. Although not every country can cope with federalist principles, however such method can also be imported in other systems of government, such as centralized or regional countries, as a form of institutional procedure.

Hence, referring to sub-national authorities within the Community legal system, even if they do not represent constituent units of the EU⁴, they could be somehow considered as subjects of governance (even if within different constitutional orders) in their respective Member States and, thus, as a “constituent” part of the whole European system of governance⁵. In these terms, the most relevant specificity of the EU is the capacity, or at least the tendency, to develop an integrated approach to various policies, both from the procedural and from the substantial point of view. Of course, this is neither an easy nor a completed process. Obstacles concerning the demand of a stronger legitimacy and the claim on a more relevant influence, both by sub-national entities or national authorities, are current issues. In particular, sub-national actors still need to increase their pressure within their respective States' procedures in order to influence the decision-making process and their role towards the European policies. Anyway, within this panorama, sub-national

4 The analysis of F. MORATA, *Come migliorare la governance democratica europea con le Regioni*, in *Le Istituzioni del Federalismo*, 1, 2004, p. 24, about the role of the Regions within the EU's multilevel perspective is accurate. Namely, “[...] as far as the territory has become at the same time an object and an actor of European policies, the expansion of EC policies has developed with detriment to the constitutional powers conferred to Regions with the consequence that, differently from central governments, they do not have at European level institutional mechanisms in order to develop an effective influence within the decision-making structure” (our translation).

5 *Ibid.*, p. 25 *et seq.*

authorities could find a role beyond the traditional conception of power, with creative solutions and a dynamic capacity of a constant renewal⁶.

1.2. Sub-national authorities within the EU's MLG territorial perspective: is territorial cooperation fostering a “de facto” solidarity towards a constitutional approach?

As it has been said, territorial cooperation, outside the sphere of international relations and national foreign affairs, is principally a matter that involves sub-national authorities in first line. Some paradoxes may, however, be observed. While sub-national authorities seem to gain importance within the international and supranational arenas and also within the constitutional structure of States, nevertheless the arrangement of legal instruments tends not to recognise pure rights to sub-national transfrontier activities.

Namely, on the one hand, as it will be better analysed further on, the existing legal tools dealing with transfrontier cooperation try to safeguard the national constitutional orders; on the other hand, sub-national authorities ask for their role even by putting into place foreign activities. Within this scenario, it is possible to develop a concrete observation about the relations existing between political instances, legal rules, concrete phenomena and the way they influence each other. Namely, if normative documents aim to respect the national constitutional orders and the clear subdivision of competences and functions among the tiers of government, it is also remarkable how this allocation is rarely well-defined and how territorial cooperation couldn't be, in fact, simply restricted to the allocation of competences, in particular when those competences are “shared” or just “mixed” between levels of government. Thus, the conception of multilevel governance within the EU seems to look for a kind of fruitful interaction of the above-mentioned trends. In this view, a peculiar observation could be done. In fact, the more a demand of legal certainties comes to the fore, the more an action of multiple actors seems to be better concerted with soft law or “meta legal” principles that become increasingly enshrined within the legislations and the constitutions.

⁶ See F. MORATA, *Come migliorare la governance democratica europea con le Regioni*, in *Le Istituzioni del Federalismo*, cit., p. 39.

An example about the EU will clarify the statement. Namely, the so called semi-permanent⁷ evolution of the EC/EU primary law progressively gives importance to *quasi-normative* principles, such as subsidiarity, cooperation and partnership, which become key factors of the new form of governance and, at the same time, functional instruments for integration. Within this frame, territorial cooperation is one of the elements requiring and fostering the perspective of a new governance⁸.

Thus, territorial cooperation between sub-national authorities assumes a kind of proactive role with regard to the progressive transformation of institutional relations from a *de facto* solidarity towards a constitutional approach. Of course, a *de facto* solidarity is the necessary precondition for sub-national communities to build territorial cooperation, but even a new constitutional approach should be proposed and practised also by central authorities. To what extent these elements can be combined and in which form they effectively influence the development of the European integration will be a crawling key-point for the further analysis and the related conclusions.

1.3. The background of territorial cooperation. An ex post justification

Governance and subsidiarity are both indicative elements of what could be called a “post-sovereignty constitutional context”⁹. Within this perspective the role of multiple institutional actors is relevant and requires a shared responsibility for what concerns the sphere of substantial political choices. Looking at the different experiences of the Council of Europe and of the European Union it is quite clear that the States need to leave some space to other political and administrative subjects in order to implement functional policies or interventions. Concerning the formal

7 See B. DE WITTE, *Il processo semi-permanente di revisione dei Trattati*, in *Quaderni costituzionali*, 2002, p. 499 *et seq.*

8 See J. GABBE, *Governance and cross-border co-operation*, Speech on the occasion of the RFO Annual Conference in Joensuu, North Karelia, Finland, March 2005, available at: <http://www.aebr.net/publikationen/pdfs/governancevortragjoensuu.gb.pdf>, p. 2 *et seq.*

9 This expression has been borrowed from Prof. R. Toniatti, who spoke about “post-sovereignty constitutionalism” during the seminar “The Constitutional Transition of Bosnia-Herzegovina. From an imposed system to a sustainable multinational State?”, presentation of the book by J. Woelk, held on 25 February 2009 at the School of International Studies, Trento.

aspect, namely the procedures, the involvement of super-national and sub-national authorities is also required.

From a legal point of view, the traditional conception of constitutional law has clearly evolved into a system that can be hardly based on a strict and exclusive allocation of competences. The territorial dimension is an emblematic example in this regard. In the same sense, the principle of conferred competences and, as a consequence, the increasing development of meta-State policies should be based on procedural principles like cooperation, consultation and partnership. Within this scenery, the biggest question for a lawyer is to find the proper and suitable role of the law. Namely, analysing European territorial policies and the sub-national increasing functions, legal documents seem to have a secondary place in respect to non-binding acts. It seems, in practice, that political and soft-law assumptions, declarations and fragmented concrete interventions prevail on juridical instruments. Since this statement is true and, thus, apparently showing a subordinate role of legal instruments, nevertheless a broader context has to be taken into consideration. Namely, as it has briefly mentioned during the previous paragraphs of this chapter, legal tools concerning a territorial approach do effectively exist and territorial cooperation, if not in every case, is covered by normative provisions. But hard law and soft law instruments have not necessarily to be seen as contrasting elements, rather, as complementary features. The post-sovereignty constitutional background is deeply connected to the use of powers and competences and to a related structure that depends from a balanced interdependence of legal and non legal tools, in other words a process of mandatory and voluntary aspects¹⁰. Principles like subsidiarity, cooperation and partnership are essential factors for the implementation of a multilevel governance's perspective and fundamental keys for the synergy of different and compound legal orders.

In this perspective the previous paragraphs spent some words drawing the background of territorial cooperation as a relevant aspect and connotative mirror of transfrontier phenomena and the related institutional approaches from a non exclusively legal perspective¹¹.

¹⁰ See SOCIETÀ GEOGRAFICA ITALIANA, *Europa. Un territorio per l'Unione*, Villa Celimontana, 2006, p. 25.

¹¹ In this regard, see the contribution of N. VEGGELAND, *Competitive Regions and European Neo-Regionalism Cross-border Cooperation: A New Mode of Nation-Building?*, in G. BUCKEN-KNAPP, M.

2. The evolution of territorial policies within the European context

2.1. *Qualifying the territorial approach: a wide perspective on European institutions*

The progressive importance of the territorial dimension has involved European institutions, considered in a wide sense, both the EU and the CoE levels¹².

In this paragraph the broader “European” approach towards the territorial dimension will be taken into consideration, without making an individual distinction among the CoE, EU, national and sub-national perspectives. In fact, all these subjects present different interests, but, at the same time, they draw a common trend to territorial policies. Thus, no peculiar attention will be driven to one or another of the mentioned areas, but a generally comprehensive overlook about territorial policies will be presented. Namely, while such an analysis could seem vague or useless, it gives a wide focus and a systematic image of the argument.

At a first glance what is called “territorial policy” seems to be a distinct matter if compared to territorial/cross-border cooperation, being the latter a kind of stets of procedures and actions concerning different and numerous fields if compared to proper territorial matters. In fact, the concept of territorial policy reminds to the idea related to the interventions and programs about a determined physical space. But, a territorial approach comprehends, besides the spatial/physical dimension, a wider range of components and the related fields of action at different levels of government. In this sense, an effort of abstraction from the common identification of territorial policy with the sole spatial planning, brings to the conclusion that also territorial cooperation is a *species* of the *genus* “territorial policy”. Or, better said, territorial cooperation is a modality to manage territorial policies.

Intended in a broader meaning, a territorial approach implies the manifestation of concern towards the different economical and social situations across Europe and the consequent actions by political actors. For sure, this is an express deal of EU institutions, which have affirmed during the last few years, and constantly reaffirm, the necessity of an European unite intervention for fostering

SCHACK (eds.), *Borders Matter: Transboundary Regions in Contemporary Europe*, Aabenraa, 2001, p. 131 ss.

¹² See L. GRAZI, *Alle origini del GECT. L'evoluzione della cooperazione territoriale in Europa dalla Conferenza europea dei poteri locali al Comitato delle Regioni*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 121 et seq.

territorial cohesion¹³. Actually, this kind of objectives for the Community was not originally included within the Treaties and, it is also possible to argue, territorial policies within the EU were not covered by specific attributed competences in this field until the amendments brought by the Lisbon Treaty¹⁴.

Without pointing out the attention only on the EU perspective, it is somehow visible that a territoriality-oriented approach is a sort of core issue both for the EU and the CoE, even if for the latter it is not a predominant sector of action. In these terms, even if not representing an exclusive field of competence at (both) European level(s), the territorial approach has become a sort of functional element for developing different political strategies. And transfrontier cooperation is also a functional aspect of such territorial dimension, denoting an even more complex outstanding interest in what is called “territorial cohesion”¹⁵.

In this regard, some general and common aspects could be considered as a ground and as a distinctive feature within the “wider” the European reality. Namely, concepts like territorial cohesion, territorial cooperation, territorial development and territorial governance¹⁶ are essential elements related to the dialogue on European integration and development. These elements could be regarded both as descriptive terms and methods for the institutional interventions. In particular, they express the dynamic profile of a complex and specific reality in Europe, which is distinguished

13 One of the first EC efforts to foster territorial cohesion has been evinced by the EC Commission in the Third Report on Economic and Social Cohesion of February 2004: “Territorial cohesion has therefore been included in the draft Constitution (Article 3), to complement the Union objectives on economic and social cohesion. Its importance is also acknowledged in Article 16 (Principles) in the Treaty which recognises that citizens should have access to essential services, basic infrastructure and knowledge by highlighting the significance of services of general economic interest for promoting social and territorial cohesion. The concept of territorial cohesion extends beyond the notion of economic and social cohesion by both adding to this and reinforcing it. In policy terms, the objective is to help achieve a more balanced development by reducing existing disparities, avoiding territorial imbalances and by making both sectoral policies which have a spatial impact and regional policy more coherent. The concern is also to improve territorial integration and encourage cooperation between regions”.

14 See *Territorial Agenda of the EU*, Towards a More Competitive and Sustainable Europe of Diverse Regions, Agreed on the occasion of the Informal Ministerial Meeting on Urban Development and Territorial Cohesion in Leipzig on 24/25 May 2007, and A. FALUDI, *Position European Spatial Planning*, in *European Planning Studies*, 10:7, 2002, p. 899.

15 As the territorial cohesion concept is traditionally connected to the EU policies, it is anyway necessary to underline that this concept is also known by the European Conference of Ministers responsible for Spatial/Regional Planning (CEMAT) at the CoE. Namely, the CEMAT highlighted in an own document a definition of “territorial cohesion” as a multidimensional concept with, at least, three different characterising components: territorial quality, territorial efficiency and territorial identity; see European Conference of Ministers responsible for Spatial/Regional Planning (CEMAT), *Spatial Development Glossary*, Strasbourg, 2007, p. 27-28.

16 See CEMAT, *Spatial Development Glossary*, cit., p. 27-29.

by a deep territorial cultural diversity and by a multiplicity of territorial identities¹⁷. These typical aspects of the European panorama are the tangible basis for EU and CoE policies that aim at intervening with respect to economic and social imbalances, cultural distances and administrative discrepancies¹⁸. In such a general perspective, territorial cooperation becomes a key element for the simple reason that a super-national approach to territorial issues needs to find instruments, which consent a systemic and broad vision, not only constrained by the political and legal limits of national frontiers.

Thus, a European territorial approach requires necessarily a transfrontier approach, that makes Europe an experimental laboratory, integrating the research of proper legal instruments and *de facto* situations¹⁹. According to such view, three kinds of territorial interventions with a transfrontier impact can be developed by European institutions. Namely, on the one hand, interventions remaining only within political and administrative borders are previewed in order to cope with territorial imbalances across Europe; on the other hand, means for fostering cooperation among territories belonging to different States are mostly provided for sub-national authorities; and finally, the concept of a “transfrontier space” as an individual subject and direct interlocutor with super-national institutions has acquired more relevance, thus creating a kind of functional space, which becomes a single identity in function of the fulfilment of European provisions or as an object provided by European legal instruments for transfrontier cooperation²⁰.

17 See R. CAMAGNI, *The rationale for territorial cohesion and the place of territorial development policies in the European model of society*, paper presented at the Vienna Seminar on Territorial cohesion and the European model of society, July 2005, p. 20.

18 C. RICQ, *Handbook of Transfrontier Co-operation*, Council of Europe, Strasbourg, 2006, p. 19.

19 C. RICQ, *Coopération transfrontalière: laboratoire de l'Europe*, in *Temps européens*, n. 2, 1997, p. 115-121.

20 In this sense the first reference goes to the EGTC as an EC entity with legal capacity. However, although being the newest, the EGTC is not the only subject expressing a unique entity for territorial cooperation. Namely, the CoE has elaborated a third protocol to the Madrid Outline Convention, which will provide the creation of a similar legal subject, as mentioned by Ulrich Bohner, Secretary General of the CLRAE, in his speech held in the occasion of the CoE's interdisciplinary seminar on transfrontier cooperation, in Speyer, on 6 February 2009. Moreover, as the EGTC is the currently best legally defined subject for territorial cooperation, other instruments, both with a legal framework and even without, have been put in place. Here, the allusion goes to the European Economic Interest Grouping (EEIG), to the European Cooperative Society (SCE) as subjects which are not directly devoted to territorial cooperation, but also as operative tools for transfrontier activities; but it is also to remember the concept of Euroregion that, even without a well defined legal framework, represents an important unified interlocutor for cross-border activities.

Until this point, some general features about an European territorial approach have been highlighted, without indicating the differences between the super-national actors. While having different features in common, the EU and CoE have mostly divergent attitudes and perspectives of actions towards policies with territorial impact.

2.2. The CoE territorial perspective: an invitation to States towards local democracy and constructive partnership

In the last paragraph the existence of a CoE's territorial approach has been mentioned. This attitude has been mainly developed within two different fields: on one hand the transfrontier cooperation and, on the other hand, the CEMAT perspective on regional and spatial planning.

Transfrontier cooperation is a specific sector of action within both the Congress of Local and Regional Authorities (CLRAE) and the Department of Local and Regional Democracy and Good Governance, thus being an instrument for fostering the balanced development and democratic structure of government, in order to promote tolerance, good neighbouring and efficiency of public services²¹. From an international organisation's perspective, the main tasks are devoted to the respect of the inner constitutional structure of each single State, as well as to the improvement of local and regional democracies. In these terms, the assistance and the legal advice for the practice of transfrontier relations and the establishment of transfrontier bodies between local and regional authorities is a specific aim within the CoE policy, in particular for its Committee of Experts on Transfrontier Cooperation²². Among others, a very clear and direct object of CoE's transfrontier strategy is to individuate and reduce national obstacles for developing transfrontier relation between local and regional authorities, thus fostering decentralized cooperation, partnership and good governance. According to these objectives, besides the legal framework of the European Outline Convention on Transfrontier Cooperation, other instruments have

21 See the CoE Recommendation Rec(2005)2 on good practices in and reducing obstacles to transfrontier and interterritorial cooperation between territorial communities or authorities of 4 February 2009.

22 Information are available on the CoE web portal at:

http://www.coe.int/t/dgap/localdemocracy/Areas_of_Work/Transfrontier_Cooperation/Aims/default_en.asp.

been provided in order to spread out and encourage transfrontier activities. An example is offered by the setting up of the online database MORE (Matching Opportunities for Regions in Europe) on transfrontier cooperation as a service of the CLARE with the support of the Italian government, the Committee of the Regions of the EU and the Council of European Municipalities and Regions²³.

The further CoE's territorial approach concerns the European Conference of Ministers Responsible for Regional/Spatial planning (CEMAT) as consultative body with its *soft law* activity. Namely, the Conference adopted several guideline documents about European spatial planning and related strategies. Some of the most important acts are the “Guiding principles for sustainable spatial development of the European Continent”²⁴ and other documents, such as the Recommendation (2001)1 of the Committee of Ministers of the CoE²⁵ and the European Regional Planning Charter²⁶.

Having a broader approach to spatial development and territorial integration, these documents do not forget to stress the importance of transfrontier cooperation and sub-national authorities, focusing the attention on European cooperation and towards a regionally balanced development of the continent.

After this brief outlook of the CoE's territorial approach, some first conclusions could be presented. A well established fact is that the CoE do have a territorial perspective. However, the related means of action reveal its intergovernmental structure and the lack of a very structured policy. In general terms, only a few and quite fragmented legal documents have been set down, while the most of the documents contain political recommendation to States without developing concrete interventions that directly deals with sub-national authorities and without a direct impacts on them. Of course, the specific nature of an international organisation cannot bring to a coherently binding own territorial policy; nevertheless this

23 See the official website access to the database at <http://www.loreg.coe.int/more/>.

24 This program document has been adopted on the 12th CEMAT session in Hannover in June 2000; see C. RICO, *Handbook of Transfrontier Co-operation*, cit., p. 25.

25 Recommendation Rec(2002)1 of the Committee of Ministers to member states on the Guiding principles for sustainable spatial development of the European Continent, Adopted by the Committee of Ministers on 30 January 2002 at the 781st meeting of the Ministers' Deputies.

26 European Regional/Spatial Planning Charter, adopted in 1983 at the 6th Session of the CEMAT in Torremolinos, was incorporated into Recommendation (84) 2 of the Committee of Ministers to Member States on the European Regional/Spatial Planning Charter.

institution has specific tasks and objectives that aim at increasing the cooperation among local and regional communities.

Keeping this statement in mind, one question can better define the issues concerned. Are CoE's legal instruments – mainly those related to transfrontier cooperation – functional to the realization of its aims? Being aware of the fact that the CoE represents a totally different kind of order in comparison to the EU, a parallel level of analysis can individuate the efficacy of the legal instruments to pursue the respective objectives, both for the CoE and for the EU.

In this regard, the CoE's territorial approach, while not representing a well structured policy, comprehends tools for transfrontier cooperation and spatial development as instruments for reaching the objectives of local democracy and good governance²⁷. Thus, an analysis of CoE's territorial legal instruments could verify their efficiency and effectiveness in relation to its objectives.

2.3. The EU territorial policy: the increasing role of cohesion as a political objective with legal references

The EU territorial approach is a really complex and wide subject, which takes its peculiarity from the specific nature of the EU political and legal system. As the EU has not had an explicit territorial policy since its origins, the territorial dimension has progressively evolved and has gained a primary importance as a political pillar and as an objective of the Union²⁸. From the very beginning, the Community started its territorial concern in a fragmented manner and without a clear legal basis within the Treaties. What is quite evident, anyway, is the connection with the Community interest to the European territorial structure in connection to the development of regional and cohesion policies.

Namely, the very first involvement has spread out with the creation of the DG Regional Policy of the European Commission in 1968 and, later, with the establishment of the European Regional Development Fund (ERDF) in 1975.

27 See CLRAE, Recommendation 265 (2009) on Good governance: a key factor for the sustainable economic development of regions and CLRAE, Resolution 283 (2009) on Good governance: a key factor for the sustainable economic development of regions.

28 See G. MOFFA, *Coesione europea e sviluppo locale. Le politiche comunitarie di promozione territoriale*, Roma, 2005, p. 41.

Subsequently, as the “territorial” aspect wasn't really mentioned within the EC Treaty²⁹, several interventions have been based on Art. 158 TEC, Art. 2 and 3 TEU, related to economic and social cohesion objective. Namely, while the issue of cohesion is not necessarily connected only with the economic and monetary integration, it represents a kind of constitutional feature of the EU, pursuing at a balanced and equal development within the Union³⁰. Representing one of the fundamental principles of the Union, which is grounded on its diversity (linguistic, cultural, political, social and territorial)³¹, the cohesion strategy has to be intended both as a dynamic process and a guiding firm principle for the overall EU policies³².

In these terms the policy of territorial cohesion is the result of a progressive and dynamic adaptation of political aims and legal provisions. Namely, a deep incentive both from the intergovernmental side and from the institutional side brought to the development of a persisting and fruitful debate. Important acknowledgements such as the European Spatial Development Perspective (ESDP)³³, the European Spatial Observatory Network (ESPON) and other documents like the Territorial Agenda of the EU³⁴ have to be mentioned. The executive strength has

29 The only direct reference to the term “territorial cohesion” as a common value within the EU was entailed in Art. 16 TEC in relation to the general economic interest's services and, apparently, without a broader application.

30 See L. SIMONETTI, *Dal riequilibrio alla coesione: l'evoluzione delle politiche territoriali dell'Unione Europea*, in *Rassegna Economica*, n. 1, 2005, p. 203.

31 See, for instance, Art. 151 TEC, which explicitly mentions the EU national, regional and cultural diversities, as well as the common cultural heritage.

32 See the Council decision of 6 October 2006 on Community strategic guidelines on Cohesion, 2006/702/EC, Official Journal L 291, 21.10.2006.

33 The ESDP is an intergovernmental political document adopted by the Ministers for Spatial Planning at the Potsdam Council on 10 and 11 May 1999 and dealing with several aspects of the EU broader territorial approach. The online glossary of the EU website defines the ESDP with a very clear statement: “Although it does not justify further Community responsibilities as regards spatial planning, the European Spatial Development Perspective (ESDP) is a framework for policy guidance to improve cooperation among Community sectoral policies which have a significant impact in spatial terms. It was drawn up because it was found that the work of the Member States complemented each other best if directed towards common objectives for spatial development. It is an intergovernmental document which is for guidance and not binding. In accordance with the principle of subsidiarity, it is applied at the most appropriate level and as desired by the various parties engaged in spatial development.”

34 The political debate leading to the EU Territorial Agenda saw the development of a dynamic discussion, which took place not only before the main document, but also later. See *The Territorial State and Perspectives of the European Union, Towards a Stronger European Territorial Cohesion in the Light of Lisbon and Gothenburg Ambitions, Based on the Scoping Document discussed by Ministers at their Informal Ministerial Meeting in Luxembourg in May 2005, A Background Document for the Territorial Agenda of the European Union; Territorial Agenda of the EU, Towards a More Competitive and Sustainable Europe of Diverse Regions, Agreed on the occasion of the Informal Ministerial Meeting on Urban Development and Territorial Cohesion in Leipzig on 24/25 May 2007; European Parliament, Follow-up of the Territorial Agenda and the Leipzig Charter:*

come from the Commission's impulse, which has promoted increasing interventions according to the legal provisions of the primary and secondary legislation. Moreover, also the consultative role of the Committee of the Regions has given a serious incentive, mainly by underlining the connections between the role of sub-national actors, power-sharing and territorial balance³⁵. In this sense, as already mentioned, the EU territorial policy has increased in parallel with the EU regional approach. Namely, the first Community interventions with territorial impact tended to consider the sub-national actors as mere geographical areas and recipients of redistributive policies. But, progressively, this kind of “functional regionalism” evolved in a form of “institutional regionalism”, which qualifies the sub-national collectivities as active actors of the European system³⁶.

Furthermore, as already said with reference to the regional policy, the ERDF and, generally, the Structural Funds put in practice a complex normative structure based on the objectives of the economic and social cohesion. But this approach has gradually shown the importance and the centrality of the territorial dimension inside the cohesion policy in the light of the Lisbon and Gothenburg strategies³⁷.

Thus, following the secondary legislation and the impulse of soft-law, the concept of territorial cohesion seeks to find its normative place within the primary legislation, once within the Constitutional Treaty³⁸ and now within the Lisbon Treaty³⁹.

Apart from the formal “constitutional” recognition, the cohesion policy 2007-2013 already entails an objective related to territorial cohesion and cooperation, which finds in this way a sort of legitimation within the secondary legislation⁴⁰. In this regard, it is possible to notice how the supranational territorial approach do not

Towards an European Action Programme for Spatial Development and Territorial Cohesion, Brussels, 2007.

35 See Opinion of the Committee of the Regions of 10 April 2003 on Territorial Cohesion, CdR 388/2002 fin.

36 See D. FLORENZANO, *L'autonomia regionale nella dimensione internazionale. Dalle Attività promozionali agli accordi ed alle intese*, Padova, 2004, p. 110 *et seq.*

37 See the Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome, Berlin, 25 March 2007.

38 Art. I-3, III-220 and III-221 make a direct and specific reference to territorial cohesion.

39 The Treaty under ratification mentions territorial cohesion at Art. 2C as a shared competence of the Union and Member States, and will replace art. 158 TEC with the words “economic, social and territorial cohesion” as a matter of action of the EU institutions.

40 See A. DI STEFANO, *Coesione e diritto nell'Unione Europea. La nuova disciplina dei fondi strutturali comunitari nel Regolamento 1083/2006*, Catania, 2008, p. 27 *et seq.*

show only political programs and strategies, but also a legal implication that involves two different aspect of the legal rules. Namely, what is provided within the Treaties, even if only concerning social and economic aspects, explains a sort of constitutional programmatic obligation to pursue the cohesion objectives, thus comprehending the territorial aspect as a part of the Community *acquis*. In addition, the Regulations dealing with the cohesion policy, like the new ERDF Regulation or the EGTC Regulation, represent a directly applicable discipline that could also potentially legitimize legal actions.

Thus, it is possible to argue that the EU does really have a “territorial *acquis*”, which is the result of a progressive and long-lasting compensation and development of legal provisions and soft interventions. In particular, during the last few years the issue of a supranational territorial policy has demonstrated to be necessary as an expression of shared governance. Within this trend, the European Commission adopted in October 2008 the Green Paper on Territorial Cohesion⁴¹, aiming at pointing out the attention on some key-topics and at encouraging the debate about them in order to have a clearer and more efficient approach to the matter⁴².

A further proof of the widening and institutionally inclusive role of the territorial question is a document discussed by the Committee of the Regions within its CONST Commission⁴³ on 27 February 2009, as a working document on “The process of drawing up the Committee of the Regions' White Paper on Multilevel Governance”⁴⁴. This kind of own initiative intervention denotes some revolutionary aspects, since it is the first time that the Committee launches the proposal for a white paper on this subject. Besides the role of the Committee itself, the working document is particularly relevant for its content, mainly for its clarity about the focus of the current EU status and the future policy actions. The Committee stresses the importance, while respecting the national sovereignty and preserving the single

41 Communication from the Commission to the Council, the European Parliament, the Committee of the Regions and the European Economic and Social Committee, Green Paper on Territorial Cohesion: Turning territorial diversity into strength, COM(2008) 616 final.

42 *Ibid.*, p. 11. In particular, a deep attention seems to be drawn on the delimitation of what is intended for territorial cohesion and the scope and scale of intervention. Namely, this last issue shows several sensitive aspects concerning the role of public actors, thus the attribution and exercise of competences by the European institutions, national or sub-national authorities.

43 Commission for Constitutional Affairs, European Governance and the Area of Freedom, Security and Justice.

44 CdR 271/2008 rev.

national identities, of a shared responsibility between supranational, national and sub-national actors. In this terms, a too sectoral territorial approach should be replaced by an integrated and cooperative action of all levels of government, thus surpassing the traditional conception of conferred competences and applying effectively the principles of subsidiarity and partnership⁴⁵. And, one of the most interesting statement is the recognition of local and regional autonomy not only as a very relevant value, but as one of the fundamental rights of the Union. Currently, this is a quite controversial point. In fact there is a sort of dichotomy in the EU conception of the sub-national actors. The so called regional blindness has already been mentioned⁴⁶; moreover, according to the principle of multilevel governance and territorial approach and thanks to the CoR impulse, the local and regional authorities are considered as actors of European policies and subjects of a right to autonomy. However, the very essence of such a right seems, until now, not to be directly enforceable but, rather, a programmatic principle within the multidimensional European scene⁴⁷ and not a legally mandatory rule. According to such a view, while the EU governance is, in some ways increasing, the Member States hold the so-called *Kompetenz-Kompetenz* of their national order and of the formal competences of the Union.

This last issue related to competences has to be taken into consideration from a legal point of view, dealing with the EU territorial policy. Namely, the supranational institutions do not have an exclusive competence regarding both the regional issues and the territorial cohesion. But the Community initiatives are adopted in an area of shared competences with the Member States and, if the case, with other sub-national authorities. In these terms, the EU territorial approach seems not to deepen or face the question of competences; rather it apparently avoids treating the argument. The issue of the legitimate exercise of powers and competences remains, in some ways, hidden behind the management and the

45 See F. PALERMO, *The White Paper on EU Governance: the right tool for the wrong means*, in COMMITTEE OF THE REGIONS, *The Contributions to the 2008 Ateliers*, February 2009, p. 4.

46 See also R. TONIATTI, S. ORTINO *et al.*, *European Governance*, Bolzano/Bozen, 2002, p. 4.

47 See the study commissioned by the Committee of the Regions: *Strengthening regional and local democracy in the European Union*, Vol. I, Bruxelles, 2004. See also the Preamble of the Charter of Fundamental Rights of the European Union: “The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels [...]”.

implementation of a shared governance, both in horizontal and vertical meaning⁴⁸. In this sense, the intentions and the proposals of European institutions seem to go beyond a strictly positive legal conception of the competence exercise, as it has happened during the past years of integration. It is also true that Member States have recently shown a considerable tendency to remark their individuality, which often mirrors the common sense of the population. The first negative result of the Irish referendum on the Lisbon Treaty is a clear example of that. But, even beyond the biggest agreements of the Treaties, some other instruments and practices are an everyday potential tool for apply integrative dynamics. The cohesion policy and, in particular, the EC Regulation establishing the European Grouping of Territorial Cooperation (EGTC) are examples of such instruments that need to be observed as functions and benchmarks of the European process, even with a glance to the relationship between the constitutional structure of objectives and the respective implementation.

Within this scenery every public actor should take its part regarding the decision-making and implementation of European policies. Thus, what the EU institutions, mainly the Committee of the Regions, call as the fundamental right of autonomy of sub-national authorities becomes the right of those collectivities to be legal subject within the Community order and their mutual relations should be considered as free within the “European common space”⁴⁹. According to this view and in the trend of this process, the EGTC Regulations represents a silent and potential revolution, both for the EU territorial and regional policy.

48 See the CdR Working document on “The process of drawing up the Committee of the Regions' White Paper on Multilevel Governance”, cit., p. 3.

49 See D. FLORENZANO, *L'autonomia regionale nella dimensione internazionale. Dalle Attività promozionali agli accordi ed alle intese*, cit., p. 132.

CHAPTER IV

SPECIFIC INSTRUMENTS FOR TERRITORIAL COOPERATION

1. Introduction

Territorial cooperation involves several institutional actors as well as different “managing” tools. These tools could be intended as the means of setting up coordinated actions between sub-national authorities. So far the description of the general context has been already examined. In this chapter the peculiar legal instruments, which have been developed during the years, are going to be taken into consideration.

Since the first agreements on cross-border activities in the Fifties, different solutions have been experienced up to now. The biggest difference, without any univocal reference to historical evolutions, runs among cooperation with non-legal and with legal basis. The first form has been developed through informal agreements or the establishment of some kind of informal associations or conferences. The second one have its basis in different sources, which are mainly divided in three categories: national law, international law, EC law. As it will be demonstrated further on, although the exclusive role of the State is loosing certainty, the national law is constantly present within the regulation of transfrontier phenomena. In particular, this happens in the case of the establishment of inter-institutional structures with legal capacity. In fact, as we will see, international and EC legal tools cannot avoid the recalling on domestic law in order to have a proper implementation.

As different fields of law are concerned and several solutions have been proposed, the struggle to find a kind of uniformity seems to be in a stalemate. This is principally due to the fact that the search of international or supranational formulas is always somehow bounded to the application national law and, therefore, differently

implemented¹. Nonetheless, the need of uniform standards seems to be one of the most required devices. Such an approach represents a challenge for super-national institutions.

So far, a general overview of the broader phenomena related to regionalism and to the European dimension has been considered as the wider background for territorial cooperation. The next paragraphs will be devoted to the presentation and the analysis of the most important legal instruments for transfrontier relations among sub-national communities. To the most recent tools within the framework of the EU and the CoE, namely the EGTC Regulation and the CoE's Third Protocol to the Madrid Outline Convention a specific and peculiar attention has been dedicated. Before analysing these new instruments, the previous establishment of particular solutions for territorial cooperation will be overlooked in order to give an overall idea about the various means adopted in this field.

2. The role of national law: the premise for an European approach to territorial cooperation

2.1. The delay of a national legal approach about territorial cooperation between sub-national authorities

The most relevant academic literature about the legal dimension of transfrontier relations is devoted to the analysis of the main instruments provided by international law and EC law, as the most important regulatory framework for territorial cooperation. But, before giving reference to the state of the play in this regard, an evaluation about national law is essential in order to comprehend the development of alternative instruments. Looking at the different legal systems in Europe it is hard to find specific national normative provisions about territorial or transfrontier cooperation at sub-national level². However, the first legitimation for sub-national authorities to deal with territorial cooperation really comes from the

¹ See H. COMTE, N. LEVRAT, *Aux coutures de l'Europe. Defis et enjeux del la coopération transfrontalière*, Paris, 2006, p. 23.

² If explicit provisions about territorial cooperation have been recently introduced within national legislations or constitutions, it is mainly due to the adoption of new instruments at international or Community level.

national systems. Moreover, with reference to these national systems, three elements have been mentioned in regard to the national legal approach towards the foreign action of sub-national subjects, namely: the possible national provision of a treaty-making power, the progressive development of a general sub-national foreign power and the (more or less tolerated) practice of territorial cooperation. As far as these concepts could have something in common, both from a legal and from a practical perspective, it is possible to argue that they have basically evolved according to different legal perspectives. However, the progressive evolution of a sub-national (or, better, regional) foreign power follows somehow the same direction of the development of territorial cooperation, thus, in the need to find a more defined collocation within the national systems.

As it has been mentioned in the second chapter, the existence and the acknowledgement of a sub-national foreign power have increasingly evolved within the national constitutional and legislative frameworks. In this regard it has been said that territorial cooperation is part of the wider category of sub-national foreign relations. And this could, only apparently, solve the problem about legal framework for territorial cooperation and the respective traditional lack of instruments of national law for sub-national authorities. In fact, according to this view, the national provisions about sub-national relations and the related praxis, as illustrated in the second chapter, seem to be the sole national normative background for territorial cooperation as well as for any kind of sub-national foreign exercise of power. However, this statement is not really and always true. Namely, the mentioned comparative references to the development of a sub-national foreign power within various national systems were dealing with the hypothesis concerning the legitimacy of territorial cooperation as a form of sub-national foreign power, but not as a condition for the exercise of territorial cooperation. With other words, the acknowledgement of a sub-national foreign power within national systems represents the legal legitimation for actions outside the national borders. The development of such a “legal category” cannot, as a consequence, impede the development of sub-national territorial cooperation. Thus, the existence of a sub-national foreign power represents a sort of theoretical legitimation for territorial cooperation. But it doesn't mean that national legislations provide for useful instruments or regulatory

frameworks of territorial and transfrontier cooperation as such. In these terms, territorial cooperation has partially followed autonomous paths, even outside the national constitutional or legislative dispositions about the sub-national foreign power. Thus, other mechanisms, in the absence of *ad hoc* provisions, have been developed. Some methods are represented by the practice of fair cooperation (or mere tolerance) between level of governments in cases where the national interests are not considered hampered by the regional/local foreign activities; another example is given by the strict separation of competences from the central authorities, thus trying to divide as much as possible the potential overlap of affairs. Also cooperation with foreign subjects through informal agreements, exchange of informations, courtesy visits, etc., are considered as alternative ways to build foreign relation.

All the mentioned examples highlight that the peculiar recourse to national constitutional (or legislative) provisions about “regional” foreign powers have been rarely useful in order to set up territorial cooperation. Emblematic in this sense is the diffusion of Euroregions without a well-defined legal framework, but mainly based on informal arrangements. Another example in this sense is represented by the cooperation at local level, which is typically not considered in the constitutional provisions about the sub-national foreign powers and has, therefore, found other methods to spread out.

In any case, the practice demonstrates that solutions provided at national level in order to develop an effective transfrontier cooperation are not enough³. As far as cooperation involves the presence of institutional subjects belonging, at least, to two different countries, a sort of reciprocal recognition and a method of bi-univocal legal connection are anyway required. However, national legislations are almost lacking in defining or providing apposite legal means for this kind of activities and national authorities seem to prefer the European level to deal with these issues. In particular, two aspects regarding national law need to be taken into consideration in order to understand the development of legal instruments of territorial cooperation: the projection of national law in the international/supranational field and the consequential development of national provisions.

³ See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, Madrid, 2008, p. 43.

Furthermore, although it has been proven to be insufficient, it might be worth to retrace the development of national legal approaches towards transfrontier cooperation. In general terms, looking at the different legal orders in Europe, it is hard to find original domestic disciplines in this respect. It is necessary, then, to make a kind of historical observation. As it has already been mentioned, the development of cross-border relations between territorial communities started soon after the second war conflict and progressively increased even without *ad hoc* legal frameworks. Thus, the phenomenon has developed in a kind of spontaneous way. During the years and after the proliferating amount of transfrontier decentralized relations, the national legislations or constitutional provisions came with delay to discipline some aspects or some basic rules regarding the legitimization of cross-border relations of the respective sub-national collectivities. In most of the cases the first national interventions were related to the signature of inter-state protocols, agreements or international treaties to allow transfrontier cooperation between territorial authorities⁴. In this regard, two types of relation have been established: on the one hand “neighbourhood relations” were undertaken⁵, which were carried on principally by States with the participation of the sub-national subjects as a mere eventuality; on the other hand, the official relations of transfrontier cooperation had been put in place in different ways, but mostly through a covering international treaty signed by States⁶. Actually, keeping in mind the different constitutional dimensions of the European States and the peculiar treaty-making power of federal entities, the existence of a general possibility for federated units to conclude international treaties has represented a formally easiest formula to develop territorial cooperation. It is the case of Switzerland, where Article 56 of the Federal Constitution provides the right for Cantons to conclude treaties with foreign countries within the scope of their

4 See J. GABBE, V. VON MALKUS ET AL., *Cooperation between European border regions: review and perspectives*, Baden-Baden, 2008, p. 42.

5 See C. FERNÁNDEZ DE CASADEVANTE ROMANI, *L'aménagement par l'État de la coopération transfrontalière des collectivités territoriales*, cit., p. 5. The author speaks about “*relations de voisinage interétatique*”, which mainly depend from the will of the State. Some examples about these relations between France and Spain regard the utilization of frontier water, the works related to frontier rivers, etc., and sometimes *ad hoc* commissions where created in order to deal with these issues, even with the participation of territorial communities. The ancient commission (*Commission Internationale des Pyrénées*) was created in 1875 and the participation of French local communities was allowed after a decision of the *préfet*. In this case, a decentralized, but still governmental authority, had an authorizing power towards the local communities.

6 *Ibid.*, p. 5-17.

powers⁷. However, the recurs to international agreements between the federated entities of federal countries and foreign States hasn't been really much practised. Namely, in almost every European country the first example of legal solution for cooperation has been the existence of so-called “covering inter-state agreements” as a preliminary requirement and an exigence under national law⁸.

According to such situation, the legal activity of States has been more concentrated on the international dimension, rather than on an internal attempt to give a legal clarification and a defined framework to cross-border/territorial cooperation, thus, determining a kind of commitment to the international level instead of providing for national legal approaches. Nevertheless, a huge praxis demonstrates that structured territorial cooperation between sub-national communities was in the need to find a legal form in order to establish enduring organisations. In the absence of apposite disciplines, these structures borrowed the legal form according to the most suitable national law, thus becoming Portuguese or Spanish *consorcio*, French *Groupements d'intérêt public* (GIP) and *société d'économie mixte locale* (SEML), or simple private associations. Only gradually, and mainly after a discrete evolution of the material phenomenon and the progression of the debate within the international/supranational organizations, some national systems have implemented specific dispositions about transfrontier cooperation. Generally speaking, according this kind of dispositions, local and regional territorial cooperation do represent a *species* within the bigger *genus* of sub-national foreign relations⁹. In this regard, it the development of French legislation is particularly interesting. The process of decentralization allowed the exercise of foreign powers by territorial communities (*collectivités territoriales*) according to the condition of a governmental authorisation¹⁰. Afterwards, the law of 6th February 1992 expanded the

7 The article follows: “These treaties may not be contrary to the law nor to the interests of the Confederation nor to the laws of other Cantons. Before concluding a treaty, the Cantons must inform the Confederation. The Cantons may deal directly with lower ranking foreign authorities; in other cases, the relations of the Cantons with foreign countries shall be conducted by the Confederation on their behalf”. See C. RICQ, *Handbook of Transfrontier Co-operation*, cit., p. 48.

8 *Ibid.*, p. 17.

9 D. FLORENZANO, *L'autonomia regionale nella dimensione internazionale. Dalle Attività promozionali agli accordi ed alle intese*, Padova, 2004, p. 65.

10 In particular, Art. 65, par. 3, law of 2 March 1982, affirmed that “[w]ith the authorisation of the government, the Regional Council can decide to organise, with a view to concerted action and in the framework of transfrontier cooperation, regular contacts with decentralised foreign communities possessing a common frontier with the region.” See also, P. LAYE, *La coopération décentralisée des collectivités territoriales*, Voiron, 2008.

previous provisions, covering all forms of decentralized cooperation without a prior authorisation of the State. As an exception, the authorisation from the Prefect was only needed if French territorial communities which wanted to join a cooperation body governed by foreign law¹¹. Moreover, the General Code of Territorial Communities¹², adopted in 1996 and currently into force, foresees the possibility to stipulate conventions with foreign territorial communities, within the limits of their competences and respecting the international obligation of France¹³. Also the Italian Constitution after its last revision has reformulated in Article 117, par. 9, the capability for Regions to establish, within their competences, agreements with foreign States and arrangements with territorial entities that belong to a foreign State, in the cases and forms provided for by state law¹⁴. These examples do not represent an original national attitude towards sub-national foreign power, but demonstrate a clear development towards the management of sub-national transfrontier cooperation.

These kind of national provisions, in accordance with the constitutional structure of each State, are progressively increasing in Europe, even in the south-eastern countries, which are traditionally connoted with a centralistic attitude¹⁵. Of course, each country establishes some forms of national control over sub-national transfrontier relations, but the creation of explicit provisions in this regard seems to leave a more open space for mutual cooperation between levels of government¹⁶. Since the first contemporary examples of territorial cooperation started almost fifty

11 See C. Ricq, *Handbook of Transfrontier Co-operation*, cit., p. 47.

12 Art. L 1112-1, Code général des collectivités territoriales, Loi n°96-142 du 21 février 1996 relative à la partie Législative du code général des collectivités territoriales.

13 The provisions of the General Code were anticipated by Art. 131, *Loi d'orientation* n. 92-125 of 6th February 1992 related to the territorial administration of the (French) Republic. The article affirmed: "Ces conventions entrent en vigueur dès leur transmission au représentant de l'Etat dans les conditions fixées aux I et II de l'article 2 de la loi no 82-213 du 2 mars 1982 précitée. Les dispositions de l'article 3 de la même loi sont applicables à ces conventions.". See also *Loi d'orientation* n. 95-115.

14 This provision was part of the constitutional review of the V Title, adopted with the *Legge costituzionale* n. 3/2001.

15 See, as an example, the case of Croatia. Although the country is still characterized by a strong centralistic aptitude, the Law on Local Self-Government adopted in April 2001 provides, at Art. 14 *et seq.*, for the possibility of sub-national units to join correspondent foreign authorities of other countries in order to pursue cooperation, in compliance with the law and under the supervision of central government.

16 Y. LEJEUNE, *La surveillance des relations internationales conventionnelles des collectivités fédérées*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, Bruxelles, 2008, p. 105-129, analyses in particular the cases of Belgium and Switzerland.

years ago, it is now quite useless to remark the late national concern towards this issue. Looking at the historical evolution of territorial cooperation, the prevalent state concern seemed, and still seems, to be related to the respect of the internal attribution of competences and the exclusive control on the matter foreign affairs/international relations. That is maybe the reason of a progressive attempt to find a coherent approach within other institutional centres, *in primis*, the Council of Europe, and also with the contribution of regional associations like the Association of European Border Regions (AEBR), devoted to such issues since years. The ratification of the first European legal instrument for transfrontier cooperation, the so-called Madrid Outline Convention, within the national systems has certainly given an important impulse about the necessary awareness and development of the phenomenon and, in particular, about the sub-national demand of clearer rules. However, the national legal implementation continued to be lacking and the Madrid Convention has shown all its legal weakness as international instrument. In this sense, the state approach shows a “negative” involvement in territorial/transfrontier cooperation, instead of a proactive role in order to set down positive rules for cross-border relations of regional and local authorities¹⁷.

2.2. *The constant presence of the State*

Until this point, two factors concerning the development of territorial cooperation in Europe have been highlighted: the expansion of transfrontier relations between sub-national authorities as a material phenomenon and the delay regarding the adoption of specific national regulatory measures for these phenomena. However, within this context, sub-national authorities aspiring to develop territorial cooperation are required to observe specific legal principles in order to be formally legitimized in their actions, namely: the field of their competences, the national law and the international obligations of the State¹⁸. Of course, as far as different solutions

17 V. COCUCCI, *Nuove forme di cooperazione territoriale transfrontaliera: il Gruppo Europeo di Cooperazione Territoriale*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2008, p. 895, affirms that national governments traditionally had difficulties in accepting forms of transfrontier cooperation, even if they were aware of their opportunity. In particular, it seems that States in some ways had fear of the involvement of sub-national communities in foreign activities.

18 C. FERNÁNDEZ DE CASADEVANTE ROMANI, *L'aménagement par l'État de la coopération transfrontalière des collectivités territoriales*, cit. p. 16.

are available, the necessary involvement of national legal details generates different forms of cooperation in each single case, but, in general, the above-mentioned three elements remain a kind of constant and stable presence. This is valid both for the past activities as well as for the most current forms of territorial cooperation¹⁹.

As far as the respect of sub-national competences and national international obligations are, at least from a formal point of view, quite linear to be individuated, the necessity to respect the national law seems a more fluctuant concept. In particular, since the lack of a well determined legal framework within the national systems is almost constant, the national ratification of international treaties or the implementation of Community law represent the basic device for the establishment of specific references for territorial cooperation. But, within this scenery, also the entire national legal systems need to be taken into consideration as legal obligation to build up territorial cooperation. In this sense, the dynamics with the single domestic legal orders could be really complex and reaching legal uniformity in this field is a difficult (if not impossible) challenge due to such a tight link with the national legislations²⁰. The application of national legislations, in particular, is involved when transfrontier cooperation is managed through structures with own legal personality and legal capacity. In this regard, it is possible to speak about a necessary “conformity with the national legal order” concerned, which has to be observed by the public entities involved in transfrontier activities or, more precisely, in transfrontier structures with other foreign entities.

In order to open a point of discussion, it is possible to wonder whether such conformity could be considered as a sort of “explicit consent of central authorities”²¹ or whether the concepts of “conformity” and “consent” are somehow different in nature. Namely, the term “consent”, or consensus, reminds to the idea of an explicit authorization that shall come from a certain central governmental authority in order to allow sub-national entities to carry on territorial cooperation. Instead, the concept

19 It is maybe superfluous to remark that we are dealing with official forms of territorial cooperation, because the development of informal or unofficial activities do not require, intrinsically, specific legal frameworks.

20 See J.M. PÉREZ MEDINA, *El Estado y la cooperación transfronteriza*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, Bruxelles, 2008, p. 46.

21 *Ibid.*, p. 31. The author affirms: “La coopération transfrontalière des collectivités territoriales n'est possible qu'avec le consentement de l'Etat; consentement manifesté par établissement de règles spécifiques de Droit International et de Droit national.

of “conformity” with the legal order represents an implicit requisite or condition, which doesn't need a positive or discretionary approval, but generally complies with the system of the national legislation in general terms without creating legal conflicts. Apart from being an interesting theoretical digression, the mentioned issue has some practical repercussions in relation to the practice of territorial cooperation. In fact, it is radically different for local and regional authorities to wait for a governmental authorization or to act somehow autonomously, according to the respective national legal order and within the framework of the constitutional system. In regard to this, a relevant distinction occurs between international law and Community law. Namely, whereas the first implies for sure the active role of the States, the second could have direct legal effects, mainly in the case of Regulations. The Italian Constitutional Court has clearly explained this difference in its judgement No 258/2004, affirming that the legal source legitimizing the creation of a transfrontier structure – namely the EC Regulations related to the ERDF – were sufficient in order not to violate the competences of the State²². Within this scenery, an agreement between foreign territorial communities was justified on the basis of Community law, thus, not bounded to the national law²³ which ratified the Madrid Outline Convention on transfrontier cooperation and which required a previous governmental consensus.

As a partial conclusion, it is now possible to affirm that the setting up of territorial cooperation knows the existence of both the above mentioned concepts – the state consensus and the conformity with the legal order – but they do not necessarily coexist, although they can cohabit. Namely, the conformity with the legal order, quite banally, is a constant requisite for sub-national authorities to observe, as it happens for every legal subject within a legal system in order to act validly. The consent or approval of the State is a more complex matter. It deals both with a form of express authorization to create transfrontier relations among sub-national communities or with a non-explicit or tacit form of permission as a kind of approval

22 For a better explanation of the issue, see L. SOVERINO, *I servizi pubblici nell'Euroregione: nuove prospettive di diritto comunitario per la cooperazione transfrontaliera, tra Consiglio d'Europa e potere estero delle Regioni (a proposito del Regolamento CE 1082/2006)*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2009, p. 56-59.

23 In particular, Art. 5, law 19 November 1985, n. 948 that foresees a necessary previous agreement between the Government and the sub-national authorities in order to set up transfrontier cooperation with correspondent foreign entities.

in relation to the specific norms of the case²⁴. At the very end, the two concepts intend to reach the same objective, which is the guarantee of the national legal order and the national sovereignty. However, it seems that there could be a subtle, but substantial difference. In fact, the formal and explicit approval is an act of the central government in order to allow sub-national authorities to develop territorial cooperation. This act is directed to safeguard the prerogative of the State, considered from the point of view of the central authority. The tacit consent is, on the contrary, a form of supervision, which is related to the conformity with the legal order and tends to guarantee the coherence of the national legal system in its complexity. Namely, it tends to safeguard the existence of a certain degree of pluralism, even with regard to the territorial composition of the State concerned. In particular, the existence of an “implied” consent from the State represents a peculiar form of tolerance towards sub-national transfrontier activities that are not considered as dangerous from the point of view of the general national interest. And maybe this kind of tolerance has been in the past one of the main factors contributing to the development of territorial cooperation in the absence of specific national measures.

3. The development of Euroregions

3.1. *The “non-legal” definition*

Due to the original lack of general legal frameworks about territorial cooperation, the need to establish regional or local relations between foreign partners brought to the expansion of the so-called “Euroregions”. The most important common characteristic of these forms of cooperation is not the procedure or the modalities for cooperation, but the cooperation itself. In a very simple and banal way, the Euroregion identifies a region, a portion of European territory, which is extended

24 In order to give an example, Art. 4, par. 3 of the EGTC Regulation affirms: “[...] the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of such Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval.” In this provision, the consent of the State seems to be a little different from an authorization, being it not conditioned by a degree of discretion. Namely, the control of conformity with the applicable rules implies, in our opinion, an objective evaluation and, in a positive case, a subsequent obliged approval.

across national borders. The “Euroregion” or “Euregio” cannot be qualified as a classified or codified instrument for territorial/transfrontier cooperation between sub-national authorities. With other words, the Euroregion does not represent a standard model or a defined procedure as such. So, why to take this experience into consideration in this chapter, which is dealing with the instruments of transfrontier cooperation?

The answers to this question are not univocal, but the main reason handles with the collective perception of the Euroregions as peculiar means for territorial cooperation. Namely, as far as these entities do not refer to a determinate model, it is well recognised that they represent useful means for developing transfrontier cooperation at sub-national level.

The terminology used to distinguish the existence of a transfrontier space is rather variegated. The concept of Euroregion is not substantially different from that of a working community²⁵. Sometimes they are treated as different structures, but there is not a strict criteria of legal identification. Normally, working communities cover a broader geographical area and deal with wider tasks²⁶. The same observation could be proposed for the comparison between Euroregions and the so-called Eurodistricts²⁷, which usually have a more economic connotation.

As we will observe, the number of Euroregions that have been created on the European territory, from the West to the East and from the North to the South, is

25 According to M. MASCIA, *Dalle comunità di lavoro interregionali al GECT: il caso Alpe Adria*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 150, the establishment of Euroregions has chronologically anticipated the constitution of working communities. As far as both the two structures have no uniform identifications, it is possible to say that there is not a substantial difference between the two concepts. However, in this regard, some peculiar observations highlight that while the Euroregions typically can be constituted with or without legal personality, working communities are usually organisations without legal personality.

26 See COMMITTEE OF THE REGIONS, *The Status quo of Transeuropean Co-operation between Territorial Authorities and the Future Steps that contribute to realise a New Model of European Governance*, cit. p. 78.

27 See C. RICO, *Handbook of Transfrontier Co-operation*, cit., p. 30-31. As the notion of *Eurodistricts* does not really have a legal definition and could be compared to some extent to the public-law Euroregions, a further concept defines the so-called *European districts* which have been established according to the French Law on Local freedoms and responsibilities of 13 August 2005. These structures are constituted “in the form of a 'mixed open syndicate' able to associate different types of territorial communities including intermunicipal consortia or any type of public institution set up for intermunicipal cooperation, and at the same time public-law entities such as chambers of commerce”. The peculiarity of this instrument resides in the fact that the headquarters shall necessary be based in France and that the majority of its members shall be French.

huge²⁸. Their adventure started at the end of the 50s and is lasting nowadays with the creation of the Euroregions of so-called second generation.

So far, no common or shared definition has been given to the Euroregions. Namely, they are set up with different structures, through different agreements and according with different laws or procedures. The non-existence of a general framework or model for the Euroregions is also related to the legal aspects concerning this issue. In fact, since no unique general description has been accepted, all the more no certain legal definition is available for the term “Euroregion”. Thus, Euroregions cannot be considered as standard-entities based on defined legal criteria.

Despite the lack of legal or general meaning, some common aspects or features of the Euroregions have been inductively listed. The technique at the basis of such a categorization is necessarily the inference from the analysis of the concrete praxis and reality of the existing Euroregions, since a general category doesn't exist. The most common features have been identified, thanks to the studies conducted by the Association of European Border Regions (AEBR), as follows: their formation is permanent, i.e. the Euroregions are not established for a limited period of time; their identity is distinct from the identity of the members²⁹; they have own administrative, technical and financial resources; they follow an internal decision-making process³⁰.

Due to the fact that, in any case, some common aspects exist, the Council of Europe proposes the definition of a Euroregion as “an organisation for transfrontier or interterritorial cooperation between territorial communities or authorities [...] with general responsibility for promoting, supporting and developing neighbourly relations between its members in their common area of responsibility [...]”³¹. Being extremely vague and at the same time restrictive, this definition doesn't provide any clarification to the concept. In order to avoid confusions and to highlight some basic

28 Some examples of Euroregions are the following: (between Germany and the Netherlands) Euregio (1958), Regio Rhein-Waal (1969), Regio Ems-Dollart (1978); (between Germany, Switzerland and France) Regio Basiliensis (1963); (between Germany and Czech Republic) Euroregion Egrensis (1991), Euroregion Elba (1992), Euroregion Erzgebirge-Krusne Hory (1992), Euroregion Bayerischer Wald/Sumava (1993); (between Germany and Poland) Euroregion Pomerania (1991), Euroregion Spree-Neisse-Bober (1992), Euroregion Pro Europa Viadrina (1993).

29 The term “identity” seems not to have a legal connotation. As we will see, the Euroregions have different structures and they do not necessarily have the legal personality. Thus, the distinct identity of the Euroregions with respect to their members gives the idea of a general connotation of the structure, as subjects with an own individuality.

30 See J. GABBE, V. VON MALKUS, K. MAHNKOPF, H. MARTINOS, *Institutional aspects of Cross-border Cooperation*, Gronau 1999, p. 9.

31 LR-CT (2004)15, p. 20.

concepts, the AEBR and the European Commission completed the already mentioned list of features by the individuation of the potential characteristics that delineates an Euroregion, from three different points of view, namely³²: organisation³³, method of working³⁴ and content of cross-border cooperation³⁵. In this regard, Euroregions develop transfrontier activities according to different structures and working-procedures.

From a strictly legal point of view, thus, a Euroregion can be set up according to the most various forms that have been developed for creating transfrontier activities and/or structures between sub-national authorities. Namely, they can be established without legal personality in form, for instance, of working communities, or with legal personality according to private or public law. The use of the term “Euroregion” confer to the organisation an explicit transfrontier connotation and a positive unifying idea. Therefore, Euroregions are just the result of the praxis of transfrontier cooperation in its various modalities. As transfrontier actors are also various, Euroregions are not necessarily composed by territorial communities, but also by European organisations, associations, chambers of commerce and

32 The chart was developed by the AEBR and the DG Regio. See ASSOCIATION OF EUROPEAN BORDER REGIONS AND EUROPEAN COMMISSION (ed.), *Practical Guide to Cross-border Co-operation*, 3rd edition by J. GABBE, V. VON MALKUS, K. MAHNKOPF, H. MARTINOS, Gronau, 2000.

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

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

35 Definition of fields of action according to joint interests (e.g. infrastructure, economy, culture); co-operation in all areas of life: living, work, leisure time, culture etc.; equal emphasis on social-cultural co-operation as on economic-infrastructure co-operation; implementation of treaties and agreements and concluded at European level between countries to achieve cross-border practice; advice, assistance and co-ordination of cross-border co-operation, particularly in the following fields: Economic development; Tourism and leisure; Transport and traffic Agricultural development; Regional development; Innovation and technology transfer; Environmental protection; Schools and education and nature conservation; Culture and sports Social co-operation; Health affairs Emergency services and disaster prevention; Energy; Waste disposal; Communications and Public security.

enterprises³⁶. In this sense, as it has been said at the beginning of the paragraph, they are not instruments, rather the result of transfrontier cooperation.

3.2. *The normative quality of Euroregions*

The historical analysis of the Euroregions measures the developments of cross-border cooperation, both from the normative and from the practical perspective. The first experience has been identified in the EUREGIO, created in 1958 across the German-Dutch border, involving almost 100 municipalities. As it has already been mentioned above, transfrontier cooperation between local and regional authorities has been established through different legal and non-legal forms, so that it is not possible to define a single model of Euroregion. In these terms, the evaluation of the normative quality of transfrontier regions shows all the legal implications concerning the establishment of sub-national cross-border relations and highlights the legal issues dealing with the Euroregions. And the main conclusion in this regard reveals the necessity to accept a third dimension between law and non-law³⁷. An explanation of the statement is the following.

The historical development of Euroregions shows that different structures have been created. The first agreements have been concluded as forms of partnership and aimed at the establishment of a mere coordination and consultation. The system of the so-called working communities that have been developed since the 70s, such as the *Arbeitsgemeinschaft Alpenländer (ARGE ALP)*, the *Arbeitsgemeinschaft Alpen-Adria*, the *Communauté de Travail des Alpes Occidentales (COTRAO)*, the *Comunidad de Trabajo de los Pirineos*, has been a reality without a particular legal framework. Moreover, these organisations were not entitled with legal personality. The main functions of these working communities were related to the possibility to create coordination in order to find some common solutions to strictly transfrontier issues, as disaster prevention, transports, protection of the natural resources, etc. In

36 B. WASSENBERG, *Vers une eurorégion? La coopération transfrontalière franco-germano-suisse dans l'espace rhénan de 1974 à 2000*, Bruxelles, 2007, p. 453. See also J. LANGER (ed.), *Euroregions: the Alps-Adriatic context. Symposium on cross-border cooperation in the territory between the Alps and the Adriatic Sea*, Frankfurt a/M, 2007; K. BÖTTGER, *Grenzüberschreitende Zusammenarbeit in Europa: Erfolge und Misserfolge der Kooperation am Beispiel der EUREGIO (Rhein-Ems-Ijssel), der Euregio Maas-Rhein und der Euroregion Neisse-Nisa-Nysa*, Tübingen, 2006.

37 W. LANG, *Die normative Qualität grenzüberschreitender Regionen zum Begriff der "soft insitution"*, in *Archiv des Völkerrechts*, Band 27, Nr. 3, 1989, p. 280.

general, it is possible to say that there is no substantial legal difference between the organisations established as “Euroregion” and the other working communities that are not identified with the same term. In fact, the organisational structure is, more or less, the same and it is generally composed of an assembly of the members, thematic commissions, working groups and a turning presidency³⁸.

The subsequent historical evolution of the Euroregions was more dealing with the issues concerned to their legal configuration, such as the role of international law, the (eventual) necessity of a covering inter-state agreement and the provisions established by the international and supranational organisations, both Council of Europe and the European Community. The concrete development of these transfrontier structures grew the attention on the legal instruments available for cross-border cooperation and to the competences of sub-national authorities to create *ad hoc* structures.

Of course, what can be considered the “hardest” form of transfrontier cooperation is the establishment of a transfrontier entity with legal personality and legal capacity. This step implies a complex evaluation on different kind of rules and on their interaction: namely, the law applicable to the agreement and the rules governing the everyday-functioning of the structure.

From the working partnership to the establishment of a legal entity, the difference is of substantial relevance with reference to the legal implications. In fact, whereas an agreement on the exclusive ground of partnership is situated in the space of the non-law, a binding agreement – an inter-state agreement as well as an agreement between sub-national authorities – is legally enforceable. However, despite the evolutions about their legal quality and about the legitimacy of territorial communities to get involved, Euroregions maintain the role of “soft institutions”³⁹. Whichever normative quality they have and whichever law legitimates their action, their role is collocated in a kind of limbo between the law and the non-law, namely the institutional soft-law.

38 See W. FERRARA, *Le Euroregioni*, in *Progetti transfrontalieri per città gemelle e per città mondiali*, Anno VII, N. 3-4, Dicembre 1998, p. 1, available at <http://www.isig.it>; see also the paper by J.L. ARNAUD, *Cross-border and transnational cooperation: the new Europe is inventing itself in its margins*, Paris, 2002.

39 *Ibid.*, p. 284-285.

4. International instruments

4.1. Public international instruments before the 1980

As already remembered, the Council of Europe adopted the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities in Madrid on the 21st May 1980. Before the agreement on this document, which represents the first attempt to find a legal homogeneous tool for transfrontier cooperation in Europe, traditional international law has been used in the form of treaties between States in order to regulate single cases of cooperation across a common frontier. This kind of legal instruments, however, seemed not to satisfy the challenges drawn by the transfrontier matters concerned. In this regard, the analysis proposed by C. Ricq is particularly clear and it is worth to be quoted.

Namely, “States accordingly undertake by an international agreement – i.e. between States – to recognise that, under their domestic legal system, their frontier communities are empowered to conduct relations directly, but always under their auspices, and conclude legal transactions, with their approval, with frontier communities located on the territory of another signatory State. The agreements in question thus seek to promote a redistribution of powers in public international relations between central government and transfrontier communities, rather than to develop new mechanisms of inter-state cooperation. This objective does not yet seem to have been achieved by existing agreements”⁴⁰.

A peculiar characteristic of this kind of international treaties is the variability and flexibility, depending on the frontier involved and on the matters concerned. As the use of international law in the form of treaties or intergovernmental commissions represents a still current instrument, existing in parallel with other developing tools of cooperation, it shows the inadequacy of the state diplomacy to answer to the aspirations and challenges of the transfrontier territories⁴¹.

40 C. RICQ, *Handbook of Transfrontier Co-operation*, cit., p. 49. By the way, the Author lists a series of transfrontier structures created before 1980 with international agreements, namely: Oresund Council, Sarlorlux, North-Calotte Council, Euregio (the precursor of AEBR), Maas-Rhine Euregio, Ems-Dollart Region, Rhine-Waal Euregio, Regio Basiliensis, Comité régional franco-genevois, Arge-Alp, Alpe-Adria, Cotrao.

41 See N. WISMER, *Les modalités d'intervention de l'Etat dans la coopération transfrontalière*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, Bruxelles, 2008, p. 88.

4.2. *The system of the Madrid Outline Convention (MOC)*

As already said, the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, commonly known as Madrid Outline Convention (MOC)⁴², was adopted in 1980 and entered into force on the 22nd December 1981. Out of 47 Member States of the CoE, the Convention has been ratified by and has entered into force in 36 countries⁴³. The MOC is composed by 12 articles and its main aims are specified in Article 1, which recites: “Each Contracting Party undertakes to *facilitate* and *foster* transfrontier cooperation between territorial communities or authorities within its jurisdiction and territorial communities or authorities within the jurisdiction of other Contracting Parties. It *shall endeavour to promote* the conclusion of any *agreements and arrangements* that may prove necessary for this purpose with due regard to the different constitutional provisions of each Party”⁴⁴. As it is quite clear, the intention of this international document is that of promoting and trying to support transfrontier cooperation according to the national constitutional structures⁴⁵, rather than to create any kind of right for sub-national territorial communities or authorities. However, it is worth to remember that the text of the Convention was approved after a debate that lasted several years within the CoE, as the Explanatory Report to the Convention clearly points out⁴⁶. An interesting aspect within such a debate was the feel of the necessity

42 CETS No. 106.

43 At the time of writing, Iceland and Malta have signed the Convention, but have not ratified it yet. Andorra, Cyprus, Estonia, Greece, Montenegro, San Marino, Serbia, the FYROM and United Kingdom have not signed the Convention. Data available at:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.aspNT=106&CM=7&DF=5/29/2009&CL=EN>
G.

44 *Italic is ours*. The official version regarding the aims of the adoption of the MOC affirms that “[t]he Convention is intended to encourage and facilitate the conclusion of cross-border agreements between local and regional authorities within the scope of their respective powers. Such agreements may cover regional development, environmental protection, the improvement of public services, etc., and may include the setting up of transfrontier associations or consortia of local authorities. To allow for variations in the legal and constitutional systems in the Council of Europe's member States, the Convention sets out a range of model agreements to enable both local and regional authorities as well as States to place transfrontier co-operation in the context best suited to their needs. Under the Convention, Parties undertake to seek ways of eliminating obstacles to transfrontier co-operation and to grant to authorities engaging in international co-operation the facilities they would enjoy in a purely national context.”, see at: <http://conventions.coe.int/Treaty/en/Summaries/Html/106.htm>.

45 The Explanatory Report suggests to consider this provision as a tantamount to a “federal clause”.

46 The Explanatory Report to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities is published at the webpage:

<http://conventions.coe.int/Treaty/en/Reports/Html/106.htm>. Some important documents that anticipated the intention and the need to adopt a legal framework for transfrontier cooperation between sub-national territorial subjects are: Recommendation 470(1966) on European co-operation between local authorities, Resolution 8(1974) on co-operation between local communities in frontier

to introduce some changes within the national legislations “as were necessary to remove any obstacles to transfrontier cooperation between local authorities” and to “provide local authorities with the instruments appropriate for transfrontier cooperation”⁴⁷. With regard to the adoption of this document, it is important to note that its signature and subsequent entry into force happened some years before the adoption of the European Charter of Local Self-Government, adopted in 1985, which also provides at Article 10, paragraph 3 the right for local authorities to association with foreign counterparts. However, the political and legal involvement of the Charter about the necessary recognition and implementation of the principle of local self-government seems to skip with regard to the development of transfrontier cooperation, thus, leaving the issue to the previous Madrid Convention.

It is well known and recognized that the MOC doesn't introduce a new experience within the panorama of transfrontier relations, but tries to legitimate and institutionalize a consolidated phenomenon⁴⁸. As many academic contributions and public debates demonstrate, the above-mentioned aims have been only partially satisfied with the adoption of the MOC. If the existence of a common legal instrument for transfrontier cooperation between sub-national entities appeared to be a first and new goal, the legal outcome and the content of the Convention are weak. According to N. Levrat, what he calls a “*relative faiblesse juridique*” is a typical attitude of the CoE's international legal instruments⁴⁹. Namely, the text of the MOC clearly shows the possibility for States to add some reserves or statements in relation

areas, Recommendations 784 (1976) and 802 (1977), Resolution 90 (1977). Another interesting remark in the Explanatory Report is the attention to the Opinion No. 96 (1979) on the draft European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities. In this document, which enthusiastically anticipated the adoption of the MOC, it is affirmed that the Convention itself “might afford a basis for a new doctrine of international law governing neighbourly relations across frontiers and the division of responsibilities among local authorities”. See also E. DECAUX, *La Convention-cadre européenne sur la coopération transfrontalière des collectivités ou des autotités locales*, in *Revue générale de droit international public*, 88/3, 1984, p. 538-620.

47 See Resolution 8(1974).

48 See D. FLORENZANO, *L'autonomia regionale nella dimensione internazionale. Dalle Attività promozionali agli accordi ed alle intese*, cit., p. 67 et seq. and G. VEDOVATO, *Les relations transfrontalières dans la nouvelle Europe intégrée des régions*, in *Rivista di studi politici internazionali*, LXI, 4, ottobre-dicembre 1994, p. 580 et seq.

49 See N. LEVRAT, *L'émergence des instrument juridiques del la coopération transfrontière du Conseil de l'Europe*, in *La cooération transfrontalière*, Numéro thématique de *Annales de droit de Louvain*, 2004, vol. 64 n. 3, p. 367. The Author explains that “[c]ette relative 'faiblesse juridique' des instruments du Conseil de l'Europe se révèle dans des domaines nouveau, dont le potentialités évolutives et les conséquences juridiques ne sont pas encore clairement identifiées par les Etats, être un atout autorisant les autorités nationales à envisager des solutions novatrices dont les risques juridiques leur paraissent limités en raison précisément de la souplesse de l'engagement”.

to the adaptation of the Convention to each single legal order. The related effect is that transfrontier cooperation between sub-national territories is *quantitatively* and *qualitatively* under the choice of the States parties⁵⁰. In fact, the signatory States have the discretionary power to indicate which sub-national entities are entitled to put into practice transfrontier cooperation and also the eventual extension from the border of the territory concerned.

Article 2 of the Convention defines the concept of transfrontier cooperation as “any concerted action designed to reinforce and foster neighbourly relations between territorial communities or authorities within the jurisdiction of two or more Contracting Parties and the conclusion of any agreement or arrangement necessary for this purpose, according to the powers conferred to such authorities by domestic law”. First of all, such a provision highlights the presence of a so-called “protection clause” for the domestic legal orders of the Member States, as far as the respect of the internal attribution of competences to the sub-national authorities is necessarily required⁵¹. Moreover, the content of Art. 2, mainly with regard to the qualification of the actions and acts of the sub-national authorities, has no clear legal frame or outcome. In general terms, the Convention individuates two different forms of cooperation that do not really represent something new with regard to the past experiences. Namely, the “neighbourly relations” remind to a non-legally framed cooperation in form of consultations or exchanges of informations, while the “agreement or arrangement” seem to deal with the establishment of specific legal relations⁵². Actually, also the specification related to the two terms – agreement or arrangement – seems to be extremely vague and without a precise qualification of the legal nature concerning those instruments⁵³, which obtain a diverse connotation within each national act of ratification. Furthermore, it's not easy to comprehend if

50 A clear example of this kind of discretion is set down in Art. 2, par. 3, where each Contracting Party is entitled, at the time of signing the Convention or afterwards, to indicate the “communities, authorities or bodies, subjects and forms to which it intends to confine the scope of the Convention or which it intends to exclude from its scope”; a list of such declarations is available at: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.aspNT=106&CM=7&DF=6/3/2009&CL=ENG&VL=1>.

51 See A. FODELLA, M. PERTILE, G. AVOLIO, *Studio sulla creazione di nuove forme di cooperazione transfrontaliera a livello sub-statale per lo sviluppo sostenibile del territorio*, in AA.VV., *Strumenti giuridici della cooperazione per lo sviluppo sostenibile di un'area montana transfrontaliera. Atti del Convegno FAO, Roma 1 giugno 2005*, Bolzano, 2005, p. 79.

52 See the Explanatory Report, points 21-23.

53 See D. FLORENZANO, *Gli atti pattizi delle Regioni italiane nell'ambito delle attività di cooperazione transfrontaliera alla luce del rinnovato quadro costituzionale*, cit., p. 681.

these agreements and arrangements shall be signed between States or between territorial communities, although the official interpretation given in the Explanatory Report considers the agreements as matter of States and the arrangements as instruments for sub-national communities. Namely, according to Article 3, paragraph 1, “the Contracting Parties shall [...] encourage any initiative by territorial communities and authorities inspired by the outline arrangements between territorial communities and authorities drawn up in the Council of Europe. If they judge necessary they may take into consideration the bilateral or multilateral inter-state model agreements drawn up in the Council of Europe and designed to facilitate co-operation between territorial communities or authorities.” Following this statement, paragraph 3 of the same Article clarifies that “[i]f the Contracting Parties deem it necessary to conclude inter-state agreements, these may *inter alia* establish the context, forms and limits within which territorial communities or authorities concerned with transfrontier cooperation may act. Each agreement may also stipulate the authorities or bodies to which it applies”.

Although apparently redundant, such a literal transcription of some salient extracts of the MOC is quite useful in order to have a clear and visible acknowledgement of the style and standard of the Convention.

Advancing some general comments about the Convention, one of the most relevant provisions, which discovers the weak legal nature of the Convention in the perspective of sub-national authorities, concerns the possibility for States to define the frame of cooperation with inter-state agreements covering the content of future actions and relations between local and regional communities. Such a discretionary power is able to eliminate *a priori* the creation of a peculiar right for sub-national entities to engage in cooperation with some degree of autonomy.

Furthermore, although the Convention itself doesn't directly deal with the legal aspects at national level, it provides, without having a binding value, for some models of inter-state agreements on transfrontier cooperation at local and regional level and outline agreements, statutes and contracts as optional and potential basis for transfrontier cooperation between territorial authorities or communities⁵⁴.

54 The Explanatory Report, at point 12, underlines that “[t]he graduated system of models and outlines appended to the Convention (out not forming an integral part thereof) is designed to provide states on the one hand, and territorial communities on the other, with a choice of forms of co-operation best suited to their problems. Accordingly, the Convention does not preclude either the use of different

As a general observation about the MOC, it is possible to affirm that its clearest and most definite legal outcome regards the intention to safeguard the national constitutional structures of the States Parties and their unconditioned sovereignty, being the transfrontier cooperation between sub-national authorities mainly subject to national law⁵⁵.

As already remembered, the Convention does not substitute other available legal instruments or solutions for transfrontier cooperation, but represents an optional and eventual tool for sub-national authorities. However, since its legal value could be considered as quite weak, some important results have, been achieved. Namely, the MOC has had, and still has, the political value to have approached for the first time the phenomenon of transfrontier cooperation between sub-national entities from a unitary legal point of view. Despite all its vagueness and legal weakness, the Convention pretends anyway to represent a common juridical system. The consequent effect is a legal document with less juridical power, but with some political involvements which are mainly focused in two directions. On the one hand, it explicitly treats the phenomenon of transfrontier cooperation as a single unique matter for the first time, instead of considering isolated specific experiences as it was before. On the other hand, the MOC underlines that such a phenomenon needs a general legal approach and a standard model. Between the words, this was a kind of tacit admissions that the national approaches were not adequate as such, but were in the need of some new and innovative shared solutions⁵⁶.

More in general, the Convention inaugurates what could be conceived as a “system” for a general legal approach to transfrontier cooperation. Namely, the attempt to settle this phenomenon according to juridical parameters is faced through

forms of agreements or the adaptation of the appended models to each specific case of transfrontier co-operation. Moreover, as may be seen from Article 3, paragraph 1, and Article 8, further model and arrangements between territorial communities or authorities may be drawn up within the Council of Europe.”

55 See P. GAUTIER, *La nature juridique des conventions de coopération transfrontalière entre autorités régionales ou locales relevantes d'Etats différentes*, in *La coopération transfrontalière*, Numéro thématique de *Annales de droit de Louvain*, 2004, vol. 64 n. 3, p. 408.

56 N. LEVRAT, *L'émergence des instrument juridiques del la coopération transfrontière du Conseil de l'Europe*, cit., p. 371, explains that “[...] l'existence de cette Convention va permettre un 'normalisation' du phénomène, qui sortira de la marginalité pour afficher d'apparentes réalisation institutionnelles [...]. Ces réalisations institutionnelles montrent une acceptation politique, notamment par les ministères des Affaires étrangères des Etats concernés, de la réalité du phénomène des relations transfrontalières; mais les structures mises sur pieds voient leur capacité d'action très fortement limitée, en raison de l'absence de cadre juridique préalablement défini dans lequel elles pourraient s'inscrire.”

a (more or less) complex and necessary interaction between international and national law.

4.3. The implementation of the Madrid Outline Convention in the national perspectives: a failed attempt to find uniformity?

Article 4 of the MOC encourages the States Parties to adapt their national legislations in order to facilitate territorial communities or authorities to set up transfrontier relations⁵⁷.

More than this, the principal aim of the MOC was that of creating a standard legal framework for these sub-national relations. The consequent and successive challenge was the intention to pursue a certain degree of legal uniformity within the States' legislative provisions in this field. But, despite the appreciable attempt, the plans didn't reach the expected results in this sense. Namely the Convention, trying to protect as much as possible the principle of national sovereignty, leaves to the Contracting Parties a really wide space for the free interpretation of some crucial provisions entailed in the document and allows a high level of discretion about the subsequent normative implementation in the national contexts as well. In this regard, insofar as one of the main problems was the definition of suitable legal instruments for sub-national institutional subjects, the 1980's document didn't create fruitful conditions for the establishment of transfrontier structures under public law⁵⁸. In fact, national authorities generated some difficulties for territorial communities aiming to take part in cross-border permanent structures and were more open to the possibility concerning the conclusion of temporary projects.

Moreover, confirming the discretionary approach of the national Contracting Parties, several examples demonstrate how States, in the very first phase of application of the Convention, preferred to keep control over the acts of territorial

57 Art. 4 recites: "Each Contracting Parties shall endeavour to resolve any legal, administrative or technical difficulties liable to hamper the development and smooth running of transfrontier cooperation and shall consult with the other Contracting Party or Parties to the extent required".

58 See J. GABBE, *Legal status of cross-border co-operation structures – past, present and prospects*, Gronau, 2006, p. 4: "The main reason is that the Madrid Outline Convention leaves the states much room for interpretation while implementing the Convention through bilateral/trilateral agreements, e.g. as regards the respective provisions on the location, majority situation, management and the tasks. This, in turn, clearly indicates that the Madrid Outline Convention can't create uniform legal conditions for the regional / local partners of a state or on both sides of the border".

communities. Namely, among others, Spain⁵⁹, France⁶⁰, Italy⁶¹ and Belgium⁶², required a covering inter-state agreement as a preliminary condition before setting up transfrontier cooperation between sub-national communities or authorities, according to the provisions of MOC. However, this kind of reserve has not been embraced by all the States parties to the Convention. In particular, it is interesting to notice how sometimes the state approaches changed during the years. In fact, in some cases, like for Belgium and France⁶³, the reserve about the previous inter-state agreement has been withdrawn and the application of the MOC continued without reserves. Thus, it is possible to formulate the following considerations.

The easiest way to comprehend the imperative state predominance in implementing the content of the MOC is precisely the provision concerning an express reserve about the possibility to condition the establishment of cooperation to a previous inter-state agreement. But this is not the only element. Namely, as it has been mentioned, not every Contracting Party proposed this kind of reserve and, in other cases, the reserve has been abandoned. Thus, the MOC is often applied without reserve of the inter-state agreement⁶⁴. However, even in such cases the discretion of State Parties are preserved by the international nature of the Convention and by its soft legal content. In fact, although not specified through international agreements, the implementation of transfrontier cooperation between sub-national authorities is strictly shaped by national legal orders and the respective national procedures. To mention an example, Austria ratified the MOC without the reserve of a previous agreement between States⁶⁵. Moreover, the Austrian Constitution allows the *Länder*,

59 Spain ratified the Madrid Outline Convention with the law of 16 October 1990. In two occasions Spain made some reserves to the application of the Convention, the first about the subordination to previous inter-state agreements and the second about the necessary express approval of the government.

60 France ratified the MOC with the L. n. 83-1131 of 23 December 1983.

61 Italy ratified the MOC with the law of 19 November 1994, no. 948. The Italian Government, referring to paragraph 2 of Article 3 of the Convention, declared that its application shall be subject to the conclusion of inter-state agreements. See:

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.aspNT=106&CM=7&DF=6/5/2009&CL=ENG&VL=1>.

62 Belgium ratified the MOC on 6 April 1987 with the express reserve of a previous inter-state agreement; the reserve has been removed since 11 December 2002.

63 See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Report on the current state of the administrative and legal framework of transfrontier co-operation in Europe*, Council of Europe, 2006, p. 65.

64 Austria, Germany, Switzerland, the Netherlands, Bulgaria and other countries didn't provide for specific reserves or declarations.

65 The Austrian ratification of the MOC is dated 18 October 1982.

within the limits of their respective competences, to conclude treaties with other States or sub-national entities⁶⁶. However, the national law requires, for any agreement including of transfrontier cooperation, an approval from the Federal Government⁶⁷.

In this sense, the implementation of the MOC remains concretely bounded to the national procedures concerning the exercise of sub-national foreign power and no radical differences are perceivable with regard to the implementation of the Convention in composed or non-composed countries. Moreover, two types of State control are potentially practicable: an *ex ante*-control and an *ex post*-control⁶⁸. The first one usually takes the form of a governmental supervision on the correct exercise of the attributed competences of sub-national entities or, in other cases, it consists in the explicit reserve of authorisation concerning the opportunity/legitimacy of transfrontier relations as undertaken by regional or local authorities. The *ex post*-control, which doesn't necessarily presume a previous explicit authorisation, is, potentially, determined to cease with a judiciary check of legitimacy⁶⁹. Again, the dichotomy between the State-approval and the conformity with the national legal

66 See Art. 15, 16 and 116 of the Austrian Constitution.

67 "In particular, the Federal Government must be informed before negotiations begin, and the authorisation must be signed by the President of the Republic, following a recommendation from the *Land* Government, and counter-signed by the *Landeshauptmann* (president of the *Land*). Approval may also be tacit. Any treaty concluded under this procedure must be revoked if the Federal Government so requests. The *Länder* feel that such a complicated procedure somewhat limits their ability to enter into transfrontier cooperation agreements." Moreover, it is quite peculiar to observe how this kind of internal proceeding has detracted Austrian regional authorities from using it for transfrontier relations' scopes. Namely, "[t]he Austrian *Länder* have not yet concluded one agreement on the basis of Art. 16 of the Federal Constitution. The Austrian *Länder* normally conclude 'agreements' which are legally not binding with neighbouring regions. Transfrontier cooperation of the Austrian *Länder* normally falls under Art. 17 of the Federal Constitution (competences of the *Länder* as holders of civil rights)." See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Report on the current state of the administrative and legal framework of transfrontier co-operation in Europe*, cit., p. 33.

68 See L. MALO, *Le contrôle administratif de la coopération transfrontalière*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, Bruxelles, 2008, p. 131-156, and M. AUDIT, *Le contrôle juridictionnel de la coopération transfrontalière*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, cit., p. 157-166.

69 With regard to the jurisdictional control, it is worth to remember that it should not concern issues related to the States' prerogatives about the international affairs. Namely, as it has already been underlined, the foreign relations of sub-national authorities related to cross-border cooperation do not refer to the international relations of States. Rather, this kind of jurisdictional control deals with the respect of the matters in which the sub-national authorities have an attributed competence that can be also projected in the transfrontier field. See M. AUDIT, *Le contrôle juridictionnel de la coopération transfrontalière*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, cit., p. 162.

order seems to mark the difference between the first and the second modality of supervision. In these terms, the control about the competence/legitimacy of sub-national authorities about the establishment of transfrontier relations for cooperation is not a matter of international law, rather a mere internal question⁷⁰. Namely, it is about the external/foreign projection of an internal/national competence and the related control should be limited to the verification of such a compatibility.

4.4. The Additional Protocol to the Madrid Outline Convention

The content of the MOC revealed quite soon its incompleteness and its scarce contribution in regard to the operative development of effective transfrontier relations between sub-national entities. In particular, these authorities didn't obtain an enforceable recognition of competence by their respective States to set up transfrontier cooperation's agreements and, additionally, the structures of transfrontier nature didn't find a clear legal framework⁷¹.

The Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities⁷² (hereinafter referred to as the "Additional Protocol") was signed on the 9th of November 1995 and entered into force in December 1998⁷³. This document considers the necessity to adapt and supplement the MOC, as it is clearly affirmed in the Preamble. Namely, it has been patently noticed that the local and regional authorities hadn't find in the Convention a legal opportunity in their respective States⁷⁴, even if some States signed bilateral agreements in order to put transfrontier cooperation into practice or implemented the MOC within the national legal system. But, as the Explanatory Report to the Additional Protocol affirms, "[i]t [was] nevertheless useful to add to the Convention

⁷⁰ *Ibid.*, p. 163.

⁷¹ See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Report on the current state of the administrative and legal framework of transfrontier co-operation in Europe*, cit., p. 9. See also the study undertaken by the Select Committee of Experts on Transfrontier Co-operation LR-R-CT (91)2.

⁷² CETS No. 159.

⁷³ The Additional Protocol has not been signed by the following States: Andorra, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Lichtenstein, Malta, Montenegro, Norway, Poland, San Marino, Serbia, Spain, FYROM, Turkey, and United Kingdom. Following States signed it, but haven't ratified it yet: Belgium, Georgia, Iceland, Italy, Portugal and Romania.

⁷⁴ See Standing Conference of Local and Regional Authorities of Europe (CLRAE), Resolution 227(1991).

a protocol describing legal instruments proven by experience, unifying the fundamental principles of transfrontier cooperation among territorial communities or authorities and suggesting appropriate solutions to the Contracting Parties.”⁷⁵

In order to face the mentioned problems, the Additional Protocol introduced a supplementary framework aiming at creating a common reference for transfrontier cooperation bodies established by sub-national authorities. Namely, the Additional Protocol recognises “under certain conditions, the right of territorial communities to conclude transfrontier cooperation agreements, the validity in domestic law of the acts and decisions made in the framework of a transfrontier cooperation agreement, and the legal corporate capacity (“legal personality”) of any cooperation body set up under such an agreement.”⁷⁶ According to this general aim, Article 1 recognises to the territorial communities or authorities, within the limits of their competences, an individual right to develop cross-border relation in the form of transfrontier cooperation's agreements⁷⁷. In these terms, sub-national authorities could on their own initiative and responsibility develop cross-border actions⁷⁸, even through the creation of structures with legal capacity, both of private or public law. The legal capacity is defined according to the national law where the transfrontier structure will have its headquarters⁷⁹. With other words, the Additional Protocol aims at defining the legal effects of acts performed within the framework of transfrontier cooperation and of the legal status of any cooperation bodies to be set up by transfrontier cooperation agreements.

75 See the Explanatory Report to the Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, available at: <http://conventions.coe.int/Treaty/en/reports/html/159.htm>. Among other issues, this Report underlines the lack of legal details from the MOC to the States' national laws in order to resolve problems, which were peculiar to the transfrontier cooperation, such as: the putting into effect of transfrontier cooperation between territorial communities or authorities within a public law framework; the legal force in the national law of each State of the measures taken in the context of transfrontier cooperation by territorial communities or authorities; the legal personality and public or private law status granted to any transfrontier co-operation bodies which may be set up by territorial communities or authorities.

76 See <http://conventions.coe.int/Treaty/en/Summaries/Html/159.htm>.

77 Art. 3 is also to keep in mind: “A transfrontier co-operation agreement concluded by territorial communities or authorities may set up a transfrontier co-operation body, which may or may not have legal personality. The agreement shall specify whether the body, with regard to the responsibilities assigned to it and to the provisions of national law, is to be considered a public or private law entity within the national legal systems to which the territorial communities or authorities concluding the agreement belong”.

78 See N. LEVRAT, *L'émergence des instrument juridiques de la coopération transfrontière du Conseil de l'Europe*, cit., p. 375.

79 Art. 4.

Since the Additional Protocol establishes some pragmatic solutions with reference to the possibility to build transfrontier cooperation structures at sub-national level, the concrete application of these dispositions doesn't eliminate several complexities regarding the law applicable to such structures and the following consequences. In fact, according to the analysis of N. Levrat, this Protocol creates a kind of dualistic effect, when providing that “[d]ecisions taken under a transfrontier cooperation agreement shall be implemented by territorial communities or authorities within their national legal system, in conformity with their national law” (Art. 2). Thus, territorial communities have to transpose the acts of a transfrontier body into the national system in order to give them a legal value. In these terms, however, it is possible to wonder about the nature of such an obligation⁸⁰.

Undoubtedly, the Additional Protocol shows a new perspective for territorial communities. Despite that, its practicability has found several obstacles, mainly due to the different praxis already established in transfrontier relations and, probably, due to its scarce attractiveness. Namely, the idea of creating a common framework is practically denied by the necessary connection to the transposition in the national legal systems of acts potentially adopted under a foreign law⁸¹, thus generating an excessive complexity of legal solutions⁸².

4.5. *The Second Protocol to the Madrid Outline Convention*

The Protocol No. 2 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning Inter-territorial co-operation⁸³ (hereinafter referred to as the “Second Protocol”), signed on the 5th of May 1998 and entered into force in February 2001⁸⁴, has a different aim. While the

80 See N. LEVRAT, *L'émergence des instrument juridiques de la coopération transfrontière du Conseil de l'Europe*, cit., p. 376.

81 Namely, this reference is to the national law of the State in which the transfrontier body has its headquarters.

82 See H. COMTE, N. LEVRAT, *Aux coutures de l'Europe. Defis et enjeux del la coopération transfrontalière*, cit., p. 19-20. In particular, “[...] les solutions juridiques offertes par ce Protocole additionel, si elles semblent opérationnelles et rationnelles – bien qu'en peu complexes – d'un point de vue strictement juridique, n'attirent guère les décideurs, notamment dans la mesure où elles rompent l'égalité juridique entre les parties, contraignant l'une ou certaines d'entre elles à agir dans un environnement juridique étranger, qui se trouve être celui du co-contractant”.

83 CETS No. 169.

84 The Second Protocol has been signed by following States: Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, France, Germany, Lithuania, Luxembourg, Moldova, Monaco,

Additional Protocol deals with the strengthening of the territorial communities to set up transfrontier agreements and with the legal nature of the respective structures, the Second Protocol intends to expand the geographical context defined by the MOC. Since the Convention refers to transfrontier cooperation as a relation between adjacent neighbouring communities, the Second Protocol extends this sphere of application. Namely, the meaning of “inter-territorial cooperation” refers to authorities, which do not necessarily share a common border, as a more advanced form of transfrontier cooperation⁸⁵. According to this new shape of territorial relations, the principles, dispositions and limits entailed in the MOC and in the Additional Protocol on transfrontier cooperation shall apply, *mutatis mutandis*⁸⁶, even in the frame of inter-territorial cooperation, namely between non-adjacent territorial communities⁸⁷. As the substantial legal guidelines remain unchanged with respect to the MOC and the Additional Protocol, the new approach to inter-territorial cooperation enlarges the spectrum of the official recognition of another form of cross-border cooperation, which actually has specific peculiarities. From a formal point of view, the Second Protocol doesn't expand the range of powers for territorial communities or authorities, nor it confers a clearer legal framework. Thus, the core of the legal framework established by the MOC remains the same⁸⁸. However, the Second Protocol contributes to broaden and to legitimize, even conceptually, the field

Netherlands, Russia, Slovakia, Slovenia, Sweden, Switzerland and Ukraine. Following States signed it, but haven't ratified it yet: Belgium, Georgia, Iceland, Portugal and Romania.

85 In this regard a fundamental document inspiring the Second Protocol was the Vienna Declaration of 1993 of the heads of State and government of the member States of the Council of Europe, adopted on the 9th October 1993.

86 In particular, Art. 1 reminds that signatory States shall recognise territorial communities or authorities the right “to engage in discussions and to draw up, within common fields of responsibility, interterritorial co-operation agreements, in accordance with the procedures laid down in their statutes, in conformity with national law and insofar as such agreements are in keeping with the Contracting Party's international commitments. An interterritorial co-operation agreement shall entail only the responsibilities of the territorial communities or authorities which have concluded it.”

87 See Art. 1-5 of the Second Protocol. As the Explanatory Report to the Second Protocol (points 7 and 8) points out that “[r]elations between territorial communities across national borders have been so dynamic that agreements have emerged between geographically remote authorities. Such inter-regional agreements have been drawn up, for instance, between Spain, France, Italy and Belgium in connection with high-tech economic development poles. Many twinning agreements between towns or regions are in fact advanced co-operation agreements covering fields which have traditionally been excluded from conventional twinning arrangements. Such contacts between territorial communities are bound to undergo considerable expansion in the future. Therefore, the question is whether such schemes should remain without a legal framework at the international level or whether they should be placed from the outset into a well-known, tried and tested framework.”

88 See N. LEVRAT, *L'émergence des instrument juridiques de la coopération transfrontière du Conseil de l'Europe*, cit., p. 378. See also, U. BEYERLIN, *Rechtsprobleme des lokalen Grenzüberschreitenden Zusammenarbeit*, Berlin, 1988, p. 118 *et seq.*

and the definition of cross-border relations with reference to a given territory. Namely, if the traditional perception of territorial cooperation was mainly rooted in the classification of relations between adjacent territorial communities, the international recognition of inter-territorial cooperation opens new options for cooperation and for a new dynamic conception of territories that is not only focused on a contiguous space. In fact, transfrontier cooperation and inter-territorial cooperation entail some basic practical differences. While the first one is mainly based in the achievement of shared solutions to common questions, which do postulate the existence of a common border, the second one strives to give value to the activities concerned as such and to the intention of creating cooperation, rather than to consider it as a sort of due action because of the adjacency of the communities involved.

After this brief overview of the system of the Madrid Outline Convention, it is necessary to remind, as a general remark and as a kind of oxymoron, both its pioneering role and its legal vagueness. Of course, the Council of Europe is particularly proud of this legal framework. A measure to evaluate its effectiveness could be, in fact, the number of ratifications of the Convention and its Protocols. More complex is the evaluation of the effective implementation of the ratification-rules, even after almost thirty years from the adoption of the MOC. Namely, the system of the Convention is still facing several problematic issues within Member States, such as the nature of the agreement between territorial communities or the law applicable to the activities of a cross-border structure⁸⁹ and, in some cases, the eventual compliance with the national rules concerning the exercise of sub-national foreign powers. Another possible factor revealing the efficacy of the instruments under analysis could be the investigation about the number of transfrontier structures that have been created⁹⁰.

89 These issues have been pointed out by Auke van der Groot, (at that time) Ministry of the Interior and Kingdom Relations of the Netherlands and Chair of the Committee of Experts on Transfrontier Co-operation of the Council of Europe, during the International Seminar, *Legal Status of Cross-Border Cooperation (CBC) Structures, Towards a new European Convention on Groupings of Territorial Co-operation*, Vilnius, 4-6 December 2006; the report of the speech is available at: <https://wcd.coe.int/ViewDoc.jsp?id=1375217&Site=COE>.

90 *Ibid.*: “The enquiries done at the Council of Europe showed that while the legal framework was slowly put into practice – with legislation being amended or adopted with a view to making cross-border and interterritorial co-operation 'legal' – the other 'accompanying' measures take more time to be adopted. These may include the provision of technical assistance by a central state apparatus, the access to funds especially targeted to cross-border co-operation projects, the adoption of interstate

Anyway, while doubting about its nature of *hard law* or *soft law* document⁹¹, it is worth to underline that “the most relevant consequence of the Convention is that it brings transfrontier cooperation 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.”⁹²

4.6. *International treaties on the basis of the MOC*

The adoption of the Madrid Outline Convention has conditioned the subsequent conclusion of several treaties between States concerning transfrontier cooperation among sub-national communities in order to fix the context, the extent and the limits of cooperation between these territorial entities. The treaties are usually bilateral, but also a few multilateral agreements have been adopted. The most significant and most mentioned treaties are the following⁹³: the *BENELUX Convention* (September 1986); the *Isselburg-Anholt Agreement* between Germany and the Netherlands (May 1991); the *Bern Agreement* between Italy and Switzerland (February 1993); the *Rome Agreement* between France and Italy (November 1993); the *Vienna Agreement* between Italy and Austria (January 1993); the *Bayonne Agreement* between France and Spain (February 1995); the *Karlsruhe Agreement* between France, Germany, Luxembourg and Switzerland (January 1996); the *Mainz Agreement* between Germany and Belgium (June 1996); the *Brussels Agreement* between France and Belgium (September 2002); the *Valencia Agreement* between Spain and Portugal (October 2002).

agreements or an effective co-ordination between interstate committees, where they exist, and the initiatives taken at local level. One useful indicator of effectiveness may therefore be the number of cross-border co-operation bodies established by the territorial authorities of member states, not only by those that have ratified the Madrid Convention. Studies recently published on the 'Euroregions' created in such countries as Lithuania (and its neighbours), Slovakia (and its neighbours) and South Eastern Europe in general, show how 'Euroregions' have become popular in a relatively short period of time. There are approximately 90 Euroregions in Europe today – at least, Euroregions whose existence is known to the Council of Europe or to the Association of European Border Regions – and probably more if one takes into account those whose creation is not officially communicated to the Council of Europe – even if this communication has no legal consequences.”

91 See R. SEERDEN, *Publiekrechtelijke grensoverschrijdende samenwerking tussen decentrale overheden*, Maastricht, 1993, p. 45 *et seq.*

92 See F. PALERMO, J. WOELK, *Cross-Border Cooperation as an Indicator for Institutional Evolution of Autonomy: The Case of Trentino-South Tyrol*, in Z.A. SKURBATY (eds.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?*, cit., p. 283.

93 See C. RICO, *Handbook of Transfrontier Co-operation*, cit., p. 85-86.

Generally speaking, after the adoption of the MOC within the context of the Council of Europe, transfrontier cooperation between local and regional authorities tended to develop in the form of international treaties along that path, even if not legally well defined, in order to set down the rules to strength or to fix the basic principles for such kind of relations. Despite the existence of the MOC legal frameworks, some other “merely” inter-state agreements continued to be signed in order to foster cross-border relation without creating a new legal framework or an apposite field of action for territorial communities⁹⁴, rather to reinforce friendship and understandings between neighbouring countries⁹⁵, to approach common problems in specific fields⁹⁶, to create cross-border commissions to discuss frontier problems⁹⁷ or to develop regional planning⁹⁸.

Leaving apart these lastly mentioned inter-state agreements and returning to the treaties concerning local and regional authorities, it is worth to focus the attention on some peculiarities. In particular, the Vienna Agreement⁹⁹, the Bayonne Agreement¹⁰⁰, the Karlsruhe Agreement¹⁰¹, the Brussels Agreement¹⁰² and the

94 See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Report on the current state of the administrative and legal framework of transfrontier co-operation in Europe*, cit., p. 13-15.

95 Treaties between: Hungary and Romania (1996); Hungary and Slovak Republic (1995); Hungary and Slovenia (1992); Hungary and Ukraine (1991).

96 Agreements between: Slovenia and Austria concerning the prevention and mutual assistance in disasters and serious accidents (1996); Slovenia and Croatia on water management (1996); Austria and Hungary concerning employment in transfrontier areas (1997) and tourism (1989); Norway and Sweden on public health care (1993); Finland and Sweden about nuclear plants and nuclear events (1987).

97 Consultative commission between France and Switzerland related to problems of neighbourhood between the Canton of Geneva and the *départements* of Ain and the Haute-Savoie (1973). About the establishment of inter-state commissions see also C. FERNÁNDEZ DE CASADEVANTE ROMANI, *L'aménagement par l'État de la coopération transfrontalière des collectivités territoriales*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, cit., p. 5-8.

98 Most recent commissions for the development of regional planning within a determined frontier zone have been set up between Italy and Switzerland (1993); France and Spain (1994); Germany and Switzerland concerning the Upper-Rhine area (1996). See also the CoE's publication: *Managing old and new frontier of Europe: transfrontier co-operation in regional/spatial planning, local border traffic and impact assessment*, Transfrontier Cooperation Study Series, No. 7, 1998.

99 “*Accordo quadro tra la Repubblica Italiana e la Repubblica d'Austria sulla cooperazione transfrontaliera delle collettività territoriali*”, adopted in Vienna on 27 January 1993.

100 “*Traité entre la République française et le Royaume d'Espagne relatif à la coopération transfrontalière entre collectivités territoriales*”, adopted in Bayonne on 10 March 1995.

101 “*Accord entre le Gouvernement de la République française, le Gouvernement de la République fédérale d'Allemagne, le Gouvernement du Grand-Duché de Luxembourg et le Conseil fédérale Suisse agissant au nom de Cantons de Soleure, de Bâle-Ville, de Bâle-Campagne, d'Argovie et du Jura sur la coopération transfrontalière entre les collectivités territoriales et organismes publics locaux*”, adopted in Karlsruhe on 23 January 1996.

102 “*Accord entre le Gouvernement de la République française, d'une part, et le Gouvernement du Royaume de Belgique, le Gouvernement de la Communauté française, le Gouvernement de la Région*

Valencia Agreement¹⁰³ will be taken into consideration as paradigmatic examples. Their objective is, as well as for the other mentioned international agreements on the basis of the MOC, to facilitate and foster transfrontier cooperation between sub-national authorities, according to the domestic legal orders¹⁰⁴.

In these terms, the local and regional authorities are explicitly allowed to develop transfrontier activities, but, at the same time, no nationally generalized right to conclude cross-border agreements is established in favour of sub-national communities, thus denoting a clear regime of “juridical subordination” to the central authorities¹⁰⁵.

Some of the mentioned international agreements – in particular the cases of Germany, Spain, France, Switzerland, Portugal and Italy – refer specifically to the establishment of transfrontier cooperation between sub-national authorities, which are located along a common border. However, the requisite of proximity is not always foreseen – with reference to Belgium, Luxembourg and the Netherlands – as a necessary criterion¹⁰⁶. Nevertheless, only determined and listed regional and local authorities are allowed to get involved in transfrontier activities. In this sense, the international treaties do not apply on the whole territory of the States parties, but only to precise and identified areas (bordering or not-bordering to the respective foreign party), which means that other areas within the same country are excluded from the scope of these treaties¹⁰⁷. Therefore, such treaties do not introduce a general

wallonne et le Gouvernement flamand, d'autre part, sur la coopération transfrontalière entre les collectivités territoriales et organismes publics locaux”, adopted in Bruxelles on 16 septembre 2002. This treaty is quite peculiar respect to the others. Namely, parties to the accord are not only States, but also some Belgian Communities and Regions. Such a peculiarity is well entailed in the expression “*Traité mixte*”, which indicates, according to Belgian law, the presence of the federal entities as well as the federal central authority. See Y. LEJEUNE, *Vers un droit européen de la coopération transfrontalière*, in *La coopération transfrontalière*, Numéro thématique de *Annales de droit de Louvain*, 2004, vol. 64 n. 3, p. 356.

103 “*Tratado entre el Reino de España y la República Portuguesa sobre la cooperación transfronteriza entre entidades e instancias territoriales*”, adopted in Valencia on 3 October 2002.

104 See P. GAUTIER, *La nature juridique des conventions de coopération transfrontalière entre autorités régionales ou locales relevantes d'Etats différents*, in *La coopération transfrontalière*, Numéro thématique de *Annales de droit de Louvain*, cit., p. 397-418.

105 See Y. LEJEUNE, *Vers un droit européen de la coopération transfrontalière*, in *La coopération transfrontalière*, Numéro thématique de *Annales de droit de Louvain*, p. 355.

106 P. D'ARGENT, *La nature juridique des partenaires à la coopération transfrontalière*, in *La coopération transfrontalière*, Numéro thématique de *Annales de droit de Louvain*, cit., p. 428.

107 See Art. 2 of the Vienna Agreement, which indicates the Italian territorial communities allowed for cross-border cooperation (Regions of Friuli Venezia-Giulia, Veneto, Trentino-Alto Adige and Veneto; Autonomous Provinces of Bolzano and Trento; Provinces, Municipalities, Mountain Communities, Provincial or Municipal Consortia located, even partially, within an area of 25 Km from the border with Austria) and, as well, the Austrian territorial communities (*Länder*, Municipalities and

and common national framework for transfrontier cooperation. Moreover, each agreement remembers, as an indispensable requirement, the necessity for local and regional authorities to respect their competences according to the national law as well as the internal legal system and the international obligations of the respective State; in particular, it is also foreseen the subsequent establishment of obligations and responsibilities only for sub-national entities and involved in cooperation and not for

Associations of Municipalities). Art. 2 of the Bayonne Agreement indicates the following territorial communities: (for France) Regions of Aquitaine, Midi-Pyrénées, Languedoc-Rousillon, as well as the Departments, Municipalities and respective association that are located in the territory of the mentioned regions; (for Spain) the Autonomous Communities of Pays Basque, Navarre, Aragon, Catalogne, as well as the historic Territories, Provinces and Municipalities belonging to the mentioned Autonomous Communities. Art. 2 of the Karlsruhe Agreement indicates the following territorial communities: (for Germany) a) in the *Land* of Bade-Wurtemberg, the Municipalities and *Landkreise*, b) in the *Land* of Rhénanie-Palatinat, the Municipalities, *Verbandsgemeinden*, *Landkreise*, and *Bezirksverband Pfalz*, c) in Sarre, the Municipalities, *Landkreise* and the *Stadtverband Saarbrücken*; (for France) the Regions of Alsace and Lorraine, Municipalities, Departments and the respective associations located on the mentioned regions, as well as their public institutions insofar as territorial communities do take part to this transfrontier cooperation; (for Luxembourg) Municipalities, Unions of Municipalities and public institutions put under municipal control, as well as natural parks insofar as territorial public entities; (for Switzerland) a) in the Canton of Soleure, Municipalities and Districts, b) in the Canton of Bâle-Ville, Municipalities, c) in the Canton of Bâle-Campagne, Municipalities, d) in the Canton of Argovie, Municipalities, e) in the Canton of Jura, Municipalities and Districts, as well as their associations and their public institutions legally autonomous (our translation). Art. 2 of the Brussels Agreement, which lists the single territorial communities allowed for transfrontier cooperation, doesn't consider the Belgian Communities as territorial authorities and, furthermore, doesn't include in the meaning of "transfrontier cooperation" the relations between the contracting parties, i.e. between a French entity and a Belgian Region. The article recites, at par. 1 and 2: "Le présent Accord est applicable aux collectivités territoriales et organismes publics locaux suivants: 1. Dans le Royaume de Belgique : a) Sur le territoire de la Région flamande: aux provinces; aux communes; aux structures de coopération intercommunale; aux régies provinciales et communales autonomes; aux centres publics d'aide sociale; aux associations fondées par un centre public d'aide sociale; aux polders et aux wateringues; b) Sur le territoire de la Région wallonne: aux provinces; aux communes; aux intercommunales; aux régies provinciales et communales autonomes; aux centres publics d'aide sociale; aux associations fondées par un centre public d'aide sociale; c) Sur l'ensemble du territoire belge: aux structures publiques de coopération intercommunale qui excèdent les limites territoriales des Régions. 2. En République française, à la région Champagne-Ardenne, à la région Lorraine, à la région Nord - Pas-de-Calais et à la région Picardie, aux communes, aux départements, et à leurs groupements compris sur le territoire desdites régions, ainsi qu'à leurs établissements publics dans la mesure où des collectivités territoriales participent à cette coopération transfrontalière." At par. 4 and 5: "Sont considérées comme collectivités territoriales ou organismes publics locaux au sens du présent Accord, les organismes mentionnés aux paragraphes 1 et 2. Dans le présent Accord, l'expression 'coopération transfrontalière' désigne la coopération transfrontalière des collectivités territoriales et organismes publics locaux à l'exception de la coopération transfrontalière entre les Parties, qui n'est pas régie par le présent Accord." Art. 3 of the Valencia Agreement recites: "El presente Tratado se aplicará: en España: A las Comunidades Autónomas de Galicia, Castilla y León, Extremadura y Andalucía; a las provincias de Pontevedra, Ourense, Zamora, Salamanca, Cáceres, Badajoz y Huelva; a los municipios pertenecientes a las provincias indicadas. Asimismo y siempre que incluyan municipios de los anteriores, se aplicará a las comarcas u otras entidades que agrupen varios municipios instituidas por las Comunidades Autónomas expresadas y a las Áreas Metropolitanas y Mancomunidades de Municipios creadas con arreglo a la legislación de Régimen Local. En Portugal: A las Comisiones de Coordinación de las Regiones Norte, Centro, Alentejo y

the States parties¹⁰⁸. In any case, while the agreements have some basic principles in common, the provisions about the modalities and forms of cooperation differ. For example, the Vienna agreement is very general, allowing agreements of transfrontier cooperation without specifying the nature of such agreements, the eventual legal nature of transfrontier structures and the related applicable law. In these terms, the Vienna Agreement could be considered as a “minimum standard” model for transfrontier sub-national activities¹⁰⁹. The other treaties considered are much more complex.

First of all, the Bayonne, Karlsruhe, Brussels and Valencia Agreements make reference to the so-called *conventions of cooperation*, which are identified as the basic instruments to settle the cooperation between the territorial authorities¹¹⁰ and to create structures with or without legal capacity. These conventions shall be approved by each single sub-national entity according to the respective national law procedures. The reference to the conventions is particularly relevant, because they will be a constant element for almost every European instrument of transfrontier cooperation.

Two main factors influence the nature of a convention: on the one hand, the intentions of the sub-national entities to take part to a common undertaking; on the other hand, the definition of a common field of action. The last element, quite obviously, should necessarily correspond to a common domain of competence of all the territorial subjects involved. Thus, as a general consequence, according to P. D'Argente, it is possible to observe that the national law of one entity is potentially able to limit the transfrontier cooperation capacity of another one, and vice-versa. Inevitably, the result and the concrete projection of such a common involvement has

Algarve; a las Asociaciones de Municipios y otras estructuras que integren municipios con intervención en el área geográfica de las NUTS III, definida por el Derecho interno portugués, Minho-Lima, Cávado, Alto Trás-os-Montes, Douro, Beira Interior Norte, Beira Interior Sul, Alto Alentejo, Alentejo Central, Baixo Alentejo y Algarve, y a los municipios situados en las mencionadas NUTS III.”

108 As an additional condition, the Bayonne Agreement requires for a “common interest” between the sub-national entities involved (Art. 3).

109 A peculiarity of the Vienna Agreement is to list, after recalling the necessity of respect the assigned competences, some matters that can be object of transfrontier cooperation. Since this kind of specification could represent an attempt to clarify the fields of cooperation, however it could lead to some interpretative misunderstanding; let's think, for instance, at the revision of the Italian Constitution, in particular at the Art. 117, which provides for the list of competences exclusively attributed to the State and existence of residual competences of the Regions.

110 See Art. 3 of Bayonne Agreement, Art. 3 of Karlsruhe Agreement, Art. 3 of Brussels Agreement and Art. 4 of the Valencia Agreement.

to be identified with the “*lowest common denominator*” of the competence of each single territorial subject within the respective national legal order, as a interdependent linkage of national public law. With other words “*la coopération transfrontalière impose par nature une manière de croisement des droits publics internes, d'application cumulative et de réduction par fusion de leurs éléments communs permettant de déterminer le domaine de validité matériel des conventions de coopération conclues. Le partenaire à la coopération ne se présente donc pas à celle-ci en tant qu'il est lui même: il se présente seulement avec ce qu'il a de commun avec son alter-ego transfrontalier*”¹¹¹.

Usually, the conventions contain the reference to the law applicable to the transfrontier structures, and the relative procedures and controls, which normally refer to the legislation of the country where the transfrontier structure has its headquarters. As well, in case of dispute or litigation, the competent jurisdiction is individuated according to the law of the chosen country. Furthermore, as the conventions make references to the objects of the common proposals and to the competences attributed to the common structure, they usually specify explicitly that they cannot assign to the common entity new competences or competences related to police/security powers or other attributions that are an expression of the central state power¹¹².

Generally the agreements provide for the option for sub-national authorities to create, as already said, common organism with or without legal capacity. Regarding the last case, the main objective is to establish common structures in order to face issues of common relevance, encouraging a common debate and proposing questions and solutions for the territorial communities without creating any sort of obligations for the authorities involved¹¹³. As the organisms without legal capacity do

111 See P. D'ARGENT, *La nature juridique des partenaires à la coopération transfrontalière*, cit., p. 430.

112 See Art. 3-4 of the Bayonne Agreement, Art. 3-4 of the Karlsruhe Agreement, Art. 3-4 of the Brussels Agreement and Art. 5-6 of the Valencia Agreement.

113 See Art. 7 of the Bayonne Agreement, Art. 9 of the Karlsruhe Agreement and Art. 9 of the Brussels Agreement. The latter reproduces exactly the content of the Karlsruhe Agreement, which recites: “(1) Les collectivités territoriales ou organismes publics locaux peuvent, conformément à l'Article 3, créer des organismes communs sans personnalité juridique ni autonomie budgétaire, tels que des conférences, des groupes de travail intercommunaux, des groupes d'étude et de réflexion, des comités de coordination pour étudier des questions d'intérêt commun, formuler des propositions de coopération, échanger des informations ou encourager l'adoption par les organismes concernés de mesures nécessaires pour mettre en oeuvre les objectifs définis. (2) Un organisme sans personnalité juridique ne peut adopter de décisions engageant ses membres ou des tiers. (3) La convention de

not require a typical legal framework covered with positive rules, procedures and working rules are not of a strict and formal character.

Moreover, as far as bodies with legal capacities are concerned, different solutions are proposed by the treaties, depending on the national legal system involved. From a general point of view the treaties provide for the possibility for the sub-national authorities to create common bodies with legal capacity or to join already existing bodies. In general, the subjects with legal capacities are determined by the national law applicable, namely that of the country chosen as the place for the headquarters.

In this sense the Bayonne Agreement explicitly provides for the possibility to identify the new transfrontier structure with a “*groupment d’interêt public*” or a “*société d’économie mixte locale*” according to the French law, or to create a “*consorcio*” according to the Spanish law¹¹⁴. Actually, such a provision doesn't seem to introduce a list of typical solutions for bodies with legal capacity, since the treaty enables a general possibility to constitute “organisms of cooperation, endowed or not with legal capacity”¹¹⁵. According to this agreement, for the organisms with legal capacity is necessary to adopt a statute, which shall constitute the basic rule of functioning of the transfrontier structure¹¹⁶.

The Valencia Agreement, at Art 10, explicitly indicates the legal form that structures with legal capacity shall have. Namely, in case the body will base its headquarters in Portugal, the transfrontier entity is constituted as “*associação de direito público*” or as “*empresa intermunicipal*”. In case it will be based in Spain, the form shall be that of “*consorcio*”. Furthermore, the transfrontier entities could be created for the following objectives: the realization of public works, management of

coopération qui prévoit la création d'organismes sans personnalité juridique contient des dispositions sur: a) les domaines devant faire l'objet des activités de l'organisme, b) la mise en place et les modalités de travail de l'organisme, c) la durée pour laquelle il est constitué. (4) L'organisme sans personnalité juridique est soumis au droit défini par la convention de coopération.” Art. 9 and 10 of the Valencia agreement provide for a clear-defined and strict discipline. Namely, structures without legal capacity could be “Comunidades de Trabajo” or “Grupos de Trabajo” (Art. 9). In particular, these structures will be devoted to the analysis of issues of common interest, to make proposals of cooperation between the various sub-national authorities, to prepare studies or projects in order to develop common transfrontier activities, etc.

114 Art. 5 of the Bayonne Agreement. In particular, the Article reaffirms that “[l]es décisions des collectivités territoriales espagnoles sur leur participation aux organismes français susvisés sont soumises au droit espagnol. Les décisions des collectivités territoriales françaises sur leur participation aux organismes espagnols susvisés sont soumises au droit français.”

115 Art. 3.

116 Art. 6.

common equipments or public services and the development of actions devoted to the adjudication of the Program Spain-Portugal of the EC initiative Interreg III A or of the instruments, accepted by the contracting parties, that will substitute it. This last objective permits to focus on a typical peculiarity of the Valencia Agreement, consisting in the explicit reference to Community legislation. In fact, the agreement is the only one, among those taken into consideration, that mentions Community aspects¹¹⁷. By the way, it is quite singular for an international agreement to set the requirement of conformity, besides the national and international law, to EC law. Furthermore, referring to the scope of application, the Valencia Agreement mentions both the traditional sub-national authorities and, for the Portuguese side, also structures corresponding to the geographical area of NUTS III¹¹⁸. In these terms it is possible to wonder about the effects of the implementation of the EGTC Regulation in Spain and Portugal and the potential relation with this international agreement.

The Karlsruhe Agreement and the Brussels Agreement entail, more or less, similar aspects. On the one hand, they provide for the general possibility to create or join an organism with legal capacity¹¹⁹. On the other hand, they introduce the term of

117 In particular, Art. 2 mentions the EC law in regard to the object of the Agreement: “1. El presente Tratado tiene por objeto promover y regular jurídicamente la cooperación transfronteriza entre instancias territoriales portuguesas y entidades territoriales españolas en el ámbito de sus competencias respectivas, la cual se llevará a cabo respetando el Derecho interno de las Partes, el Derecho comunitario europeo y los compromisos internacionales por éstas asumidos. 2. El régimen jurídico previsto en el presente Tratado se aplicará a las formas de cooperación regidas por el Derecho público, sin perjuicio de la posibilidad de recurrir a modalidades de cooperación sujetas al Derecho privado, siempre que las mismas resulten conformes al Derecho interno de las Partes, al Derecho comunitario europeo y a los compromisos internacionales por éstas asumidos.”

118 See M. SOBRIDO PRIETO, *El tratado hispano-portugués sobre la cooperación transfronteriza territorial*, in *Revista Electrónica des Estudios Internacionales*, n. 4, 2008, www.reei.org, p. 11 et seq., see also M.G. MERCÁN PUENTES, *El tratado bilateral hispano-portugués sobre cooperación transfronteriza de 2002*, in *Revista de Derecho Comunitario Europeo*, Año 7, Num. 15, Mayo-Agosto 2003, p. 728-729, who defines as “honest” the intent of the Agreement to mention the role and the interconnections with the EC framework.

119 While the Karlsruhe Agreement entail only a general provision (Art. 10), the Brussels Agreement indicates the categories of organisms that, according to the respective national legal systems, are enabled to include foreign sub-national authorities. Namely, Art. 10, par. 2 recites: “Les catégories d'organismes publics locaux visés au paragraphe 1^{er} ci-dessus sont les suivantes: 1. Dans le Royaume de Belgique: a) sur le territoire de la Région flamande: les structures de coopération intercommunale (décret flamand du 6 juillet 2001), les associations fondées par un centre public d'aide sociale; b) sur le territoire de la Région wallonne: les intercommunales (décret wallon du 5 décembre 1996), les associations fondées par un centre public d'aide sociale; c) sur le territoire de la Région flamande et de la Région wallonne: les associations sans but lucratif et les fondations (loi du 27 juin 1921), les associations internationales (loi du 25 octobre 1919), les intercommunales dont le ressort dépasse le territoire d'une Région (loi du 22 décembre 1986), les groupements européens d'intérêt économique (GEIE). 2. En République française: les groupements d'intérêt public de coopération transfrontalière et les groupements d'intérêt public chargés de la mise en oeuvre de politiques de développement social urbain, les sociétés d'économie mixte locales, y compris ceux déjà existant constitués par des

a *local grouping of transfrontier cooperation (LGTC)*¹²⁰. Such a legal entity could be established in order to realize undertakings or services, which embody an interest for each of the territorial communities involved. Moreover, this local grouping of transfrontier cooperation is subject to the domestic law applicable to the public institutions of inter-municipal cooperation of the State party where it has its headquarters. The grouping is considered as a legal entity of public law and the related legal personality is conferred from the date of its establishment. It has legal capacity and budgetary autonomy.

4.7. *The local grouping of transfrontier cooperation (LGTC)*

This instrument, endowed with legal capacity, has been firstly introduced by the Karlsruhe Agreement in 1996 and subsequently reproduced by the Brussels Agreement. As already said, the LGTC is a public law body with legal capacity and budgetary autonomy. The specific digression on this figure is justified by the fact that it somewhat resembles the newest European instruments of territorial/transfrontier cooperation – namely the European Grouping of Territorial Cooperation of the EU and the Euroregional Cooperation Grouping of the CoE– in their essential elements, thus constituting a sort of anticipation with regard to the progressive developments in this field.

Articles from 11 to 15 of the Karlsruhe Agreement set down a quite exhaustive discipline about the LGTC. Namely, Article 11 introduces the model of this new structure and its general aim. Territorial communities and local public organisms could create a LGTC by respecting the internal legislation of the State where the legal seat has been settled. In these terms, the LGTC is a kind of new tool, which shall, anyway, correspond to and respect the national provisions about public law bodies. More precisely, Article 11 says that an LGTC should be submitted to the national law applicable to the public institutions of inter-communal cooperation. Other articles concern the essential elements of the LGTC, namely the statute (Art.

collectivités territoriales françaises”.

120 Art. 11 of the Karlsruhe Agreement and Art. 11 of the Brussels Agreement.

12)¹²¹, the bodies of the structure (Art. 13)¹²², the financing (Art. 14) and the procedure of dissolution (Art. 15)¹²³. In particular, regarding the statute it is relevant to notice fundamental the elements prescribed by Article 12: the indication of the territorial communities or the local public organisms composing the LGTC; the objects, tasks and relations with its Members, in particular with regard to the liability; the denomination, legal seat, and the concerned geographic area; the competences of its bodies, the procedures and the number of the Members' representatives within the bodies; the procedure of convocation of the Members; the quorum; the modalities and majorities related to the deliberations; the modalities of functioning, in particular concerning the staff-administration; the criteria according to which the Members have a duty of contribution to the financial needs, the budgetary and accounting rules; the condition of modification of the Statute, in particular with regard to the accession and withdraw of Members; the duration and the conditions concerning the dissolution; the condition of liquidation after the dissolution¹²⁴.

121 In particular, Art. 12, par. 3 sets the rules regarding the modification to the Statute and the relative majorities: “Les statuts du groupement local de coopération transfrontalière prévoient les conditions dans lesquelles les modifications de statuts sont adoptées. Celles-ci sont adoptées à une majorité qui n'est pas inférieure aux deux tiers du nombre statutaire de représentants des collectivités territoriales ou organismes publics locaux au sein de l'assemblée du groupement. Les statuts peuvent prévoir des dispositions supplémentaires. Dans le cas d'un groupement local de coopération transfrontalière associant des collectivités territoriales ou organismes publics locaux de trois des quatre Parties, cette majorité ne pourra pas être inférieure aux trois quarts.”

122 Main bodies are: the assembly, the president and the vice-president. According to the statute, it is possible to provide for supplementary bodies. The designation of the representatives of the territorial communities has to be done in conformity to the national legislation of each Member.

123 Dissolution of the LGTC is prescribed in case of the expiration of the predetermined date, in case of the the accomplishment of the foreseen objectives and in case of unanimity decision of the members.

124 Also the Valencia Agreement provides for the specification of the essential elements of the statute of the entities with legal capacity (Art. 11, par. 7), namely: “la identificación de los miembros; la denominación, la sede, la zona geográfica en que desarrolle su actividad, la duración y la forma legal adoptada, haciendo referencia a la legislación que le reconozca personalidad jurídica; el objeto concreto de su actividad, las tareas que le hayan sido encomendadas por las instancias y entidades territoriales que lo constituyan y las condiciones y medios de que disponga para su realización; las relaciones que establezca con los miembros, con terceros y con autoridades superiores o de control; el régimen de contratación; el patrimonio y el régimen de financiación o formación del capital social; el ámbito y los límites de la responsabilidad de los miembros; la previsión de los órganos sociales, sus competencias, el procedimiento de toma de decisiones y el sistema de nombramiento o cese de sus titulares; el régimen del presupuesto, de los balances y de la fiscalización de cuentas; las reglas relativas al estatuto y a la gestión del personal; las lenguas adoptadas, debiendo redactarse en todo caso las decisiones de los órganos sociales en las lenguas oficiales de las Partes; las reglas relativas a la modificación de los estatutos, a la adhesión o la retirada de miembros, a la disolución del organismo y a las condiciones de liquidación después de su disolución; las formas de solución de controversias”.

A general overview of the mentioned provisions could be summarized through the pinpoint of some basic elements that represent the three fundamental components of a complete legal status for a LGTC: the framework agreement in the form of a convention; the statute, edited according to the convention's requirements; a national discipline/legislation of reference regarding the local inter-municipal associations of the State where the headquarters is settled¹²⁵.

The LGTC, as delineated by the Karlsruhe Agreement, represents a first effective attempt to draw the basic legal framework for a specific structure of transfrontier cooperation between sub-national authorities¹²⁶. Namely, as it has a kind of “dynamic factor” referring to the national legislations about the local inter-communal association, it has its own and proper elements, which are different from the typical associative or cooperative legal bodies already existing within each State party. A conclusive quite negative observation is necessary in order not to forget that such a legal instrument is not foreseen as a generally suitable structure for cooperation, but it could be created only by territorial communities (or other public entities) designated by the State parties to the covering inter-state agreement.

4.8. Brief observations about the system of the MOC and the related inter-state agreements

With regard to the creation within the CoE of a regulatory system concerning transfrontier cooperation, some negative aspects have to be stressed. Namely, on the one hand, the vague legal effectiveness of the Convention and its value of mere “programmatic instrument” has already been highlighted by various contributions; on the other hand, the extreme non-homogeneous context for cross-border activities

125 See A. FODELLA, M. PERTILE, G. AVOLIO, *Studio sulla creazione di nuove forme di cooperazione transfrontaliera a livello sub-statale per lo sviluppo sostenibile del territorio*, in AA.VV., *Strumenti giuridici della cooperazione per lo sviluppo sostenibile di un'area montana transfrontaliera*, cit., p. 87.

126 The LGTC could be considered as an element of the past, thus having a peculiar meaning in the process of the development of legal instruments of territorial cooperation. For sure, the study and the analysis of most current tools, like the EGTC, is nowadays more appropriate. However, the creation of new European common instruments doesn't substitute or amend the previous one. In the case of the LGTC, for instance, the evaluation of opting for this kind of possibility is still taken in consideration by the transfrontier structure of the *Espace Mont Blanc*, which is still in search of an adequate juridical support. Namely, the use of the EGTC could not be taken into consideration, as Switzerland is a part and a member of the transfrontier area.

created by the inter-state agreements has pointed out the weakness of the MOC system in respect to the development of effective tools for cooperation at sub-national level. Moreover, one simple instance, which clearly explains how sub-national authorities after the adoption of the MOC didn't really saw an effective progress towards the acknowledgement of their right to put into practice cross-border relations, is represented by the discretionary power of the the respective States, according to that system, to indicate the designated authorities for the participation to transfrontier activities.

As a partial observation, despite the pivotal experience of the MOC, it is possible to say that no radical legal progress have been made, from a strictly legal point of view, to improve the generalized rights of territorial communities to develop cross-border cooperation, both with regard to adjacent and non-adjacent areas: the prerogatives on transfrontier cooperation remain, practically, under state-control.

Without paradoxes, despite these negative notes, relevant improvements have, however, been made in the field of transfrontier cooperation thanks to the Madrid Convention. Namely, the system of the MOC, included the successive inter-state agreements, represents a first serious attempt to define a legal framework for transfrontier cooperation and to give to this matter an official recognition. In fact, as it has been already mentioned, transfrontier relations between sub-national authorities have progressively emerged from a *de facto* condition to a progressively legitimated reality. Moreover, since the MOC has introduced a weak legal contribution, the various inter-state agreements, although quite differently, have established a rather clear and useful legal discipline for the specific experiences concerned. The aforementioned agreements are, obviously, limited, because they do not deal with an overall national approach to the phenomenon of transfrontier cooperation and cover only geographically limited territories and communities. Anyway, some of the legal solutions proposed by the MOC system are still practised. In particular, the normative aspects regarding the conventions of cooperation between sub-national entities and the statutes of common transfrontier structures with legal personality remain substantially unchanged. Although such norms do not introduce a revolutionary element regarding legal persons, however they have introduced, without the possibility to crate uniform legal standards, explicit

provisions concerning some basic element that represent still nowadays the constant “ingredients” for transfrontier legal persons established by territorial communities. Also the designation of the law applicable to the transfrontier structures, their procedures and acts is another important factor to take into consideration, as well as the liability of the parties signatories to the conventions of the cooperation.

In particular, the system of the Madrid Convention, its Protocols and the subsequent inter-state agreements disclose and reveal openly a legal dimension that needs a dynamic interaction between different sources of the law, in particular between national law and international law. In this respect, it has been quite clearly demonstrated how these two legal spheres cannot discipline the phenomenon of territorial cooperation independently, but they need to be mutually integrated. Furthermore, from the sub-national perspective another double dynamism has been demonstrated, namely the one that concerns the relations between territorial entities, which participate to the double synergy of their domestic law and the foreign national law¹²⁷. In this sense, the legal nature of transfrontier cooperation has some own peculiarities that are somehow different, but also dependant from the legal rules they derive from.

4.9. The Third Protocol to the Madrid Outline Convention: preliminary observations

The document under analysis has been opened for signature on 16 November 2009 in Utrecht, in the occasion of the 16th session of the Council of Europe Conference of Ministers responsible for local and regional government¹²⁸. By the

127 It is worth to quote again P. D'ARGENT, *La nature juridique des partenaires à la coopération transfrontalière*, in *La coopération transfrontalière*, Numéro thématique de *Annales de droit de Louvain*, cit., p. 430-432: “On pourrait dire, abstraitement, que chaque partenaire à la coopération a deux natures juridiques. Une nature purement interne et complète lorsque ses activités ne présentent aucune élément transfrontalier. Une nature externe, incomplète et dépendante de l'étranger lorsque ses activités sont engagées transfrontalièrement. On pourrait dire aussi que la coopération transfrontalière transforme des entités internes dissemblables en entités internes comparables, à défaut d'être communes. Et que, dans l'exercice, chaque droit public interne se soumet humblement à son semblable étranger pour la détermination des compétences transfrontalières des entités qu'il constitue. La vision quelque peu pessimiste du 'plus petit commun dénominateur' peut s'embellir de l'espoir de voir les droit publics internes se rapprocher – voir s'unifier ? – dans la détermination des pouvoirs et compétences des entités locales, l'argument de la nécessaire coopération transfrontalière pouvant amener des législateurs nationaux à accroître les prérogatives des collectivités afin de leur permettre de jouer jeu égal avec des partenaires étrangers.”

128 The updated list of signatures and ratifications is available at:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.aspNT=206&CM=8&DF=04/12/2009&CL=ENG>.

way, the elaboration of the Third Protocol has been quite long and the various draft versions have been changed significantly from the original version¹²⁹. For reasons of logic and completeness the presentation of this document is proposed at this point of the study, in order to give the general idea of the evolution of the CoE's instruments on transfrontier cooperation. Anyway, it is necessary to remark that a comparison with the Regulation (EC) No 1082/2006 on the European Grouping of Territorial Cooperation (EGTC) is essential in order to have a realistic and more complex comprehension of the European legal framework devoted to develop territorial cooperation between sub-national authorities. This comparison, will be handled further on, with the analysis of the EGTC Regulation. For the moment, the main aspects of the CoE's Third Protocol are going to be taken into consideration.

The third legal document added to the MOC is called *Protocol No. 3 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings* (hereinafter mentioned as the “Third Protocol”)¹³⁰. The preliminary draft, which has been given assent to by the European Committee on Local and Regional Democracy (CDLR), has been approved by the Committee of Ministers in order to become a draft ready for the final adoption. The following consensus from the CoE's Member States opened the document to the signature and to the following ratification within the respective Member States.

The project, discussion and elaboration of the Third Protocol has been carried on within the Committee of Experts on Local and Regional Government Institutions and Co-operation (LR-IC). In the evident lack of a wide academical analysis on the argument, some basic informations can be found within the memoranda prepared for the institutional meetings at the CoE. “The work on a draft third protocol started in 2004 in the Committee of Experts on Transfrontier Cooperation (LR-CT) under the authority of the European Committee on Local and Regional Democracy (CDLR).

129 This paragraph is enriched by some personal notes and impressions matured during a study-visit at the CLRAE (March-May 2009).

130 This part of the research as been written during the drafting phase of the Third Protocol and subsequently adapted after its official adoption. The last draft versions available were those of April and May 2009, presented by the European Committee on Local and Regional Democracy CDLR(2009)9. The document reproduces the last draft version of the Third Protocol to be submitted to the Committee of Ministers. As the document reports, “[...] the changes made in the text reflect the discussions and agreements reached at the meeting of the LR-IC Committee held on 23 March 2009 (LR-IC (2009)7).”

The initial objective was the drawing up of a convention containing a “uniform law” on the legal status of transfrontier and inter-territorial cooperation bodies. After the European Communities started working on a regulation on the legal status of cross-border cooperation bodies (Commission Proposal of 14 July 2004, to become Regulation (EC) No. 1082/2006 [...] on a European Grouping of Territorial Cooperation (EGTC)), the work was reoriented towards the drafting of a third protocol to the Madrid Convention, that would provide the core provisions for the establishment and functioning of transfrontier and interterritorial cooperation bodies while at the same time being fully compatible with the EC Regulation.”¹³¹ This motivation is particularly interesting and clarifies the necessity of compare the two instruments.

With regard to the elaboration of the Third Protocol in particular, it aims at introducing the possibility to set up a new transfrontier structure, namely the so-called Euroregional Cooperation Grouping (ECG). The set of rules proposed should have the function of simplifying the procedures enabling the establishment of transfrontier bodies and of harmonising as much as possible the respective governing rules. In these terms, the choice of drafting a new additional protocol to the MOC recognizes the difficulties to establish effective forms of cooperation under the Convention and its first two protocols¹³² and embodies the necessity of supplementing the existing legal framework with a more actual instrument.

The Protocol consists of 22 Articles. From the Preamble it is possible to draw out some basic acknowledgements, namely the still existing differing legislations within the Member States, the necessity to design some common legal frameworks and the necessity to find some adaptations with the EU Regulation on the EGTC. In fact, for many reasons, these two instruments seem to be in mutual competition

¹³¹ See the Explanatory Report contained in the Preliminary Draft of the Protocol No. 3 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings, Secretariat Memorandum prepared by the Directorate General of Democracy and Political Affairs – Directorate of Democratic Institutions, Strasbourg, 7 April 2009.

¹³² “If the Madrid Convention and its Additional Protocols have cleared the way to the establishment of fruitful forms of dialogue and cooperation between territorial communities or authorities across two or more borders, the structured cooperation between the same territorial entities is faced with huge difficulties. Cross-border cooperation between member states of the Council of Europe, be it at interstate level or at the level of territorial communities or authorities, is still hampered by a number of factors related to the differences in the political systems, functions and powers of territorial communities or authorities, legal traditions, languages, etc.”, Draft Explanatory Report contained in the Preliminary Draft of the Protocol No. 3, p. 5.

regarding their role to develop transfrontier cooperation between sub-national authorities in Europe. However, what comes out from the intentions of the Third Protocol and from the related documents is an aspiration to create the conditions of a possible complementarity between the two instruments. One clear example in this regard is the geographical scope of the legal tools concerned. Namely, while the EGTC Regulation covers the smaller area of the EU, the Third Protocol focuses on the so-called Greater Europe and could, potentially, be available for more numerous territorial communities. We will see, anyway, that both of the new legal tools contain some provisions aiming at encompassing subjects that do not belong to the Member States of the respective institutional geographical area, thus considering the hypothesis of openness to third countries. In this sense, it is possible to find out a double dynamic of complementarity/competitiveness between the EGTC Regulation and the Third Protocol. Another observation that has been made¹³³ regards the potential multiplication of similar legal instruments¹³⁴. The contextual implementation of the EGTC and of the EGC could be seen as problematic for some countries. However, what has emerged from the board of the LR-IC Committee is the attention drawn on the optionality of all these instrument for transfrontier cooperation. The Congress of Local and Regional Authorities had also the occasion to stress that the instruments are fully compatible.

Moreover, the Third Protocol has been recently the object of an opinion¹³⁵ of the Congress of Local and Regional Authorities. The Congress recognises the current status of cross-border cooperation in Europe, where a huge number of transfrontier multilateral structures has been created, often under the general and non-legally well defined form of Euroregions. In this regard, the Congress has been increasingly concerned with the aim of promoting the formation of a uniform and practicable legal basis for transfrontier cooperation¹³⁶. Thus, the Congress encourages the

133 The following comments have been noted down during the LR-IC meeting of 23 March 2009.

134 The main perplexities came from the Italian and from the German representations. Namely, being also part of the EU, these countries showed some doubts about the implementation of provisions, like that of the EGC and of the EGTC, that seems somehow similar. Namely, since the process of the implementation of the EGTC Regulation is still ongoing, Italy and Germany underlined how the EGC could represent a sort of duplication.

135 Opinion 30(2009) of 10 June 2009 on the Draft Protocol No. 3 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings.

136 See the Study Report "European legal instruments of interregional co-operation" CPR/GT/CIR (14) 3.

adoption of the Third Protocol underlying some possible future implications. Namely, the use of this new legal tool and the setting up of Euroregional Cooperation Groupings could represent the natural evolution of the previous forms of Euroregions and underlines how the CoE's instrument does not compete with the EU Regulation on EGTC, rather the two instruments are somehow complementary. Trying to give a general evaluation of this opinion, it is possible to highlight two main aspects. One is related to the positive acceptance of the evolution of transfrontier cooperation and the related necessity for sub-national authorities to have a framework legal reference about the rules for the establishment of an effective cooperation. The second observation concerns the weak emphasis put on the technical-legal features of the Protocol. Namely, apart from the consideration regarding the necessity to find some compatibilities with the EU instrument, the Congress' opinion contains only very general political comments without taking a clear position on the legal features and effects of the establishment of Euroregional Cooperation Groupings. However, to be precise, the real function of such kind of opinion doesn't concern the analysis of technical aspects, but the eventual support towards the political feasibility of the matter concerned. In this regard, the intention under a political opinion is that of strengthening the will to adopt the document: in fact the political choice is a preliminary and essential condition for the legal rules to become effective¹³⁷.

Resuming the content of the Third Protocol on the whole, its provisions contain the basic common rules that frame the constitution of an ECG. The Protocol, actually, doesn't concern the capacity of sub-national authorities to set up a transfrontier structure. As already mentioned in the introductory paragraphs, the legitimacy to constitute a transfrontier body for sub-national entities comes from the competences conferred at national level. Rather, the Third Protocol aims at creating some references and a common legal standard which shall directly regard the transfrontier structure. In these terms, the legal capacity of each member is an essential requirement that doesn't concern the content of this international agreement.

¹³⁷ As it has been also observed during the LR-IC Committee meeting of 23 March 2009, the legal provisions regarding transfrontier cooperation need firstly to encounter the political intention of Member States in order to be translated into a legal instrument.

4.10. *The Third Protocol: analysis of the main legal provisions*

Article 1 recites: “1) Territorial communities or authorities and other bodies referred to under Article 3, paragraph 1 may set up a 'Euroregional Co-operation Grouping' (ECG) on the territory of the member States of the Council of Europe, Parties to this Protocol, under the conditions provided by it. 2) The objective of the EGC shall be to promote, support and develop, for the benefit of populations, transfrontier and inter-territorial co-operation between its members in their common areas of competences and in keeping with the competences established under the national law of the States concerned”. This provision contains already some of the most relevant aspects of the new legal instrument. Firstly, as it has been mentioned several times during the preparatory meetings, the Protocol aims to create a very flexible instrument for territorial cooperation. But together with the versatility, some basic limitations need to be respected. In particular, the compliance with the competences of sub-national authorities, as defined at national level, is an essential element, which covers the whole mechanism of the Protocol: it will be often repeated that neither the Protocol itself, nor the establishment of an EGC is going to confer new competences or expand the already attributed competences of the sub-national authorities members to the EGC. Although such a provision is not formally requested as necessary¹³⁸, both from a substantial and formal point of view, it seems to be one of the most relevant issues of the Protocol. Apart from the question of the competences of the territorial communities, the Explanatory Report, i.e. the official commentary to the single articles of the Protocol, underlines that also any agreement-making powers aren't conferred to sub-national authorities. In this regard, if the sub-national authorities maintain their own competences and the respective projection outside the national borders, the powers to join or create a trans-boundary body are not going to be expanded by the provisions of the Third Protocol. Thus, the new international instrument gives the references of some common rules, which actually should be seen as complementary to the national constitutional legal orders, without introducing any substantial change in respect to the first approach of the Madrid

¹³⁸ The constant repetition about the non-modification of the competences of territorial communities or authorities seems not to be necessary from a strictly legal point of view; rather it shows a kind of a need coming from the States, which want to reaffirm the unquestionable source of legitimation coming from the national legal order. In fact, as such a condition is an implicit element for the sub-national legal capacity, it doesn't need to be constantly confirmed and represents an unchanging factor for territorial communities in order to act legally.

Outline Convention. What is radically new is the direct provision, coming from an international legal document, of the possibility to create a transfrontier entity with legal capacity. The establishment of such an entity is not new per se, having been already foreseen by bilateral or multilateral treaties or by specific agreements between territorial authorities¹³⁹. However, the bilateral or multilateral structures were only common to those members parties to the peculiar agreements, while the Third Protocol introduces basic common rules that are shared by a wider range of subjects. The reason for creating a conventional model for transfrontier bodies reveals the necessity to give some guidelines to sub-national authorities in order to develop cross-border cooperation.

Regarding the geographical scope of the Protocol, as the first article affirms, both transfrontier and inter-territorial cooperation are considered: this means that a cross-border structure could be potentially created between non contiguous territorial communities. This aspect, for the moment remaining only a matter of abstract analysis, could be very interesting, maybe, if we think about the possibility to create a structure between territorial communities belonging to EU countries and other non-contiguous communities belonging to non-EU countries.

About the name “Euroregional Cooperation Grouping”, it has been pointed out that the denomination seems, at first glance, to include only the regional actors and not the local authorities¹⁴⁰, thus generating some confusions. In reality, the term has only a general and non-technical aim of comprehending both regional and local authorities. Speaking about an ECG, then, conventionally indicates a transfrontier (or inter-territorial) legal entity, without the intention to focus on (or to exclude) any institutional or administrative level in particular¹⁴¹: the exact term of reference is still the Madrid Outline Convention, which applies to transfrontier cooperation between territorial communities or authorities (of course, as identified by each State Party)¹⁴².

139 As an example, we already spoke about the the local grouping of transfrontier cooperation (LGTC) introduced in 1996 by the Karlsruhe Agreement.

140 The term “Euroregional”, referred to the new structure, is the result of several years of terminological hypothesis within the LR-IC Committee and the previous Committees dealing with transfrontier cooperation, if we think that the project of the Third Protocol started in 2004.

141 During the LR-IC meeting of 23 March 2009, Mr. A. Zardi, Head of the Department of Local and Regional Democracy and Good Governance, explained that the term has a general meaning and doesn't imply any legal consequence.

142 The Explanatory Report to Art. 1 reports: “The name 'Euroregional Co-operation Grouping' (ECG) tries to reflect the fact that local and regional communities and authorities established on a territorial basis and other public or private law entities as specified in more detail under Article 3 that

Furthermore, it is important to highlight that the ECG remains an optional instrument for the establishment of transfrontier relations between territorial communities or authorities.

Since some aspects of the Third Protocol are really peculiar and relevant from a legal point of view, even for the further comparison with the EGTC, the analysis will be divided into smaller paragraphs, which will take into consideration the most important elements of the ECG¹⁴³.

a) Optionality

The legal standards introduced by the Third Protocol are optional. This means that all the other existing forms of transfrontier and interterritorial cooperation remain untouched and still practicable. In these terms, the ECG aims to become a widespread instrument of cross-border and territorial cooperation, but is not necessarily going to substitute the previous or concurrent ones.

In particular, with regard to the obligations undertaken by the future signatory States, Article 15 clearly affirms that the applicability of other treaties existing between the parties in matters of transfrontier or inter-territorial cooperation or the ability of the party to conclude new treaties on the subject are not affected by the Third Protocol. Besides the provision about the States parties, also the other forms of cooperation between sub-national authorities, which aren't established through treaties, will not be affected as well. Namely, after the ratification within a State, the Third Protocol is not going to be the sole instrument allowing sub-national entities to develop transfrontier relations. An appendix to the Protocol will contain other optional but detailed rules regarding the possibilities of implementation of the Protocol within the contracting parties.

b) Territorial scope

As referred to in Article 1, an EGC must be set up on the territory of the Member States of the Council of Europe parties to the Third Protocol¹⁴⁴. This

participate in transfrontier and interregional co-operation intend to create sustainable networks and not new territorial entities.”

143 The order of the analysis will not necessarily follow the order of the articles.

144 The original version of the preliminary draft referred to “territorial communities or authorities of two or more Council of Europe member States”.

provision is quite easy and seems non-problematic. Namely, it is referred to the headquarters of the EGC, which shall be inevitably based on the territory of a State, party to the Protocol¹⁴⁵. As a consequence, a sub-national authority, which is determined to have the seat of the EGC on its territory, needs the previous ratification of the Third Protocol by the respective State.

However, the territory where the headquarters is based doesn't represent the sole territory on which the constitution and the activities of an EGC can have legal effects. To be more precise, it is not the territory *per se* which is relevant, rather the national law connected to that territory. In fact, as we will see further on, the EGC is not only related to the national law of its headquarters, but, for different reasons, to the national law of its members, to the law of the territory where it acts as a legal persons and to the law of the territory where third parties/people get legal consequences from the EGC's actions¹⁴⁶. Thus, the legal framework provided by the Third Protocol puts the basis for a common and simplified general standard, which necessarily needs to be integrated within a more complex legal panorama.

c) Membership

The issue of the membership has been one of the most debated questions during the drafting of the Third Protocol. The related provision has been changed significantly from the first to the subsequent draftings.

For sub-national authorities the possibility to become members of an EGC is firstly conditioned to the signature and ratification of the Third Protocol by the respective States member of the CoE, as required under Article 3, paragraph 1. Members of an EGC are territorial communities or authorities belonging to the States, signatories to the Protocol. Only in these national territories the EGC can have its headquarters. With regard to participation in the EGC, the condition of the legitimate membership of each sub-national authority is submitted to the provisions of each national system and to the respective attribution of competences to territorial

145 It seems quite obvious that a State party to the Protocol is a Member State of the Council of Europe.

146 As examples, see: Art. 7, par. 1, 2 and 4 about the necessity for sub-national authorities to respect their competences under the respective national system; Art. 9, par. 2 and 3 about the liability of the EGC; Art. 10, par. 2 about the dispute settlement with third parties; Art. 11 about the administrative and judicial review; Art. 12, par. 2 about the financial audit.

communities. As the Third Protocol strongly affirms, no new competences are transferred to the sub-national entities member to an EGC.

Besides the participation of sub-national authorities, also the States can be potential members of the EGC themselves. Namely, the first sentence of Article 3, paragraph 1 mentions the possible presence of States. The explanatory report specifies further the condition for this special membership, affirming that States may become members only if “one or more of their territorial communities or authorities are members”. This means that States, even if parties to the Protocol, cannot be member of an EGC without the engagement of at least one of their sub-national authorities as a requirement. Thus, the membership of territorial communities or authorities is the condition for the validity of the state-membership within an EGC. An observation about the potential presence of States as members of an EGC could be made with reference to the competences of territorial communities or authorities. As far as the system of the Madrid Convention and its Protocols is thought as instrument to foster transfrontier cooperation between sub-national authorities, it is important to remember that these sub-national entities are also (more or less) limited in their competences and, consequently, in their legal capacity. If the presence of the respective States within an EGC could be interpreted as a controlling intent or as a restrictive supervision, nevertheless it can be fundamental in order to exercise those powers or to put into practice those activities that sub-national authorities cannot exercise or put into practice. Namely, the provision regarding the central state-authorities should be considered in this sense. In fact, a supervisory or limiting function could be played by the States without being members of an EGC, but just with the administrative or judiciary internal supervision about the respect of the competences by sub-national subjects.

Article 3, paragraph 2 also affirms that “territorial communities or authorities of a State non-Party to this Protocol, which shares a border with a Party which is or will become the State in which the EGC has its headquarters, may take part in the establishment of, or join, this EGC if an agreement between these two States so allows, without prejudice to the provisions of this Protocol.” According to the Explanatory Report, this statement should be considered as an “opening clause”¹⁴⁷,

147 About this “opening clause” the Explanatory Report remembers that “[t]erritorial communities or authorities from non-member states of the Council of Europe can only become members of an EGC if

potentially enabling the participation of sub-national authorities, whose respective State didn't sign and ratified the Protocol. Such a provision is the result of a long and complex debate about the opportunity to include members non parties to the Third Protocol¹⁴⁸. More than a legal issue, this theme implies political evaluations. Of course, it is possible to underline a kind of “double binary” for the legal conditions of membership: one for the territorial authorities that belong to States parties to the Third Protocol and the other for territorial authorities belonging to States non parties to it. Anyway such a distinction doesn't have practical consequences on the establishment of an EGC between these two types of sub-national communities and on the subsequent rules of procedure, rather it constitutes a prerequisite for its legitimate establishment. The legal differentiation seems to have a political justification in order to permit a better and more flexible expansion of the EGC.

About the question of the membership, the establishment of an EGC is likely much broader than that of other EU instruments. In this regard, the attention of the LR-IC Committee has been highly addressed towards the necessities and expectations of non-EU countries in order to strengthen the future perspectives of cross-border cooperation in that territories. Namely, also the cooperation between communities belonging to EU countries and that belonging to non-EU countries has been taken into consideration. But, as also the EU Regulation about the EGTC provides for the possibility to include the so-called third countries, interesting spaces of comparison are going to be opened.

According to Art. 1, par. 1 and Art. 3, par. 2 an EGC should be composed of two territorial authorities, at least one of which shall belong to a State party to the Third Protocol¹⁴⁹. Moreover, the EGC shall be necessarily established on the territory of a State party, i.e. its headquarters. As a further condition, Article 3, paragraph 3 underlines that sub-national authorities belonging to the States parties to the Third Protocol shall have the majority of voting rights in the EGC. This provision has been,

the legal provisions applicable to them, in their respective constitutional system, so enable or by virtue of a treaty between their state and a Party to this Protocol”.

148 During the meetings of the LR-IC Committee, notably that of 23 March 2009, the issue about the necessity of the ratification of the Third Protocol or the possibility to become member without the ratification was at the centre of the discussion. Namely, the concern was about the possibility to be members of an EGC without having signed and ratified the Madrid Outline Convention.

149 This interpretation seems to be supported by Prof. J. Marko, who attended the meetings of the LR-IC Committee as consulting expert.

probably, introduced in order to re-establish some balance in favour of the parties that decided to ratify the Protocol.

Besides territorial communities, Article 3, paragraph 1 considers other potential members. Namely, “all legal persons established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character may be members”. In particular, these legal persons shall meet alternatively, according to the same article, the following conditions: 1) their activity shall be financed mainly by the state, a territorial community or authority or similar body or 2) their management shall be subject to the control of these entities or 3) half the members of their administrative, managerial or supervisory organs are appointed by the state, a territorial community or authority or similar body¹⁵⁰. Thus, the Protocol is open to the participation of subjects, which are not directly representing a territorial community. However, the lack of “territoriality” as a condition for the membership to an EGC is replaced by the purposes and by the public involvement. The first drafting of the Protocol provided explicitly the possible membership of private law entities when dealing with the development of public goals or not-for-profit activities. As far as this element has been eliminated from the final version, the general aim has been maintained as far as only mere private and profit-oriented entities, i.e. commercial enterprises, seem to be radically excluded from the participation to an EGC. In this sense, the ambition of the Protocol grants a wider involvement of subjects, thus establishing the broadest and most flexible membership as possible¹⁵¹. In this sense, the participation of private-law legal persons is not excluded insofar as it meets the conditions established under Article 3. We will see that the EGTC doesn't permit the participation of private law entities and provides for a determined category of public subjects that are allowed to be members; however

¹⁵⁰ This provision has been subject to several modifications. In particular, the final version is the most suitable to the compatibility with the EC Regulation on EGTC.

¹⁵¹ The first draft of the commentary to this article affirmed that could be considered as potential members: “[...] functional, legal entities such as chamber of commerce or trade unions which might also be established at regional level. Representatives social partners such as chambers of commerce or trade unions - which are established in several member states either as private law entities in the form of associations or as public law entities – may therefore become members from the very beginning. If a state's national law does not allow private law entities to participate in an ECG, this does not exclude the participation of private law entities from other state. With regard to the distinction between 'not-for-profit' private law entities and profit-oriented entities with public interest goals it is made clear that commercial enterprises may not participate for private gain per se. However, public or private law entities which make gains in pursuing goals of public interest are authorised to become members”.

the purposes of the EU Regulation are not really different, aiming at the membership of bodies which are mainly concerned with the public interest. The provisions of the Third Protocol, besides its flexibility, can be considered far-seeing as it allows the membership of “functional subjects”, i.e. non-territorial entities. Such an option can permit a potential implementation of the principle of horizontal subsidiarity, considering the participation of a multiple subjects.

With regard to the membership of non-territorial subjects, the already mentioned provision of Article 3, paragraph 3 is also applicable. As the explanatory report recalls, “[...] Council of Europe legal instruments foresee territorial and functional cooperation by territorial communities or authorities as their main purpose since they carry out tasks in the general interests of their populations. However, other legal persons pursuing goals of general interests may be members. In order to avoid the risk of these special interests organisations overruling territorial communities or authorities in the policy development and decision-making processes of their respective EGC, paragraph 3 makes it clear that territorial communities or authorities of the Parties must retain the majority of the voting rights in an EGC and therefore its control.”

d) The assent of the national central authority

The argument of this sub-paragraph wouldn't probably be treated as a separate section during an ordinary presentation of the main aspects of the Third Protocol to the Madrid Convention. However, according to our opinion, it reveals some interesting and peculiar aspects of the new international instrument that should be treated in an apposite section.

Article 4, paragraph 4 affirms: “Before concluding an agreement to found the EGC or before joining the EGC, *the territorial communities or authorities shall, as appropriate, inform, notify or obtain authorisation from their national authorities regarding this intention*”¹⁵². This provision strengthens, on the one hand, the international character of the Protocol, and, on the other hand, it reaffirms the requirement for sub-national authorities to compel to the national legal system. Regarding the obligation of conformity to the respective national law, the Protocol

152 Italic is our.

recalls several times the observance of the competences attributed under national law. This kind of provision seems to be sufficient in order to safeguard the central state from the potential misuse (or expansion) of the sub-national attributions. Namely, a violation of the internal allocation of competences during the constitution or the joining of an ECG can be managed by the central authorities through the ordinary administrative or judicial procedures provided by each national system. In this regard, the domestic mechanisms of state supervision shall fall within the physiological handling of national disputes between tiers of government. The provision of Article 4, paragraph 4 of the Third Protocol could be simply considered as a mean of transparency or better coordination between central and sub-national authorities. And this should be, maybe, the best and easiest way to consider the words of the Protocol without malice¹⁵³. However, the request of an information, notification or authorisation reveals, according to our opinion, the intention to reinforce the supervision towards sub-national communities or authorities, remarking the sovereignty of the central authorities by intensifying the national procedures of control. According to the same intentions, the provisions of Article 4 have been enriched in the final version of the Protocol, which comprehends some additional paragraphs if compared with the previous draft versions. A fast reading of the article suggests that these integrations have been made in order to make the Protocol more compatible with the EGTC Regulation. Thus, paragraph 5 of Article 4 recites that the national authorisation to sub-national authorities “may be refused if membership to the ECG would violate this Protocol or provisions of national law, including the powers or responsibilities of prospective members, or if membership is not justified for reasons of public interest or of public policy of the Party concerned. In such case, the Party shall give a statement of its reasons for withholding approval”. This wording is identical to the analogue disposition contained in the Community Regulation. However, the different nature of these instruments suggest the conclusion that, in particular in the case of the Third Protocol, due to its international nature, such provision is not really useful.

153 The Explanatory Report remembers that on the basis of the communication from the sub-national subjects, “the central authorities can have recourse to their national supervisory legal instruments in order to control the legality or the constitutionality of the draft agreement.” In this regard it is worth to specify that the state supervision doesn't directly concern the legitimacy of the agreement establishing the EGC *per se*, rather it concerns the the legitimacy of the respective sub-national authorities to take part to that agreement according to the national legal system.

Moreover, this provision is completed by Article 16, paragraph 1, which considers the possibility for each State to designate, at the moment of the ratification or approval of the Protocol, the categories of territorial communities or authorities and the other legal entities admitted which it excludes from the scopes of the Protocol¹⁵⁴. As it is quite clear that such a potential exclusion should be based on the national law and not on a discretionary choice of the State, the reiteration of this eventuality within the text of the Protocol seems to be superfluous and quite redundant. In fact, following the words of the Explanatory Report to Art. 4, the most part of the countries prescribes in their national constitutional system that regional or local authorities have to seek prior consent for such activities. Article 4, paragraph 5 completes the content of paragraph 2 of the same Article, specifying that each State may waive the requirement of information, notification or authorisation referred to in par. 2, in general or for specific categories of territorial communities or authorities.

As a conclusion on this question, what emerges from the Third Protocol is the strong interest of States to highlight and emphasize their overwhelming supervision on transfrontier cooperation between territorial communities or authorities even if such emphasis doesn't always have a legal justification¹⁵⁵. As it has been said the guarantee against sub-national non-legitimized actions in transfrontier cooperation is (implicitly or explicitly) foreseen by each national legal system.

e) Applicable law

The law applicable is considered as the law related to the operative phase of the EGC. As premise, an observation has to be made in this regard. This is about the distinction of the law founding the validity of an EGC and the proper law applicable, namely the rules of its functioning. As already mentioned in the previous paragraphs, such a difference is fundamental in order to individuate the legal source which is relevant to the different legal relations and condition of legitimacy. In fact, the proper capacity to act of each single member of the EGC, i.e. territorial authorities and other legal subjects, is determined by the respective national law, which confers to the sub-

¹⁵⁴ See also Art. 2, par. 2 of the Madrid Outline Convention.

¹⁵⁵ Although the provisions under analysis can be considered as superfluous, it is patent that the Third Protocol doesn't aim to list the conditions of participation to an EGC for its potential members; conditions, which are left to the national system of member states. As an example, it has to be kept in mind that, mainly with regard to "composite" States, some of them do not require a specific pre-authorization (Belgium and Switzerland).

national authorities some specific competences. The same is true for non-territorial entities, whose capacity to act is also defined by the national law where the concerned legal entity is established¹⁵⁶. In this sense, the respective national law of the members of an EGC is legitimating the participation of each subject to the common transfrontier structure, but it doesn't necessarily affect the working procedures of the EGC.

Conversely, the law applicable to the EGC's operational activities is the national law where the structure has its headquarters¹⁵⁷. The seat of the headquarters and, consequently, the applicable law are chosen by the members during the constituent phase. Thus, there is a necessary and binding relation between the State of the headquarters and the law applicable to the EGC. Moreover, as the EGC has the legal capacity, this is accorded by the same national law¹⁵⁸. Article 2, paragraph 1 affirms that “[t]he EGC shall be a legal person, governed by the law of the Party, Council of Europe member State, in which it has its headquarters”. In this case the Protocol doesn't introduce a new legal figure, i.e. a new type of legal person. Namely, this is established and chosen according to the national legal system in which the EGC has its seat. In fact, it is the state of the headquarters that determines the law applicable and the nature of the legal person.

What has to be considered the applicable law is strictly concerned with the rules governing the ordinary working procedures of the EGC as legal subject, while it is possible that some (administrative or jurisdictional) disputes may be settled according to the national law of other parties concerned. Moreover, it is patent that

156 Art. 1, par. 2 refers to the national law of the states concerned, thus recalling the fact that, according to the commentary of the Article, “[n]ational law covers the entire constitutional and legal system of the respective Council of Europe member state, i.e. including not only the law created by the national, regional or local authorities (and the subsequent executive provisions: regulations, decrees, etc.), but also Community law if the state in question is a member state of the European Union.”

157 The provision of the Third Protocol is quite incomplete in comparison to the respective provision of the EC Regulation 1082/2006. In fact, the latter displays a hierarchic ruling about the law applicable (Art. 2 of the EGTC Regulation). Namely, the first rules applicable are the provisions of the Regulation itself; secondly, the EGTC is governed by its statutes, when the Regulation so authorizes; only when the Regulation is lacking in governing some matters the applicable law is that of the state where the EGTC has its registered office. See COUNCIL OF EUROPE, *Report on European legal instruments of interregional cooperation*, drawn up at the request of the Congress of Local and Regional Authorities by Prof. Y. Lejeune, cit., p. 4.

158 During the LR-IC Committee meeting of 23 March 2009 Prof. J. Marko explicitly highlighted the substantial difference between the participation to an EGC, which shall be conform to the national law, and the ratification of the Third Protocol, which may legitimate a state to have the headquarters on an EGC on its territory.

the national law of a sub-national subject member to an EGC, which belong to a State non-party to the Protocol in any case cannot be considered as applicable law.

f) Establishment of an EGC: Agreement and Statutes

The first founding act of the EGC is necessarily represented by a written agreement between its members¹⁵⁹. According to Article 4, paragraph 3 some mandatory characteristics have to be specified, namely: the list of members, the name, the headquarters, the duration, the objects and tasks of the EGC, as well as its geographical scope¹⁶⁰. As it has already been mentioned in the previous paragraph, the signatory members shall respect their respective national law with regard to the competences and to the compliance with the eventual requirement of information, notification or authorisation. In order to complete the procedure, Article 4, paragraph 7 requires the publication or registration of the agreement in the State where the EGC has its headquarters, as well as in all States to which each member belongs¹⁶¹.

The conclusion of the agreement confirms the purpose and the determination of the members to set up a legal subject – the EGC – especially dedicated to transfrontier and inter-territorial cooperation. In other words, the member of an EGC are mutually obliged, through this agreement, to respect and put in practice the provisions established, in particular the scopes and tasks of the EGC. Bearing in mind that such agreement is not part of international law, it is possible to wonder about its legal nature¹⁶². In fact, with regard to the implementation of this agreement, it is binding for the signatories parties which jointly accepted the content of the accord and the commitment to found an EGC. But, according to which law are they mutually obliged? The law applicable to the functioning of the EGC is the national

¹⁵⁹ The last paragraph of Art. 4 affirms that the agreement should be written in the language of the state where the EGC has its headquarters as well as in the language of each members, all languages being equally authentic.

¹⁶⁰ As it has been already said, the agreement between the members of an EGC, being they sub-national authorities, States or other “public-oriented” legal subjects, doesn't have the nature of an international treaty.

¹⁶¹ For reasons of transparency and legal certainty the publication or registration are required in every state of the EGC's members. With reference to the different legal status an EGC can have, i.e. according to public or private law, each national law has its form of publicity, which shall be respected.

¹⁶² The relationship between the international law and the legal nature of the agreement establishing an EGC is quite peculiar in this case. Of course, the Third Protocol is part of the international law and it is binding between the signatories States. The agreement establishing an EGC is foreseen by the Third Protocol, but doesn't have a legal international character because it doesn't directly obligate international subjects, i.e. States.

law of its headquarters. And also the agreement seems to be submitted to the same national law for what concerns the relations between the members of the EGC¹⁶³. In this view, a sub-national authority is submitted to the law of a foreign State, namely that of the ECG's headquarters¹⁶⁴.

The second constituent act is the statute, which is an essential and integral part of the agreement¹⁶⁵. The content of the statute is not entirely specified by the Protocol. Article 5, paragraph 3 underlines that “[i]n addition to the mandatory provisions of the agreement, the statutes shall contain rules on membership, withdrawal and dissolution of the EGC, including the legal consequences as well as on operations, organs and their tasks, staffing, budgets and financing, liability, accountability and transparency of the EGC without prejudice of the provisions of this Protocol and in conformity with the applicable law”. As the Explanatory Report remembers, “[t]he list of the contents of the statutes is non-exhaustive and lays down the minimum requirements. The law applicable to all issues to be included in the statutes may not always be the law of the state in which the ECG has its headquarters, as was already outlined in the comment under Article 2.”

In conclusion, the constituent elements of an ECG are the unanimous agreement between its founding members and the statutes, which contains and specifies the detailed structure and operational system of the ECG. Therefore, Article 6 provides that any amendment to the agreement and any substantial amendment¹⁶⁶ of the statutes shall follow the same procedures and forms provided by the respective articles. Unlike the EU Regulation on the EGTC, the Third Protocol doesn't prescribe that the ECG should have determinate organs (like an assembly or an advisory body). The internal structure of an ECG is shaped according to the legal model provided by

163 N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 259 et seq., proposes a detailed analysis about the potential applicable law to the transnational agreements between sub-national communities or authorities. In the case of the Madrid Outline Convention and its Protocols the sub-national authorities are explicitly authorized to conclude a transnational agreement with other foreign sub-national subjects in force of the international treaty, which represents a kind of covering act for the subsequent agreements establishing the ECGs.

164 The commentary to Article 2 in the Explanatory Report affirms explicitly that the law applicable to the agreement (and to the actions of the EGC) shall be the law of the state in which the ECG has its headquarters, although there are several instances where the law of other states is also applicable.

165 As well as for the agreement, the statute shall be written in the language(s) of the State where the ECG has its headquarters and in the languages of the other members. Each version is equally authentic.

166 Substantial amendments to the statutes are considered those containing an amendment to the agreement.

the national legal order in which the headquarters has its base. Thus, the Protocol doesn't prescribe any hierarchy between its provisions and the national legislations, rather it lays down general standards which find their legal reason within the national laws.

Unfortunately, the model provided by the Third Protocol remains, for the moment, only theoretical. Of course, the binomial of an agreement between sub-national authorities and the following statutes has already been in use to create common transfrontier structures, like the Adriatic Euroregion or the Black Sea Euroregion, but the concrete functioning of an ECG will, hopefully, only be analysed in the future.

The duration of the ECG is considered in Article 8, which establishes that an ECG can be set up for a limited or unlimited period of time, as specified in the agreement and in the statute. Moreover, an ECG shall be wound up *ipso facto* when the period for which it was established has expired or if the territorial communities or authorities cease to control the majority of the voting rights or after an unanimous decision of its members¹⁶⁷. An ECG may also be wound up by a unanimous decision of its members.

g) Legal capacity

As legal person governed by the national law of the State where the ECG has its headquarters, the ECG shall have the most extensive legal capacity accorded to legal persons under the State's national law¹⁶⁸. The Third Protocol, strengthening the provisions of the Additional Protocol¹⁶⁹, considers the legal personality and the legal capacity of the ECG as mandatory. If the legal capacity of the transfrontier structure should, logically, follow the national law of the headquarters, the meaning of the words "most extensive" legal capacity is not very clear. The commentary to Article 2 of the Explanatory Report doesn't specify this meaning as well. Therefore it is not

167 According to the Report of Prof. Lejeune (COUNCIL OF EUROPE, *Report on European legal instruments of interregional cooperation*, drawn up at the request of the Congress of Local and Regional Authorities by Prof. Y. Lejeune, cit., p. 9) "this dissolution, either brought forward or when the period agreed expires, must not be confused with dissolution ordered as punishment by a court or another supervisory authority" as referred to under Art. 11.

168 See Art. 2, par. 2. According to the same article, the legal consequences of the legal capacity imply that the ECG shall have the right of its own budget, to enter into contract, hire staff, acquire movable and immovable property and bring legal proceedings. This list is non exhaustive.

169 The Additional Protocol establishes that the legal capacity of a transfrontier body is optional.

necessary to complicate the possible interpretations of this provision and it seems the better interpretation just to think that the ECG can have, according to the national law applicable, the freedom to choose the most suitable legal form available in that legal system. In this regard, the commentary explains that both private law and public law are free to be chosen at the moment of the constitution of the ECG. Thus, the new legal entity is fully connected with one national law, which confers the legal characters of its subjectivity. The Protocol doesn't provide for a list of the possible legal figures, since it is a free and shared choice of the members of the ECG to find the best solution available in conformity with the national law applicable¹⁷⁰. A deep analysis of the possible legal forms available within each national law as headquarters of an ECG is not necessarily useful to have a better comprehension of the Third Protocol and goes beyond the scope of this survey.

As the legal capacity of the ECG is ruled under the national law of the party in which it has its headquarters, also the budget implementation and the financial audit are managed according to the same national law. Therefore, according to Article 12, paragraph 2 “[t]his State shall inform the other States whose territorial communities or authorities are members of the ECG without delay of the results of the audit and of the measures taken concerning the ECG”. Thus, not only the State of the headquarters is involved, but also the States where the ECG is operative. A duty of mutual information is also foreseen.

h) Tasks and scope of action

The Third Protocol doesn't list the tasks of an ECG, in order to leave to the members the maximum of flexibility as possible. Thus, the members can agree on a vast range of material scopes. The limits related to the tasks and scope of action are,

¹⁷⁰ The Explanatory Report to Art. 2 considers the three general possibilities that an ECG can assume as legal subject in connection to the membership: a) public law ECGs with only either territorial or other so-called public bodies as members; b) public law ECSs, with both territorial authorities and public bodies as members, the latter participating in the performance of public tasks if this is allowed under the respective national law; c) private law ECGs, which might again be composed of both territorial authorities and other public entities, the latter acting, however under private law, as this is the case, for instance, under Article 17 of the Austrian Constitution when territorial authorities may, like other non-state actors, have recourse to private law legal instruments such as contracts. Private law ECGs are already possible under the Additional Protocol, so that existing forms of cooperation need not to be changed. Moreover, the members of the ECG are not granted by any additional competences that they do not already possess under their respective national law.

obviously, connected to the competences of each member. According to Article 7, paragraph 1 “these tasks shall be in accordance with the competences of the members under their respective national law and shall be listed in the agreement and in the statutes”¹⁷¹. Insofar as the attributions and competences of each member of the ECG can be very different in nature and rank, the concept of the “lowest common denominator” comes again to the fore. As it has already been mentioned in the second chapter, transfrontier structures composed by sub-national authorities belonging to different States should respect each national system and, therefore, comply with the respective attribution of competences. Thus, an ECG entrusted with tasks exceeding the competences of the “lowest powerful” of its members cannot act legitimately. For this reason, the Protocol introduces a mechanism in order to avoid this limitation. Article 3 permits the participation of a State of the Council of Europe in the case that one of its sub-national authorities takes part to an ECG. Such a provision is specifically thought for adapting the gaps of competences between the different sub-national subjects. In fact, the State can fulfil the lack of competences of its sub-national communities and, in this way, it can widen the “rule” of the common lowest denominator. Thus, the contextual membership of central and sub-national authorities is oriented towards a better coordination and towards an easiest implementation of the ECG's tasks. In these terms and according to the most logical interpretation of the Protocol, the State should not be seen as a competitor with regard to territorial communities. At least the State is not in competition with sub-national authorities when it is a member of the ECG. Namely, it can exercise its supervisory activity through other mechanisms, i.e. the internal attribution of competences and the eventual requirement of authorisation. Of course, this interpretation remains still a theoretical one, as far as the Protocol has not entered into force yet. Only with the ratification of the Protocol and its subsequent implementation it will be possible to evaluate the concrete function of its provisions.

Article 7, paragraph 2 is about the implementation of the tasks: “[t]he ECG shall adopt decisions and ensure their implementation, in respect and for the benefit of individual persons or legal entities subject to the jurisdiction of the States to which

171 Art. 7, par. 4 specifies that “[t]he ECG may not exercise competences that territorial communities or authorities exercise as agents of the state to which they belong, except where duly authorised. It may exercise competences that states members of the ECG confer upon it.”

its members belong. Members shall adopt or facilitate all necessary measures falling within their competences in order to ensure that the ECG's decisions are implemented¹⁷². This is the only provision, which concerns the tasks from a proactive point of view, whereas the other dispositions of Article 7 concern the tasks from a “negative” point of view, i.e. from the perspective of their limitations. However, the mentioned positive disposition seems to represent a programmatic purpose without imposing clear instructions or obligations about the implementation of the ECG's tasks. But, as far as the members are concerned, sub-national authorities should always follow and give incentives to the ECG's activities. As further highlighted by Art. 7, par. 3, the ECG may not exercise regulatory powers, take measures affecting the rights and freedoms of individuals or impose levies of a fiscal nature. Of course, the central authority can delegate specific competences to the sub-national authorities.

As far as the Protocol doesn't provide for a restricted list of tasks, the ECG could deal with multiple issues and implement several tasks, because of its high degree of flexibility. The limits of this flexibility are entailed in each national legal system. In these terms, the setting up of an ECG requires a certain degree of coordination and cooperation between the different sub-national authorities in order to find and to settle the maximum degree of compatibility between the respective legal order.

Moreover, an ECG can potentially implement programmes and projects co-financed by the European Union in the field of cross-border cooperation, i.e. in the case of Structural Funds and Pre-accession Instrument. This is quite an interesting perspective, as it opens the way to a possible competition with the EU Regulation on the EGTC. In fact, the constitution of an ECG could be potentially preferred in order to manage EU programmes and funds, maybe if we consider the possible participation of non-EU members. In this regard, a comparison between the tasks of an ECG and of an EGTC is essential in order to understand the possible implementation and the range of activities that these two cross-border structure can develop.

172 The second sentence of par. 2 is considered, according to the commentary, as an application of the principle of subsidiarity. When ECG, as a legal subject, lacks the necessary executive power or effective legal mechanisms to enforce its decisions, the members should facilitate and propel the ECG's actions.

Approaching the next sub-paragraph, an aspect can be anticipated with regard to the tasks of an ECG. In fact, in case an ECG is acting outside its tasks as defined in the founding documents, Article 11, paragraph 5 provides for the following rule in addition to the specific provisions about the dissolution of an ECG. Thus, when requested by a competent authority with a legitimate interest, “a competent court or the competent authority of a party where the ECG has its headquarters may order the ECG to be wound up if it finds that the ECG is acting outside the tasks entrusted to it”¹⁷³. Although such a provision is quite clear from an abstract point of view, according to our opinion some difficulties of interpretation can emerge if the tasks entrusted to the ECG are enumerated in a too general way. In these cases, it is desirable some coordination and mutual trust between the different subjects involved in order to avoid pretentious judicial processes.

i) The pathological phase

Several issues are focused in this sub-paragraph, namely the liabilities, the dispute settlement and the administrative and judicial review with regard to the actions of an ECG. These elements, even if different, comprehend the overall dispositions about the responsibilities and the consequences of possible infringements committed by the ECG and its organs and members during the activity of the ECG.

Article 9 of the Protocol establishes some general rules about the liabilities. The first three paragraphs of Article 9 are about the liabilities of the ECG, whereas the last two paragraphs display some provisions about the liabilities of the members. Paragraph 1 states that “[t]he ECG – or if its assets are not sufficient, its members jointly¹⁷⁴ – shall be liable with regard to third parties for its acts, including debts of whatever nature, even if those acts do not follow within its tasks”. This provision affirms the principle of a general liability of the ECG for its actions that violates the rights of third parties. In this case, the determination of the tasks through the agreement and the statutes is not sufficient in order to prevent some attributions of

¹⁷³ Moreover, always according to the same paragraph, the competent court or authority may allow the ECG time to rectify the situation. If the ECG fails to do so within the time allowed, it may be declared wound up.

¹⁷⁴ The commentary to the article speaks, also in this occasion, of the application of the principle of subsidiarity. Namely, the states intervene only in case the ECG doesn't have sufficient assets.

responsibility to the ECG. Namely, even acting outside the limits of its tasks, the ECG can be liable with regard to third parties as a general principle of responsibility. Furthermore, paragraphs 2 and 3 shall be read together. On the one hand, the ECG is liable to its members for any breach of the law to which it may be subject and¹⁷⁵, on the other hand, the organs of the ECG are liable with regard to the ECG for any breach of the law they have committed in their exercise of their functions. According to these provisions, there is a possible multiple and mutual liability between members, the ECG and its organs. As the law concerned is not always the law which is generally applicable to the actions of the ECG, other national legal orders can be involved and not only the law of the state where the ECG has its headquarters.

As far as the ECG has the most extensive legal capacity under the law applicable and has, therefore, a general liability for its acts towards third parties, it is possible that the members have a limited liability, according to their respective national legal status. In such case, according to Art. 4, par. 3, the name of the ECG at the time of the constitution shall include the word “limited”¹⁷⁶. In the eventuality that a member of the ECG has a limited liability in accordance with its national law, Art. 9, par. 4 provides the possibility for the other members to also limit their liability in the statutes. Moreover, according to par. 5, a State, on the territory of which it is intended to set up the headquarters, may prohibit the registration or publication of the ECG if one or more of its prospective members have limited liability.

This brief presentation of the provisions about the system of the liabilities within an ECG, makes clear that the attempt of harmonisation proposed by the Third Protocol is far from resolving the complexities arising from the existence of different legal systems, their national law and the legal dimension of sub-national authorities. About the role of national central authorities, it is obvious that where they are not members of an ECG no liabilities can be ascribed to them. Thus, with regard to the activities of an ECG the State, in general, has the quality of third party¹⁷⁷.

175 The commentary makes the following example: if a member acts on behalf of an ECG (for instance as under Art. 7, par. 2) and violates the respective law so that the ECG is held responsible by a third party according to Art. 9, par. 1, then the ECG has the rights to seek regress against the member in accordance to Art. 10, par. 2.

176 The national law of the other ECG members will determine whether they can limit their liability as well.

177 See COUNCIL OF EUROPE, *Report on European legal instruments of interregional cooperation*, drawn up at the request of the Congress of Local and Regional Authorities by Prof. Y. Lejeune, cit., p. 9.

Article 10 considers the cases of dispute settlement. The general rule states that in case of disputes between the ECG and its members, the competent courts shall be those of the state in which the ECG has its headquarters¹⁷⁸. Alternatively, in case of a dispute between the ECG and a third party, the competent court shall be those of the State in which the third party effectively resides or, with regard to a legal person, the State in which its seat or headquarters is located, as long as these States are member States of the Council of Europe¹⁷⁹. In this regard, the applicable law is connected to the competence of the court. As an exceptional option and if the parties agree in advance, the disputes with third parties may be settled through an arbitration agreement. However, if the residence, seat or headquarters is not located in a members State of the Council of Europe the ECG is obliged, according to Art. 10, par. 3, to conclude an arbitration agreement for all the activities with this party. In these situations, the main concern is related to avoid the application of the law of a State which is not member of the Council of Europe. The necessary respect of democracy and the rule of law are considered as an achievement for the CoE's member States¹⁸⁰. At least, the monitoring activity and the institutional relevance of the Council play a fundamental role which is not guaranteed in non-member States.

Article 11 concerns, in general, the control over the legality of the acts of an ECG. Following the rule of the general law applicable, “[d]ecisions and acts of the ECG shall be subject to the same supervision and administrative and judicial review of the legality of acts of territorial communities or authorities as those required in the State in which the ECG has its headquarters.” In order to facilitate the relations with the institutions involved, the ECG shall comply with requests of informations coming from the authorities of States to which the territorial communities or authorities belong. But, besides the acts of the ECG itself, the Third Protocol takes into consideration also the actions of the members. Namely, according to Article 11, paragraph 3, decisions and acts of the members of an ECG – both sub-national subjects and the other “public-based” entities – are subject to the supervision,

178 Art. 10, par. 1.

179 *Ibid.*, par. 2.

180 According to these principles, Art. 10, par. 4 and 5, specifies the general rights of third parties. “Third parties shall retain, vis-à-vis territorial communities or authorities in behalf of which the ECG performs certain tasks, all the rights they would enjoy if those tasks were not performed by the ECG. In any case, the rights of individuals and legal persons shall include the right to appeal before all competent organs and courts, including the rights of access to services in their own language and the right to access information”.

administrative and judicial control under their respective national law¹⁸¹. This last remark seems to be a sort of reassurances for the States signatories to the Third Protocol. Indeed, several provisions of the Protocol aim to confirm the control of national central authorities on the legality of the activities of the respective sub-national entities.

In this regard, Art. 11, par. 4 considers the eventuality that an ECG violates with its activities some of fundamental interests of States to which its members belong, such as public policy, public security, public health and public morality. Besides this principles of public order, also the violation of the public interest of a State is mentioned. In case of such contravention, a competent authority of the State concerned “may prohibit that activity on its territory or require those members that fall under its jurisdiction to withdraw from the ECG unless the latter ceases the activity in question”. This is a general safeguard clause against possible activities of the ECG against the state-interests. On the one hand, it is comprehensible that the Protocol includes such a disposition in order prevent from an abuse of activities but, on the other hand, this provision can lead to an excessive discretionary control of States on the respective sub-national authorities and, also, on foreign sub-national subjects¹⁸². For this reason, paragraph 4 continues as follows. “Such prohibitions shall not constitute a means of arbitrary or disguised restriction on cooperation between the members. Review of the competent authority's or body's decision by a judicial authority shall be possible”. The text of the paragraph seems to contain the conditions for a balanced supervisory activity coming from the States. However, as the national fundamental interests, and mainly the concept of “violation of the public interest”, are of difficult and (generally) evolving interpretation, there is always the risk to submit the parameters of legitimacy to a mere political and arbitrary evaluation.

181 The commentary remembers that this provision remarks Art. 3, par. 4 of the Madrid Outline Convention which states that “agreements and arrangements shall be concluded with due respect with due regard to the jurisdiction provided by the internal law of each Contracting Party in respect of international relations and general policy and to any rules of control or supervision to which territorial communities or authorities may be subject.”

182 The fact that a state can prohibit the activity of the ECG has its consequences on each member of the ECG and, therefore, also on subjects that do not belong to the state concerned.

4.11. *An overall evaluation about the Third Protocol: simplification vs. legitimization*

The main aim of the Third Protocol is to foster transfrontier and interterritorial cooperation and to provide for a harmonized and substantive set of rules in order to facilitate the establishment of cooperation. The added value of the Third Protocol with regard to the Madrid Outline Convention has to be seen in the provision of common legal standards related to the establishment of a transfrontier body with legal capacity. The very first idea of constituting the unique and foremost legal instrument for the development of the future transfrontier structures had to be set aside after the adoption of the EU Regulation on the EGTC. The process of drafting the document, therefore, has needed to look for possible forms of compatibility with the EU provisions¹⁸³. However, the ECG still aims to provide one of the best optional model to implement territorial cooperation between sub-national communities or authorities¹⁸⁴.

As it has been remarked by the Committee of Experts on Transfrontier Cooperation, the three main problems, which remained unresolved after the implementation of the MOC are: 1) the absence of an almost generalized explicit recognition of sub-national authorities' legal competence to conclude transfrontier cooperation agreements; 2) the legal nature of transfrontier cooperation bodies and 3) the legal force of the acts accomplished by these bodies¹⁸⁵. If such questions represent the main difficulties for sub-national subjects to put in force transfrontier activities, it is possible to affirm that the Third Protocol sorts out these issues? Obviously, an answer can be only partial for two reasons. Firstly, because the process for the ratification and effective implementation of the Third Protocol is currently

183 The attempt to find the best ways of compatibility of the Third Protocol with the EU Regulation have not remained only words. Namely, an accurate comparison between the two legal instrument has been the object of a Report commissioned by the CLRAE in order to give a significant contribution and a clear legal advise for the drafting of the Third Protocol. The document in question is COUNCIL OF EUROPE, *Report on European legal instruments of interregional cooperation*, drawn up at the request of the Congress of Local and Regional Authorities by Prof. Y. Lejeune, July 2007, CPR/GT/CIR(14)3.

184 See COUNCIL OF EUROPE, *Report on European legal instruments of interregional cooperation*, drawn up at the request of the Congress of Local and Regional Authorities by Prof. Y. Lejeune, cit., p. 2 and p. 16: "In drawing up Protocol No. 3 and its appendix, the committee of experts on transfrontier cooperation (LR-CT) is pursuing a precise objective, which is to provide the Contracting Parties with a set of legal rules that make it possible to supplement, modify or replace national legislation governing cooperation bodies set up between territorial authorities or groupings of territorial authorities in different countries. The need for such rules is mainly felt within states that have no practical experience of transfrontier cooperation or legislative tradition in this area."

185 See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Report on the current state of the administrative and legal framework of transfrontier co-operation in Europe*, cit. p. 9.

still ongoing and, therefore, its final dimension is not yet defined; secondly, because the Protocol is an optional instrument and, as such, it cannot cope with all aspects and forms of transfrontier cooperation. In fact, as far as States will sign and ratify the document, other approaches to transfrontier cooperation remain still practicable.

Starting to answer from the second and the third mentioned aspects, the legal nature of transfrontier cooperation bodies is defined by the creation of the new figure of the Euroregional Cooperation Grouping and by the mandatory attribution of the legal personality and the legal capacity. The status, conditions and procedures concerning this legal subject are demanded, as already explained, to the national law of the State where the ECG has its headquarters. The legal force of the acts of an ECG follows the tasks conferred to the new body. It is described, in general, through its limitations with regard to the possible conflicts with the various national central authorities' competences and with regard to the potential breaches of the national fundamental interests.

The first question is about the recognition of a sub-national general competence to conclude transfrontier cooperation agreements. The Third Protocol entails some dispositions about the creation of an ECG as a transfrontier cooperation's body, which is created by an agreement between, as major members, territorial communities or authorities. Does it mean that sub-national authorities have a generalized right to territorial cooperation?

The ratification of the Third Protocol by the States members of the CoE will allow territorial communities or authorities to set up an ECG through a written agreement and in conformity to the conditions provided in the Protocol. As far as the MOC considers the possibility of a previous inter-state agreement, this eventuality seems (but it's still not definitely sure) to be abandoned by the Third Protocol. Namely, States entitle sub-national authorities to conclude an agreement constituting an ECG through the Protocol itself, which already represents a kind of covering inter-state agreement. Some dispositions of the MOC remain, however, the same and are confirmed in the Third Protocol, such as the faculty for the States parties to designate the categories of territorial communities or authorities or other public or private entities, which they exclude from the scope of the Protocol.¹⁸⁶ Thus, the new

¹⁸⁶ See Art. 16, par. 1.

instrument of the Council of Europe doesn't introduce an overall competence for territorial communities or authorities to engage in transfrontier cooperation. The reference to the compatibility and conformity with the national legal orders and the respective systems of competences' attributions remain the core legal issue of the Third Protocol.

Rather than facing the question of the legitimization of sub-national authorities toward transfrontier cooperation, the Third Protocol seeks to improve legal certainty and legal simplification in a matter which is characterized by a high degree of variability.

During the works for the adoption of the CLRAE's opinion on the (previous Draft) Third Protocol, the lack of knowledge about the concrete development of transfrontier cooperation was highlighted by several sub-national subjects. In particular, territorial communities belonging to the east-countries of the Council of Europe raised the question¹⁸⁷. Moreover, the differences among the national legal systems and the multiplication of the models for the development of cross-border cooperation required the implementation of clearer solutions. Thus, the Third Protocol intends to overcome the obstacles deriving from the differences between national legal systems and from the multiplicity of the different forms of territorial cooperation which have spread out across Europe¹⁸⁸.

The analysis of single aspects of the ECG demonstrates that the Protocol is far from supplying to the complexities emerging from the existence of different national legal and administrative systems. Rather, the Protocol needs a cohabitation with the national rules, without whose it is legally not self-sufficient. Within the panorama of transfrontier cooperation the interaction of different national systems cannot be neglected, being a typical legal character of the greater Europe. Therefore, also in order to face the pressure of the member States of the CoE, the Third Protocol should try to cope with legal complexities and not to refuse them¹⁸⁹.

187 This aspect emerged in several meetings held with the CLRAE's officials with regard to the drafting of the adopted CLRAE, Opinion 30(2009) of 10 June 2009 on the Draft Protocol No. 3 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings, during my study visit at the Congress.

188 See A. ENGL, *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*, European Diversity and Autonomy Papers 03/2007, Bolzano, 2007, <http://eurac.edu/edap>, p. 25.

189 "The revised draft protocol and its appendix will thus constitute a much more diversified legal

In this regard, the intention to reach a simplification and a systematization of the matter, seems to be achieved by the provision of some general and necessarily flexible legal standards¹⁹⁰. From the point of view of sub-national subjects, the situation with regard to the role of central authorities remains substantially unchanged except for the new option to build up a recognised transfrontier structure such the ECG. Namely, the knowledge of the existence of an apposite body with legal capacity will hopefully foster the development and the implementation of transfrontier initiatives¹⁹¹.

5. Community instruments

5.1. General remarks

From a general point of view, the EU/EC approach to territorial cooperation is rather different from that of the Council of Europe. Both of the two institutions certainly present various similarities, mainly concerning the most general ideas and principles of territorial/transfrontier cooperation¹⁹². In this regard, some remarks about the approach of the European Community and of the Council of Europe's territorial dimension have already been made. As far as territorial cooperation represents for the Council of Europe a sector of interest and intervention, for the EU it consists of a part of its policies within the Member States. Actually, such an observation doesn't want to be rude or to diminish the pioneering role the CoE has had and still has with regard to the development of transfrontier cooperation between sub-national

instrument than the European Regulation. Their flexibility will, in particular, enable states to adhere more easily to their traditional legal principles.”, see COUNCIL OF EUROPE, *Report on European legal instruments of interregional cooperation*, drawn up at the request of the Congress of Local and Regional Authorities by Prof. Y. Lejeune, cit., p. 17.

190 *Ibid.*, p. 16, where Prof. Lejeune speaks about “legal standardisation”.

191 See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Report on the current state of the administrative and legal framework of transfrontier co-operation in Europe*, cit. p. 23 *et seq.* The difficulties derived from the existence of different legal frameworks can be faced only via complex and coordinated actions, which do not always coincide with interventions on legal rules. If there is a responsibility of the states with regard to the legal framework for sub-national authorities in order to develop cross-border cooperation, some obstacles can be overcome by other means. For instance, neighbourly collaboration between states or regional and local authorities, mutual consultations and provision of financial support are essential key-factors to develop an effective cooperation besides the difficulties of the legal orders.

192 See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Similarities and differences of instrument and policies of the Council of Europe and the European Union in the field of Transfrontier Co-operation*, cit., p. 34.

authorities. The approach of these two institutions is, however, different due to the “physiological” fact of their distinct legal and political nature. Moreover, also the geographical dimension is different. In fact, it is possible to affirm that the CoE's instruments for transfrontier cooperation do not have, as such, geographical purposes and consequences: they apply uniformly in each country that ratifies the instruments. Conversely, the EC/EU territorial policy affects differently the various zones of the Community through its various instruments and funds¹⁹³.

With reference to the development of territorial cooperation between sub-national communities supported by the EC/EU, it is possible to say that it did not begin as an explicit objective or as an urgent need to find legal instruments to foster this kind of activities¹⁹⁴. In particular, it is important to remark that the original Treaties do not provide an explicit competence for the Community to deal with territorial cooperation.

For this reason, the first Community approach to sub-national issues has been deeply connected to the necessity of finding an economical balance among the various European regions and, in particular, to the cohesion policy according to Articles 158, 159 and 160 TEC¹⁹⁵. In this sense, transfrontier and inter-territorial cooperation are, at the origins of the Community territorial approach, a kind of indirect consequence of the Community interventions¹⁹⁶ within the cohesion and regional policies. In particular, the concept of “cohesion”, which has been introduced with the Single European Act¹⁹⁷, represents the aim of a redistributive policy aiming

193 *Ibid.*, p. 37.

194 *Ibid.*, p. 36. It is interesting to note that, on the one hand the Council of Europe has been firstly concerned with the exigence to elaborate a legal framework for transfrontier cooperation and, on the other hand, it finances almost exclusively “soft” projects aiming to establish contacts and cooperation between regional and local communities. Conversely, the European Community has not originally involved in the provision of legal instruments for the development of cross-border cooperation, nonetheless it has implemented “hard” projects.

195 See P. LÉGER, *Commentaire article par article des traités UE et CE*, Bruxelles, 2000, p. 1280-1289.

196 In regard to the EU territorial cohesion policy, according to A. Faludi, it is not possible to speak about an explicit territorial approach before the 2000s. Nevertheless, implicitly, such a territorial concern has been part of the EU institutional activities and known also under other terms like regional policy or regional planning and spatial planning or spatial development policy. See A. FALUDI, *Territorial Cohesion under the Looking Glass. Synthesis Paper about the history of the concept and policy background to territorial cohesion*, 2009, available at the EU Commission official website: http://ec.europa.eu/regional_policy/consultation/terco/index_en.htm, p. 6.

197 More than the concept of cohesion, the SEA introduced in the Treaties also an explicit provision regarding the ERDF (originally created with the Regulation EEC no. 724/75), entailed in Art. 160 TEC.

at promoting the development of disadvantaged regions and local communities within the European market, as well as at reducing social and economic inequalities across Europe¹⁹⁸. As far as such an approach could be intended quite easily as mainly of economic nature, it is relevant to underline that the policies related to cohesion, convergence and regionalism do have an intrinsic political nature, being deeply connected to the “constitutional” objectives of an harmonious development of the whole Community, capable of granting an equitable social protection and a high standard of life-quality, as enshrined in Articles 2 and 3 TEC. However, it is not possible to forget the functional/economical aspect of the development of territorial policies within the EU. In this scenery the issue of cross-border cooperation has developed, quite paradoxically, both as an essential element for generating a deeper integration and as a collateral effect of policies that are not, at a first instance, directly addressed to such an issue. Thus, the very first existence of a common concept of a “transfrontier territory” was linked to the possibility to obtain a Community financial contribution¹⁹⁹.

Within this context, the slow development of an official territorial policy brought to a delayed awareness of the political necessity of a legal instrument for territorial cooperation which found its culmination with the adoption of the EGTC Regulation in 2006.

Even if the adoption of a proper legal tool for territorial cooperation is a recent happening, previous years have seen the development of an important experience in the field of the so-called “trans-european” cooperation. Namely, the creation of the INTERREG programme in 1989 launched a huge and relevant Community initiative devoted to foster trans-frontier, trans-national and inter-

198 See I. BACHE, *Europeanization and Multilevel Governance: Cohesion Policy in the European Union and Britain*, London, 2007, p. 3. See also I. BEGG, N. DE MICHELIS, R. ESPOSTI, *Cohesion in the EU*, in *CESifo Forum*, 2008, v. 9, n. 1, p. 3-34. If the concept of “cohesion has been introduced with the Single European Act, the idea of reducing the development gaps between different regions and the delay of the less favourites have been one of the first concerns of the Member States, even according to the Preamble of the Rome Treaty. Namely, this explains the creation of the ERDF in 1975, some years before the SEA. Main objectives of the cohesion/regional policy are: the promotion of development and the structural adjustment of region with development-delay, the reconversion of regions with industrial decline, the struggle against unemployment, the adaptation of workers in regard to the industrial mutations and the rural development. For the programming period 2000-2006 these objectives have been reduced to three main priorities. Furthermore, it has to be pointed out that the creation of a specific Cohesion Fund dates back to 1994.

199 A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, Madrid, 2008, p. 47.

regional cooperation²⁰⁰. As far as this kind of initiative does not represent a proper solution and a true legal instrument for the establishment of sub-national cooperation, the creation and the subsequent spreading out of Community planning and financial tools have deeply marked the evolution of the EU approach towards territorial cooperation.

In this regard, the EU showed, as a first involvement in the field of territorial cooperation, the intention to develop a promotional role rather than a legal systematization of the subject.

5.2. The experience of INTERREG

The development of INTERREG programmes is a peculiar aspect related to the Community cohesion policy and structural funds. It started in the Nineties and lasted, with significant modifications, until 2006, namely until the adoption of the new cohesion policy 2007-2013, when the objective of territorial cohesion has been explicitly introduced as an autonomous part of the general policy. INTERREG knew three phases of programming, respectively 1990-1993 (INTERREG I), 1994-1999 (INTERREG II) and 2000-2006 (INTERREG III)²⁰¹. Generally speaking it is known as an economic-promotional tool of the Community to foster projects or programmes related to the development of cross-border, transnational and interregional cooperation, thus promoting a better European integration directly on the field of localized interests.

Before deepening the analysis of the background, a clarification has to be made. Speaking from a legal point of view, the context of INTERREG does not have a peculiar value with regard to the creation of juridical tools for cross-border cooperation between sub-national authorities. Actually, the idea crawling under the

²⁰⁰ See Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments.

²⁰¹ INTERREG I supported 31 cross-border programmes. INTERREG II financed 79 programmes and introduced three types of approach, namely related to cross-border cooperation (strand A), completion of energy and networks (strand B, only available in this second phase) and regional and spatial planning (strand C, introduced in 1996). INTERREG III, strong of an almost 10-years experience, developed 72 programmes for a total amount of EUR 4.875 and was divided into three strands: cross-border cooperation (strand A), transnational cooperation (strand B) and interregional cooperation (strand C). See INTERACT, *A Study of the Mid Term Evaluations of INTERREG Programmes for the programming period 2000 until 2006*, Vienna, 2005, p. 17-21.

design of INTERREG is that the presence of national borders should not be a barrier for a balanced development and integration of the European territory²⁰². Therefore, part of the Structural Funds, in particular the European Regional Development Fund (ERDF), have been designated for this scope. In this sense, the main interest for the Commission has not been that of finding a legal framework for territorial cooperation, rather to foster the substantial efficacy of promotional initiatives devoted to the real development and integration of areas, spaces and territories divided by a national border, but in the need (and in the will) of shared projects. Thus, although it is not possible to consider the INTERREG as a legal instrument or as a legal framework for cross-border relations between sub-national authorities, it is worth, and necessary, to retrace briefly its story and to consider, anyway, its contribution in the perspective of the development of territorial cooperation in Europe.

The presentation and the subsequent comprehension of the INTERREG system implies a high degree of complexity, a detailed analysis and a quite good practical experience concerning its concrete planning. Therefore, the following pages will only attempt to give a general overview of this instrument and will draw some general conclusions and observations with regard to the role of INTERREG in the development of the legal instruments for cooperation between foreign territorial communities.

After an experience of almost 10 years, the last phase of INTERREG (2000-2006)²⁰³ saw the conclusive definition of the three areas of intervention, namely, strand A, B and C, which influenced the conceptual subdivision of the terminology related to trans-European cooperation. According to the Commission's guidelines, *cross-border cooperation* (strand A) concerns neighbouring authorities, adjacent to a common border, and it is intended to develop cross-border economic and social centres through joint strategies for sustainable territorial development²⁰⁴;

202 See Communication from the Commission to the Member States of 28 April 2000 laying down guidelines for a Community initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory - Interreg III, OJ C 143, 23.5.2000, p. 6-29.

203 See Council Regulation (EC) No 1260/99 of 21 June 1999 laying down general provisions on the Structural Funds.

204 Priority is given to the following objectives: promotion of cross-border urban, rural and coastal development; development of entrepreneurial spirit and small and medium-sized enterprises (SMEs), tourism, local development and employment initiatives (LDEI); creating an integrated labour market

transnational cooperation (strand B) concerns national, regional and local authorities and aims to promote a higher degree of territorial integration across large groupings of European regions, with a view to achieving sustainable, harmonious and balanced development in the Community and better territorial integration with candidate and other neighbouring countries²⁰⁵; *interregional cooperation* (strand C), concerning the whole Community territory, is intended to improve the effectiveness of policies and instruments for regional development and cohesion through networking, particularly for regions whose development is lagging behind and those undergoing conversion²⁰⁶. With regard to this tripartite terminological background it is worth to propose a brief observation. The intention to divide the INTERREG programming arrangement is connected to the structural target of the Community policy, but has nothing to do with a clear theoretical classification of territorial cooperation *per se*, nor it has some consequences for the legal distinction of different forms of cooperation. In particular, while this tri-partition has become a traditional and familiar classification within the cohesion policy, it creates some confusions from a strictly legal-terminological point of view.

About the procedures of implementation of INTERREG and with regard to the actors of the different programmes, a differentiation has to be made. On the one hand, the issue of so-called eligibility concerns the individuation of the territories admitted for the funding; on the other hand the actors of cooperation could be available among institutional territorial authorities (national, regional or local) without forgetting the possible participation of other subjects like economic or social partners²⁰⁷. In this perspective, it is important to spend a few words about the eligible

and promoting social inclusion; cooperation on research, technological development, education, culture, communications, health and civil protection; environmental protection, energy efficiency and renewable energies; basic infrastructure of cross-border importance; cooperation in the legal and administrative fields; cooperation between citizens and institutions; and technical assistance.

205 Main objectives are: territorial development strategies; development of efficient and sustainable transport systems and improved access to the information society; promotion of the environment and sound management of cultural heritage and natural resources, in particular water resources; and technical assistance for the establishment of transnational partnerships.

206 See Communication from the Commission to the Member States of 28 April 2000 laying down guidelines for a Community initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory - Interreg III, 2000/C 143/08, p. 3-5. The objectives of strand C are settled in a specific document (Commission Communication to the Member States of 7 May 2001 - "Interregional cooperation" - Strand C of the INTERREG III Community initiative, C(2001) 1188 final - Official Journal of 15.5.2001)

207 Non-governmental organisations and the academic world are, according to the Commission, examples of non-institutional partners.

territories. For cross-border cooperation (strand A) the eligible areas are all the NUTS III²⁰⁸ level along internal or external Community borders²⁰⁹. For transnational cooperation (strand B) the eligible areas are made up among groups of regions and for interregional cooperation (strand C) the whole of the Community is eligible. As far as the three kinds of cooperation could be conceptually quite different in relation to the territories concerned and in relation to the types of relations between the authorities involved, from a strictly legal point of view the related instruments and procedures do not really basically change, being the Member States always concerned in the phase of the programming.

Another relevant aspect concerns the individuation of the institutional authorities responsible for the programming. The Commission's guidelines provides for the following allocation: the regional or local authorities in partnership with the national authorities (Strand A); the national authorities in close cooperation with the regional or local authorities located in the geographical area where transnational cooperation is to take place (Strand B); and only the national authorities (Strand C)²¹⁰.

Generally speaking, the INTERREG III, as last and most complete phase, individuates some common aspects and principles as guidelines for the development of the three strands of programmes. The principle of *coherence* with the domestic policies of Member States and the principle of *complementarity* with the general provisions of the Structural Funds permit a balanced Community action. The

208 According to the Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS), the level of NUTS III corresponds to the following existing administrative units: for Belgium "arrondissementen/arrondissements", for Denmark "Amtskommuner", for Germany "Kreise/kreisfreie Städte", for Greece "nomoi", for Spain "provincias", for France "départements", for Ireland "regional authority regions", for Italy "province", for Sweden "län" and for Finland "maakunnat/landskapen". Furthermore, as a clarification the Regulation affirms, at art. 3, that if for a given level of NUTS no administrative units of a suitable scale exist in a Member State, in accordance with the criteria referred to in paragraph 2, this NUTS level shall be constituted by aggregating an appropriate number of existing smaller contiguous administrative units. This aggregation shall take into consideration such relevant criteria as geographical, socio-economic, historical, cultural or environmental circumstances. Regarding the employment of the concept of NUTS in relation to the eligible territories for cross-border cooperation, while a positive aspect could be referred to the homogeneity and balance between the areas interested for the various programmes, a negative aspect concerns the potential difficulty to overlap the territorial division with the correspondent and suitable institutional subject.

209 In particular, according to the Commission's guidelines, all the internal and external areas along the borders and certain maritime areas are eligible. See Annex I to the Commission's Communication 2000/C 143/08.

210 See at:

http://europa.eu/legislation_summaries/regional_policy/provisions_and_instruments/g24204_en.htm.

principle of *programming* invites regions or other territories involved in the cooperation to present the Commission a so-called Community Initiative Programme (CIP) “defining their joint development strategy and demonstrating the cross-border value added by the operations planned”²¹¹, whereas the principle of *partnership* calls for a bottom-up approach to develop shared actions among national, regional and local authorities and the other economic and social partners. These two principles have, then, to be considered together with the fact that every programme needs to be carried on by a single managing authority, which shall be the referent for the entire the programme. Moreover, the development of these kind of Community initiatives has the important merit to spread the methodology of agreements and coordination between public subjects²¹².

According to these general references, it is possible to observe how INTERREG, in particular the third and more advanced phase, is something more than a system of funding and an economical resource. As far as it is true that the local and regional communities don't find a new instrument for developing autonomous actions and initiatives, it is also true that INTERREG could be considered as a benchmark for the elaboration of specific relations between territorial communities within a Community initiative²¹³. As some doctrinal contributions notice, a negative character of INTERREG could be individuated in the excessive involvement of central national powers with regard to the establishment of the different forms of cooperation. In this sense, the strict supervision of the State could represent a kind of obstacle for an autonomous development of sub-national cooperation and decision-making²¹⁴. As far as such an observation is concerned, one reason could be found in

211 See at:

http://europa.eu/legislation_summaries/regional_policy/provisions_and_instruments/g24204_en.htm.

212 See N. BASSI, *Gli accordi fra soggetti pubblici nel diritto europeo*, cit., p. 59-60.

213 With regard to the possibility of managing determinate objectives within regional policy and the structural funds, the Commission proposed the legal instrument of the so-called “tripartite contracts” as a more advanced form for territorial policies between European Community, Member States and the respective local and regional authorities. See the Communication from the Commission, A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities, COM (2002) 709 final.

214 See J. GABBE, V. VON MALKUS ET AL., *Cooperation between European border regions: review and perspectives*, Baden-Baden, 2008, p. 49: “As the implementation of INTERREG-programmes [...] is still often heavily influenced by the national level, the flexibility needed to meet the special priorities of different border regions is often lacking. The lack of regionalisation in these programmes is clearly noticeable. In recent years, it has been possible to achieve gradual improvements in these areas. By means of the principles of partnership and solidarity, several border regions were increasingly brought into the decision-making process [...]”.

the technical-economic content of the structural policy that has not necessarily to do with the pressing or innovative aspects of cooperation among regional and local communities²¹⁵.

So far, a kind of double role of INTERREG has been pointed out. On the one hand, this Community initiative has widely contributed to the establishment of a quite long experience of trans-European cooperation, even in partnership and partially on behalf of territorial communities; on the other hand, the possibilities for sub-national authorities to take part and drawing up operational programmes vary. In this sense, this specificity of INTERREG brought, as a consequence, to deficiencies or delays in the legal treatment of inter-regional cooperation²¹⁶.

An indicative and more general symptom of this question is the lack or the delay of an explicit provision in the primary and secondary Community legislation regarding the role and legitimacy of regional and local authorities within the Community legal system. Such a situation is also related to the INTERREG programming and it is, however, clearly in line and coherent with the provisions contained in Article 159 TEC, where the implementation of the cohesion objectives entailed in Article 158 and the related responsibility of the economic choice and of the allocation of financing resources are charged to the conjunct actions of the Member States and the Community²¹⁷. In this perspective it is quite easy to comprehend why the role of the sub-national authorities in the INTERREG programmes is concentrated more in the concrete realization of projects rather than in the preliminary decision-making phase and in the adoption of proper legal acknowledgments for territorial communities.

Although the INTERREG programmes hasn't developed a significant legal systematization in the field of trans-European cooperation, however they represent a set of financial and economic resources that have to be seen as a parallel and complementary instruments with regard to the legal ones²¹⁸.

215 See K. SODUPE, *The European Union and Inter-regional Co-operation*, in F. ALDECOA, M. KEATING (eds.), *Paradiplomacy in Action: The Foreign Relations of Subnational Governments*, cit., p. 74. See also M. JOUEN, *La cohésion territoriale, de la théorie à la pratique*, Paris, 2009, p. 29.

216 *Ibid.*, p. 74-78.

217 See P. LÉGER, *Commentaire article par article des traités UE et CE*, cit., p. 1286.

218 In this regard, the economic contribution and the financial means should not be considered as to the detriment of proper legal solutions. Namely, the funding resources are as much important as the legal certainty. With a metaphor, the legal instruments represent the essential skeleton of the body-structure of cross-border cooperation, while the economic resources represent its nutrition.

Moreover, the INTERREG experience lead, progressively and unconsciously, to the new conception of territorial cooperation²¹⁹. Namely, considering the territory of the Union as a common space within the purposes of cohesion, the main attention is not addressed towards the frontier, but to the territory itself. In this sense, the frontiers cease to be the prominent element related to the field of cooperation, whereas the territories become the principal factors. Territorial cooperation has seen a slow development in the sense of integration. Also from the legal point of view, the adoption, after the long INTERREG phase, of the EGTC Regulation symbolizes a real change in the form of epilogue for transfrontier cooperation as a legal taboo-matter, with the subsequent designation of territorial cooperation.

5.3. Community instruments for external cross-border cooperation

The European programmes fostering cohesion and, consequently, territorial cooperation, take also into consideration the issue of the external borders of the Community. Namely, if the achievement of a more equilibrate and cohesive European territory is one of the most relevant concerns for the European institutions, even the development of relations with third countries or entities belonging to other countries plays a significant and strategic role for the European Union. As for the establishment of the programming phase of INTERREG, cross-border cooperation toward the external borders of the Community, in particular to the Eastern borders, has been developed throughout specific programmes and projects.

Neither the internal, nor the external cross-border cooperation has originally made use of proper legal instruments; rather the EU programming phase has strengthened institutional and administrative structures that encouraged cooperation and that opened the way for the further development. The reason for this brief mention of the EU external programmes resides in the relevance that this kind of relations play also with regard to the new instrument of the European Grouping of Territorial Cooperation (EGTC). In fact, the possibility to include in cross-border cooperation territorial communities or authorities belonging to third countries, seems to have its precursor in the various programmes and projects that have been

²¹⁹ See INTERACT, *Study on organisational aspects of cross-border INTERREG programmes - Legal aspects and partnerships*, 2006, p. 30 *et seq.*

developed before the last phase of cohesion policy 2007-2013. This last phase have recently systematized and substituted the previous instruments.

The mostly known experiences of Phare CBC²²⁰, Tacis CBC²²¹, Cards²²² and Meda²²³ started a cooperation along the European borders that is now comprehended within the territorial objectives of the new cohesion policy²²⁴. More in general, these former experiences opened the way to the inclusion of subjects belonging to third countries in cross-border cooperation. Such an issue is particularly sensitive with regard to the legal basis for the participation of “external” local and regional authorities to the territorial instruments of the EU. Namely, as it has been pointed out about the CoE's Third Protocol to the Madrid Outline Convention and as it will be discovered about the EC Regulation on the EGTC, the participation of sub-national authorities of third countries represents a challenging and debated argument.

As it has been already concluded for the INTERREG, the mentioned instruments for cross-border cooperation have an economic/promotional nature and do not represent suitable legal instruments for sub-national authorities. However, these instruments have created the basis for building up mutual trust and a potential political good attitude towards regional and local cross-border activities²²⁵. And this is a kind of prerequisite for the effective implementation of legal means.

220 The programme Phare cross-border cooperation has been established in 1994 and aimed to develop cooperation with the Eastern Europe candidate countries in order to reduce the marginalisation of the border areas and the respective territorial communities. Main projects have been financed in the field of infrastructures and economic development. The programmes have been renewed in correspondence to the Interreg phasing and lasted until 2006. From the year 2000 all the frontier regions between the EU and the European Eastern countries have been covered.

221 Tacis CBC, set up in 1996, finances activities related to the European borders of the Russian Federation, Belarus, Ukraine and Moldova. It dealt mainly with infrastructures, environment and transfrontier cooperation at local level. This programme has not been coordinated with the other cohesion programmes.

222 Cards has been adopted in 2000 and deals with cross-border, transnational and trans-regional cooperation in the frontier zones of the Western Balkans (Albania, Bosnia-Herzegovina, Croatia, etc.).

223 Meda provides for measures of financing and technical instruments concerning Mediterranean third countries.

224 See COMITÉ DES RÉGIONS, *La coopération transeuropéenne entre collectivités territoriales*, Bruxelles, 2001, p. 62-65; see also ASSOCIATION OF EUROPEAN BORDER REGIONS, *LACE PHARE CBC Practical Manual*, Gronau, 2000.

225 “Despite difficulties and in some cases also reservations in the candidate countries, cross-border cooperation gradually became a routine, even in areas that were particularly affected as a result of historical developments”, see J. GABBE, V. VON MALKUS ET AL., *Cooperation between European border regions: review and perspectives*, cit., p. 33.

5.4. Other Community legal instruments for cooperation's purposes

As long as the EU/EC didn't provide for a suitable *ad hoc* instrument for the development of transfrontier relations under the framework of the Community legal order, other existing tools have been utilized in order to develop cooperation across the borders. The references go in this case to the European Economic Interest Grouping (EEIG) and to the European Cooperative Society (SCE). These legal models developed under Community law have been used for cross-border cooperation mainly in order to manage specific cross-border projects.

The legal subjects concerned have been created both through a Community Regulation and, therefore, they aim to overcome the already mentioned obstacles deriving from the different national legal systems. Although they are more suitable for the activities of SMEs, regional and local communities have made use of the legal instruments provided by Community law because of the lack of national uniform and proper legal models for cross-border cooperation²²⁶. However, several aspects suggest that they are not really suitable for transfrontier cooperation between territorial communities, even if they have for sure some important and positive implications. Namely, some basic discrepancies between these legal instruments and the eventual membership of public law entities dissuaded from their massive utilization. On the one hand, these instrument have the aim to encourage and promote the constitution of transfrontier structures and to develop transfrontier relations between legal entities belonging to different States. On the other hand, their major economic attitudes are not really appropriate or satisfactory for achieving the main targets of cross-border cooperation, which has mainly the scope to pursue public interests. A brief presentation of the mentioned instruments will permit a better comprehension of the argument.

a) *The European Economic Interest Grouping (EEIG)*

The EEIG has been established by the Council Regulation (EEC) No. 2137/85²²⁷ and aims to facilitate and develop the economic activities of its members by fostering an effective cooperation across frontiers²²⁸.

226 See COMITÉ DES RÉGIONS, *La coopération transeuropéenne entre collectivités territoriales*, cit., p. 56.

227 OJ L 199 of 31 July 1985. The Regulation entered effectively into force in 1989.

228 See Art. 3 of the Regulation on the EEIG.

Different subjects can utilize such instrument and can become members in order to develop the concerning activities: as it has been mainly created for the cooperation between enterprises, it is also open for the participation of public subjects mainly with regard to the provision of services. For these purposes, also territorial communities are potentially allowed to participate in such structures. In this regard, public territorial authorities act more as private actors than as public representative bodies. As such, the EEIG is a not-for-profit structure, but aims at fostering the economic activities of its members at transnational level. Anyway, the EEIG displays some inconvenients concerning the implementation of transfrontier cooperation and concerning the involvement of sub-national territorial authorities²²⁹.

Namely, its scope of action is principally devoted to economic objectives. In this regard, the EEIG is mostly linked to private law and is barely connected with the interests of public institutions such as regional and local authorities²³⁰. In particular, legal relations with third parties remain submitted to private law and the economic functions present some limits in order to manage resources such as the INTERREG funds²³¹.

Rather than a general legitimation to take part in a trans-national structure, the limitations for sub-national territorial authorities to get involved in an EEIG resides in the mere private/economic scope. Public authorities cannot, in general, confer their competences, functions and responsibilities to a legal entity of this kind.

229 In this regard, the EC Regulation No. 1082/2006 on the EGTC explicitly affirms, at paragraph 4 of the preamble, the inadequacy of the Community law to grant the possibility to create suitable structures for territorial cooperation: “The existing instruments, such as the European economic interest grouping, have proven ill-adapted to organising structured cooperation under INTERREG initiative during the 2000-2006 programming period”.

230 “Un deuxième élément qui restreint leur usage pour la coopération transfrontalière est la relation juridique particulière qu'ils entretiennent avec le tiers et les organismes de droit public, qui ne peuvent être soumis qu'à une législation nationale spécifique et non être contrôlés par les membres du groupement. Cependant, lorsque tels organismes sont engagés dans des relations gouvernées par le droit privé, la règle du contrôle direct par la loi nationale ne s'applique plus. Dans ce cas, la relation juridique relève en premier lieu du contrat instituant le groupement et ensuite de la réglementation communautaire, le droit national n'intervenant que lorsque ces deux options ont été épuisées. N'étant pas possibles en droit national, les relations entre tiers nécessiteraient de la création d'un nouvel organe représentatif. Il s'agit là d'un handicap majeur pour l'utilisation des GEIE dans la cadre de la coopération transfrontalière, car ils ne pourront, à moins d'en passer par la création d'une autre structure, assumer la gestion d'un grand programme de coopération, laquelle impliquerait très probablement des contacts avec des tierces parties de droit public.”, see COMITÉ DES RÉGIONS, *La coopération transeuropéenne entre collectivités territoriales*, cit., p. 57.

231 The same conclusion comes from the European Court of Auditors, see: Cour des comptes européenne, *Special Report n°4/2004 on the programming of the Community Initiative concerning trans-European co-operation – Interreg III*, Doc. 14728/04 FIN 521 FSTR 41.

Moreover, although it may be entrusted with legal capacity²³², it doesn't have a legal personality and cannot access to the Community funding programmes, so that the restrictions to transfrontier cooperation seem to be quite numerous if compared to the benefits²³³. Despite the mentioned difficulties, some successful examples have been carried out, such as: *La Thuile – La Rosière “Sud Mont-Blanc” EEIG* for the management of ski resorts; *The cross-border agency for the Bayonne- San Sebastian Eurocity EEIG*; the *Euroregion EEIG*, which associates Brussels, Flanders, Kent, Wallonia and Nord-Pas de Calais Region; the *TRIURBIR EEIG*, which associates the towns of Castelo Branco (Portugal), Caceres and Palasencia (Spain)²³⁴.

Thus, if the EEIG represents sometimes a kind of flexible instrument for the development of certain cross-border activities, which are mostly concerned with economic activities and projects²³⁵, it is less appropriate in order to constitute a general, permanent and overall legal instrument for the establishment of long-lasting transfrontier bodies concerned with public interests involved in strictly cross-border or territorial cooperation²³⁶.

b) The European Cooperative Society (SEC)

The European Cooperative Society (SEC), established with the Council Regulation (EC) No. 1435/2003²³⁷, is another instrument created by Community law and aimed at developing transfrontier relations. Of course, the provisions concerning

232 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, Study carried out by GEPE under the supervision of Prof. N. Levrat, Bruxelles, 2007, p. 39. One of the biggest difficulties which is linked to the establishment of a cross-border structure for cooperation is the lack of clear rules on the legal personality of a joint cooperation body.

233 See the Communication from the Commission - Participation of European Economic Interest Groupings (EEIGs) in public contracts and programmes financed by public funds, COM/97/0434 final. The Commission has found that the best involvement in an EEIG is not devoted to the conclusion of public contracts or programmes financed by public funds.

234 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, cit., p. 40.

235 Other experiences of EEIG with the participation of territorial administrations are: Usse EEIG (Union des sylviculteurs du Sud de l'Europe); Ernac EEIG (Réseau de régions européennes pour l'utilisation des technologies de la communication) Eurocorp EEIG; Euro-Institut EEIG (Institut pour la coopération régionale et l'administration européenne); Ecom EEIG (European Chamber of commerce). See COMITÉ DES RÉGIONS, *La coopération transeuropéenne entre collectivités territoriales*, cit., p. 211.

236 See J. GABBE, V. VON MALKUS, K. MAHNKOPF, H. MARTINOS, *Institutional aspects of Cross-border Cooperation*, Gronau 1999, p. 4.

237 OJ L 207 of the 18 August 2003. The Regulation has been supplemented by the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

such a structure derive as a consequence of the difficulties encountered in developing cross-border activities among cooperatives belonging to different States.

The existence of different national legislations generates several obstacles for business and social activities within the internal market²³⁸. Thus, the objectives of the SEC Regulation pursue, in particular, the conclusion of agreements between the members in order to supply goods or services, or to execute works of the kind that the cooperatives normally carry out, or to constitute joint commissions. A SCE may also aim at the satisfaction of its members' needs by promoting, in the manner that has been mentioned above, their participation in economic activities, in one or more SCEs and/or national cooperatives. An SCE may conduct its activities through a subsidiary.²³⁹ With regard to the members, the European cooperative may be formed by natural persons resident in the Member States, by private or public law legal persons subject to the national law of the Member States, by the merger of already existing cooperatives or by the conversion of a cooperative formed under the national law of a Member State and if it has had an establishment in another Member States²⁴⁰.

As far as this structure is somehow thought for facilitating a certain kind of activities and economic relations, it is quite patent that it is not really suitable as permanent instrument for the establishment of a transfrontier cooperation's structure between territorial communities or authorities. In any case, the development of alternative and more suitable instrument for cooperation between territorial communities has taken a relevant advantage from the fruitful experiences represented by the SEC and by the EEIG, notably with regard to the formulation of common legal dispositions, principles and standards for transfrontier activities.

238 See paragraph 10 of the Preamble. Moreover, paragraph 11 affirms: "Cross-border cooperation between cooperatives in the Community is currently hampered by legal and administrative difficulties which should be eliminated in a market without frontiers".

239 Article 1, paragraph 3.

240 For the detailed provision, see Art. 2.

CHAPTER V

THE EUROPEAN GROUPING OF TERRITORIAL COOPERATION

1. The Regulation (EC) No 1082/2006 and the European Cohesion Policy

1.1. Introduction

The European Grouping of Territorial Cooperation (EGTC) is a legal instrument, which enables territorial authorities belonging to different States to create a body with legal personality. This legal subject shall be specifically set up for scopes of territorial cooperation. From a strictly technical point of view, it would be helpful to mention briefly the principal structural element of an EGTC in order to have a first idea of this instrument. At a first glance, the new instrument is not radically different from the other transfrontier structures that have already been developed. However, the EGTC presents undoubtedly some peculiarities that derive mainly from its nature of Community instrument. Thus, the main characteristics of an EGTC are the following.

An EGTC could be set up by different potential members such as States, regional or local authorities. The possibility to include other subjects is foreseen. An EGTC is established by a convention agreed by all the members. The EGTC's functions, tasks, organs and internal procedures are governed by a statute drafted and subscribed by the members. An EGTC has legal personality, governed either by public or private law. The legal capacity is accorded under the national law where the EGTC has its registered office. The headquarters is located on the territory of an EU Member State. The tasks of an EGTC should be conform to the objectives of economic and social cohesion and its competences should comply with the members' attributions under the respective national laws. The law applicable to the EGTC, if no

or only partial provisions are established by the Regulation, is the national law of the Member State where the EGTC has its registered office.

This new tool has been introduced with the Regulation (EC) No 1082/2006¹ and represents an innovation in the field of transfrontier relations between sub-national authorities. The EGTC Regulation is part of the package of the EU cohesion policy 2007-2013 and has been adopted in the same context of the other instruments such as the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the Instrument for Pre-Accession Assistance². For the first time, the Community action within the social and economic cohesion policy provides for a directly applicable normative model on territorial cooperation instead of the simple allocation of funds³. In this regard, it is important to remember that the EGTC Regulation is not part of the Structural Funds and, even if it has been approved at the same time, it has a different nature. In fact, a first observation concerns the fact that the other instruments have a temporary character, while the EGTC Regulation has a permanent nature⁴. However, even if the EGTC is not part of the Structural Funds, it is one of the newest and most peculiar instruments within the cohesion policy in order to develop territorial cooperation and regional integration⁵. As an introductory observation, it would be relevant to spend some words remembering the context of Community cohesion policy and, in particular, of the territorial cooperation objective in order to describe and individuate the background of the EGTC⁶.

1 Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European Grouping of Territorial Cooperation (EGTC), published in OJEU L210/19, 31.7.2006.

2 See, Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999, Council Regulation of 14 July 2004 (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94 and Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA).

3 See M. PERTILE, *Il GECT: verso un organismo di diritto comunitario per la cooperazione transfrontaliera?*, in *Diritto del commercio internazionale: pratica internazionale e diritto interno*, 2005, p. 119.

4 To be precise, as far as an EGTC, as legal, person can have a permanent nature, the Regulation, according to Article 17, could be subject to amendments by the 1 August 2011. In any case, by the same date the Commission shall forward to the European Parliament and the Council a report on its application.

5 General information about EU Cohesion Policy are available at the official website of the European Commission, DG Regional Policy, http://ec.europa.eu/regional_policy/index_en.htm.

6 See F. GAETA, *La nouvelle politique régionale européenne: mécanismes, acteurs et objectifs d'une réforme complexe*, in *Revue française d'administration publique*, n. 111, 2004, p. 447-459.

As already mentioned in the previous chapters, the adoption of the EGTC Regulation represents a kind of silent revolution concerning the legal framework of territorial cooperation in Europe. In particular, the Community Regulation is the first legal act that fixes the living reality of transfrontier relations in legal terms. The genesis of this new tool has to be analysed and evaluated within a larger panorama. As far as the EGTC's implementation has to be evaluated and analysed in its individuality, also the general approach of the European policies towards territorial cooperation has to be taken into consideration. In fact, the progressive development of the EC territorial policy brought to a renewed approach to territorial cooperation and to the creation of the new legal instrument. Thus, it is of great importance to give some references with regard to the cohesion policy as a wider context, and to the related effects on national and sub-national tiers of government. The following paragraphs will not attempt to develop a well-structured and complete analysis of cohesion policy or structural funds, rather they are going to select some relevant issues in order to describe some basic grounds of the legal aspects concerning territorial cooperation and to the implementation of European integration. In particular, the analysis of the territorial cooperation objective and of the broader framework of cohesion policy have a fundamental role not only as background of the EGTC, but also for its effective implementation. In fact, as it will be explained further on in this chapter, territorial cooperation represents the field of action of an EGTC. Thus, the definition and exemplification of this concept is applied to draw the limits of the EGTC's action within its tasks.

1.2. The territorial objective of European Cohesion Policy 2007-2013: Community “constitutional” implications

a) Before the Lisbon Treaty

Referring to the adoption of the EGTC Regulation, the emerging question regards the position of this new instrument within the context of the Community cohesion policy⁷ and, more in general, within the objectives of the European Union.

⁷ L. ANTONIOLLI, G. BENNACCHIO, F. LAJOLO DI COSSANO, *Lineamenti di diritto dell'Unione europea*, Padova, 2005, p. 214 *et seq.*

First of all, it is important to focus on the option to consider territorial cohesion and territorial cooperation as competences of the European institutions in order to set and define some legal standards for cooperation between regional and local communities. As it has been remarked in the first part of this work, the concept of territorial cohesion has been explicitly introduced within the Community primary legal sources only with the Lisbon Treaty. However, as it has already been remembered, the Community involvement in cross-border cooperation is not new and it has been approached through the concept of economic and social cohesion⁸. In this sense, the Regulation (EC) No 1082/2006 establishing the EGTC is still linked to the evolution of territorial cooperation before the entry into force of the Lisbon Treaty. The concept of cohesion as a Community objective was not introduced by the original TEC and its legal ground was created only with the SEA, as an object of a Community policy to be implemented by the European institutions together with the Member States. The consolidated version of the TEC included the concept of economic and social cohesion within the general principles of the Community. Among the Community's tasks, Article 2 TEU and Article 2 TEC mention explicitly the economic and social cohesion, while Article 3 TCE, in order to achieve the purposes of the previous article, lists the necessary Community's activities which shall even include the development of economic and social cohesion⁹.

In regard to this, it is possible to see a kind of constitutional prescriptive within the Community legal order to achieve a deeper political integration, rather than a mere economic or functional perspective. The concept of cohesion should be considered something more than an economic way of eliminating disparities. It shall be intended as a method for dealing with the pluralistic nature of the EU. Without

⁸ See ESPON Atlas, *Mapping the structure of the European territory*, Bonn, 2006, p. 9 ss. The European territory is various not only from a strictly geographical point of view, but mainly from economical, demographical, cultural, functional and regional aspects. See also G. VIESTI, F. PROTA, *Le politiche regionali dell'Unione Europea*, Bologna, 2007, p. 15 ss. Since the 70s the European Commission provided for an increasingly amount of financial support and financial assistance for developing regional policy. EC interventions within regional development became stronger and in 1972, during the Paris summit, the political will to create an European Regional Development Fund (ERDF) emerged for the first time. Based on the promotion of convergence between different regions, the ERDF was set up in 1975 on the legal base of art. 235 ECT (now art. 308). The original budget was quite limited, but progressively increased with the subsequent EC enlargements and with the consequent augment of regional disparities. With the SEA the Structural Funds found their legal base within the new Title V "Economic and Social Cohesion", further strengthened with the Maastricht Treaty.

⁹ See art. 3, k) TEC.

representing a legal – enforceable – principle¹⁰, the objective of cohesion can be interpreted as a guiding/inspiring principle or as a value, a peculiar character of the EU constitutional phenomenology¹¹ and a distinctive aspect of the supranational integration. As far as cohesion constitutes an objective of the Treaties, the question that emerges is whether cohesion can be considered only a political objective, which doesn't necessarily imply a prescriptive nature, or whether it has some legal implications as well. In this regard, it seems plausible to differentiate among two main issues dealing with cohesion policy.

Firstly, there are some general provisions, such as the already mentioned Treaty dispositions, which state the main objectives of the Community interventions. This kind of provisions about the necessity to realize the goals of cohesion, while they do not represent a binding obligation, play, nevertheless, a kind of constitutional role by representing a sort of value-parameter for Community activity. An objection to this approach can be easily foreseen in the fact that such principles – as territorial integration – cannot be considered in a strictly legal conception, being not-binding and not jurisdictionally enforceable in their essence. However, a constitutional objective¹² doesn't really require to be necessarily enforceable while being a

10 M.L. FERNANDEZ ESTEBAN, *Constitutional Values and Principles in the Community Legal Order*, in *Maastricht Journal of European and Comparative Law*, 1995, 2, 2, p. 131, gives a clear explanation of the legal distinction of 'principles' and 'values': "Values and principles differ in that the essence of principles expresses an 'ought to be' proposition, while values express 'what is good'". According to this statement the concept of cohesion is to be intended more as a principle than as a value, in the sense that it does not represent an obligation, but an element of exclusive positive worth, which can also embody an objective to achieve.

11 See R. BIN, P. CARETTI, *Profili costituzionali dell'Unione europea*, Bologna, 2005, p. 145.

12 Speaking about constitutional issues within the EU could require to introduce a digression about the peculiar nature of the constitutional order of the EU. Given the acknowledgment of the constitutional nature of the EU legal order, both by scholars and by the European Court of Justice, it seems to be acceptable to justify the use of such a concept. Being aware that there are even dissenting views, relevant literature give a theoretically grounded validation of the "constitutionality" of the EU system. See J.H.H. WEILER, *The Constitution of Europe*, Cambridge, 1999, J.C. PARIS, *L'Union européenne a-t-elle une constitution? Lui en faut-il une?*, in *Revue trimestrielle du droit européen*, n. 4, Oct.-Déc. 1999, p. 599 ss., G. DE BÚRCA, J. SCOTT, *Constitutional Change in the EU*, Oxford, 2001, G. ZAGREBELSKY (cur.), *Diritti e Costituzione nell'Unione europea*, Roma-Bari, 2003, R. TONIATTI, F. PALERMO, M. DANI (eds.), *An Ever More Complex Union. The Regional Variable as a Missing Link in the EU Constitution?*, Bolzano, 2004, R. TONIATTI, F. PALERMO (cur.), *Il processo di costituzionalizzazione dell'Unione europea. Saggi su valori e prescrittività dell'integrazione costituzionale sovranazionale*, Trento, 2004, F. PALERMO, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Padova, 2005. About the ECJ jurisprudence, it's worth to mention the well known judgement of 23 April 1986 "*Les Verts*" v. *European Parliament*, C-294/83, in *Racc.*, p. I-1339, where the Court defines the EC Treaties as "European constitutional charter".

programmatic value and a hierarchic parameter for other normative settings¹³. In regard to this, the EU objectives, as embodied within the Treaties¹⁴, represent an element of constitutional phenomenology and make the EU legal order an entity with a tendency to achieve general purposes¹⁵.

Secondly, cohesion policy is equipped with a specific legal framework, which directly provides methods and procedures to allocate financial resources such as the Structural Funds. Furthermore, even actions that are not comprehended under the Structural Funds can be undertaken. Economic resources coming from the Community level, since they do not really touch the constitutional structure of Member States, nevertheless introduce Community interventions directly within the sub-national level. Consequently, territorial issues don't necessarily depend on national resources.

The legal base of cohesion policy has been firstly set down in Articles 158-162 TEC¹⁶, which explicitly allow specific actions of the European institutions in this sense. The objectives of cohesion policy are foreseen in order to promote the overall harmonious development of the Community and to reduce disparities between the levels of development of the various regions¹⁷. Originally these norms didn't provide for an explicit or direct mention of the territorial dimension of cohesion. Nevertheless the territorial aspect has been one of the most relevant concerns with reference to the regional integration. At this step of the analysis, an observation is necessary. The Community territorial dimension and the peculiar field of territorial cooperation between local and regional authorities is now a consolidated reality. But, in the past, Community interventions have been limited to a kind of soft action without a defined legal reference. However, the objective of economic and social

13 "Perhaps some form of constitutional background must emerge, not in the sense of a constitution of a European mega-state, but in the sense of a constitution acknowledging the different spheres of individuals, regions and states.", see R. SCHOBEN, *'New governance' in the European Union: a cross-disciplinary comparison*, cit., p. 53.

14 See Art. 2 and Art. 3 TEC.

15 According to that, cohesion policy has to be considered as a clear example of the spill over of the mere economic conception of EU integration. See M.L. FERNANDEZ ESTEBAN, *Constitutional Values and Principles in the Community Legal Order*, cit., p. 129 ss.

16 Title XVII, Economic and Social Cohesion.

17 General objectives and purposes of Economic and Social Cohesion are set in art. 158 TEC, which states as follows: "In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas".

cohesion has been interpreted in the sense of including also a territorial dimension, thus, giving the ground for a territorial approach. The reasons of this phenomenon are multiple and complex. In particular, even if the Community “constitutional” system somehow justifies the development of interventions in the field of territorial cooperation, the institutional approach has demonstrated to be prudent. Namely, the territorial cooperation has spread out without an explicit legal recognition within the Treaties through soft measures, such as the funding initiatives¹⁸. The adoption of the EGTC Regulation represents, thus, an innovative approach, which is essentially based in the principle of subsidiarity.

As the regional and local component are linked to the national constitutional orders of Member States, Community policies, which directly deal with sub-state entities, are quite a sensitive issue. In these terms, although the Community does not have direct competences in relation to interventions on regional and local levels, Community policies do have a high influence on sub-national territories as objects of the concrete involvement within the cohesion policy and, consequently, these policies have an indirect impact on the domestic system of Member States¹⁹. Actually, such an issue has strong connections with the exercise of the principle of subsidiarity, as already said²⁰. Namely, if Member States are often detractors of supranational implications within sub-national affairs, it is possible to argue that a policy of cohesion – be it economic, social or territorial – is better achievable if faced from the Community level²¹. In fact, the aim to achieve a balanced level of development within Europe requires a wider approach if compared to Member States’ exclusive and isolated actions²².

18 The construction of the European constitutionalism has evolved through both 'soft' and 'hard' regulatory mechanisms. In particular, the almost recent concept of multilevel governance deals with these factors. See S. VELLUTI, *Experimental Forms of 'New' Governance and the Paradoxes of European Legal Integration*, in COMMITTEE OF THE REGIONS, *The Contributions to the 2008 Ateliers*, February 2009, p. 158.

19 This reflection emerged from the contribution of M. Magrassi about the role of sub-state entities within the context of EU territorial cohesion policy during the International Workshop on Cross-Border Cooperation in Europe, Faculty of Law, University of Trento, 3-4 November 2008.

20 “Reflections on the future of cohesion policy”, D. Hübner’s speech at the Conference on the future of cohesion policy organised by Slovenian Presidency of the EU, Maribor, 7 April 2008.

21 See G. SORRENTE, *La politica di coesione dell’Unione europea per il periodo 2007-2013: Lo stato dei lavori*, in *Le Istituzioni del Federalismo*, 6.2002, p. 1095. See also P. GARCIA, D. HUET, *Vers l’Europe des Eurorégions? L’objectif de “cohesion territoriale”*, in *Revue du Marché commun et de l’Union européenne*, 2005, n. 249, septembre, p. 499-502.

22 See the Preamble of Regulation 1083/2006, par. 25: “Since the Convergence, Regional competitiveness and employment, and European territorial cooperation objectives cannot be sufficiently achieved by the Member States by reason of the extent of the disparities and the limit o

As mentioned above, the tasks related to territorial cooperation within the EU are part of the more general context of the European cohesion policy, in which the traditional role is represented by economic and social cohesion. Thus, current EU territorial policies have to be read within the perspective of the cohesion policy 2007-2013²³ and the respective financing tools such as the Structural Funds (ERDF and ESF) and the Cohesion Fund²⁴. General provisions about objectives and financial contributions of cohesion policy are laid down by the Council Regulation (EC) No. 1083/2006²⁵, also known as General Regulation, which represents a very complex and composite legal basis for financial instruments in order to give effectiveness to political purposes.

Economic, social and territorial factors are directly connected to each other, all representing one side of the general objective of welfare, stability and development in Europe. According to this view, the issue of cohesion²⁶ among

the financial resources of the Member States and regions eligible under the Convergence objective and can therefore be better achieved at Community level through the multiannual guarantee of Community finance which allows cohesion policy to be concentrated on the Community's priorities, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives."

23 Cohesion Policy 2007-2013 presents relevant elements of simplification in respect to the previous period 2000-2006. As the main aim of CP is that of reducing disparities, the re-launch of the Lisbon Strategy brought to a necessary rationalisation of the objectives and instruments for reaching cohesion. Namely, objectives and financial instruments are reduced and clarified. CP 2007-2013 comprehends 3 objectives to be achieved within the time period, which can be financed by other 3 kind of instruments: Convergence (financed by ERDF, ESF and Cohesion Fund), Regional competitiveness and employment (financed by ERDF and ESF) and European territorial cooperation (financed by ERDF). See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Member State and Regions delivering the Lisbon strategy for growth and jobs through EU cohesion policy, 2007-20013, COM(2007) 798 final.

24 ERDF (European Regional Development Fund) and ESF (Social Fund) are part of the so called Structural Funds together with other financing instruments (such as the European Agricultural Guidance and Guarantee Fund and the Financial Instrument for Fisheries Guidance), which are not part of Cohesion Policy. The Cohesion Fund is not part of Structural Funds and is set under the terms of Article 130d of the EC Treaty to provide financial help for projects in the fields of environment and transport infrastructure. Finance from the Fund goes only to the four poorer Community countries, the aim being to reduce the disparities between the EU members' economies, see:

http://ec.europa.eu/regional_policy/glossary/glossary_en.htm.

25 Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, published in OJEU L 210/51 31.7.2006.

26 It is relevant to stress the difference between the concept of cohesion, which is associated with the political dimension, and the concept of convergence, which is dealing with the economic dimension; see A. BRUZZO, *Le politiche strutturali della Comunità Europea per la coesione economica e sociale*, Padova 2000, p. 35 ss.

territories is another way to speak about equality, non-discrimination and integration²⁷.

Territorial cooperation²⁸, as an explicit policy objective, has been introduced for the first time within the agenda 2007-2013²⁹ and has been raised to the level of an autonomous objective with greater visibility and clearer legal basis covering 2,5% of the whole financial resources allocated for the entire cohesion policy³⁰. The main interest of the European institutions is still coherent with the initiative of the previous INTERREG programmes. Namely, the major concern aims to avoid that national frontiers hinder the balanced development and the integration within the European territory. The objective of territorial cooperation is divided into three different aspects, which refer to the traditional distinctions of cooperation across national borders. Namely, territorial cooperation is composed by cross-border, transnational and interregional cooperation³¹. Although the management of finance resources assigned to territorial cooperation is handled, according to the additionality principle, by the Commission and the Member States, also the regional authorities have some role with regard to the designation of territorial priorities³², thus seeking to create an effective system of multilevel governance³³.

A major commitment of the cohesion policy is represented by the necessity to reduce social and economic disproportions between different regions or groups

27 See G. MOFFA, *Coesione europea e sviluppo locale. Le politiche comunitarie di promozione territoriale*, Roma, 2005, p. 21.

28 For the official EC text “[t]he European territorial cooperation objective aims to reinforce cooperation at cross-border, transnational and interregional level. It acts as a complement to the two other objectives [...]. It aims to promote common solutions for the authorities of different countries in the domain of urban, rural and coastal development, the development of economic relations and setting up of small and medium-sized enterprises (SMSs). The cooperation is centred on research, development, the knowledge-based society, risk prevention and integrated water management”, see EUROPEAN COMMISSION, *Cohesion policy 2007-2013, Commentaries and official texts*, Luxembourg, January 2007, p. 20-24.

29 European territorial cooperation substitutes the previous initiatives of Interreg III, URBAN II, EQUAL and Leader+.

30 Total available resources for Cohesion Policy 2007-2013 amount to EUR 347.410 billion.

31 See EUROPEAN COMMISSION, *Cohesion policy 2007-2013, Commentaries and official texts*, cit., p. 20. Every type of cooperation concerns a different level of territorial tier (corresponding to NUTS 1, 3 and 3) eligible for cooperation objectives.

32 See G. SORRENTE, *La politica di coesione dell’Unione europea per il periodo 2007-2013: Lo stato dei lavori*, cit., p. 1099.

33 “[...] Member States are required to draw up a medium-term strategy for the use of the resources, to co-finance European aid from national resources, to work in partnership at national, regional and local level, and to respect EU laws and policies. These conditions have resulted in the development of a shared management system, between the European, national, regional and local level: in short, a system of multi-level governance”, EUROPEAN COMMISSION, *Growing Regions, growing Europe – Fourth report on economic and social cohesion*, Luxembourg, 2007, p. XIV.

within the EU³⁴. Thus, given that EU territories are different in nature, the European territorial development requires to find the best decisional process and the optimal regulatory power in order to draw a “territorial justice”³⁵. As far as the key challenge aims to ensure a balanced and sustainable territorial development of the EU as whole³⁶, the notion of territorial cohesion is necessarily linked with the objective of an equilibrate and sustainable development within the Union.

Although territorial cohesion has been developed as a form of European policy, nevertheless its definition remains problematic for several reasons. Namely it flows from the focus on eliminating disparities to a stronger attempt of integration of regional and local levels³⁷. One of the most evident features, however, is the comprehension of territorial cohesion as a process of governance, dealing with multiple actors of government³⁸. As far as public responsibilities and competences are allocated between different tiers of government, the participation of sub-national subjects within the policy-definition is necessary. In regard to this issue, public actors – at supranational, national or sub-national level – are respectively, albeit differently, involved in the definition of European territorial policies, hence implying the choice of methods and procedures in order to develop a functional organisational structure, which can be apt to deal with the tasks of territorial cooperation³⁹.

Within the concept of multilevel governance⁴⁰, the legal analysis could find a proper role by achieving and establishing effective tools and instruments, procedures

34 See the glossary of the EU official website at:

http://europa.eu/scadplus/glossary/economic_social_cohesion_en.htm

35 ASSEMBLEA DELLE REGIONI D'EUROPA, *Regioni e Territori in Europa. Gli effetti territoriali delle politiche europee visti dalle regioni*, Strasbourg, 1995, p. 20 ss.

36 EUROPEAN COMMISSION, *Green Paper on Territorial Cohesion: Turning territorial diversity into strength*, COM(2008) 616 final, p. 6.

37 See R. CAMAGNI, *The rationale for territorial cohesion: issues and possible policy strategies*, in L. PEDRAZZINI (ed.), *The process of territorial cohesion in Europe*, Milano, 2006, p. 53.

38 See ESPON Atlas, *Mapping the structure of the European territory*, cit., p. 60-61. About an European spatial development the concept of governance is often seen as an element of territorial cohesion. As spatial planning has always been connected to the power of governments and the exercise of public authority, governance represents a different method of doing government. Namely, formal authorities are increasingly supplemented by new forms of participation and coordination within different political fields, as well as on and between different spatial levels.

39 “In this view the EU is a multi-level (supranational, national and sub-national) and multi-actor (private and public) system of governance containing highly complex networks for producing policy outcomes.”, see R. SCHOBEN, *‘New governance’ in the European Union: a cross-disciplinary comparison*, cit., p. 51.

40 Communication de la Commission au Parlement européen, au Conseil, au Comité Economique et Social Européen et au Comité des Régions sur le résultats des négociations concernant les stratégies et programmes relatifs à la politique de cohésion pour la période de programmation 2007-2013, COM(2008) 301, p. 13.

and structures to enact territorial cooperation. In this sense, Community objectives and tasks could be more achievable. Since neither the States' centralistic attitudes can give a response to complex issues nor the supranational system has the strength to empower their objectives, a “vertically integrated regime” seems to grant the most feasible and optimal solutions.

b) After the Lisbon Treaty

At the conclusion of a problematic process, the entry into force of the Lisbon Treaty is going to bring some changes with reference to the EU territorial dimension. Namely, the consolidated version of the Treaty on the European Union and of the Treaty on the Functioning of the European Union includes now explicit and clearer references regarding territorial cohesion, introducing a new legal dimension for territorial cooperation.

Namely, the new version of the Treaty on the European Union, as amended by the Lisbon Treaty, affirms in Article 3⁴¹ that “the Union shall promote economic, social and territorial cohesion, and solidarity among Member States”. Within the framework of such a general principle, the Treaty on the Functioning of the UE, at Article 4, deals with the distribution of competences between the Union and the Member States, considering economic social and territorial cohesion as a matter of shared competence. In particular, the Title XVIII of the Treaty regards economic, social and territorial cohesion (Articles 174-178⁴²).

As a first observation, it is possible to say that apparently limited changes have been brought to the previous version of the Title on economic and social cohesion⁴³. What has to be pointed out, however, is the introduction of the term “territorial” within a field of Community action that already knew the approach to this dimension. In this regard, the inclusion of territorial cohesion within the Treaties is not a later justification in order to legitimize Community actions. Rather, the recognition of the existence of a territorial dimension related to the European

41 Ex Article 2 TEU.

42 Ex Articles 158-162 TEC.

43 Article 174 (ex Art. 158) recognises that a “particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions”.

cohesion policy represents the importance of the matter as autonomous concept and the impossibility to ignore the issues concerned.

As far as territorial cohesion is now representing a matter of shared competence between the Union and the Member States, mechanisms of fair implementation about the EU interventions need to be followed. Recalling the provisions of the previous versions of the Treaties, the new Article 4 TEU affirms: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives”.

Far from considering this words as vague principles, territorial cooperation represents a concrete field where to put such words into practice for the future. In particular, as it will emerge during the analysis of the Regulation on EGTC, the principle of sincere cooperation has a fundamental role in order to permit an effective implementation of EU interventions in the Member States. Besides the principle of sincere cooperation, another element has to be kept in mind. Namely, Article 4, paragraph 2 of the new TEU's version states that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. In these terms, the Treaties, explicitly mentioning the internal structure of Member States, reaffirm the necessary restraint from the intrusion within the national constitutional systems' identity, but, at the same time, identify sub-national subjects as relevant entities within the EU system. Territorial cooperation represents a sensitive issue in this regard.

The introduction of the territorial dimension within the Treaties is surely a positive aspect. However it is too early to propose an interpretation about the effects on the concrete development of territorial cooperation after the entry into force of the Lisbon Treaty.

1.3. General legal framework

As already mentioned above, overall provisions about the current cohesion policy are defined in the General Regulation 1083/2006. This normative document sets out general rules about the financial instruments related to the three cohesion policy objectives. These three objectives of cohesion (Convergence; Regional competitiveness and employment; European territorial cooperation) are financed by different tools, namely European Regional Development Fund (ERDF), European Social Fund (ESF) and Cohesion Fund. Funds are provided by the European Commission through Member States and managed by competent authorities. Other specific Regulations deal individually with each kind of fund: Regulation (EC) No 1080/2006 on the ERDF, Regulation (EC) No 1081/2006 on the ESF and Regulation No 1084/2006 establishing a Cohesion Fund.

As an overall consideration, several academic studies show that the implementing procedures of cohesion policy draw a typical paradigm of multilevel governance and an integrated policy system dealing with a vertical and intergovernmental range of institutional actors⁴⁴. This paragraph will take into consideration the General Regulation with regard to the objective of territorial cooperation, as it specifically concerns transfrontier activities⁴⁵, and some relevant aspects of the Regulation on ERDF concerning territorial cooperation in particular. Namely, the general objective of territorial cooperation is financed only by the ERDF⁴⁶ with the aim of supporting different projects and programmes. Within this objective, the adoption of the EGTC Regulation is quite peculiar, as it has to be collocated outside the funds and the respective implementation doesn't necessarily depend from Community funding.

The procedure for setting and financing cohesion objectives is complex and detailed. The General Regulation consists of 108 articles comprehending both overall scopes and technical provisions. Regarding the ERDF, a primary procedural issue is

44 See A. BENZ AND B. EBERLEIN, *The Europeanization of regional policies: patterns of multilevel governance*, in *Journal of European Public Policy*, 6:2, 1999, p. 335.

45 See the Preamble of Reg. 1083/2006, par. 4: "The increase in the number of the Community's land and sea borders and the extension of its territory mean that the value added of cross-border, transnational and interregional cooperation in the Community should be increased"; and par. 19: "A European territorial cooperation objective is to cover regions having land or sea frontiers, the areas of transnational cooperation being defined with regard to actions promoting integrated territorial development and support for interregional cooperation and exchange of experience".

46 Reg. 1083/2006, Art. 4, par. 1, c).

related to the so called “geographical eligibility”, which is directly connected to the destination of economical resource to operational programmes linked with a determined geographical area. For every single objective the geographical reference is that of NUTS⁴⁷ levels. With reference to the objective of European territorial cooperation the level of NUTS involved varies from the type of territorial cooperation concerned: namely, it is related to level 3-Regions for the purpose of cross-border cooperation⁴⁸, whereas for transnational cooperation a list submitted by the Commission should individuate the eligible regions, and for interregional cooperation the entire territory of the Community shall be eligible⁴⁹.

The mentioned geographical criteria established for the definition of programmes and the allocation of financial resources leads to a reflection about the institutional and administrative systems of the Member States. Namely, the NUTS system is based on the internal institutional subdivision of Member States. But, as national systems differ in the hierarchical structure of sub-national entities, the European nomenclature tries to find a standard system for targeting regional and local tiers as areas which benefit from the funds. In these terms, a common delimitation of territorial units is useful in order to reach homogeneous scopes⁵⁰. However, such a territorial standard does not always coincide with the proper administrative system of a country, thus creating a gap between the level of Community interventions and the sub-national administrative authorities. But, more than having a legal significance, such a supranational involvement within sub-national level seems to develop more a soft principle of cooperation and support, without conferring to sub-national entities supplementary powers and space of autonomous action.

47 Nomenclature d'Unité Territoriale Statistique indicates the common classification of territorial units for statistical purposes and find its legal framework in the Regulation (EC) No 1059/2003. NUTS subdivides Member States hierarchically into three levels (1, 2 and 3) on the basis of population threshold. “Territorial units are defined in terms of the existing administrative units in the Member States. An 'administrative unit' marks out a geographical area for which an administrative authority has power to take administrative or policy decisions in accordance with the legal and institutional framework of the Member State.”, see <http://europa.eu/scadplus/leg/en/lvb/g24218.htm>.

48 More specifically Reg. 1083/2006, Art. 7, par. 1, states that “[f]or the purposes of cross-border cooperation, the NUTS level 3 regions of the Community along all internal and certain external land borders and all NUTS 3 level regions of the Community along maritime borders separated, as a general rule, by a maximum of 150 kilometres shall be eligible for financing taking into account potential adjustments needed to ensure the coherence and continuity of the cooperation action”.

49 Reg. 1083/2006, Art. 7.

50 See R.H. WILLIAMS, *European Union Spatial Policy and Planning*, London, 1996, p. 118.

Without giving advise of the whole General Regulation's content, some aspects are particularly relevant vis-à-vis the connection among different authorities and the respective tasks and responsibilities. One of the main principles about the ruling of the funds is *complementarity*, which means that they shall provide assistance complementing national actions, including actions at the regional and local level, integrating them into the priorities of the Community⁵¹. This kind of multi-dimensional approach shows the particular attitude of such a Community tool, which cannot be implemented without the coordination and cooperation of different institutional actors. The principle of *partnership*, intended as close cooperation between the Commission and each Member State, is also foreseen as indispensable in order to pursue the objectives of the funds⁵². About the requisite of partnership, also sub-state entities and other authorities or bodies should be involved, as competent regional, local, and urban authorities, economic and social partners, or any other appropriate body representing civil society, environmental partners, non-governmental organisations⁵³.

Obviously, the principal and leading subjects together with the European Commission are the Member States. The responsibility of designating the competent entity for managing the operational programmes is devolved to them⁵⁴. Namely, Member States have the duty of supervising the implementation of operational programmes and shall provide all the necessary resources and information for granting the functioning of the monitoring system in concert with the Commission⁵⁵.

51 Reg. 1083/2006, Art. 9, par. 1. The following paragraphs of the same article set out other important principles such as "consistency", "coordination" and "compliance". All these factors are single aspects of the more general principle of assistance, which is provided as main argument of this group of norms.

52 *Ibid.*, Art. 11, par. 1.

53 *Ibid.*, Art. 11, par. 1.

54 This procedure is composed by a three-phase strategy, which is divided among the main levels of implementation of the Funds. Namely, according to Art. 25-33 of the General Regulation, the Community shall establish strategic guidelines on cohesion, which have to in line with other relevant EC policies. Subsequently, Member States shall present their national strategic reference framework, which should be consistent with Community priorities. Thus, Community strategy contains determinate policy-choices that limit the discretionarily action of the Member States. It is also relevant to mention the fact that, according to Art. 28, the national strategic reference framework has to be taken as prepared after the consultation of relevant actors as referred to in Art. 11. The third phase is dedicated to the specific adoption of operational programmes, which should be drawn up by Member States or competent authorities designed by Member States and submitted to the European Commission for approval (Art. 32). For every single objective of the Cohesion Policy specific dispositions are provided. Concerning the European territorial cooperation, Art. 38 states that specific rules are laid down in the Regulation (EC) No 1080/2006.

55 Reg. 1083/2006, Art. 47, 48 and 49.

At the same time Member States have to designate specific authorities for the carrying on of the programmes: a managing authority, a certifying authority and an audit authority⁵⁶. These bodies can be selected among national, regional, local public authorities or other private bodies in order to create systems of managements and controls which operate independently.

While the primary role and responsibilities are carried out by Member States, however, other sub-national entities are necessary for the implementation of the operational programmes. In other words, the objectives of the cohesion policy are part of the general scopes of Community policies and the respective procedures are laid down by Community rules; these objectives pass through the strategies and norms of every single Member States for being, at the very end, implemented at a sub-state level. Thus, the final target of sub-state levels represents a *condicio sine qua non* for the realization and execution of the operational programmes and this target shall be considered the living-factor and real scope of the cohesion policy. In these terms, territorial cooperation seems to have neither a top-down approach nor a bottom up, rather a merge of both of them.

Since the General Regulation sets down the main criteria and procedures related to the funds for cohesion policy, it seems indispensable to spend few words about the already mentioned Regulation (EC) No 1080/2006 on ERDF⁵⁷ which constitutes the main financial resource for the European territorial cooperation objective.

The ERDF Regulation lays down general priorities for territorial cooperation, rules related to eligibility of expenditure and specific provisions on operational programmes. Beyond the already mentioned main issues of transfrontier nature, like tourism, culture, environment and public services, the ERDF may also contribute to the promotion of legal and administrative cooperation across borders⁵⁸. Member States are directly and substantially responsible for the overall management of the

⁵⁶ *Ibid.*, Art. 59-62.

⁵⁷ Published in OJEU L 210/1 31.7.2006. "The role of ERDF is to promote investments and correct the main regional imbalances of the European Union. Priority financing is aimed at research, innovation, environmental questions and risk prevention, whilst infrastructural investment continues to play an important role, notably in the least developed areas. The whole of the general regulation being applied to the ERDF, the following regulation only covers the points which differ from the general provisions", see EUROPEAN COMMISSION, *Cohesion policy 2007-20013, Commentaries and official texts*, cit., p. 96.

⁵⁸ Reg. 1080/2006, Art. 6, pt. 2.

programmes and they should designate the competent authorities for administering and supervising the programmes. However, Member States cannot be considered as the very last beneficiaries of the contributions coming from the ERDF. In fact, the development of the regional and local dimension is the main aim of the cohesion policy. The target of the Community financial allocations is concerned with a non-centralized system of integration, which implies a decentralized and collective implementation and development of programmes⁵⁹. Namely, the ERDF has a clear intent of targeting specific territories that are typically characterized by disadvantages. In this perspective, Community policies are not primarily concerned with the adoption of a legal instrument for territorial cooperation between sub-national authorities. The constitutional and administrative national systems have not been touched in their substance by the cohesion policy, since the Community strategies have revealed a kind of objective intention to compensate territorial gaps of welfare. Thus, being even criticized for the heavy implication of bureaucracy, the funds assigned to cohesion's objectives have certainly introduced a multi-level instrument of governance⁶⁰. Programmes dealing with the territorial cooperation objective – at cross-border, transnational or interregional level – have open a dynamic way of regulatory instruments, which developed from supranational to local tiers and vice versa. Namely, while policies and financial tools are set down by Community norms, the practical effects take action differently within specific territories and, through the filter of Member States supervision, go back to EU level for a consistency and conformity test.

59 See I. TUROK, J. BACHTLER, *Introduction*, in J. BACHTLER, I. TUROK, *Coherence of Eu Regional Policy: Contrasting Perspectives on the Structural Funds*, Oxford, 2002, p. 5-6. According to the authors EU cohesion policy and respective Funds have a specific local “reach”, which is directed to the achievement of an horizontal interaction between local and regional levels. In this view the effectively of partnership creates a new concept of governance “based on trust and dialogue rather than central control and direction.”

60 J. BUKOWSKI, S. PIATTONI, M. SMYRL, *Introduction*, in J. BUKOWSKI, S. PIATTONI, M. SMYRL (eds.), *Between Europeanization and Local Societies: The Space for Territorial Governance*, New York, 2003, p. 5, argue that “[...] as a system of European governance evolves around the EU institutions and growing body of legislation, member-states political systems are necessarily transformed as they are forced to adapt to the impact of European policy making, not only in strictly economic policy domains such as the Single Market, but also in other areas such as environmental or social policy. [...] But there is also growing evidence that all states are increasingly constraints in their decision-making ability, as they are forced to comply with EU laws and practices”.

1.4. Territorial cooperation according to Article 6 of the Regulation (EC) No 1080/2006

The Regulation on ERDF deals with the territorial cooperation objective in Article 6. In particular, this article refers to the priorities related to the ERDF, which are divided into three basic groups corresponding to the subdivision of territorial cooperation, namely cross-border, transnational and interregional cooperation. Thus, the priorities are the following: 1) the development of cross-border economic, social and environmental activities through joint strategies for sustainable territorial development⁶¹; 2) the establishment and development of transnational cooperation, including bilateral cooperation between maritime regions not covered under point 1, through the financing of networks and of actions conducive to integrated territorial development⁶²; 3) reinforcement of the effectiveness of regional policy⁶³. For each

61 The list of correspondent activities: a) encouraging entrepreneurship, in particular the development of SMEs, tourism, culture, and cross-border trade; b) encouraging and improving the joint protection and management of natural and cultural resources, as well as the prevention of natural and technological risks; c) by supporting links between urban and rural areas; d) by reducing isolation through improved access to transport, information and communication networks and services, and cross-border water, waste and energy systems and facilities; e) by developing collaboration, capacity and joint use of infrastructures, in particular in sectors such as health, culture, tourism and education. In addition, the ERDF may contribute to promoting legal and administrative cooperation, the integration of cross-border labour markets, local employment initiatives, gender equality and equal opportunities, training and social inclusion, and sharing of human resources and facilities for R&TD.

62 Related activities are: (a) innovation: the creation and development of scientific and technological networks, and the enhancement of regional R&TD and innovation capacities, where these make a direct contribution to the balanced economic development of transnational areas. Actions may include: the establishment of networks between appropriate tertiary education and research institutions and SMEs; links to improve access to scientific knowledge and technology transfer between R&TD facilities and international centres of RTD excellence; twinning of technology transfer institutions; and development of joint financial engineering instruments directed at supporting R&TD in SMEs; (b) environment: water management, energy efficiency, risk prevention and environmental protection activities with a clear transnational dimension. Actions may include: protection and management of river basins, coastal zones, marine resources, water services and wetlands; fire, drought and flood prevention; the promotion of maritime security and protection against natural and technological risks; and protection and enhancement of the natural heritage in support of socio-economic development and sustainable tourism; (c) accessibility: activities to improve access to and quality of transport and telecommunications services where these have a clear transnational dimension. Actions may include: investments in cross-border sections of trans-European networks; improved local and regional access to national and transnational networks; enhanced interoperability of national and regional systems; and promotion of advanced information and communication technologies; (d) sustainable urban development: strengthening polycentric development at transnational, national and regional level, with a clear transnational impact. Actions may include: the creation and improvement of urban networks and urban-rural links; strategies to tackle common urban-rural issues; preservation and promotion of the cultural heritage, and the strategic integration of development zones on a transnational basis.

63 Sector of intervention: a) interregional cooperation focusing on innovation and the knowledge economy and environment and risk prevention in the sense of Article 5(1) and (2); b) exchanges of experience concerning the identification, transfer and dissemination of best practice including on sustainable urban development as referred to in Article 8; c) actions involving studies, data collection, and the observation and analysis of development trends in the Community.

filed, a list of suitable activities is provided in order to individuate the most pertaining interventions. This provision is useful in order to understand the areas where the ERDF aims to operate in order to achieve the objective of territorial cooperation. But, the contrary is not true. Thus, territorial cooperation is not necessarily defined through the priorities of the ERDF. This doesn't necessarily mean that the sectors related to territorial cooperation are wider, but it means that territorial cooperation could be also something different and could be achieved also through other means. Although linked to the ERDF, the focus on these priorities and related sectors of intervention or activities have been interpreted in the sense that it constitutes a list of the activities concerning the framework of territorial cooperation in general. In fact, without a strict legal definition of the sectors covered by territorial cooperation it is sometimes difficult to individuate the related sphere of actions in order to foresee legitimate fields of intervention. However, Article 6 doesn't provide for a catalogue of enumerated activities allowed in order to implement territorial cooperation. The mentioned priorities and the related activities are broad. However, they do not indicate a comprehensive declination of what territorial cooperation is. Establishing the priorities under the ERDF's territorial objective, it represents more an indicative framework for the rest of territorial cooperation rather than an obliged path to follow.

The intention of this short digression doesn't aim to persuade that Article 6 is useless or misleading, but it is important to notice that it is strictly linked to the implementation of the ERDF, which is only a part of the territorial cooperation, as it will be explained further on with the analysis of the EGTC Regulation.

1.5. Sub-national entities within the context of EU Territorial Cooperation Objective: transfrontier legal implications

The European territorial cooperation objective has inherited the experience of several years of INTERREG activities. Actually, INTERREG (A, B and C) projects and programmes have created a flourishing ground for transfrontier cooperation,

being at cross-border⁶⁴, transnational⁶⁵ and interregional⁶⁶ level, thus implementing the EU policies at sub-national level⁶⁷. Within the territorial cooperation objective nearly seventy, between projects and programmes, have been set up in transfrontier areas and with the involvement of sub-national institutions⁶⁸. However, it has already been noticed that, as far as regional and local priorities have been fostered among European policies, there is not a real empowerment of transfrontier structures, which should be properly and only committed to transfrontier issues. Cross-border, transnational and interregional programmes have surely intensified convergence, partnership and territorial cooperation's aims, as effects of these policies. In this view, sub-national entities are directly involved, for example, as managing authorities or as parties of operational programmes. EU cohesion policy and related funds aimed explicitly to involve sub-national actors⁶⁹. But, Member States remain primary subjects of policy-negotiations and policy-making⁷⁰.

64 An example of cross-border program is Alps-ALCOTRA, located along the French-Italian border; Regione Piemonte is the Managing Authority. "The general purpose of the programme is to improve the quality of life of the people living in the area concerned and to promote the sustainable development of cross-border economic and territorial systems through cooperation in the social, economic, environmental and cultural fields", see http://ec.europa.eu/regional_policy/atlas2007/italia/crossborder/it03_en.htm.

65 As further example the Alpine Space Programme is a transnational cooperation programme between Germany, France, Italy, Austria and Slovenia (with participation from Liechtenstein and Switzerland), which aims at increasing the competitiveness and attractiveness of the alpine space and, at the same time, at developing accessibility, connectivity and environment in a sustainable way; see www.alpine-space.eu. A complete list of operational programmes, also comprehending third countries is available at http://ec.europa.eu/regional_policy/cooperation/transnational/index_en.htm.

66 The Interreg IVC programme, representing the major element of interregional cooperation, enables EU regions to work together and is structured around two priorities, which address: innovation and the knowledge economy, and environment and risk prevention; for more information see: http://ec.europa.eu/regional_policy/cooperation/interregional/index_en.htm.

67 See EUROPEAN COMMISSION, *Region as partners. The European Territorial Cooperation Objective*, Inforegio, No 24, December 2007, p. 7-10.

68 Projects and programmes follow the three different components of Territorial cooperation objective. With regard to cross-border cooperation 52 projects have been launched along internal EU borders, while 13 transnational co-operation programmes cover larger areas of co-operation such as the Baltic Sea, Alpine and Mediterranean regions; moreover, interregional cooperation programme is composed by Interreg IVC and 3 other networking programmes, such as Urbact II, Interact II and ESPON, covering all Member States of the EU. Detailed information and interactive maps are available at: http://ec.europa.eu/regional_policy/cooperation/index_en.htm. A complete list of operational programmes, also comprehending third countries is available at: http://ec.europa.eu/regional_policy/country/prordn/search.cfm?gv_pay=ALL&gv_reg=ALL&gv_obj=1&gv_the=ALL&lan=EN&gv_per=2.

69 See I. BACHE, *Europeanization and Multilevel Governance: Cohesion Policy in the European Union and Britain*, London, 2007, p. 49-50 and I. BACHE, *Europeanization and Multilevel Governance: Empirical findings and conceptual challenges*, ARENA Working Papers, No. 16, July 2008; C. ROCHE, *Les collectivités territoriales et l'Union européenne*, in *AJDA hebdo: L'Actualité juridique. Droit Administratif*, 2005, année 61, n. 24 27 juin, p. 1325-1333.

In these terms, the analysis related to the INTERREG initiative is applicable also to the new general objective of territorial cooperation as developed through the funds. It has been already mentioned that operational programmes do not create new legal structures for cooperation, and do not enlarge sub-national powers in relation to territorial objectives. With the provision of a territorial objective within the Structural Funds, the Community has continued to support the development of a substantive phenomenon, without the imposition of particular legal standards. With regard to this, neither EU policies interfere with the internal constitutional system of Member States, nor they produce changes within the national allocation of powers. Consequently, also territorial cooperation within cohesion policy cannot literally represent a proper legal instrument for sub-national authorities to manage autonomous transfrontier/territorial activities. Nevertheless, operational programmes created with EU co-financing are an useful administrative instrument for regional and local communities in order to increase the number and the experience of cross-border activities, while administrative systems of public authorities belonging to different countries remain unaltered. Thus, EU territorial cooperation integrate a common package of distinct operative programmes, which do not necessarily correspond to a new legal structure of implementation. Indeed, the enactment of the territorial objective, as for the previous INTERREG initiative⁷¹, can be developed through the creation of apposite structures, but also without them, just being managed by already existing national administrative authorities.

Moreover, while EU territorial policy insists on reducing the gaps among disadvantaged regions, cohesion policy doesn't point out through its programming initiative an explicit intent to focus the attention on territorial relations between sub-national subjects as a peculiar and specific object of supranational legal interventions⁷². In this view, cross-border territories become part of cohesion objectives as long as their features do coincide with that of less developed regions and not with institutional subjects in the need of more autonomy to manage territorial

70 See J. GABBE, *Governance and cross-border co-operation*, Speech on the occasion of the RFO Annual Conference in Joensuu, North Karelia, Finland, March 2005, p. 3, available at: <http://www.aebr.net/publikationen/pdfs/governancevortragjoensuu.gb.pdf>.

71 See J. GABBE, V.VON MALCHUS, K. MAHNKOPF, H. MARTINOS ET AL., *Institutional aspects of Cross-border Cooperation*, Gronau, 1999, p. 6-7.

72 See COMMITTEE OF THE REGIONS, *The Status quo of Transeuropean Co-operation between Territorial Authorities and the Future Steps that contribute to realise a New Model of European Governance*, study developed by J. Gabbe, Th. Stumm, Gronau, 2001.

relations⁷³. However, a very relevant issue is represented by the fact that cross-border activities at regional or local level are not a priority for Member States with the consequence that the intervention at supranational level is fundamental⁷⁴.

Conclusively, since the EU territorial objective within the ordinary principles of cohesion policy doesn't really introduce a new general approach to territorial cooperation between sub-national authorities, however it increases good practices and incentives different administrative and legal systems to collaborate despite the differences of political and legal structures⁷⁵. While different levels of government and respective competences are involved, it seems, up to now, that cooperation and partnership among different actors can avoid conflicts of competences in order to achieve a satisfactory level of integration.

2. The EGTC and its legal framework

2.1. Introduction

The long development of territorial cooperation within the EU policies culminates with the adoption of a Community legislative act on territorial cooperation⁷⁶. This is the first legal document at Community level concerning territorial cooperation as a direct and unique object and, in this perspective, its legal peculiarities and the following effects are quite interesting.

The European Grouping of Territorial Cooperation, set up by the Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006⁷⁷, has been adopted in order to create a stable legal framework for territorial

73 See ASSOCIATION OF EUROPEAN BORDER REGIONS, *Comments on the proposal of the European Commission for a Council Regulation laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund*, Gronau, 2004, p. 9-12, where an intention to increase the attention on the peculiar aspects of border-regions is firmly expressed. Namely, the comments of AEER are concentrated on the lack of consideration of problems related to border-regions within the EU Cohesion Policy, being the whole Territorial cooperation objective concentrated more on less developed territories.

74 See J. GABBE, *Governance and cross-border co-operation*, cit., p. 3.

75 "This in turn requires a co-ordinated and concerted action of all levels, as otherwise conflicts with regard to competences are unavoidable", see J. GABBE, *Governance and cross-border co-operation*, cit., p. 4.

76 More than three years have passed after the adoption of the Regulation on EGTC. However, there is not a great production of legal studies about the Regulation and its implementation.

77 See OJEU L 210/19, 31.7.2006.

cooperation within the EU. In particular, the Regulation aims at creating a standard setting in this field. One of the most popular definition of the EGTC describes it as an innovative tool for local and regional authorities, States and other public entities to build up a specific structure pertaining to issues extended “across frontiers”⁷⁸. A relevant characteristic of an EGTC is the attribution of the legal personality. Namely, an established EGTC can act as a legal entity as such⁷⁹.

Differently from the other Regulations adopted within the framework of cohesion policy, the EGTC Regulation came into force on 1 August 2006 and should have been applied by 1 August 2007. Within this term, Member States had the duty to approve national provisions in order to make the Regulation effectively applicable. However, the process of implementation within the single Member States has been quite difficult and, at the time of writing, the process is not yet completed.

In general, EU institutions, the Committee of the Regions (CoR) in first line, highlight the importance and the potential positive role of this new tool. In particular, the adoption of a legal instrument for territorial cooperation under Community law has some peculiar prerogatives and relevant differences with regard to the previous instruments. As an example, for sub-national actors an inter-state covering agreement is not necessary in order to set up cooperative actions across the borders of different States because of the direct applicability of the Regulation⁸⁰.

In any case, it is important to note the complex and necessary relation between the EGTC Regulation and the national legal systems. Although this Regulation is a product of Community law, nevertheless its implementation is conditioned by national laws, which first have to create the legal grounds for the

78 Useful and practical information about the EGTC is available on the European Commission-DG Regional Policy website http://ec.europa.eu/regional_policy/funds/gect/index_en.htm. The EU web glossary gives a short description of an EGTC: “In the light of the difficulties encountered by Member States in the field of cross-border cooperation, this Regulation introduces a new cooperation instrument at Community level as part of the reform of regional policy for the period 2007-2013. European groupings of territorial cooperation (EGTCs) will be legal entities and will be set up from 1 January 2007. [...]The objective of EGTCs is to facilitate and promote cross-border, transnational and interregional cooperation between its members. An EGTC is made up of Member States, regional authorities, local authorities and/or bodies governed by public law, as the case may be.”, see <http://europa.eu/scadplus/leg/en/lvb/g24235.htm>.

79 See EUROPEAN COMMISSION, *Cohesion policy 2007-2013, Commentaries and official texts*, cit., p. 126.

80 See the official website of the European Commission on territorial cooperation at: http://ec.europa.eu/regional_policy/funds/gect/index_en.htm.

Regulation to be effectively applicable⁸¹. From this point view the EGTC Regulation seems, at first glance, to show the nature of a directive rather than of a regulation according to the definition of the EU legal acts⁸².

A first attempt to describe and define the EGTC has been given by some unofficial statements from the European institutions, mainly by the CoR, according to which “the European Grouping of Territorial Cooperation is a new European instrument enabling regional and local authorities from different Member States to set up cooperation structures with legal personality. It can facilitate and promote cross-border, trans-national and interregional cooperation with a new approach for multilevel governance”⁸³. Such an explanation highlights the major peculiarities introduced by the Regulation 1082/2006, e.g. the target of regional and local communities, the legal capacity and the uniqueness of the legal instrument for the whole territory of the EU. However, it is also important to remark that the EGTC includes the possibility for States to be members. In this regard, Regulation (EC) No 1082/2006 is the first legal instrument providing the option for States and sub-national authorities to be in a kind of contextual position within the same transfrontier structure. In fact, remembering the previous instruments developed for territorial cooperation, in particular the international bi-or multilateral treaties, States had the power to legitimize cross-border activities of sub-national authorities, but they were not an active part of cross-border cooperation. The implementation of the EGTC Regulation has needed, and still needs, a double approach, which combines a non-technical political encouragement and a legal-technical awareness.

On the one hand, the concrete application and the effective utilization of the new legal instrument represent a real challenge for Community institutions and for sub-national authorities, while Member States show various attitudes towards its

81 See N. LEVRAT, *Fact Finding on the EGTC and Territorial Pacts*, in COMMITTEE OF THE REGIONS, *The Contributions to the 2008 Ateliers*, February 2009, p. 179-180: “The Regulation on EGTC refers too largely to national legislation, which sometimes renders its use delicate in terms of political choices (among others, the choice of which legal order to embed the EGTC in - which may prove particularly tricky when several States become members of an EGTC; would a State accept participation in a legal structure which will be placed under the legal and even administrative control of a foreign power...) and of legal certainty (specific or appropriate legal frameworks are not sufficiently developed and tested)”.

82 See art. 249 TEC.

83 See also the online CoR definition in French: “Le GECT est un nouvel instrument juridique européen qui permet aux collectivités territoriales de différents États membres de mettre en place des groupes de coopération dotés de la personnalité juridique”, available on the website: <http://cor.ip.lu/pages/EventTemplate.aspx>.

implementation⁸⁴. This is one of the reasons why EU institutions and regional associations like the AEBR strengthen with particular enthusiasm the forthcoming actualization of the EGTC Regulation, which is probably made more attractive through a supporting promotional activity and through the elaboration of basic explicative reports⁸⁵. The idea is, namely, to foster an easy comprehension of this new instrument in order to develop its further application. According to this point of view, definitions or explanations on the EGTC are not necessarily dealing with peculiar legal aspects. Rather, the first approaches to the EGTC Regulation enthusiastically highlight its originality in the hope of its future widespread application.

On the other hand, a clear and aware comprehension about the legal nature of the EGTC is, in any case, indispensable. In this respect the establishment of European Groupings of Territorial Cooperation is considered as a legal solution in order to overcome the obstacles of transfrontier relations between sub-national communities and in order to facilitate cooperation at Community level. Namely, these structures will “implement territorial cooperation projects co-financed by the Community or undertake territorial cooperation measures at the initiative of the Member States”⁸⁶. The understanding of the legal nature and the functioning of the EGTC Regulation is fundamental to recognise its potentialities and weaknesses.

In general, what has been underlined as the main outward feature of the EGTC is the creation of a common legal model for territorial cooperation within the EU. However, we will see that, besides its undoubted importance, the Regulation on the EGTC does not introduce uniform solutions for territorial cooperation. Of course, several good results are expected. But a detailed analysis of Reg. 1082/2006 underlines the existence of uncertainties, legal ambiguities and difficulties of implementation. Thus, the new legal framework remains extremely complex.

84 See L. VAN DEN BRANDE, *Per un'Unione europea politica: valori, governance inclusiva e partenariato con le sue regioni e città*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 35 et seq.

85 N. LEVRAT, *Fact Finding on the EGTC and Territorial Pacts*, cit., p. 181, explains that “[a] combined 'pressure' and support approach from regional/local governments on the one side, the CoR on the other, could be developed by in order to make maximal use of this provision”; here the reference goes to Article 16, paragraph 1 of the EGTC Regulation about the Member States' responsibility to take appropriate national provisions in order to ensure the effective application of the Regulation.

86 See <http://europa.eu/scadplus/leg/it/lvb/g24235.htm>.

Moreover, it seems relevant to think about the role of the EGTC in relation to three main aspects that the further analysis is going to take into consideration as cross-cutting issues.

One first issue concerns the general context of cohesion, representing the wider background under which the EGTC Regulation was adopted. Namely, the field of territorial cooperation has been introduced as one of the main objectives of the cohesion policy 2007-2013. In this respect, the analysis is directed to understand the interaction between the implementation of EGTCs and the cohesion policy, in particular the potential added value of this new tool within the realization of European cohesion and multilevel governance. One of the questions that has been raised after the adoption of this Regulation is its concrete contribution towards territorial cohesion within and also beyond the frame of Structural Funds⁸⁷. This issue is then related to the multilevel governance, since the actors of territorial cohesion and cooperation are not only represented by Member States or Community institutions, but also by regional and local communities and other subjects, as active components for realizing integration⁸⁸. Although this topic can be seen as a general political-science theme behind the EGTC proper legal functioning, it is significant to evaluate its effects on a larger scale, even if not always in a strict legal manner, within the process of European integration⁸⁹.

A second argument of analysis seeks to evaluate the institutional process that has led to the adoption of the EGTC Regulation – in particular the role of the Committee of the Regions as consultative body – in relation to the legal basis provided by the Treaties. Although the complexity of the legal aspects concerning cross-border cooperation between sub-national authorities and although the potential

87 As already mentioned, the Regulation n. 1082/2006 was approved in the same context, among the 2007-2013 Cohesion Policy, with Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.

Even if the EGTC Regulation doesn't directly deal with Structural Funds, being a specific action outside them, it has anyway relevant connection to them, as a part of the general Cohesion Policy.

88 See COMMITTEE OF THE REGIONS, *Territorial Cohesion in Europe*, Brussels, 2002, p. 7.

89 See F. MORATA, *First Fact Finding on the EGTC and Territorial Pacts*, in COMMITTEE OF THE REGIONS, *The Contributions to the 2008 Ateliers*, February 2009, p. 183-188. Also concerning the EGTC the author explains that “au-delà des formules juridiques, les études disponibles sur les eurorégions montrent l'importance des réseaux en tant que mécanismes fonctionnels adaptés à la gouvernance de la Coopération Territoriale (CT). Ceux-ci représentent un approche non hiérarchique et intégrée aux politiques publiques et un instrument utile pour affronter les questions qui traversent les divisions administratives”.

reluctance of Member States, the approval of the EGTC Regulation – under the co-decision procedure – was extremely fast in respect, for instances, to other similar instruments such as the European Economic Interest Groupings and the European Cooperative Society.

Thirdly, the implementation of the Regulation within the Member States will be taken into consideration. As already mentioned, even if the adoption of the Regulation was extremely rapid, the same rapidity does not concern the concrete application of this legal tool. The reasons are twofold, both political and juridical. As the intervention of Member States is concerned, some hesitations could be noticed with regard to the adoption of national legislation and to the constitution of new EGTCs.

Next paragraphs will be dedicated to the detailed analysis of the Regulation from a legal perspective, trying to find out some feedbacks also regarding the issues mentioned above as a general background.

2.2. The adoption of the EGTC Regulation

One of the main reasons for the adoption of the EGTC Regulation was the necessity to create an instrument of territorial cooperation based in public law. The problematic applicability of the Council of Europe's legal instruments and the limited scope of bi-or multilateral inter-state treaties accelerated the process leading to the adoption of the EU Regulation on EGTC. Considering territorial cooperation as a domestic Community policy, rather than a States' foreign activity, the added value of a Community legal instrument has been primarily found in the possibility to build up general strategic cooperation and specific project-oriented cooperation. However, this didn't require only the involvement of EU institutions. Regional associations, *in primis* the Association of European Border Regions (AEBR), highlighted the exigency to create *ex novo* a Community legal instrument. In particular the role of the AEBR has been crucial during the phase that anticipated the institutional procedure for the adoption of the EGTC Regulation. The activity of this lobbying subject had a strong impact on the action of the Committee of the Regions, which explicitly and officially makes references to this important external contribution.

According to the AEBR's vision “a new instrument under Community law would create a homogeneous legal basis that could be applied directly in all EU Member States for decentralised trans-European cooperation on a cross-border, interregional and transnational basis at regional and/or local authority level”⁹⁰. The system of INTERREG, which didn't provide for an adequate and clear legal basis, needed also to be revised in order to open the field of cross-border cooperation to other experiences that are not necessarily linked to the Community initiatives and to the related funding resources⁹¹. The AEBR supported the idea to adopt a Community regulation in order to set down general rules for all forms of cooperation (namely cross-border, interregional and transnational) and for both strategic and long-term cooperation realizable on any topic, in any form and without territorial or temporal limits. In this regard, two new solutions have been proposed, as legal instruments based in public law and with general scopes: the European Special Purposes Association (ESPA) and the European Public Law Agreement (EPLA)⁹². None of the two purposes has been concretely realized.

The first official document dealing with the creation of a Community legal act is the Commission's proposal of 14 July 2004 for a Regulation on a European Grouping of Cross-border Cooperation (EGCC)⁹³. First of all, it is interesting to note that already in 2004 and without an explicit legal base in the Treaties the Commission made references in this document to the concept of territorial cohesion⁹⁴. Regarding this proposal in particular, as the title itself suggests, the aims

90 See ASSOCIATION OF EUROPEAN BORDER REGIONS, *Towards a new Community legal instrument facilitating public-law-based transeuropean cooperation among territorial authorities in the European Union*, Gronau, 2004, p. 5.

91 *Ibid.*, p. 5. After an evaluation of cross-border cooperation's state of the play, the AEBR concluded that “[i]mprovements to existing legal instruments or a special solution for EU programmes cannot generate the desired value added. Consequently, a far-reaching, new legal solution is required”.

92 *Ibid.*, p. 6. Some characteristics of the two models proposed seem to remember certain elements of the final version of the EGTC. Namely, according to the intentions of the AEBR, “[t]hese two solutions allow each regional/local authority to choose the public law solution that suits their capabilities and means and the development stage of their cooperation, be it cross-border, interregional or transnational cooperation. Existing forms of cooperation and agreements will not be excluded. Via the *ex-novo* legal instrument, the EU is creating the basis and stating the conditions under which a special purpose association can be set up or a public law agreement can be concluded and registered under EU law at national level. The EU regulation does not go into detail, but merely describes the general requirements that have to be met. This will allow flexibility to suit the different conditions applying across the whole of Europe”.

93 Commission's Proposal of 14 July 2004 for a Regulation of the European Parliament and the Council establishing a European Grouping of Cross-border Cooperation (EGCC), COM(2004) 496 final.

94 *Ibid.*, p. 2.

of cooperation were limited, at least from a terminological point of view, to merely cross-border relations. However, the document was not conceptually clear, since it made also reference to the possibility of pursuing interregional and transnational scopes. As a quite revolutionary element, the proposal provided for the possibility for States to be members of an EGCC. In this sense, the perspectives of territorial cooperation begun to change in order to consider the national authorities as partners in the cooperation rather than only as supervisory subjects. This aspect in particular has to be kept in mind as a rather revolutionary element within territorial cooperation at EU level.

The Commission's proposal received some suggestions. Namely the Opinion of the Committee of the Regions⁹⁵ and the Resolution of the European Parliament⁹⁶, adopted under the co-decision procedure, submitted important contributions⁹⁷. In particular, the CoR asked for more clarity in relation to the textual formulation of the Regulation. The Committee urged to introduce some changes, mainly with reference to the name of the new instrument, which should be adopted with the term of European Grouping of *Trans-european* Cooperation instead of *Cross-border*. The Parliament, then, proposed to amend the term with *Territorial* in order to preserve a kind of terminological coherence. The new term of “European Grouping of Territorial Cooperation (EGTC)” was, thus, created as a new general category for different forms of trans-boundary relations. In general, the CoR and the European Parliament agreed on the amendments to the Regulation's proposal and pointed out that the new instrument should be open to local and regional authorities also without the obligatory participation of Member States. Despite the provision of the possible

95 Opinion of the Committee of the Regions on the Proposal for a Regulation of the European Parliament and of the Council establishing a European grouping of cross-border cooperation (EGCC), adopted at the 57th plenary session of 17 and 18 November 2004, (2005/C 71/11). Actually, the CoR was concerned already some years before 2004 about the necessity to find proper instruments for territorial cooperation; see the Opinion of the Committee of the Regions of 13 March 2002 on Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU – a basic document setting out guidelines for the future (CdR 181/2000 fin). In that opinion the CoR stressed the attention on the lack of political will, in particular at national level, to remove existing legal barriers in order to implement territorial cooperation and, at the same time, the lack of a proper EU legislation in this sense.

96 European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing a European grouping of cross-border cooperation (EGCC) (COM(2004)0496 - C6-0091/2004 – 2004/0168(COD)).

97 Making reference to the complete procedure, it is also necessary to mention the intervention of the Economic and Social Committee: Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council establishing a European grouping of cross-border cooperation (EGCC) (COM(2004) 496 final – 2004/0168 (COD)).

participation of Member States, the grouping was mainly thought as a legal solution for sub-national authorities. The suggestions made by the CoR and by the Parliament didn't brake off the extremely fast adoption of the last and official version of the EGTC Regulation. The AEBR assessed the benefits of this new legal instrument, underlying its added value in order to build a long-standing cooperation between sub national authorities⁹⁸.

2.3. *Legal basis of the EGTC Regulation within the Treaties*

The legal ground of the EGTC Regulation is quite important in order to have a better comprehension both of the legal approach to territorial cooperation at Community level and at national level. As already mentioned several times, there is not an explicit reference to territorial cooperation within the Treaties before the amendments of the Lisbon Treaty. The unique reference in the TEC about this issue is Article 265 concerning the mandatory consultation of the Committee of the Regions on matters related to “cross-border cooperation”. According to the opinion of N. Levrat, this provision is relevant in the sense that it confers to the Committee a particular legitimacy to deal with the matter of territorial cooperation as far as it represents the development of cross-border cooperation. But the same provision is also relevant for the so-called “*effet utile*”: in fact, “the existence of this provision could be of particular relevance if the validity of the EGTC Regulation was questioned in front of the Community judiciary authority. If the Member States accepted this wording for Article 265 TEC, they must have specifically envisaged a kind of Community attribution in this field”⁹⁹. Nonetheless, Article 265 is not sufficient as a legal base for a Community legislative act¹⁰⁰ and a more substantive legal base is needed in order to cover the Community initiatives in the field of territorial cooperation.

As far as no other provision does explicitly concern territorial or, at least, cross-border cooperation, other potential general legal grounds could be Article 308

98 J. GABBE, V. VON MALKUS ET AL. , *Cooperation between European border regions: review and perspectives*, cit., p. 79.

99 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, Study carried out by GEPE under the supervision of Prof N. Levrat, Bruxelles, 2007, p. 60.

100 *Ibid.*, p. 60.

or Articles 94-95, which usually cover actions of the Community when it has no specific competences. However, none of these two articles has been considered suitable for the purposes concerned¹⁰¹. In particular, the main reason for this choice concerns the fact that those mentioned dispositions are mostly linked with the implementation of the internal market and, therefore, less appropriate for public-institutional aims such as territorial cooperation¹⁰².

Regulation No 1082/2006 refers to Article 159 TEC¹⁰³ as legal basis for its adoption; in particular, the reference goes to the third paragraph. This provision allows the Community, within the field of the economic and social cohesion, to take actions outside the Funds under certain specified conditions¹⁰⁴: these actions shall be proved to be necessary and shall not create prejudice to other Community' policies. Thus, the EGTC Regulation and its implementation, in order to constitute a valid Community act, shall follow the general framework of cohesion policy, especially the objective related to territorial cooperation. Should this requirement be overstepped, the EGTC Regulation has to be considered not legitimized, as well as the respective implementation by other subjects. In paragraph 1.4. the priorities related to the territorial cooperation objective within the ERDF have been mentioned. As it has been said, territorial cooperation is not necessarily connected to that

101 See S. ALOISIO, *Il GECT: disciplina comunitaria e attuazione italiana, un'analisi giuridica*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 97.

102 About the analysis of these articles, in particular with regard to the role of Article 308 and the erosion of the strict conception of the competences see, among others, M. CARTABIA, J.H.H. WEILER, *L'Italia in Europa*, Bologna, 2001, p. 118 *et seq.*

103 Article 159 ECT, as amended by the Treaty of Nice, recites:

Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 158. The formulation and implementation of the Community's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 158 and shall contribute to their achievement. The Community shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments.

The Commission shall submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years on the progress made towards achieving economic and social cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals.

If 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.

104 Preamble of the Reg. n. 1082/2006, point 1).

enumeration of activities, rather, it could be implemented also through other actions as long as complying with the principles of cohesion. In the same sense, with regard to Article 159, paragraph 3 TEC, the EGTC Regulation should be considered legitimate as long as complying with cohesion policy or other Community policies.

As already mentioned in the previous chapter, the TEC Title on economic and social cohesion was introduced by the SEA, modified by the Treaty of Nice¹⁰⁵ and lastly amended by the Lisbon Treaty in line with the developments of the European cohesion policy. Because the achievement of cohesion requires appropriate actions in order to pursue the objectives laid down in art. 158 TEC, the major part of the Community interventions related to cohesion has been, and still is, taken within the Structural Funds. Namely, the Funds represent in general a way to exercise European policies within Member States and their territorial communities without the necessary implication of the constitution of new legal structures or entities. Rather, the Funds could be considered as a strategic path for cohesion policies to be implemented and spread out across Europe. Apart from actions financed by the Community with Structural Funds, paragraph 3 of Article 159 allows other actions that have proved to be necessary without creating any prejudice to other Community policies¹⁰⁶. The adoption of these actions require the specific procedure of Article 251 TEC¹⁰⁷ – co-decision procedure – and the mandatory consultation of the Economic and Social Committee and of the Committee of the Regions. Therefore, although it can be considered still unsatisfactory, Article 159 TEC seems to be, up to now, the most adequate legal base for the EGTC Regulation¹⁰⁸.

In conclusion, according to the TEC, two norms form the legal ground of the EGTC Regulation. Article 159 enshrines a kind of substantive nature, while Article 251 concerns the procedural aspect. A brief consideration of these two dispositions, as conceived within the Regulation, follows.

Besides the application of the co-decision procedure together with the Council and the Parliament, Art. 159 requires the consultative opinion of the

105 See A. TIZZANO, D. VIGNES, *Code de l'Union européen*, Bruxelles, 2001, p. 94.

106 See P. LÉGER, *Commentaire article par article des traités UE et CE*, Bruxelles, 2000, p. 1288.

107 Co-decision procedure.

108 The AEBR suggested also the use of Article 308 as a legal base for the EGTC Regulation. Namely, the reference to this legal base could open the way to a potentially broader margin of action, which should not necessary bound to the policy of economic, social (and territorial) cohesion. See ASSOCIATION OF EUROPEAN BORDER REGIONS/ COMMITTEE OF THE REGIONS, *Trans-European cooperation between local and regional authorities*, Luxembourg, 2002, p. 217.

Committee of the Regions. As the same role of the Committee is also provided by Article 265 TCE it is quite strange that nor article 159 ECT, neither Reg. 1082/2006 make any references to this article¹⁰⁹. Various hypothesis could be proposed in this regard. The most plausible, in any case, concerns the fact that, as far as the provision is respected, it is not necessary to recall it in the preamble of the Regulation.

With regard to the substantive parameters, Article 159, paragraph 3 displays a quite general provision, allowing a multiple range of actions outside the Funds, as long as these actions are proved to be necessary and in conformity with other Community policies. Given this, the Regulation dedicates specific provisions in this sense, mainly concerning the objectives and tasks of an EGTC that shows the necessity of measures directed to “reduce the significant difficulties encountered by Member State and, in particular, by regional and local authorities in implementing and managing actions of territorial cooperation within the framework of different laws and procedures”¹¹⁰. Thus, the Regulation itself motivates its role in order to achieve the objective of economic and social cohesion policy.

Community actions or interventions adopted under Article 159, paragraph 3 have a so-called residual function as far as they are allowed to be pursued under specific “negative” conditions. It is relevant to notice that before to the adoption of the EGTC Regulation, this legal basis has never been the ground for specific long-lasting normative provisions, rather it has been an instrument for devolving non-structural and temporary financing¹¹¹. On the contrary, the Regulation sets up a legal basis for potentially permanent structures of territorial cooperation. Therefore, some doubts could emerge with regard to the legitimacy of this norm as legal base for founding long-term and multi-task structures of territorial cooperation. Anyway, if the necessary consistency with the cohesion policy seems to be a limiting element, it is also true that a certain degree of flexibility is present with regard to the possibility to undertake a various range of activities. Namely, there is no specific or explicit list of tasks, scopes or objectives that the EGTC cannot deal with. In this sense, the

109 The preamble of the regulation refers to the opinion of the CoR, OJEC C 71, 22.3.2005, p. 46, without mentioning art. 265 ECT.

110 See point 2) of the preamble Reg. 1082/2006.

111 M. PERTILE, *Il GECT: verso un organismo di diritto comunitario per la cooperazione transfrontaliera?*, in *Diritto del commercio internazionale: pratica internazionale e diritto interno*, 2005, p. 122.

clause of Article 159, paragraph 3 has a residual nature¹¹², which confers the EGTC Regulation a clear normative ground in the TEC¹¹³.

2.4. *The role of the Committee of the Regions*

Despite its scarce legal commitments¹¹⁴, it is not possible to forget the involvement of the Committee of the Regions (CoR) when speaking about sub-national authorities in Europe and, in particular, about the EGTC¹¹⁵. Namely, the Committee has had a fundamental role during the phase of adoption of the EGTC Regulation. The activity of the CoR, which has produced the strongest effective results, is the Opinion given during the preliminary phase for adopting the Regulation after the Commission's proposal. This Opinion, together with the Parliament's Resolution had some weight in order to modify the Commission's proposal. Despite its mere consultative function, the CoR is still one of the Community organs which are mostly concerned with the implementation of the EGTCs¹¹⁶. As the unique seat representing sub-national authorities at Community level its enthusiasm seems to be quite obvious¹¹⁷. However, it is rather difficult for

112 Decades of EC legislative actions have shown the capacity of EC/EU to expand its competencies both indirectly through acts of soft law and even through norms provided by the Treaties, conferring them a broader impact of influence on Member States sovereignty, outside the strict conferred powers. Art. 308 TEC (prior Art. 235) is a good example of the EC power development, representing the clause of so called “implied powers”, see M. CARTABIA, J.H.H. WEILER, *L'Italia in Europa*, cit., p. 113. Another, although less relevant, clause is Art. 151, par. 4 TEC on culture, enabling EC cultural actions within Member States even indirectly through other interventions, which are not necessarily requested for cultural purposes. Such clauses denote the capacity of the EC/EU order to expand the area of its conferred powers.

113 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* – cit., p. 61.

114 The literature about the Committee of the Region is huge. In this case, see J. NERGELIUS, *The Committee of the Regions Today and in the Future – A Critical Overview*, in S. WEATHERHILL, U. BERNITZ, *The Role of Regions and Sub-national Actors in Europe*, Oxford, 2005, p. 119-129; see also, T. COLE, *The Committee of the Regions and Subnational Representation to the European Union*, in *Maastricht Journal of European and Comparative Law*, 2005, vol. 12 n. 1, p. 49-72.

115 See the interview with M. DELEBARRE, *Le Comité des Régions définit une stratégie offensive*, in *Inter-Régions*, N. 266, Mai-Juin 2006, p. 16-18.

116 The CoR assigned to one of its departments (Unit 3) the monitoring of the EGTC's implementation. The activities that have been carried out are several: organisation of conferences and seminars, development and commission of different studies on the subject, collaboration with sub-national associations, providing information for different public and private actors, etc. The activity of the CoR and the main information on the EGTC are available at CoR's official webpage:

<http://www.cor.europa.eu/pages/EventTemplate.aspx?view=folder&id=1ae87373-d198-4bf5-b26c-7e9930fb813e&sm=1ae87373-d198-4bf5-b26c-7e9930fb813e>.

117 “The Committee of the Regions is calling on all Member States to implement national provisions on the EGTC so that all regions and cities in Europe can participate in the scheme. (...). The EGTC

this consultative body to face the different attitudes of Member States and the reluctance of some of them to adopt national provisions in order to assure a fast application of the Community Regulation.

The CoR's active function towards the issue of territorial cooperation started officially in 2001¹¹⁸. Currently the CoR follows all the processes related to the implementation of the EGTC Regulation and the creation of new EGTC's on Community territory. In this regard, the CoR represents the natural interface for sub-national authorities to receive information and clarifications about the argument. The huge number of internal and official documents reveal its deep involvement. In particular, a group of international independent experts from regional and local authorities has been created as a consultative group on the main issues of EGTCs for facilitating the exchange of experiences¹¹⁹. The CoR keeps highlighting to the Commission and to the Member States the necessity to improve and implement the EGTC Regulation¹²⁰. According to the words of L. Van den Brande¹²¹ “the CoR has been a major political driving force behind the approval of the Regulation on EGTC. Afterwards, the CoR has been capable to keep the EGTC dossier high on the inter-institutional agenda”¹²². This active involvement of the Committee demonstrates the relevance of the political and soft-law background as base for an effective application of the legal instrument. For this reason, the analysis of the legal aspects of the EGTC

will help to get rid of red tape and enable partners to realize joint projects that meet public needs” CoR President, Luc Van den Brande, at: <http://www.cor.europa.eu/pages/EventTemplate.aspx?view=folder&id=1ae87373-d198-4bf5-b26c-7e9930fb813e&sm=1ae87373-d198-4bf5-b26c-7e9930fb813e>. See also the Resolution of the Committee of the Regions, Cooperation beyond national borders makes Europe a reality – An appeal to adopt the Regulation on the European Grouping on Territorial Cooperation, Brussels, 22 February 2006, CdR 72/2006 fin.

118 In 2001 the CoR published the study *Trans-European cooperation between territorial authorities*, realised by the AEBR. In our opinion, the CoR seems to be more active than the European Commission. One point is interesting in this regard. Due to the delay of many Member States to enforce the EGTC Regulation, the Commission didn't open any infringement procedure. On the contrary, the CoR, even from its consultative position, underlined the necessity to implement the Regulation as soon as possible.

119 See the Report on the First Meeting of the Committee of the Regions' EGTC Expert Group held in Brdo on 17 January 2008 and the Report on the Second Meeting of the Committee of the Regions' EGTC Expert Group held in Brussels on 11 March 2008.

120 See Committee of the Regions, Unit 3, *EGTC in the contributions to the Green Paper on Territorial Cohesion. Considering the state of the play and future of the EGTC from different actors' perspectives*, Brussels, 29 May 2009, CdR 169/2009, p. 1. See also, Committee of the Regions, *European Grouping of Territorial Cooperation (EGTC): state of the play and political strategy and supporting actions*, Brussels, 28 January 2009, CdR 15/2009.

121 President of the Committee of the Regions at the time of writing.

122 See the interview with L. Van den Brande on *Regions Magazine – hors série spécial – Coopération territoriale transfrontalière/ GECT*.

cannot forget to keep in mind these backgrounds as far as they represent its living-conditions.

The main interests of the CoR are devoted to the effective participation of sub-national actors within the European decision-making process and to the implementation of multilevel governance. The EGTC, in this sense, represents a perfect example of multilevel integration, legal dynamic and potential coordination between different national systems¹²³. Some internal CoR's documents underline its twofold role in the context of the EGTC. Namely, “[o]n the one hand, it further encourages Member States to adopt national measures and candidate countries to quickly adopt the Regulation in their *acquis communautaire* through the activities of the CoR members, the publication of studies and the different initiatives proposed. On the other hand, it enhances the policy-learning process between parties interested in setting up EGTCs, or those that have already established the Grouping but are still facing problems”¹²⁴. After the adoption of the Regulation in 2006, the CoR dedicated many efforts to implement and develop a first comprehension of the new instrument for territorial cooperation. In fact, notwithstanding the already long practice of transfrontier cooperation, many sub-national actors required an introduction to the functioning of the EGTC and to the understanding of its pretended added value¹²⁵.

Apart from the specific Opinion realised under the procedure for the adoption of the EGTC Regulation, where peculiar amendments have been proposed by the CoR, most of the official documents that has been analysed have a general political aim without entering into the legal details of the EGTC Regulation¹²⁶. The Opinion

123 See Committee of the Regions, Unit 3, Note to the attention of the COTER Commission on the state of the play of the European Grouping of Territorial Cooperation, Brussels, 29 May 2009, CdR 168/2009, p. 2.

124 *Ibid.*, p. 5.

125 The seminars and following debates during the Open Days 2007, 2008 and 2009 had a deep importance for exchanging opinions, asking questions and arising doubts on the implementation of the EGTC Regulation and on the effective establishment of EGTCs. In this regard, one of the first workshops on the subject has been held on 5 October 2007 with the title “EGTC: from Regulation to its implementation”. Such meetings are extremely important as they help to understand the mechanisms regarding the EGTC. Our opinion after the attendance to several seminars is that many potential stakeholders have difficulties to understand how to implement Community legal rules within national systems.

126 This statement refers to the official documents adopted by the CoR and to the internal and preliminary drafts. Of course, the CoR incentives the proliferation of the literature about the EGTC and the analysis of the legal aspects. Namely, the most detailed and accurate legal analysis of the EGTC Regulation has been commissioned by the CoR (see the already mentioned COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, Study carried out by GEPE under the supervision of Prof N. Levrat, Bruxelles, 2007). However, in such cases, the analysis doesn't

adopted on 18-19 June 2008 during the 75th Committee's Plenary session is emblematic in this sense¹²⁷. Namely, the main attention is driven on the future role that the EGTC's will have in the panorama of territorial cooperation within the EU territorial agenda, cohesion policy and regional diversity. The legal impact of the Regulation is considered only in general terms, as a vehicle for a better regulation of territorial cooperation. Likewise, the CoR tends not to stress on the legal potential difficulties arising from the application of the Regulation. The emphasis that is put on the general and positive elements of the new instrument reveals a clear strategic intent to pursue the interests of local and regional authorities as well as an attempt to foster European multilevel integration. Besides the legal effects of the EGTC Regulation, the subject of territorial cooperation represents a test for the future development of multilevel governance. The action of the Committee towards the development of a better instrument of territorial cooperation, which could be mostly suitable for regional and local authorities, has a major political and strategic value in conformity to the scopes of this institution¹²⁸. However, in the case of the EGTC this role seems to have displayed a relevant influence. In this regard it is remarkable to observe the possible effects of the actions of a consultative body and of the so-called *soft law* during the process of adoption and implementation of an EC legislative act. The intervention of the CoR in this process is prescribed by Article 265 TEC and its constant involvement is somehow legitimized by the sub-national interests concerned. From this point of view the case of the EGTC is, anyway, peculiar and paradigmatic to understand the dynamics that take place within the Community legal order between European institutions, Member States and sub-national authorities.

2.5. Some observations about the political ambition of the EGTC Regulation

Before entering into the legal details of the EGTC Regulation, it seems interesting to spend some words about the political implications of this legal

normally reproduce the official position of the Committee.

127 Opinion of the Committee of the Regions on European Grouping of Territorial Cooperation: new impetus for territorial cooperation in Europe, adopted at the 75th plenary session of 18 and 19 June 2008, CdR 308/2008 fin.

128 L. BEKEMANS, *Cooperazione territoriale e multilevel governance. Il ruolo propulsore del Comitato delle Regioni*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 59-60.

instrument. Actually, the EGTC Regulation is the first legal document of general application that provides for a detailed regulatory mechanism for transfrontier relations between sub-national authorities within the EU. In this sense, it overcomes the already existing legal instruments: the CoE's system of the Madrid Outline Convention with its two Protocols (it has to be kept in mind that when the EGTC Regulation has been adopted the Third Protocol was not in force) and the bilateral or multilateral inter-state agreements based in international law. The first framework, although pioneering, has proven to be hardly enforceable; the second type of tools provided only *ad hoc* solutions and, therefore, covering a limited geographic area. Thus, the EGTC Regulation shows a clear political (before than legal) intent to be considered as the standard reference and the future legal model for territorial cooperation, which should be valid and applicable on the entire EU territory. Two obstacles limit this aspiration: it needs to cope with national legislations in order to be fully applicable and it doesn't substitute the other existing instruments or solutions for territorial cooperation. In this sense, the EGTC Regulation requires a strong political emphasis that can make it more attractive. For this reason, the EU institutions, especially the Committee of the Regions stress its positive characteristics. Namely, the following prerogatives of the EGTC are often pointed out: “it gives legal stability to cooperation and, at the same time, it allows a variety of multilevel institutional formatting; it incorporates the genetics of the 'soft cooperation' and, at the same time, it has the legal capacity to deliver structuring development projects; for the first time we have an instrument of European nature which is also strongly anchored to the territory. In short, the EGTC [...] can be a powerful tool to rationalize and better coordinate investments and to ensure a coherent and efficient use of limited resources”¹²⁹.

Due to its direct applicability, the political implications of the implementation of the EGTC Regulation are mainly inherent to the dichotomy between the Community and the Member States. On the one hand, the EU institutions encourage the development of territorial cooperation. On the other hand, some Member States seem to be very prudent before the adoption of national measures for the

129 See the Speech of L. Van den Brande on the occasion of the First Meeting of the Committee of the Regions' Expert Group, held in Brdo on 17 January 2008; see also the speech of L. Coen, *La cooperazione territoriale come risorsa economica*, held on the occasion of the seminar about “Public powers and local economic development, in Udine on 14 November 2008.

implementation of the Regulation¹³⁰. Namely, the main fear of Member States seems to be the potential uncontrolled action of sub-national authorities outside the national borders. Even if the Regulation is explicit in highlighting the necessary respect of the national legal orders, sometimes a crawling feeling of mistrust is perceivable¹³¹. Anyway, as the EGTC is mostly targeting territorial communities, the debate about the conferral of an effective right attributed by the EGTC Regulation to sub-national authorities for the development of territorial cooperation is typically left out from debates. Namely, this issue is quite sensitive and can cause some conflicts or antagonisms between the central authorities and the sub-national entities¹³².

Thus, the political aim that has spread out around the EGTC Regulation intends to focus on the major positive peculiarities of the new instrument without concentrating the attention on the possible issues of friction. Within this perspective, the EGTC can spend its entire political credibility for the cause of European integration, for the future development of a multilevel system of powers and inter-institutional cooperation. However, the establishment and proliferation of EGTCs can encounter institutional concerns, even coming from the sub-national authorities. The successful development of territorial cooperation needs a strong institutional commitment, mutual engagement and trust between the subjects involved. In this sense, the legal feasibility of the new instrument has its necessary counterpart in the political – and also emotional – dimension. The legal *self-determination* of the EGTCs depends, as a primary condition, from the political agreement between its stakeholders¹³³. As we will see further on, the scale of this institutional and political coordination deals with two different aspects. On the one hand, a mere political coordination between institutions is linked to a high degree of directionality. This is both vertical (i.e. between the different level of government) and horizontal (i.e. between the actors involved in territorial cooperation). On the other hand, a more legally-bounded concept is also concerned. It takes the form of what could be called

130 See R. DEGRON, *Le groupement européen de coopération territoriale: consécration des eurorégions?*, in *AIDA hebdo: L'Actualité juridique. Droit Administratif*, 2007 année 63, n. 25, p. 1376.

131 See V. COCUCCI, *Nuove forme di cooperazione territoriale transfrontaliera: il Gruppo Europeo di Cooperazione Territoriale*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2008, p. 925.

132 See *Ibid.*, p. 924.

133 See J. MAIER, *European Grouping of Territorial Cooperation (EGTC) – Regions' new instrument for 'Co-operation beyond borders'. A new approach to organize multi-level governance facing old and new obstacles*, cit., p. 20.

“constitutional cooperation” between institutional authorities belonging to the different levels in each national system. With reference to the attribution and exercise of competences, the principle of trusted cooperation could be applied in order to arrange a better coordination between tiers of government. We will see that it could be useful also for the implementation of the EGTC Regulation, as a soft-rule for managing the competences' exercise. Namely, this principle, although not always explicitly foreseen and anyway difficultly enforceable, is a preliminary and necessary condition for good inter-institutional relations and for realizing an effective coordination¹³⁴.

Conclusively, summarising what has been said in this paragraph, the EGTC Regulation's political implication concern a complex system of institutional relations. Thus, the application of this instrument implies, as a primary condition, the approach to a multiple political dimension.

3. Analysis of the Regulation 1082/2006

3.1. *Flexibility and optionality*

As already mentioned in the first part of this work, the use of the term “territorial” in a legal document, which is directly applicable to transfrontier relations, embodies the relevant development that has been made in this field¹³⁵. Namely, this new legal tool has been created for managing cross-border, transnational and interregional programmes or projects, providing an unprecedented path for cooperation between States, regional and local authorities, without replacing the already existing instruments¹³⁶.

134 The mentioned concept is technically known as “sincere cooperation” and mainly inserted in the Constitutions of federal countries in order to display some general methods for the relations between the tiers of government. A similar concept has been introduced in the EU legal order through Article 10 of the TEC. Without opening a too long digression on the argument, it is quite clear that this principle is borderline between the political and legal dimension. Maybe it is one of the most difficult constitutional principles in order to set the relations among different authorities. However, and opportunely in this historical moment, it is necessary as a guide to solve physiological discrepancies that have a pathological dimension in the judiciary settlement of competences.

135 See J.I. LUACES FERNÁNDEZ, *La Agrupación Europea de Cooperación Transfronteriza y las implicaciones del nuevo instrumento jurídico: ¿bases para una integración efectiva?*, in *Unión Europea Aranzadi*, 2005, año XXXII, n. 12, Octubre, p. 22-23.

136 MISSION OPÉRATIONELLE TRANSFRONTALIÈRE (MOT), *European grouping of territorial cooperation*, Paris, 2008, p. 8-9.

The Regulation (EC) No. 1082/2006 is composed of 18 Articles which define its nature, its structure and its working procedures. The rather basic content of the Regulation aims at setting down the fundamental elements of an EGTC, which should be common to every structure. Other aspects will be anyhow defined jointly by its prospective members (in the Convention and in the Statutes) and by the respective national laws of implementation. Thus, the rules on the EGTC are basically of two types: a part of them is fixed according to the general norms contained in the Regulation, while the other part is constituted by variable normative elements. Regarding the first group of rules, the Regulation sets down a core system of norms that should represent the general and common legal framework for each EGTCs. Subsequently, the joint agreement of its members and the national laws will give to the EGTC its peculiar identity. The originality of this instrument excludes, then, the multiplications of identical structures; rather, several types of EGTC are going to be set up, according to the content of its variable normative elements.

As we have already mentioned, the peculiarity of the Regulation 1082/2006 resides in the fact that it resembles more a directive rather than a regulation. Namely, according to Article 16, paragraph 1 “Member States shall make such provisions as are appropriate to ensure the effective application of this Regulation”. According to this aspect, the EGTC is a Community instrument that should also follow national rules in order to be effectively implemented. In this perspective, the new Regulation is evidently a flexible instrument. Anyway, it contains at the same time some ineluctable elements, which confer to the Regulation its nature of peculiar Community instrument devoted to set down some standard rules. Namely, as the Regulation itself points out, an intervention for the establishment of common norms in this field was highly desirable.

In fact, the second recital of the Preamble states: “[m]easures are necessary to reduce the significant difficulties encountered 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”. By underlying this occurrence, the Regulation remembers the significant contributions given by the already existing Community instruments, such as the European Economic Interest Grouping and the INTERREG programmes, as well as by the

Council of Europe's *acquis*¹³⁷. Afterwards, the Preamble continues: “[i]n order to overcome the obstacles hindering territorial cooperation, it is necessary to institute a cooperation instrument at Community level for the creation of cooperative groupings in Community territory, invested with legal personality, called *European Grouping of Territorial Cooperation* (EGTC). Recourse to an EGTC should be optional”¹³⁸. Thus, the Regulation introduces a new structure for territorial cooperation – the EGTC – which represents, on the one hand, the desired instrument for overcoming the existing obstacles and, on the other hand, an optional solution. The EGTC Regulation begins in the pursuit of flexibility, without the explicit aim of replacing other tools.

Despite its flexible and optional nature, one of the first purposes of an EGTC is the intention to create a common and general legal standard applicable to relations of territorial cooperation¹³⁹. In this regard, the following observation of N. Levrat is enlightening in order to explain the complex nature of the Regulation. “Now that the need of these national rules is clear, there are two possible approaches. One would be to attempt to harmonise cross-border cooperation structures across the European Union [...]. The Community approach is not, on the other hand, aimed at harmonisation; the fifth recital of Regulation No. 1082/2006 states that the instrument 'is not intended to... provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community'. It should be pointed out, however, that the obligation laid down in Article 16 of the Regulation could well lead to harmonisation of solutions at Community level, much more quickly and effectively than a hypothetical Council of Europe convention, whose ratification process [...] would undoubtedly be lengthy and not uniform.”¹⁴⁰

According to what has been said, it is possible to conclude that the EGTC Regulation introduces an instrument which tends to pursue harmonization without imposing it. Some scholars, however, see in the Regulation a true instrument for the

137 Recital no. 4 and 5.

138 Recital no. 8.

139 Actually the lack of a common legal basis among EC Member States is one of the difficulties for cross-border cooperation stressed either by scholars and practitioners since decades, see J. GRIX, V. KNOWELS, *The Euroregion and the Maximization of social capital: pro Europa Viadrina*, in AA.VV., *Regioni e Territori in Europa. Gli effetti territoriali delle politiche europee visti dalle regioni*, ARE, Strasburgo, 1995, p. 166.

140 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, cit., p. 51.

harmonization of transfrontier relations¹⁴¹. But a consideration needs to be done. According to our opinion, such a conception of harmonisation should not be considered as related to the nature of the various regulatory instruments for transfrontier activities: namely, it is rather patent that a multiplicity of tools remains available and that the EGTC Regulation itself doesn't provide for a real legal harmonisation of the phenomenon. To be precise, this kind of “harmonisation” is somehow special and concerns the creation of a new instrument that has a general aim to create some common rules and that is applicable to a wide range of situations. Thus, a kind of potential model has been provided without the possibility to be a “normalizing” tool. Moreover, there are no legal grounds to eliminate the already existing legal tools as far as they are legitimately applied. In regard to the last statement, the EGTC Regulation represents, more than a mandatory rule, a set of homogeneous rules¹⁴² and the official recognition of territorial cooperation as a legislative object instead of a spotted phenomenon. Namely, the optional and flexible nature of the EGTC's rules grants a variable adaptation to a multilevel system of different legal orders.

3.2. Nature and scope of an EGTC

First of all, it is important to remember what could be perceived as an obvious observation. Article 1, paragraph 1 of the Regulation affirms that “the objective of an EGTC shall be to facilitate and promote cross-border, transnational and/or interregional cooperation, hereinafter referred to as *territorial cooperation*, between its members [...] with the exclusive aim of strengthening economic and social cohesion”. Since the different transfrontier approaches are not going to be replaced by the new instrument but are incorporated in it, it has to be stressed again that the EGTC has necessarily a cross-border nature in the broader meaning (i.e. not only between neighbourly territorial communities, but also between non-contiguous

141 See R. DEGRON, *Le groupement européen de coopération territoriale: consécration des eurorégions?*, cit., p. 1373-1374.

142 “Urge, por tanto, una nueva concepción, que abandone la idea de cooperación transfronteriza en términos de política exterior nacional, y que asuma el contexto de la cooperación como una verdadera política interior europea”, see I. LUACES FERNÁNDEZ, *La Agrupación Europea de Cooperación Transfronteriza y las implicaciones del nuevo instrumento jurídico: ¿bases para una integración efectiva?*, cit., p. 24.

territories)¹⁴³. In this sense, territorial cooperation incorporates a dimension that essentially comprehends and transcends national borders. An EGTC must, therefore, be established among at least two members belonging to different Member States.

Moreover, as already quoted from Article 1, the unique aim of an EGTC should be the support towards economic and social cohesion. Also the 11th recital of the Preamble has to be analysed according to this condition. Namely, “an EGTC should be able to act, either for the purpose of implementing territorial cooperation programmes or projects co-financed by the Community, notably under the Structural Funds in conformity with Regulation (EC) No 1083/2006 and Regulation (EC) No 1080/2006 [...] on the European Regional Development Fund, or for purposes of carrying out actions of territorial cooperation which are at the sole initiative of the Member States and their regional and local authorities with or without a financial contribution from the Community”¹⁴⁴. The quoted provisions are very relevant in order to understand the scopes of an EGTC and, eventually, to evaluate if it has been legitimately established and if it acts correctly. Generally speaking, these provisions represent a declination of Article 159 TEC that represents the legal base of the EGTC Regulation. As a consequence of Article 159, paragraph 3 TEC, the activities of an EGTC shall be conform with the cohesion policy¹⁴⁵. However, the content of the Regulation doesn't provide for a specific set of matters that an EGTC should or should not deal with. Therefore, as far as territorial cooperation could cover different forms of activities, this residual clause has to be subject to evolving interpretations. In this perspective, the potential application of this legal tool and the creation of new EGTCs is far from being limited by the Regulation itself, rather they also depend from other “external” conditions, which should be identified within the policies of cohesion. With regard to this presumptive limitation of the EGTC it is possible to

143 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, cit., p. 73. The study remembers that only “territorial cooperation” has a necessary transfrontier nature, while the concept of “territorial cohesion” “doesn't necessarily have a dimension that transcend national borders”.

144 See R. DICKMANN, *Il Gruppo Europeo di Cooperazione Territoriale (GECT)*, in *Foro Amministrativo: Consiglio di Stato*, n. 10, 2006, p. 2902.

145 “The European territorial cooperation objective aims to reinforce cooperation at cross-border, transregional and interregional level. It acts as a complement to the two other objectives [...]. It aims to promote common solutions for the authorities of different countries in the domain of urban, rural and coastal development, the development of economic relations and the setting up of small and medium-sized enterprises (SMEs): The cooperation is centred on research, development, the knowledge-based society, risk prevention and integrated water management.”, see EUROPEAN COMMISSION, *Cohesion policy 2007-2013, Commentaries and official texts*, cit. p. 20.

make a comparison with the CoE's Third Protocol to the Madrid Outline Convention establishing a Euroregional Cooperation Groupings (EGC). In particular, the idea of the Congress of Local and Regional Authorities is that the EGTC Regulation has a restricted scope if compared with the Third Protocol. Namely, while the EGTC is subject to the mentioned limiting factors of economic and social cohesion, the ECG has wider purposes that aim at “promoting, supporting and developing, for the benefit of populations, territorial cooperation”¹⁴⁶. According to such view, the ECG could seem (once ratified by the States parties) a more flexible and open instrument for stakeholders. However, according to our opinion, it is important not to fall into the trap to consider the EGTC as an excessively constrained tool. Namely, on the one hand, the objectives of economic and social cohesion, territorial cooperation included, are quite broad. On the other hand, it is necessary to consider the functioning of these instruments in the praxis. From this point of view, it seems logical to think that the effective use of these two instruments will not have so different purposes, as far as they deal with the same typical transfrontier issues, and shall principally comply with sub-national authorities' tasks and competences¹⁴⁷.

Another important condition, which is settled down in the 15th recital of the Preamble, is the respect of the principles of subsidiarity and proportionality as enshrined in Article 5 TEC. The Regulation “does not go beyond what is necessary in order to achieve its objectives, recourse to an EGTC being optional, in accordance with the constitutional system of each Member State”. As far as this provision could seem a quite obvious statement attached to the Regulation, it has, anyway, high relevance as a final coherency clause. In fact, the optional recourse to the legal structure of the EGTC is justified by the reference to the subsidiarity/proportionality principle: the provision of a mandatory recourse to this instrument would have evidently violated such peculiarity of Community law, thus exceeding what is necessary to pursue the objectives of the Regulation¹⁴⁸.

146 See COUNCIL OF EUROPE, *Report on European legal instruments of interregional cooperation*, drawn up at the request of the Congress of Local and Regional Authorities by Prof. Y. Lejeune, cit., p. 3.

147 See I. OTTAVIANO, *Riflessioni sul Gruppo Europeo di Cooperazione Territoriale*, in *Studi sull'integrazione europea*, v. I, n. 3, 2006, p. 545-562.

148 See N. WISMER, *Les modalités d'intervention de l'Etat dans la coopération transfrontalière*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, cit., p. 98.

Moreover, the Regulation adopted the necessary provision in order to respect the national legal orders and the constitutional systems of competences of central and sub-national authorities. The issue concerning the conformity to the constitutional system of the Member States is quite sensitive due to the direct applicability of the EGTC Regulation. Namely, one of the key questions related to the legal consequences of this Regulation is whether a new right for sub-national authorities to engage in territorial cooperation has been created¹⁴⁹. This question is more relevant for the reason that the normative act setting up the legal base for cooperation is a Regulation, thus, *per se* directly applicable within the Member States. Conversely, the issue can be raised otherwise, by considering whether a new and strengthened power-exercise for sub-national entities has been created with the adoption of the Regulation.

According to one possible interpretation, the facultative/optional utilization of this instrument for territorial cooperation could imply the possibility for Member States to prevent local and regional authorities to be member of an EGTC. On the contrary, as this tool has been adopted under the form of a Regulation, the direct applicability would leave the faculty for sub-national authorities to create or take part in an EGTC without a discretionary assent of Member States. However interpreted, these two characteristics of the EGTC Regulation seem to be quite conflicting¹⁵⁰. As far as it is not clear if a new right for sub-national authorities to engage in territorial cooperation has been created or not, anyway it is quite clear that the Regulation (EC) No 1082/2006 generates, at least, the obligation for Member States to create the conditions established in the Regulation and not to hinder its application¹⁵¹.

149 Both of the thesis, the positive and the negative, could be potentially supported. From a certain perspective, the direct applicability of the Regulation seems to offer a new opportunity for sub-national authorities to develop territorial cooperation in the form of EGTCs. However, the strict references to the conformity with national systems prevent regional and local authorities from a complete autonomous commitment towards transfrontier relations.

150 N. WISMER, *Les modalités d'intervention de l'Etat dans la coopération transfrontalière*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, cit., p. 98.

151 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 85. Would Member States obstruct the application of the EGTC Regulation, a potential violation of Article 10 TEC could be recognized.

3.3. Direct applicability and national rules of implementation: the problematic path for the application of the Regulation at national level

A peculiarity of the Regulation No 1082/2006 concerns the strong connection with the national legal systems. Namely, as already remembered, Article 16, paragraph 1 requires Member States to adopt the appropriate provisions for the effective application of the Regulation. With other words, the EGTC Regulation cannot be correctly implemented without the correspondent national provisions. It has to be kept in mind, then, that also the sub-national authorities could be in charge of the normative implementation of the Regulation according to the internal structures of the different countries and to the attribution of the competences among the tiers of government. Nevertheless, the intervention of central authorities is necessary required in order to adopt some general and uniform provisions within the national territory about the establishment of an EGTC. This is particularly true for what concerns the procedure of notification and authorisation from the central authorities as provided by Article 4 of Regulation 1082/2006.

Various scholars have seen in the necessity of a national implementation the typical nature of a Community directive. However, according to our opinion, it's quite unimportant to wonder about the real character of the EGTC Regulation, as far as its formal denomination and structural nature are those of a Regulation (although a little *sui generis*)¹⁵². Also the attempt to define the exact nature of the Regulation coming from national institutional authorities or jurisdictional subjects is rather misleading¹⁵³. In any case, it is relevant to observe the normative effects of the

152 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, cit., p. 133 affirms that such a provision is not really clear, but it's not equivalent to those contained in directives. The interpretation proposed in the study commissioned by the CoR is interesting. “In our view, the obligation contained in a directive to transpose legislation by a stipulated deadline does not apply here, and the Commission would probably not be able to regard the absence of national measures (within the meaning of TEC Article 226) as constituting failure to comply. In contrast to the situation with a directive, it will not be possible here to invoke the absence of national legislative or regulatory provisions in order to prevent the implementation within a national legal system of a measure provided for in the Regulation”.

153 During the process to implement the Regulation, the Italian Government asked for a consultative opinion from the *Consiglio di Stato* about the possibility to implement the Community act in form of an administrative act or of a legislative act. The opinion rejected the possibility to implement a Community Regulation with an administrative act. Moreover, throughout the opinion (see *Consiglio di Stato*, Sezione Consultiva per gli Atti normativi, Adunanza del 9.10.2007, Sezione N. 3665/2007) the *Consiglio di Stato* indirectly touched the issue of the normative nature of the Regulation and affirmed its easiest assimilation with a directive rather than with a regulation. However, it has been a constant assumption that national institutions or jurisdictions are not entitled to admonish about the formal character of a Community legislative act.

Regulation within the national legal orders, rather than to dispute about formal epithets. Since the Community act concerned is directly applicable, it is necessary to distinguish two different sets of norms, some of which have a direct effect at national level, while some others need national implementation¹⁵⁴. In this regard, according to some interpretations of the EGTC Regulation, this Community act wouldn't leave so much space of assessment for the national means of application though¹⁵⁵.

So far, it is well known that Member States have been generally in delay with the adoption of the necessary national provisions. As the deadline to comply with this obligation was fixed within 1 August 2007, most States have a delay of several months (and also years) concerning the conformation with the Regulation¹⁵⁶. However, no infringement procedures have been opened against any of the Member States involved. What is quite surprising within this scenery is the incredibly fast adoption of the EGTC Regulation in comparison with the slow adaptation of the national legislations. A possible hypothesis in this sense could be the hesitation of central authorities to adopt concrete legislative measures in order to support sub-national authorities in their activities with a foreign dimension. But another reasonable supposition is the real difficulty to introduce the EGTC as a new legal subject within the national legal systems. Namely, as far as the interaction with the domestic legislation of Member States is concerned, it is undoubtedly true that the new entity has a strong symbolic implication as stemming from the European level. In this sense, the EGTC Regulation, by recognising the legal value of territorial cooperation, imposes Member States to provide for some mechanisms in order to devise the establishment of EGTCs' structures. In particular, this concerns a necessary complex interaction with sub-national authorities.

154 It seems quite reasonable to make a differentiation between the so-called "transposition" of a directive into the national legislation and, as in this case, the national implementation of a Regulation that is directly applicable, but some of whose provisions have no direct effect. In fact, as the direct applicability concerns the act (the Regulation), the direct effect concerns the legal effect of the provisions entailed in the act. The fact that the provisions of a Community act have no direct effect doesn't invalidate the direct applicability of the act.

155 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 67.

156 The CoR keeps an updated list of the national provisions regarding the implementation of the Regulation 1982/2006 on its official web-page at: <http://www.cor.europa.eu/pages/EventTemplate.aspx?view=folder&id=2a35663b-5cd7-41e7-88e5-a148f1747e43&sm=2a35663b-5cd7-41e7-88e5-a148f1747e43>. At the time of writing 12 Member States haven't implemented the EGTC Regulation yet.

Several doubts surround a plain development of the EGTC Regulation. First of all, the Community nature of the new structure provides for a possible cohabitation of States and sub-national authorities as members of the same legal subject, thus implying a certain degree of parity that is not really an ordinary circumstance. This is the first time that territorial cooperation is considered from this point of view, contemplating the cooperation between sub-national authorities and States within the same legal structure. As far as the main attention is drawn on the development of cooperation between territorial communities, the potential presence of central authorities has not to be underestimated. Beside this, however, other difficulties remain pending for quite a long time within each Member State.

With regard to the procedure for the adoption of the national provisions, some States showed hesitations concerning the type of act suitable to implement a Community Regulation within the national system.¹⁵⁷ Moreover, the potential application of foreign national law or the foreign relations between national territorial authorities create some perplexities when these relations are not covered by an inter-state agreement. As sub-national authorities typically need the State's assent to be involved in an EGTC, the form of such approval is not patent according to the different national constitutional systems and national legislations¹⁵⁸. The fact that Community law governs the rules of territorial cooperation together with the following development of foreign relations between sub-national authorities seems to be still a doubtful matter. Another doubt concerns the legal capacity of the EGTC. Namely, the Regulation is lacking in this regard as it doesn't oblige to the public law-personality or the private law-personality¹⁵⁹.

So far, some difficulties about the effective adoption of the EGTC Regulation have been pointed out. There are some political concerns as well as other technical complications¹⁶⁰. However, since the Regulation leaves a certain degree of

157 This was, for example, the case of Germany. While the *Länder* decided to implement the Regulation throughout an ordinary law, the Federal Government didn't provide for a piece of legislation. Namely, at central level, Germany adopted the requested provisions by an ordinance of the Federal Ministry of Economy and Technology.

158 The implementation of the EGTC Regulation required the abolition of the Article L1115-5 of the General Code of territorial communities.

159 See J.M. PÉREZ MEDINA, *El Estado y la cooperación transfronteriza*, in RÉSEAU D'ÉTUDE DES NORMES TRANSFRONTALIÈRE ET INTER-TERRITORIALES (RENTI), *L'État et la coopération transfrontalière: actes de la journée d'étude du 13 septembre 2006*, Bruxelles, 2008, p. 52-56.

160 *Ibid.*, p. 55. Some of the technical problems are the same encountered in the framework of the Council of Europe. Namely, the issue about the liability of the body, the personal recruitment, the

discretionality for Member State to carry out national provisions, nevertheless the exercise of such discretionary faculties remains hesitant.

3.4. The normative hierarchy established by the Regulation about the law applicable to an EGTC

Once more it is better to remember the difference between the law concerning the legitimacy for public subjects to develop territorial cooperation and the law applicable to the activities and relations concerning cooperation. In this paragraph we will deal with the second argument. The issue concerning the law applicable to the relations of transfrontier cooperation has always been, and still is, one of the most complex question to approach, mainly with regard to the function of public law. All the legal solutions that have been elaborated for the development of territorial cooperation and, in general, for transfrontier relations try to overcome the obstacles concerning the law applicable to these relations as far as different legal systems are concerned. However, despite the various attempts and the different legal means that have been proposed, several questions remain still open. Also with reference to the Council of Europe's *acquis* and in particular to the Third Protocol to the Madrid Outline Convention, it is quite difficult to find clear solutions only in one regulatory source. In fact, the legal implications of a legal subject involving members belonging to different countries, concerning different national territories and acting under different legal systems are multi-fold. The adoption of the EGTC Regulation, according to its promoters, should have helped to find a clear and definitive legal solution to this issue. However, in the opinion of N. Levrat, the provisions of the Regulation are quite misleading because they do not resolve the issues concerning the applicable law¹⁶¹.

Article 2 of the EGTC Regulation concerns the applicable law and recites at paragraph 1: “An EGTC shall be governed by the following: a) this Regulation; b) where expressly authorised by this Regulation, the provisions of the convention and the statutes referred to in Articles 8 and 9; c) in the case of matters not, or only partly,

effects of the acts taken by the EGTC present the same problems for every transfrontier structure that involves different subjects and different legal systems.

161 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, Study carried out by GEPE under the supervision of Prof N. Levrat, cit., p. 100.

regulated by this Regulation, the laws of the Member State where the EGTC has its registered office¹⁶². This provision clearly sets down a normative hierarchy concerning the possible legal sources applicable to the EGTCs. In particular, Article 2 deals with the law applicable to an EGTC, but not with the law applicable to the establishment of an EGTC¹⁶³. The ranking order listed in Article 2, paragraph 1 draws a general criterion for the law applicable, but there are other provisions in the Regulation concerning the rules applicable to the EGTC's activities and liabilities, such as the rules related to the financial control or the law applicable to the relation between the members. Furthermore, it has to be kept in mind that other different sources determine the law applicable to the relations with third parties¹⁶⁴. In this sense, Article 2, paragraph 1 a), b) and c) provides only for a partial and extremely wide clause, which doesn't exclude the occurrence of other provisions, also under the various national legislations.

The Article under consideration establishes the first precedence of the Regulation's provisions over national law, which is only charged to complete the blanks left by the Regulation. The second rank is up to the rules entailed in the conventions and in the statutes as funding acts of an EGTC, agreed and submitted by its members. National law comes in third place and is intended as a complement or as an alternative to Community law¹⁶⁵. In this sense, the national legislations could display two alternatives: either there are already existing provisions which are applicable to the EGTCs or new national provisions should be drafted in this regard.

162 Article 2 continues with the following provisions: "Where it is necessary under Community or international private law to establish the choice of law which governs the EGTC's acts, an EGTC shall be treated as an entity of the Member State where it has its registered office. Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned". Although important and clarifying, this provisions are just repeating what has explicitly affirmed in other parts of the Regulation.

163 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, Study carried out by GEPE under the supervision of Prof N. Levrat, cit., p. 100.

164 *Ibid.*, at p. 100-109, different categories of the law applicable to an EGTC are mentioned under the general title "law applicable to an EGTC and to its acts", namely: law applicable to the establishment of an EGTC; law applicable to the interpretation of the convention and the statutes governing the EGTC; law applicable to an EGTC in accordance with Article 2 of Regulation 1082/2006; law applicable to the control of an EGTC's activities (comprising the rules applicable to the financial control of an EGTC and the extraordinary control aimed in particular at defending the public interest); law applicable to the relations between members; law applicable to an EGTC's relations with third parties; liability of the authorities that are members of an EGTC; liability of the Member States; law applicable to the dissolution of an EGTC.

165 *Ibid.*, p. 121.

Moreover, another complex question generated by the legal hierarchy among the Regulation and the national provisions in general is the dynamic related to the Regulation's rules having direct effect and those that need an implementation. The subsidiary role of national law, then, can create some differences in the homogeneous application of the Regulation insofar as national existing legislations on territorial cooperation could be extremely dissimilar.

As the normative hierarchy established by Article 2 seems to be apparently quite clear, some difficulties and paradoxes can emerge. In fact, the rules contained in the statutes and conventions are said to prevail over national law. However, as far as regional and local authorities can be member of EGTCs and determine the content of those funding acts, provisions coming from sub-national authorities could theoretically overcome national provisions, according to the words of the EGTC Regulation. The opinion stemming from the study directed by N. Levrat highlights this occurrence as paradoxical and stresses the eventuality of future difficulties¹⁶⁶. A reasonable solution for possible antithesis between national law and the content of conventions and statutes adopted by sub-national authorities could be the strict respect of the competences and functions attributed to the different territorial authorities under national law. However, even in this case the remaining problems are, at least, twofold. On the one hand, it is quite difficult to establish *a priori* the exact limit of the matters that are object of the respective competences of national or sub-national authorities. Therefore, in a conflicting situation the intervention of jurisdictional bodies will take place. On the other hand, there could be some complications between national laws and those acts in the creation of which also foreign sub-national authorities take part.

Summarising what has been said until now about the EGTC Regulation, the direct applicability combined with the direct effect of many provisions and the

166 Another interesting observation, which also concerns Article 2 of the EGTC Regulation and the relations between Community law and national law, is the following. "The question of the interpretation which might arise will be how to establish whether a legal issue relating to the existence or life of an EGTC is fully dealt with or not by Regulation (EC) No 1082/2006. This question, which would be raised by the operator or if necessary the national court, can be presented to the Community court for a preliminary ruling (Article 234 TEC) for interpretation of the provision concerned. In practice, the management of questions that are only partly governed by the Regulation are likely to be complex. We would emphasise that determining the extent to which a matter is partly or fully governed by the EGTC Regulation is a question of Community law, not national law", see *ibid.*, p. 121.

necessary national implementation of other provisions individuate a double kind of obligatory effects. On the one hand, the EGTC Regulation imposes its standard: directly according to the general ranking order of Article 2 or coming from other specific provisions. On the other hand, the Regulation prescribes (and this is also an obligation) the subsidiary contribution of national provisions in conformity with each national legal systems. In this case it is possible to speak about an “imposed discretionality”. How wide this space of discretion would be, it is not really clear. According to some interpretations, the EGTC Regulation doesn't leave a big autonomy to the national activities of implementation¹⁶⁷. In fact, as we will see further on there are several Articles of the Regulation that impose strict and compelling rules in regard to which the national provisions could provide only for exceptional conditions. On the contrary, other interpretations consider the Community Regulation as an act with moderate direct effects, thus being substantially depending on the national application¹⁶⁸. For this reason, it should be possible to see in these national requirements some necessary and discretionary condition for the validity of the constitution of EGTCs. Moreover, as far as also sub-national legislation is concerned in the implementation of the Regulation according to each national constitutional system¹⁶⁹, it is also possible that the application of the Regulation is partially developed by sub-national provisions. However, considering this potential ambiguity of the EGTC Regulation it is not possible, at this time of the survey, to be in favour of one of the two mentioned interpretations.

In conclusion to this paragraph about the normative hierarchy introduced by Article 2, it is possible to affirm that the issue is much more complex than how it is presented in the EGTC Regulation. Actually, when speaking about normative hierarchy within the EC legal order, it is almost obvious that Community law has the precedence over national law. Thus, the Regulation doesn't really introduce something new in relation to the traditional dynamic between Community law and national law.

167 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 137. According to this interpretation it seems that Member States lack enough discretionality in comparison with the instruments of the Council of Europe, i.e. the Third Protocol to the Madrid Outline Convention.

168 See M. PERTILE, *Il GECT: verso un organismo di diritto comunitario per la cooperazione transfrontaliera?*, cit., p. 126.

169 See Regulation (EC) No 1082/2006 at Article 2, paragraph 2.

More interesting, instead, is to evaluate the space of discretionality left to national law and the subsequent effect on the activities of regional and local authorities.

3.5. *The members of an EGTC*

Article 3 of Regulation 1082/2006 regarding the composition of an EGTC affirms: “1. An EGTC shall be made up of members, within the limits of their competences under national law, belonging to one or more of the following categories: Member States; regional authorities; local authorities; bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC [...]”¹⁷⁰. Associations consisting of bodies belonging to one or more of these categories may also be members. 2. An EGTC shall be made up of members located on the territory of at least two Member States”.

Starting from the last paragraph of Article 3, it is clear that the minimum composition of an EGTC shall consist of at least two members of the mentioned categories belonging to two different Member States. As far as such a provision has a reasonable justification in order not to allow the establishment of an EGTC within the same country, the same provision is also relevant for another reason. Namely, the Regulation 1082/2006 foresees the potential participation of entities belonging to third countries. Without being contemplated by the words of Article 3, these authorities are not comprehended in the list of so-called ordinary members, but their participation is allowed under other particular conditions¹⁷¹. In this regard, then,

¹⁷⁰ 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. For what concerns the mention in the EGTC Regulation Article 1(9) of this Directive provides that a “*body governed by public law*” means any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.

¹⁷¹ The 16th recital of Preamble affirms: “ The third subparagraph of Article 159 of the Treaty does not allow the inclusion of entities from third countries in legislation based on that provision. The adoption of a Community measure allowing the creation of an EGTC should not, however, exclude the possibility of entities from third countries participating in an EGTC formed in accordance with

Article 3, paragraph 2 prescribes the conditions under which an EGTC can be legitimately composed. Would it be founded by members belonging to the same Member State or by members belonging to one Member State and to a third country, this occurrences wouldn't be permitted.

The ordinary members of an EGTC could be, basically of four types. The first three types consists of national, regional and local authorities. According to the CoR's study, the variety of potential members could lead to both positive and negative consequences. On the one hand, multilevel governance gains a new instrument and a new method in order to develop European integration. On the other hand, the differences among the various actors could lead to potential, but also practical, imbalances¹⁷². This is the case, for instance, of the contextual membership of States and sub-national authorities or the case of the presence of sub-national authorities belonging to different countries and having differentiated competences, powers and responsibilities according to the respective national structures.

Insofar as territorial cooperation has been developed between and in favour of sub-national territorial subjects, the instruments that have been elaborated before the Regulation 1082/2006 normally aim at strengthening transfrontier relations between local and regional institutional entities. The EGTC Regulation introduces the possibility for Member States to become members of an EGTC. This is an innovation within the panorama of territorial cooperation and revises the traditional paradigms of transfrontier cooperation. Namely, the intrinsic sub-national nature has progressively brought to the conception of territorial/transfrontier cooperation as a peculiar phenomenon and as a peculiar “sub-national” legal matter; conception which is going to be partially revised by the potential presence of States.¹⁷³ In the same perspective, also the new instrument of the Council of Europe, the Third Protocol to the Madrid Outline Convention, provides for the possible participation of

this Regulation where the legislation of a third country or agreements between Member States or third countries so allow.

172 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* –, p. 88.

173 As it has been already explained in the first chapter, territorial cooperation has developed as a phenomenon which substantially linked to sub-national authorities. The States, for both political and legal reasons, have been traditionally considered out of the issue. As a direct consequence of this exclusion, the analysis about the legal nature of transfrontier/territorial cooperation mostly concluded that it was not a matter of international law. Of course, Member States have been constantly present as regulators or supervisors towards sub-national authorities (both within the national system and mostly through covering inter-state agreements), but they were not direct actors of cooperation.

States in the European Cooperation Grouping (ECG). However, as it has been already explained, such a participation in this case is submitted to a particular condition and, thus, it is substantially different from the provision of the EGTC Regulation. In fact, Article 3 of the Third Protocol affirms that the members of an ECG shall be territorial communities or authorities of a party to the Protocol and may also include the respective Member State concerned of the CoE¹⁷⁴. The condition required for the participation of a State is, thus, the membership of the sub-national authorities belonging to that State¹⁷⁵. But this is not the case for the EGTC which doesn't entail such a condition and which can potentially be formed only by States.

The participation of national central authorities within an EGTC could be interpreted as a kind of supervisory function towards sub-national authorities. The exact effects of the provision concerning the States' presence, anyway, are not really predictable and cannot be defined *ex ante*. In fact, the role of States, as entailed within the EGTC Regulation, is rather complex and it is linked to the dynamic coming up with regard to Community law – the provisions of the Regulation with direct effects – and national law – the domestic rules of implementation. As we will see, the States will maintain, in any case, a general supervisory role about the participation of sub-national subjects in the establishment of EGTCs.

At this point, it is necessary to remember what Article 3 says about the “capacity” of the members in an EGTC. Namely, each member shall remain within the limits of their competences under national law. In this sense, the potential participation of States could be considered in the perspective of widen the extent of the spectrum of competences available for the EGTC in case the attributions of sub-national authorities seem too narrow to develop the required activities and tasks. However, also the States' role has to be dimensioned in relation to the eventual decentralisation of competences according to the respective constitutional structures¹⁷⁶. In this regard, speaking about competences, it is necessary to

174 The reason for the potential State's participation within an ECG could be twofold. On the one hand, this participation can be used as an instrument of supervision towards the activities of sub-national authorities. On the other hand, it is useful with regard to the fact that sub-national authorities have limited competences and, therefore, the State's membership could grant the approach to a broader set of tasks.

175 See also the Explanatory Report to the Third Protocol about Article 3.

176 According to the interpretation given by N. Levrat this is the key for comprehend that the participation of the States is not so revolutionary as it has seemed at a first view. Namely, the supervisory role of central authorities is not really different from the role that has been played in the

distinguish between the national provisions concerning determined substantial subjects as a matter of sub-national competence (i.e. public services, environmental protection, transports, waste management, etc.) and the (eventual) national provisions attributing to sub-national entities some specific powers for transfrontier cooperation with correspondent foreign authorities. In any case, also the existence of the last mentioned general attribution shall be exercised within the limits of the “substantial” competences, namely within the limits of the subject-matters that are attributed to sub-national authorities. In this sense, the legitimation regarding the membership of an EGTC of both central or sub-national authorities should be solved according to each single national law¹⁷⁷. Even for what concerns possible disputes, they have to be treated under national law and by the competent national jurisdictions.

In parallel to the attribution of competences, the national constitutional structures concern also the exact qualification of “regional” and “local” authorities as mentioned in the Regulation. Recalling what has been said above in this paragraph, insofar as it competes to the national system to define and qualify sub-national authorities as legal entities separated from the State, possible imbalances could emerge within an EGTC and affect its activities¹⁷⁸. In particular, it is interesting to observe that some national provisions have introduced new figures of territorial authorities allowed to be member of an EGTC according to the respective national legislation. It is the case, for instance, it is possible to mention the Portuguese Metropolitan areas or the Greek Communities¹⁷⁹. According to our opinion, the eventual national addition of territorial authorities is not in contrast with the Regulation as far as this circumstance reflects the internal territorial subdivision of each State¹⁸⁰.

past, see COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, p. 89.

177 The following study could be useful in order to have an updated description about the different State-structures in Europe: COMMITTEE OF THE REGIONS, *Study on the Division of Powers between the European Union, the Member State, and Regional and Local Authorities*, Study realized by the European University Institute (Florence), Luxembourg, 2008.

178 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation (EGTC): state of the play and prospects*, Study carried on by METIS GmbH, Bruxelles, 2009, p. 31.

179 *Ibid.*, p. 34.

180 For example, this is the case of Italy. Namely, the Italian Constitution remembers at Article 114 the composition of the Italian Republic, which consists of Municipalities, Provinces, Metropolitan Cities, Regions and State. The law of implementation of the Regulation (EC) No 1082/2006 (Legge comunitaria 2008 of the 23 June 2008) provides for the definition of some correspondences between the EC Regulation and the Italian legislation about the EGTC members in conformity with the Italian system. “Regional authorities and local authorities” as considered by Article 3 of the Community

Furthermore, concerning the fourth type of members – the bodies governed by public law according to the Directive 2004/18/EC – the range of possible subjects is really huge and manifold.

The justification for such a provision seems to be the decision to leave a flexible and open range for the inclusion of various subjects having some connection with public aims. Namely, besides the legal personality, other two basic conditions to be considered as a public-law-body are the purposes of general interest (i.e. without commercial or industrial scopes) and the connection with a territorial or other public-law authority in terms of financing, management or supervision. In this case, there are not so many differences with the CoE's Third Protocol on ECG. Namely, the Protocol considers the possibility to include other public-oriented entities in the same line with the EGTC. Listing the possible combination of non-institutional members with reference to the EGTC and to the ECG is not a really useful exercise. What can be observed, in general, is the determination of the EC Regulation to be linked to the public institutional and territorial asset also with reference to the additional members. Thus the ECG seems also to leave some more flexibility, but, according to our opinion, it should not be considered as an over-estimated peculiarity.

The last figure of members is represented by the association of bodies belonging to the precedent categories. Actually, it seems not to be a problematic category. The interesting point of this issue is the possibility to consider not only national associations (i.e. associations of municipalities belonging to the same country), but also associations comprehending authorities belonging to different States. It is the case of the already mentioned AEBR and AER, but many other associations exist. With regard to the constitution of EGTCs it seems that two possibilities are available for this kind of subjects. On the one hand, the associations considered by Article 3 can take part to an EGTC with other members as a single partner. On the other hand, it is potentially possible the transformation of these associations into EGTCs. General consequences of such eventualities are, respectively, a simplification of the composition of EGTCs and a clearer and more

Regulation correspond to the Italian Regions, the Autonomous Provinces of Trento and Bolzano, and the Local Authorities as provided by Article 2, paragraph 1 of the legislation about local authorities (D.Lgs. n. 267/2000), which intends for local authorities all the Italian Municipalities, Provinces, Metropolitan Cities, Mountain Communities, Insular Communities and Associations of Municipalities.

uniform definition of the legal nature of the “international” associations of sub-national authorities.

3.6. *Partners belonging to Third Countries*

The expansion of EGTCs outside the territory of the European Union could represent a great potential for territorial cooperation. Not only for third States, but also for territorial communities belonging to these countries. As already mentioned, the Regulation 1082/2006 considers the possibility to include institutional partners belonging to non-Community countries. For the reason that Article 159 TEC would have been violated, these subjects cannot be considered as real ordinary members of an EGTC on the same ground of the Community subjects. Namely, the possibility to include non-Community partners is not foreseen in the Articles of the EGTC Regulation, but, as already alluded to in the previous paragraphs, it is foreseen by the 16th Recital of the Preamble. Besides the respect of the provisions set down by the Regulation for the establishment of an EGTC, the conditions allowing the non-exclusion of this possibility are two: either the permission according to the third country's legislation or an agreement between the Member States and third countries concerned. As the study of the Committee of the Regions observes, this provision doesn't have direct effects, but it is limited to the non-exclusion of a possibility¹⁸¹. Furthermore, as far as one of the conditions for the EGTC's set up requires the participation of at least two members belonging to EU Member States, bilateral cooperation between Member States and Third Countries is *per se* excluded in the form of an EGTC¹⁸².

For reasons of territorial contiguities and political opportunities the presence of this clause is necessary. Of course, the relation of the EU/EC with Third Countries, also in the field of transfrontier cooperation, is not new and the existence of several funding programmes in parallel with the INTERREG Initiative has been delineated in the chapters above. Thus, the Community has a strong policy of neighbourhood with the contiguous and non contiguous areas outside the borders of its territory, mainly with interest to the Eastern borders and to the countries of

181 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, p. 93.

182 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation (EGTC): state of the play and prospects*, cit., p. 37.

Mediterranean Sea. Moreover, such disposition is necessary to grant the perpetration of a strong tradition of transfrontier cooperation with territorial communities belonging to European third countries (i.e. Switzerland and Norway) and, in any case, to deepen cooperation with countries that are members of the Council of Europe. In this regard, the provision of the Third Protocol on the ECG is quite different, allowing the possible participation of members that do not belong to States parties to the Protocol under the condition of a previous inter-state agreement with the State where the ECG will have or has the headquarters. In this case, the differentiation is also originated from the international-law nature of the instrument. However, the intent of both the EGCT and the ECG seems to be, in substance, the same: the potential broader expansion of the two instruments of territorial and transfrontier cooperation. Sometimes, besides the attempts of the Council of Europe to develop compatible measures with the Community Regulation, the Third Protocol appears to be the European instrument representing the most flexible and open legal means to set up transfrontier cooperation.

In any case, for both the instruments the practice of the inclusion of “third” partners depends mainly from additional conditions in respect to the ordinary membership and it is not currently possible to make an abstract evaluation about the expansion of the two instruments outside the territories covered by the European Union and by the Council of Europe. Concerning the national implementation of the EGTC Regulation, the national provisions adopted do not necessarily make reference to the partnership of non-Community subjects. “The participation of entities from third countries (bordering countries outside the EU territory) is neither mentioned nor explicitly excluded in the overall majority of national provisions.”¹⁸³ Namely, only Romanian and French legislations have adopted a clause in regard to this issue. While Romanian legislation has adopted a general statement authorising third countries to join the EGTC only when their national legislation so allows ¹⁸⁴, the French legislation speaks about the frontier States that are Member of the Council of

183 *Ibid.*, p. 37. Another critical point concerns the existence of such inter-state agreements. Namely, the study commissioned by the Committee of the Region doesn't mention any kind of agreement. At the moment, thus, the participation of third countries seems to be more theoretical than effective.

184 See the English version of Official Journal of Romania, Part I, No 769/13.XI.2007, Article 2, paragraph, 2, available at: <http://portal.cor.europa.eu/egtc/en-US/NationalProvisions/Pages/Adopted.aspx>.

Europe¹⁸⁵. Thus, it is possible that Member States limit the scope of application regarding third countries. Namely, the Community Regulation make references to the possible participation of “entities” belonging to third countries, whereas the French provisions seem to allow only States, which are at the external border with the EU and which are at the same time members of the CoE. In addition, another element of complexity of the EGTC Regulation can be observed. In fact, the national provisions about the application of the Regulation concern mainly the EGTCs to set up in the respective national territories. But, what about a French territorial authority participating in an EGTC under a foreign national law, which allows the partnership of a sub-national authority belonging to a State, which is a non-member of the CoE? We leave an open question, just to underline the almost uncountable variabilities that characterize the concrete establishment of EGTCs and the multiplicity of its legal combinations. For the moment, as we will deal with in the paragraph about the already established EGTC, the issue of the participation of members belonging to Third Countries is not a reality yet. However, mainly with regard to the relations at the Eastern borders of the Community, this will probably be a relevant issue.

3.7. The procedure for the establishment of an EGTC and the minimum arrangements prescribed by the Regulation

Article 4 of Regulation 1082/2006 prescribes a detailed procedure to follow for the creation of an EGTC. The Community Regulation sets down a combination of formal and substantial duties that imply a mutual agreement of the prospective

185 The French implementation of Regulation (EC) No 1082/2008 modified the *Code Général des Collectivités Territoriales*. For what concerns the participation of non-Community partners to an EGTC, Article L. 1115-4 recites that “Les collectivités territoriales et leurs groupements peuvent, dans les limites de leurs compétences et dans le respect des engagements internationaux de la France, adhérer à un organisme public de droit étranger ou participer au capital d’une personne morale de droit étranger auquel adhère ou participe au moins une collectivité territoriale ou un groupement de collectivités territoriales d’un Etat membre de l’Union européenne ou d’un Etat membre du Conseil de l’Europe”. Moreover, Article L. 1115-4-2 recites that “Dans le cadre de la coopération transfrontalière, transnationale ou interrégionale, les collectivités territoriales, leurs groupements et, après autorisation de leur autorité de tutelle, les organismes de droit public au sens de la directive 2004/18/CE [...] peuvent, dans les limites de leurs compétences et dans le respect des engagements internationaux de la France, créer avec les collectivités territoriales, les groupements de collectivités territoriales et les organismes de droit public des Etats membres de l’Union européenne, ainsi qu’avec les Etats membres de l’Union européenne ou les Etats frontaliers membres du Conseil de l’Europe, un groupement européen de coopération territoriale de droit français, doté de la personnalité morale et de l’autonomie financière [...]”.

members and the involvement of the respective States. This procedure, anyway, has to be considered also with reference to other provisions of the Regulation in order to have a more complete perspective about the setting up and structure of the EGTC.

According to Article 4, paragraphs 1 and 2, the first constitution's phase, after the common initiative of the future members to constitute an EGTC, requires the notification from each member to the respective State. This communication represents a preliminary obligation for the potential members to set up a valid and effective agreement¹⁸⁶. Thus, sub-national authorities are subject to this condition before setting up a legitimate transfrontier structure. The information shall contain the declaration of the intention to participate to an EGTC and the copy of the proposed convention and statutes¹⁸⁷.

In particular, the convention shall be concluded unanimously by its members and shall specify several aspects, as listed in Article 8 of the Regulation. The most important specification regards the law applicable to the interpretation and enforcement of the convention; this law shall be the law of the Member State where the EGTC has its registered office¹⁸⁸. The Regulation, thus, confers to the prospective members of an EGTC the possibility to choose the seat of the headquarters among the Members States to which at least one of the members belongs. This choice determines the national law applicable to the general functioning of an EGTC. According to the study commissioned by the Committee of the Regions, this provision is quite unnecessary because it is “the Regulation that governs this matter, and its inclusion in the text of the convention cannot under any circumstances diverge from this Community provision”¹⁸⁹. However, we cannot consider this specification as a dangerous provision, just because it seems not to determine real

186 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 95.

187 Article 4, paragraph 2. Paragraph 4 of the same Article states that it is up to the Member States to designate the competent national authorities to receive the notification required under paragraph 2.

188 According to Article 8, paragraph 2, the other necessary specifications require that the convention shall entail are: the name of the EGTC and its registered office, which shall be located in a Member State under whose law at least one of the member is formed; the extent of the territory in which the EGTC may execute its tasks; the specific objective and tasks of the EGTC, its duration and the conditions governing its dissolution; the list of the EGTC's members; the appropriate arrangements for mutual recognition, including for the purposes of financial control; the procedures for amending the convention, which shall comply with the obligations set out in Articles 4 and 5.

189 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* –, p. 82.

effects against the normative structure and application of the Regulation. Furthermore, as it has been already said, this is not the only law applicable, as far as the reality of legal relations is more complex. Namely, in particular with regard to relations with third parties, the application of other national laws could be necessary.

Regarding the statutes, Article 9 of the Regulation prescribes that it shall be adopted on the basis of the convention by the unanimous action of the members. The statutes shall have a minimum content, which is also set down in Article 2, paragraph 2, in order to fix the basic rules for the EGTC functioning such as the decision-making procedures, the management of personnel, etc¹⁹⁰. In this regard, Community law provides for a minimum standard framework while the basic rules are decided by the members and, obviously, in conformity to the national rules applicable. Of course, members are free to add other specifications or to provide for a stricter organisation of an EGTC. With regard to the organisation of the EGTC, the Regulation provides for a minimum requirement as well. Namely, Article 10 states that the necessary organs are the assembly (made up of members' representatives) and the director (representing the EGTC and acting on its behalf). Other organs can be provided by the statutes.

Going back to Article 4 with regard to the convention and statutes, paragraph 5 establishes that members shall agree on their content as required under Articles 8 and 9 “ensuring consistency with the approval of the Members States in accordance with paragraph 3 of this Article”. This is a not very clear provision, indeed. Namely, it is quite obvious that the content of the convention and statutes shall be compatible with the prescriptions of the Regulation. In this regard, the procedure for the establishment of an EGTC goes on. In fact, after the member of the EGTC have notified their intentions and have sent a copy of the convention and statutes to the Member States, Article 4 paragraph 1 and 2, paragraph 3 deals with the “active” role

190 According to Article 9, paragraph 2, the Regulation prescribes that statutes shall contain, as a minimum, the following: the operating provisions of the EGTC's organs and their competencies, as well as the number of representatives of the members in the relevant organs; the decision-making procedures of the EGTC; the working language or languages; the arrangements for its functioning notably concerning personnel management, recruitment procedures and the nature of personnel contracts; the arrangements for the members' financial contributions and the applicable accounting and budgetary rules, including on financial issues, of each of the members of the EGTC with respect to it; the arrangements for members' liability in accordance with Article 12(2); the authorities responsible for the designation of independent external auditors; the procedures for amending the statutes, which shall comply with the obligations set out in Articles 4 and 5.

of the States during this constitutive phase. Namely, “[...] the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTCs, unless it considers that such participation is not in conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified by reasons of public interest or of public policy of that Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval”¹⁹¹. The form of the approval, as well as the competent authority, is left to the choice of the Member States.

Apparently, this provision is quite clear and contains what the Regulation already affirms in other provisions: the necessary respect of the Regulation itself and of the national legislations from the point of view of the prospective members. In fact, the prospective members of an EGTC are entitled to participate in this legal structures only in conformity to the constitutional order of the respective States. So far, nothing new¹⁹². For this reason, maybe, the study of the CoR doesn't dedicate so much space to the provision. However, according to our opinion, Article 4, paragraph 3 represents a potentially problematic issue. In fact, the Regulation, besides the argument of the necessary conformity to the national constitutional systems, introduces an active role of States about the establishment of an EGTC. Namely, the already mentioned respect of the national subdivision of competences and the conformity to the national law applicable are a kind of “passive” elements of legitimacy with regard to the constitution of an EGTC. On the contrary, Article 4

191 Paragraph 3 also provides that Member States shall generally reach their decision within the deadline of three months from the date of the receipt of an admissible application.

192 The Third Protocol to the Madrid Outline Convention sets down a similar procedure for the constitution of the ECG. In particular, the first version of Article 4 has been changed in order to make it more compatible with the EGTC Regulation. Namely, the final version of Article 4, paragraph 5 of the Protocol is very similar to Article 4, paragraph 3 of the Regulation: “Authorisation may be refused if membership of the ECG would violate this Protocol or provisions of national law, including the powers and responsibilities of prospective members, or if membership is not justified for reasons of public interest or of public policy of the party concerned. In such case, the party shall give a statement of its reasons for withholding approval”. As far as the CoE's and EU's provisions are identical, it is possible to wonder if the respective effects are different considering the different nature of the two legal instruments for transfrontier/territorial cooperation. With regard to the EGTC Regulation, it has been said that Member States have the general duty to approve the participation to an EGTC with the exception of the enumerated case in which it can refuse the approval. The general duty, thus, derives from the direct applicability of the Regulation as Community normative act. With regard to the Third Protocol, the conclusion could be the same, but it's important to remember that the Madrid Outline Convention leaves to the State the faculty to exclude sub-national authorities from the possibility to engage in transfrontier cooperation.

introduces a kind of “active” role of the State, which shall approve the participation of the prospective members of an EGTC that fall under its sovereignty. Beside the compatibility with the constitutional order, the condition provided for the State's approval are two. Firstly, the participation is allowed unless it is not in conformity with the Regulation or the national law. Secondly, the participation is allowed unless it is non-justified for reasons of public interest or public policy of the Member State. In these cases the State may, by explaining its reasons, impede the participation to an EGTC to regional and local authorities and other bodies. Apparently neutral, this provision represents the closing element of the system and a kind of balance to the potential power of sub-national authorities to be involved in territorial cooperation.

First of all, Article 4, paragraph 3 imposes to the States the control regarding the conformity to the Regulation. Thus, it is up to the Member States to implement the Regulation with national provisions and also to watch over its rightful application. The references to “national law”, “public interest” and public policy” are general concepts, differently defined according to each national system. Trying to make a comparison among the 27 different constitutional systems within this survey could distract from the main point of this analysis. Namely, what is interesting at this point is the equilibrium between the sub-national authorities' legitimation to form an EGTC and the power of the State to limit their membership. The main problem is to comprehend the level of discretionality left to the State in this case in connection to the form of the approval required by the Regulation.

In this regard, the best interpretation of the concerned provision, which seems to be more literally in line with the text of paragraph 3, is the following. The State must, as a general rule, approve the establishment of an EGTC. Thus, the participation of the prospective members to an EGTC doesn't solely represent a right for them, but the grant of the approval represents an obligation for the State concerned.

Only in the mentioned cases Member States may deny the EGTC's constitution and there are no other reasons that can justify the withholding of consensus. Thus, the Member State concerned is obliged to authorize the participation to the prospective member of the EGTC unless the circumstances strictly mentioned by Article 4, paragraph 3 occur. Some literature sees in this clause

a very stringent enumeration – respect of the Regulation, national law, public interest and public policy – which doesn't leave much discretion to the State's action. According to this interpretation, this lack of discretionality is the direct consequence of the enumerated cases under paragraph 3. With other words, the State has no discretionality in order to deny its authorisation¹⁹³.

However, if it is quite easy to agree to the first part of this reasoning, namely the general obligation of Member States to give their approval, the final consequence is not really so patent, actually not so certain. Namely, it is possible to argue that, although the possibilities to hamper an EGTC are not numerous and shall be motivated, the respective concepts are broad enough to leave a high margin of discretionary action. The research of this equilibrium – faculty of sub-national authorities vs. State's power – are an issue of national law and should be solved by the competent national jurisdictions according to the national legal principles. In any case, as far as concepts such as public interest or public policy are generally not flexible but quite versatile and they often depend from changing variables across the time. Therefore, an eventual conflict between a prospective member of an EGTC and the respective State would be better defined, as we have already mentioned in the previous chapters, on the basis of reasonableness, proportionality and mutual cooperation.

3.8. The legal nature of an EGTC: legal personality

One of the most important characteristics of an EGTC is its legal personality, as foreseen in Article 1, paragraph 3. This means that an EGTC is a legal entity, distinct from its members. According to Article 5, paragraph 1 “the EGTC shall acquire legal personality on the day of registration or publication, whichever occurs the first”. The registration's procedure follows the national law of the State where the EGTC has its headquarters. The completion of the registration's procedure ends with the publication of a notice in the Official Journal of the European Communities. The EGTC itself shall comply with this duty of information, which is not the legal

193 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 125 *et seq.*

condition for its constitutions, but a subsequent obligation regarding a form of cognitive publicity.

It is not the first time that a legal subject is established as “transfrontier structure” in order to develop territorial cooperation between its members. Namely, the possibility to create a common body with legal personality has been provided by the Additional Protocol to the Madrid Outline Conventions, but also by inter-state agreements, such as the Bayonne Agreement or the Karlsruhe Agreement. Moreover, the Third Protocol to the MOC has created the new figure of the European Cooperation Groupings, which is also provided with legal personality. It has been mentioned in the previous chapters that the legal nature of these bodies is linked to the national legislations of reference. In comparison to these instruments, however, the EGTC presents some peculiarities.

According to the study commissioned by the Committee of the Regions, the main feature of the EGTC concerns the fact that its legal personality has to be considered under Community law and not under national law. The first acknowledgement in this sense is given by Recital No 8 of the EGTC Regulation, which affirms: “[...] it is necessary to institute a cooperation instrument at Community level for the creation of cooperative groupings in Community territory, invested with legal personality [...]”. Namely, it is the Regulation itself that represents the first condition for the validity of an EGTC. In fact, the Community Regulation creates a legal subject which didn't exist before. Even if bound to the national legislations and even if the issues regarding the law applicable are quite complex in terms of legal hierarchy, the legal personality of an EGTC finds its first ground in Community law. The study directed by N. Levrat proposes some reasons in order to justify this statement.

Firstly, although the Regulation (EC) No 1082/2006 doesn't contain a complete legal framework, it founds the legal existence of EGTCs: namely the Regulation creates a new legal subject and, at the same time, it is the the first normative act applicable out of the ranking order that it sets down¹⁹⁴. To be precise,

194 This reasoning derives, analogically, from the conclusion presented by the Advocate General in the Case C-436/03 between the European Parliament and the Council on the validity of the Regulation on the Statute for a European Cooperative Society (SEC). Namely, the Regulation establishing the SEC has many things in common with the EGTC Regulation, in particular the references to the domestic law of Member States. See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* –, p. 75. See also Judgement of the Court of Justice of 2 May 2006 - European

the Regulation prevails upon the national disciplines. In particular, for two reasons. On the one hand, we already spoke about the ranking order established in Article 2, which explicitly confers to the Regulation the primary role of regulatory source for the EGTCs. On the other hand, the general principles of Community law establish that a Regulation as such has the prevalence over the national legislation. Moreover, also the funding acts of the EGTC – conventions and statutes – shall have a prevalence over national provisions.

Theoretically speaking, in order to contradict this reasoning it is possible to recall the elements of complexity deriving from the application of national law and its necessary role to permit the concrete and effective establishment of an EGTC. In this sense, also the national legislation seems to represent a condition for the existence of EGTCs. However, from a formal and substantial point of view, the conclusion of N. Levrat is decisive. Namely, “[i]t is therefore established that the EGTC is a legal person governed by Community law and that certain aspects of an EGTC are governed by national law, either because this is stipulated in the Regulation (EC) No 1082/2006 or because the Regulation says nothing about them¹⁹⁵. In this sense, the normative character of the Regulation is confirmed as the first legal condition for the existence of the EGTC¹⁹⁶.

Another issue concerns the nature of the legal personality. The establishment of a legal subject under private law or public law have often been object of reflections in the field of territorial cooperation. In this regard, it has been already highlighted that several institutional subjects have expressed a demand of a public-law instrument in order to develop a better interaction between sub-national

Parliament v. Council of the European Union, Case C-436/03, OJ C 143 of 17.06.2006, p. 4, in particular at paragraph 40 “In the present case, it is apparent from the content and the purpose of the contested regulation that it aims to introduce a new legal form in addition to the national forms of cooperative societies, as it is also indicated in recitals 12 and 14 in the preamble to the contested regulation, according to which the European cooperative society must be considered to be a European legal form for cooperative societies which has specific Community character”. The analogy with the Regulation (EC) No 1802/2006 on EGTC is clearly patent.

¹⁹⁵ *Ibid.*, p. 76. In this regard, the legal personality of the ECG as provided in the Third Protocol to the Madrid Outline Convention is substantially different. In fact, both legal personality and legal capacity are accorded under the national law of the State where the ECG has its headquarters.

¹⁹⁶ A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 105-114 confirms through a long digression the Community legal personality of the EGTC. In particular, according to this analysis, the EGTC doesn't correspond to any precedent existing legal figures within the national legal systems and, *a contrario*, the main aspects regarding its regulation and functioning are not provided by national legislations, but by the Regulation.

authorities and in order to grant a wider and long-lasting approach to cooperation¹⁹⁷. However, such demands have to be balanced with the existent multiple forms available and suitable for territorial cooperation and with the national provisions about legal persons. In particular, it could be quite difficult to find in all the 27 EU Member States similar figures to impose as legal structures for the EGTCs¹⁹⁸.

These circumstances need a flexible approach. In fact, the Regulation nothing provides about the public- or private-law nature of the legal personality. Thus, the legal nature of an EGTC is acquired according to each national system. In this sense, the peculiar nature of this new legal subject is visible. On the one hand, the EGTC takes roots from the Community law. On the other hand, the combination with the national law is essential. And this dynamic shows the phenomenon of a complex, but necessarily effective integration.

Even if the recourse to private law is possible, the content of the Regulation seems to be more suitable with the public law's option for the scope and nature of the subjects and tasks concerned. In fact, several provisions of the Regulation refer to aspects of public law¹⁹⁹. On the contrary, the recourse to public law could be difficult in case of the participation of more than one States in case of conflicts of legislations.

In particular, N. Levrat analyses the issue from a peculiar point of view. Namely, in the silence of the Regulation, the Member States are not really charged to define the private or public legal nature of an EGTC in their respective acts of implementation. In fact, the legal form of the EGTC is concretely determined by the convention between the members according to the law of the Member State where

197 See ASSOCIATION OF EUROPEAN BORDER REGIONS, *Towards a new Community legal instrument facilitating public-law-based transeuropean cooperation among territorial authorities in the European Union*, cit., p. 4.

198 In this regard, a mandatory rule on the public or private law nature of an EGTC wouldn't have been neither easily practicable nor desirable. From a formal point of view, the choice for one or the other for could have caused some difficulties of implementation within the national systems. From a substantial point of view, such an homogenising attempt would have generated conflicts with the principle of subsidiarity, as far as it could be considered not necessary. Namely, the definition of the public or private nature of an EGTC is really not necessary, if the same establishment of an EGTC has to be itself considered as non-necessary. See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 166.

199 A couple of examples: Article 4, paragraph 3 about the conditions under which the Members States can impede the establishment of an EGTC for reasons of public interest or public order; Article 7, paragraph 4 about the potential tasks of an EGTC, which is interdicted to exercises the typical regulatory functions of public law, such as those regarding the State's general interests, public authority, administration of justice, etc.

the EGTC is registered²⁰⁰. The legal form of the EGTC could be established through different criteria, namely: the tasks given to the EGTC, the legal solutions offered by the State where the EGTC has its registered office or the intention of the members²⁰¹. Anyway, it is more coherent to leave the choice to the State about the public or private nature of the legal personality²⁰² and the choice about the legal form (e.g. association or something else according to the legal figures provided by the respective national systems) to the members' agreement. In particular, it's up to the decision of the members to determine the legal status of the EGTC within the national law.

Although a wide range of possibilities is left open by the Regulation, the legal personality established according to the principles of public law seems the most suitable for this kind of cooperation between public subjects. In this regard, the analysis of the different national rules, which have been adopted up to now, “suggests that a non-profit legal entity governed under public law becomes the rule²⁰³, while only in a few Member States is the EGTC permitted under private law”²⁰⁴.

200 See Regulation (EC) No 1982/2006, Article 8, paragraph 2, 1st and 5th alinea.

201 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* –, p. 77-78.

202 The national provisions use different approaches in order to indicate the legal nature of the EGTCs established on their territory. In particular, some States provide for more detailed procedures for the acquisition of the legal personality (examples: Hungary and Greece), while other States remain more vague (examples: Romania and Portugal).

203 The choice to establish a public-law-based legal subject confers also an added value if put in relation with the possibility to manage EC Funds. Namely, Article 18 of the Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund recites: “Member States participating in an operational programme under the European territorial cooperation objective may make use of the European grouping of territorial cooperation under Regulation (EC) No 1082/2006 [...] on a European grouping of territorial cooperation (EGTC) with a view to making that grouping responsible for managing the operational programme by conferring on it the responsibilities of the managing authority and of the joint technical secretariat. In this context, each Member State shall continue to assume financial responsibility”. Generally speaking, managing authorities are public subjects. See: http://ec.europa.eu/regional_policy/manage/authority/authority_en.cfm.

204 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation (EGTC): state of the play and prospects*, cit., p. 38. In general, the EGTC is constituted as a non-profit legal entity, without the specification of its private or public nature. Provisions in this sense make a clear reference to the national law about non-profit legal subjects. For instance, the legislation of Bulgaria affirms that shall be registered as associations, pursuing activities for public or private benefit on the basis of the law on non-profit legal entities; Greece affirms that the EGTC is organised as a company of non-profit making character. United Kingdom do not refer to a particular legal form under national (or regional) law. In any case, less States affirm that the EGTC shall have a private law personality: it's the case of Romania (non-profit legal entity of private law) and Hungary (not for-profit business organisation). Other States refer to a public law body, for example: Portugal (public collective associational body); Italy (public law personality); France (public law personality); Spain (public legal person).

3.9. *The legal capacity*

The recall to national law about the legal personality concerns also to the legal capacity. As written in Article 1, paragraph 2, 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 and immovable property and employ staff and may be party to the legal proceedings”. In this sense, an EGTC can have contractual and employment relations according to private law. For this reason, Article 2, paragraph 1 establishes at the second subparagraph that “where it is necessary under Community or international private law to establish the choice of law which governs an EGTC's act, an EGTC shall be treated as an entity of the member State where it has its registered office”.

“The most extensive legal capacity” intends to confer to the EGTCs a broad field of action within the national legislation in order to develop as much as possible the activities of territorial cooperation. However, different kinds of limitation occur with regard to the effective activity of an EGTC.

Firstly, the very connection with the single national legal orders plays an essential role towards the effective extension of the legal capacity. In particular, the limitation is twofold. On the one hand, without entering into details, it is quite obvious that different models of legal persons have differently acting legal capacities depending on their specific tasks. In fact, a non-profit association is quite different from a private-law person dealing with public transport. On the other hand, even if the legal capacity should be as extensive as possible, the tasks of an EGTC are limited by the extent of the competences attributed to its members. Namely, Article 7, paragraph 2 of the Regulation affirms that the tasks attributed to an EGTC shall “be determined by its members on the basis that they all fall within the competence of every member under its national law. Furthermore, the same Article states that an “EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion”. Also a territorial limitation is foreseen as Article 8, paragraph 2 b) provides that the Convention shall indicate the territory where the EGTC may execute its tasks.

Without deepening the analysis about the tasks of the EGTC, it is quite clear that the legal capacity, albeit rewarded as extensive as possible²⁰⁵, is confined within flexible but strict conditions. These limitations, however, do not only concern restrictions coming from the national legislation, whereas they also concern the provisions directly coming from the Community Regulation. Thus, as for the other characteristics of the EGTC, the first glance at the text of the Regulation should be followed by a careful analysis of the legal consequences and combination of articles.

3.10. The tasks of an EGTC

The tasks assigned to an EGTC represent the condition for its prospective action. The matter is explicitly ruled by Article 7 of the EGTC Regulation. The issue regarding the tasks of an EGTC is, like many other aspects of this legal instrument, quite complex. Namely, the tasks attributed to an EGTC determine its concrete and effective capacity to act, with other words, its feasible field of action. It has to be kept in mind that, besides the causes of dissolution of an EGTC defined by its members within the convention, the violation of the tasks is considered by Article 14 of the Regulation as an explicit reason enabling an order of dissolution coming from the competent court or authority of the State where the EGTC has its registered office²⁰⁶.

As stated by the Regulation under Article 7, paragraph 1, the tasks of an EGTC are defined by its members and specified in the convention. It is quite clear from the content of Article 7 that the Regulation doesn't provide any list of possible activities of an EGTC, but it establishes the tasks in a “negative” form, thus, considering the limits beyond which the tasks conferred have to be considered as non-legitimised. Basically, it is possible to consider the attribution of tasks under two

205 The Third Protocol to the Madrid Outline Convention has a quite similar provision. Namely ECG shall have the most extensive legal capacity accorded to legal persons under the state's national law. The only parallelism with the EGTC concerns the fact that also in this case the provision is not very clear. Or rather, in the CoE's framework it is a little clearer than in the EU context as far as the legal capacity of an ECG is directly bounded to the national law concerned. However, the same reasoning that has been done about the EGTC with regard to the tasks and to the competences of its members is also valid for the ECG.

206 Moreover, as stated in paragraph 2 of Article 14, “the competent court or authority may allow the EGTC time to rectify the situation. If the EGTC fails to do so within the time allowed, the competent court or authority shall order it to be wound up”.

different perspectives: on the one hand, Community aspects have some influence on the determination of the tasks; on the other hand, the definition of tasks needs to respect national principles.

a) Tasks defined according with Community aspects

Something about the tasks of an EGTC has been already anticipated in paragraph 4.3.2. about the nature and the general scope of an EGTC with reference to the 11th Recital of the Preamble and to Article 1, paragraph 3. According to the last provision the objectives of the new legal structure shall be devoted to the promotion and support of territorial cooperation – comprehending cross-border, transnational and/or interregional cooperation – with the exclusive aim of strengthening economic and social cohesion²⁰⁷. Article 7, paragraph 2 confirms this by saying that “[a]n EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion and be determined by its members on the basis that they all fall within the competence of every member under its national law”. The promotion of territorial cooperation represents, thus, the general objective of the EGTC and such an aim could be considered as a comprehensive framework for the activities that will be undertaken. However, according to the interpretation of the study commissioned by the CoR, this determination is too restrictive as far as it is “limited to the facilitation and promotion of territorial cooperation”. In this regard, within the logic of cohesion policy and EU integration, the general aim of the EGTC should concern not only the promotion, but mainly the implementing territorial cooperation²⁰⁸. This interpretation finds a “soft” confirmation in the 1st Recital of the EGTC Regulation, where it is affirmed that “[...] the harmonious development of the entire community territory and the greater economic, social and territorial cohesion imply the strengthening of territorial cooperation. To this end it is appropriate to adopt the measures necessary to improve the implementation conditions for actions of territorial cooperation”.

207 According to the study COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* –, p. 94, the formulation of Article 1, par. 3 is excessively vague and should have included, beside the scope of the promotion, also the *implementation* of territorial cooperation in order to confer to the EGTC a kind of proactive role.

208 *Ibid.*, p. 93-100.

The detailed reasoning proposed by the study, explains how the achievement of economic and social cohesion requires more than a simple “promotion” of territorial cooperation, rather, an active and dynamic “implementation”. The components of territorial cooperation – cross-border, transnational and interregional cooperation – are specified in detail by Article 6 of the ERDF Regulation, but do not represent a strict enumeration of activities excluding other types of actions to reinforce the respective field of action. In any case, the activities of an EGTC shouldn't strictly follow such specifications that have been primarily set down as a general guiding framework for the funding programmes of the Community. Thus, if the aim of territorial cooperation represents the general scope of an EGTC, it shall be pursued throughout a flexible range of activities. But also the even more general aim of cohesion policy could be implemented through activities that are not listed as typical of this subject but still compatible with it²⁰⁹.

As a confirmation of the proposed interpretation, the analysis of some national provisions that have already been adopted in relation to the general scopes of the EGTC show the possibility for Member States to broaden the scope of an EGTC by mentioning the “implementation” of territorial cooperation as its main objective²¹⁰. However the majority of the States has kept the wording of the Regulation almost unchanged, but has added some specifications concerning the tasks. The objective of territorial cooperation is, anyway, the biggest container or a larger framework of the EGTC's activities, which needs to be specified in detail in order to be concretely realized. In this regard, it could be theoretically possible to establish EGTCs with different tasks/purposes. In general, two ways are feasible: on the one hand, the constitution of EGTCs with general tasks; on the other hand,

209 The study quoted above explains that economic and social cohesion do not officially include matters like environment or research. However, it is still possible to affirm that environment and research could be sectors of activity within cohesion policy. Thus, an analogy could be made with territorial cooperation, which could be compatible, and even necessary, with regard to fields that are not officially considered as part of territorial cooperation. In this sense, the disappointment towards the provision of Art. 7, par. 2 is justified, as far as it seems too constraining towards a positive implementation of territorial cooperation.

210 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation (EGTC): state of the play and prospects*, cit., p. 46: “Although article 7 is rather restrictive, and a strict application could hinder the implementation of a number of potential EGTC projects, the Member States have the possibility of interpreting this article more broadly: only in two cases (HU, PT) there is a further definition of the tasks given by either excluding tasks that a grouping may not undertake (business and public authority activities in Hungary) or by specifying in detail what an EGTC can undertake (Portugal). Generally, the limitation to tasks concerning the facilitation and promotion of territorial cooperation in order to strengthen economic and social cohesion is respected”.

EGTCs with more specific aims. Up to now, most of the EGTCs display general tasks and only sometimes the addition of more specific aims is foreseen²¹¹. As an example, the first established EGTC *Lille-Kortrijk-Tournai* has very broad tasks concerning institutional coordination and its convention doesn't report very specific missions or activities in order to leave a wider scope of activity within the flexible limits provided by the convention itself and by the Regulation²¹². The attribution of general tasks has, without doubts, several advantages. Namely it is adaptable and flexible to changing situations with regard to the concrete actions of the EGTC and it could hardly configure patent violations of the Regulation and of national legislations, included the competences of sub-national authorities.

Paragraphs 3, 4 and 5 of Article 7 concern the tasks in relation to Community funding programmes or to other systems of funding. Both of the cases are possible. The tasks of an EGTC shall be limited, primarily, to the implementation of programmes or projects developing territorial cooperation co-financed by the Community within the ERDF, the ESF and the Cohesion Fund. However, other specific actions related to territorial cooperation could be undertaken with or without the financial contribution of the Community. This last statement represents a flexible possibility for an EGTC to expand the range of its tasks/actions outside the path drawn by Community funds as long as limited to the objective of territorial cooperation. As it has already been said, the parameters of territorial cooperation are defined within the instrument of cohesion policy 2007-2013, but the matters concerned are quite indicative and not necessarily strict. In this sense, the Regulation

211 In such cases, there is a mix between broad tasks and more specific missions. For examples the EGTC Pyrenees- Mediterranean mentions, within its missions, the innovation of technology, research, training and culture, the development of tourism, the management of funding programmes coming from the Community or the States, etc. In this view, the tasks remain quite general, but they are more specific than in other EGTCs. Regarding the possibility to establish structures with very specific tasks, there is an ongoing project known as Cerdanya joint cross-border hospital between France and Catalonia. This kind of project, which already has been launched through an agreement between the French Ministry of Health and the Catalan Ministry of Health could be a prospective interesting form of EGTC, encompassing several of the problematic issues we have mentioned in the course of this chapter.

212 Article 2 of the convention of the *Lille-Kortrijk-Tournai EGTC* establishes the “missions” of the new structure, namely: “L'Eurométropole Lille-Kortrijk-Tournai a pour mission principale de promouvoir et de soutenir une coopération efficace et cohérente au sein du territoire concerné. En rassemblant l'ensemble des institutions compétentes l'Eurométropole Lille-Kortrijk-Tournai est un lieu permettant: d'assurer la concertation, le dialogue et de favoriser le débat politique; de produire de la cohérence transfrontalière à l'échelle de l'ensemble du territoire; de faciliter, de porter et de réaliser des projets traduisant la stratégie de développement à élaborer en commun; de faciliter la vie quotidienne des habitants de la métropole franco-belge”.

has foreseen an “open clause” that could be, in case, developed with reasonableness. Nonetheless, the provision stated in paragraph 6 seems to reduce the possible effects of the open clause. In fact, “Member States may limit the tasks that EGTCs may carry out without a Community financial contribution. However, those tasks shall include at least the cooperation actions listed under Article 6 of Regulation (EC) No 1080/2006”²¹³. The study promoted by the Committee of the Regions considers this provision as illogical²¹⁴. Namely, it seems quite paradoxical to foresee possible autonomous actions of the EGTCs outside the Community cohesion policy and, then, to permit States confining their limitations within the territorial cooperation's objectives. The main intention of this provision is to avoid EGTCs, i.e. sub-national authorities, acting against the Members States' consent. But, as long as several guarantees are already provided within the Regulation (Art. 3, par. 1, Art. 4, par. 3, Art. 7, par. 2 and Art. 13), the 5th paragraph of Article 7 is redundant and not necessary. In this sense it gives to the Member State a discretionary faculty to hamper the implementation of EGTCs²¹⁵.

b) Tasks defined according to national rules

The exact specification of the tasks is decided unanimously by the members and defined in the convention. The 13th Recital of the Preamble anticipates that “the powers exercised by regional and local authorities as public authorities, notably police and regulatory powers, cannot be subject of a convention”. The intent of this provision is clear and it reflects a common principle that has also been provided in the other legal instruments of transfrontier/territorial cooperation.

The main implicit objective of the EGTC Regulation is to strengthen territorial cooperation between sub-national authorities belonging to different States. Therefore, it had to be expected that an EGTC should act within the legitimate field of action of its members. In this sense Article 7, par. 2 provides that the tasks given to an EGTC shall fall within the competence of every member under its national law.

213 As already mentioned Article 6 of the ERDF Regulation defines and lists the tasks and activities concerning the territorial cooperation's objective.

214 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* –, p. 98-99.

215 *Ibid.*, p. 99. In particular, it is possible for Member States to exclude cooperation “in fields covered by other Community policies”, that would have represented the open-clause for a reasonable implementation of territorial cooperation outside its definition within economic and social cohesion.

This is a remand to what has already been stated in Article 3, paragraph 1 about the respect of the national attribution of competences. Which kind of national norms this provision concerns is clear and vague at the same time. In fact, on the one hand it is clear that the issue concerning the competences is a matter of national legal order; on the other hand, looking at the national legal orders, it is quite difficult to find uniform solutions about the competences of sub-national authorities to engage in territorial cooperation with foreign subjects²¹⁶. However, the EGTC Regulation is not helping in this sense and the solutions have to be found only within national legislations. But, if only attributions under national law count, here comes back what has been already said with regard to the other instruments of transfrontier cooperation establishing entities with legal capacity. Namely, the argument of the “lowest common denominator” is still present, signifying that an EGTC cannot develop actions exceeding the competences attributed to the (let's say) less powerful of its members. As for the Third Protocol to the Madrid Outline Convention, it could be possible to overcome such obstacle only with an express delegation of powers to the concerned member from the respective State or with the participation of the State itself in the EGTC.

An excessive protection of the traditional state attributions is contained in Article 7, paragraph 6, which states that tasks given to an EGTC shall not concern the exercise of powers conferred by public law or the exercise of duties regarding the safeguard of the general interest of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy. The inclusion of this kind of guarantees is presumable and legitimated in order to limit the actions of an EGTC against possible interferences with fundamental national public powers²¹⁷. However, the study directed by N. Levrat considers this provision as an excessive restriction for the reason that a similar obligation is also stated in Article 13 concerning the

²¹⁶ We remind to the analysis proposed in the second chapter about the law funding the competence.

²¹⁷ A similar provision is contained in Article 7, par. 3 of the Third Protocol to the MOC. However, the limitation of the tasks is defined in more general terms, mentioning only the prohibition regarding the exercise of regulatory powers. In fact, the Protocol doesn't foresee a detailed safeguard of the national prerogatives during the phase of the establishment of an ECG, rather it deals with their eventual violation during its activities. Namely, Art. 11, par. 3 of the Protocol considers the violations committed by an ECG towards public policy, public security, public health or public morality and towards the public interest of the State concerned as causes for the prohibition of the related activities on the territory of the State or as causes for the withdrawal of sub-national authorities belonging to that State from the ECG.

violation of public interest and other state interests (i.e. public policy, public security, etc.) by the activities of an EGTC²¹⁸. In such cases, the state authority has the full legitimation to forbid the EGTC's actions or to obtain the withdrawal of the members under its jurisdictions from the EGTC. But there is a temporal substantial difference between Art. 7 and Art. 13 regarding the phases of the EGTCs.

Namely, whereas Article 13 concerns the activities of an already established and functioning EGTC, Article 7, par. 4 aims at preventing whichever intrusion within the State's prerogatives starting from the moment of the tasks' conferral. In any case, such provision seems quite superfluous, because other mechanisms are provided by the Regulation. The constitution-phase is granted through Article 4, paragraph 3 concerning the State approval and the action-phase is safeguarded through Article 13.

Another interesting provision concerning the tasks is set down in Article 16, paragraph 2: “where required under the terms of that Member State's national law, a Member State may establish a comprehensive list of the tasks which the members of an EGTC within the meaning of Article 3(1) formed under its laws already have, as far as territorial cooperation within that Member State is concerned”. Although formulated in a complex way, this paragraph adds an ulterior form of guarantee for the States' prerogatives under their respective national orders. In fact, the possibility to introduce a comprehensive list of tasks according to the competences' attributions represents a clear intention to have a supervision on sub-national authorities. However, the adoption of such a list seems, on the one hand, excessively restrictive and, on the other hand, not fundamental. In fact, it has just been observed that the Regulation provides different mechanisms in order to safeguard the national prerogatives. It seems sufficient, to clarify the position of sub-national subjects, that the members of an EGTC shall act in conformity to their competences as stated in Article 3, paragraph 1 according to the respective national orders. The violation of this provision could be presented to the competent national jurisdictional authorities

218 Article 13 of Reg. 1082/2006 states: “Where an EGTC carries out any activity in contravention of a Member State's provisions on public policy, public security, public health or public morality, or in contravention of the public interest of a member States, a competent body of that Member State may prohibit that activity on its territory or require those members which have been formed under its law to withdraw from the EGTC unless the EGTC cases the activity in question. Such prohibitions shall not constitute a means of arbitrary or distinguished restriction on territorial cooperation between the EGTC's members. Review of the competent body's decision by a judicial authority shall be possible.”

in order to find an adequate legal solution. Thus, an over-safeguarding addition of this tasks-list could impede a positive evolution of the EGTCs actions or, at least, hamper an effective implementation of territorial cooperation. Moreover, the wording “as far as as territorial cooperation within that Member State is concerned” is not really clear, but it could be interpreted in a too restrictive way as well. In fact, the interpretation of the concept or of the praxis of “territorial cooperation” by single Member States will generate a confusing perception of the phenomenon and a limiting parameter for the members of an EGTC. In case of application of this provision by Member States and in the eventuality of an effective restriction of sub-national attributions, the only solution for sub-national authorities is to submit the question to the competent national court for the violation of their competences.

3.11. Other rules applicable to the EGTC

The main functions of an EGTC are determined according to the national law of the State where it has its registered office. Thus, the importance of having a single registered office is linked to the certainty of the application of determined national rules. In particular, the national legislation of the State that has been chosen for the registered office applies to the convention and the statutes and, for this reason, may apply to the relations between the members of an EGTC where appropriate.

Of course, it is not possible to affirm that the national law of the State where the EGTC has its registered office applies to all the cases that are not ruled by the Regulation. In particular, referring to relations with third parties, other national laws can apply. However, as a general rule, the national law related to the EGTC's headquarters deals with some of its basic functions according to the overall framework of the Regulation, as in the case related to the financial control²¹⁹.

a) Financial control

In this regard, the provisions related to the control of management of public funds are defined rather in detail and need a transparent interaction between Member States and the Community. Article 6, in fact, affirms that the controls on the use of

²¹⁹ An EGTC has its own annual budget, which is adopted within the assembly, according to Article 16 of the Regulation.

public funds shall be carried out according to the international audit standards. In particular, as the management of public funds is primarily governed according to the national law of the registered office, the competent authorities designed by that Member State concerned shall act in good cooperation with the other Member States, thus, providing for a mutual exchange of information and supporting cross-controls. Moreover, in case of co-financing by the Community, EC legislation concerning the control of funds applies²²⁰.

b) Liabilities

A general principles entailed in Article 10, paragraph 3 provides that an EGTC is liable for the acts of its organs toward third parties, even where such acts do not fall within the tasks of an EGTC.

The regime of liabilities is ruled in Article 12. According to paragraph 1, the general rule affirms that “as regards liquidation, insolvency, cessation of payments and similar procedures, an EGTC shall be governed by the laws of the Member States where it has its registered office, unless otherwise provided in paragraphs 2 and 3”. The general rule about the liability of the EGTC's Member States affirms that they have extensive liability as long as they maintain the membership. However, some exceptions are possible.

The Regulation, thus, establishes that an EGTC, as a legal person with legal capacity, shall be liable for its debts whatever their nature. In case the EGTC results insolvent, its members shall be liable in proportion to the respective contributions. The rule about the unlimited liability shows some exceptions in case national laws impose to the respective members a regime of limited liability. In this eventuality, also the other members may limit their liability in the statute and the name of the EGTC shall contain reference to the concept of “limited liability”; this is mainly for reasons of transparency and information towards third parties. The possibility to introduce a system of limited liabilities has been provided because of the existence of very different national legislations and in order to permit flexible solutions²²¹. However, “a Member State may prohibit the registration on his territory of an EGTC

²²⁰ EC legislation refers to the general rules applicable to the Community budget as well as the financial rules concerning the Structural Funds established especially in Reg. No 1083/2006; see COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC* –, p. 104.

²²¹ A similar provision is entailed also in the Third Protocol to the Madrid Convention on the ECG.

whose members have limited liability”. Another interesting statement concerns the fact that the members of an EGTC may affirm in the statutes that they will be liable even after they have ceased to be members in relation to the obligations undertaken during their membership²²². Thus, *a contrario*, the general rule is that the members are not liable for those obligations after their withdrawal from the EGTC. Maybe, such a provision, encourages the participation to EGTCs and, thus, the implementation of territorial cooperation.

c) Jurisdiction

Article 15 of Regulation (EC) No 1082/2006 reports three important principles about the rules on jurisdiction concerning the acts of an EGTC. Paragraph 1 considers the rights of third parties who have been wronged by acts or omissions of an EGTC. In such cases, third parties “shall be entitled to pursue their claims by judicial process”. This provision is clear, but very general. The rule is further specified in paragraph 2: “Except where otherwise provided for in this Regulation, Community legislation on jurisdiction shall apply to disputes involving the EGTC. In any case which is not provided for in such Community legislation, the competent courts for the resolution of disputes shall be the courts of the Member States where the EGTC has its registered office”. Thus, according to the words of article 15, courts of the Member State where the EGTC has its the registered office are competent unless it is differently established by Community legislation on jurisdiction. However, an exception in order to safeguard citizens' rights is foreseen in paragraph 3. Namely, “[n]othing in this Regulation shall deprive citizens from exercising their national constitutional rights of appeal against public bodies which are members of an EGTC in respect of: administrative decisions in respect of activities which are being carried out by the EGTC; access to services in their own language and access

222 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, p. 159, proposes two possible interpretations in order to explain the introduction of such provision: “On the one hand it helps to strengthen the credibility of an EGTC as regards third parties, which know that in addition to an EGTC's legal person, all of its members are liable for the activities it carries out. On the other hand, include such a provision within the statutes would also make it easier for a member to leave: there would be no further financial consequences for the other members if a cause of action for liability or unforeseen debts were to arise following a member's departure that dated back to the period when it was still a member. For this reason, such a provision should be included in the statutes if the liability of an EGTC's member cannot be limited.”

to information. In these cases the competent courts shall be those of the Member State under whose constitution the rights of appeal arise”.

d) Dissolution

The Regulation introduces two clauses concerning the dissolution of an EGTC: the first represents a physiological end of the EGTC, while the second represents a “pathological” dimension. Namely, according to Article 8, paragraph 2, third point, the convention shall specify the duration of an EGTC and the conditions governing its dissolution. Thus, it is up to the members, within the limits provided by the Regulation, to decide if the EGTC has a permanent or temporary duration and the causes for its dissolution. Differently, Article 14 considers another cause for the dissolution in addition to those mentioned in the conventions. Namely, any competent authority with a legitimate interest can apply to the competent court or authority of the Member State where the EGTC has its registered office in order to obtain the order to wound up the EGTC in the case it does no longer comply with the requirements under Article 1, paragraph 2 or Article 7. Substantially, the reason for ordering the dissolution concerns the fact that the EGTC acts outside the objectives of the cooperation or outside the limits of its tasks. This provision has a twofold consequence. Namely, on the one hand, it prevents non legitimate actions of an EGTC; on the other hand, it could represent a dangerous instrument for impede the EGTC's activities in case of too restrictive interpretations of the conferred tasks. However, as it has already been mentioned, the practice demonstrates that several EGTCs have really wide tasks in order to permit a flexible implementation of the respective interventions.

4. Implementation of the EGTC Regulation: national legislative measures and progressive establishment of EGTCs

4.1. Introduction

Before presenting some conclusions about the development of territorial cooperation in Europe and about the contribution brought by the EGTC Regulation,

it is fundamental to give some references about the implementation of the Regulation within the national legislations and to the following set-up of the first new EGTCs. The adoption of national provisions has generally encountered some delays: although the deadline was established within 1 August 2007, at the beginning of 2010 some States have not completed the process of implementation yet.

According to various observations proposed on this topic, it has been noticed that in countries with federal systems the application of the Regulation involves a stronger role of the regional level and, for this reason, the implementation is more complex and raises some questions regarding the uniform application of Community law. With regard to this last consideration, it is quite interesting to note that the Regulation has been faster implemented within traditionally unitary countries while, generally speaking, composed countries have taken more time. This delay appears rather strange as far as the difficulties connected to the structural complexity of federal countries could be compensated by the major autonomy of regional entities in order to apply the Regulation. In any case, such situation has to be considered as emblematic of the progressive evolution of the “sub-national question” in unitary countries. In this sense, as it has been mentioned in the second chapter of this work, the distinction between composed and non-composed countries is quite obsolete and not really functional in order to analyse or comprehend the development of territorial cooperation.

Moreover, from a geographical point of view, the EU's area where the Regulation is in the most advanced phase of implementation concerns the South East, while the Centre Europe and the Nordic countries needed more time²²³. Even in this case the situation seems curious for the reason that the so-called new democracies have granted a faster implementation of the Community Regulation if compared to the historic EU Member States. In this respect, the interpretation could be as follows. On the one hand, the evidence of a fast application of Community law and the interest towards the promotion of territorial cooperation show a clear political intent to follow the process of European integration and to take advantages in this sense. On the other hand, the young constitutional structures of these countries, despite the heritage of the past centralistic perspectives, seem to be quite aware of the principles

223 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation (EGTC): state of the play and prospects*, cit., p. 2.

of local and regional self-government²²⁴. Of course, this is only a very general statement and it is worth to remember that, even if the slow implementation of national provisions by the States of Central and Western Europe suggest the idea of a more static attitude, these legal orders have demonstrated a peculiar capacity of adaptation to new solutions.

With regard to the recent establishment of new EGTC, few experiences have materialized in the form of this new structure. Up to now the EGTC set-ups already in place are about ten and other twenty projects are under preparation. Different realities are involved in the application of such an instrument: not only already existing and experienced forms of cooperation have opted to constitute an EGTC, but also new cooperative structures have decided to build up territorial cooperation under the system of an EGTC.

In general terms, the concepts of “variety” and “adaptability” seem to be the best way to describe the application of the Regulation No 1082/2006 into real EGTCs. As a negative note, the mentioned delay of national provisions hinders the constitution of new EGTCs, mainly in those cases sub-national authorities are already determined or resolved to put in place this kind of cooperation but a lack of national dispositions persists. In particular, these limitations at national level can occur in different ways. A first example is represented by the eventuality a determined Member State has been chosen for the registration of an EGTC and this State has not adopted the necessary measures to implement the Regulation. A second eventuality happens if a sub-national authority wants to take part to an EGTC, which is placed in the territory of a foreign Member State, but cannot participate because of the lack of national procedural dispositions allowing this sub-national authority to act legitimately as member of an EGTC. Of course, this is only a transitory problem, since every Member State is going to adopt the necessary measures; however, it is quite functional to describe the beginning phase of the EGTC and the issue connected in order to have a clear idea of its further evolution.

224 P.H. RUSSEL, *The future of Europe in an era of federalism*, in S. ORTINO, M. ŽAGAR, V. MASTNY (eds.), *The changing faces of federalism: Institutional reconfiguration in Europe from East to West*, Manchester, 2004, p. 4-20.

4.2. National implementations

National provisions are necessary and fundamental for two reasons. Firstly, they contribute to settle the procedures regarding the establishment and the functioning of EGTCs constituted on the national territories; secondly, they give authorisation to respective sub-national authorities for the participation to an EGTC, in particular when established on the territory of a foreign State.

Although such a huge reference to national provisions is rather unusual for a Community Regulation, however it seems the only solution to make an instrument of this type effective at national level. Actually, the strong connections of territorial cooperation to the national legal orders and the impossibility to dissociate the sub-national activities from the national supervision generate this multidimensional system of legal sources, which represent a necessary condition for the creation of an EGTC. Notwithstanding the reliance to national provisions, the Regulation is, anyway, not less direct applicable. However, several complexities have to be faced in order to cope with the consequences of this legal uncertainty²²⁵. From this point of view, it is quite curious that a legal document, which has been adopted in order create a common legal framework and to solve legal disparities between different national legal systems, introduces a further problematic issues. The peculiar aspect of this particular situation is given by the fact that the most accessible level of legal certainty is reached only by a collaborative attitude of Member States. Thus, the concrete result of a differentiated application is that the Regulation cannot assure uniform legal effects, but only a uniform legal approach to territorial cooperation²²⁶.

As it has been pointed out during the previous analysis, the Regulation refers both generally and specifically to national legislations. In particular, Article 16, paragraph 1 and Article 2, paragraph 1 c) prescribe the adoption of national appropriate measures. This obligation, according to the study commissioned by the Committee of the Regions, is quite controversial because it doesn't resemble the duties of a directive to reach determinate goals, but needs, at the same time, to be implemented. In particular, the strange aspect of this Community act resides in the indispensable contribution of national measures, whose delay have practically

²²⁵ See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, cit., p. 113.

²²⁶ *Ibid.*, p. 116.

determined no penalties at all. Within this limb, it has been remarked that “a Member State cannot invoke the absence of national measures in order to nullify the direct effect of this Regulation [...]”²²⁷. But, how can be the Regulation applied in case of missing national provisions? This eventuality has really happened and will be further illustrated.

Regarding the specific national provisions, some examples are going to be analysed. In particular, some fundamental aspects will be taken into consideration, such as the dispositions concerning the capacity of sub-national authorities, the provisions about the tasks of the EGTC and the way specific technical aspects are implemented. The choice of the national legislations follows the criteria that have been used in the second chapter about the analysis on the sub-national foreign power. Thus, legislative provisions of traditionally federal, regional and unitary countries are going to be examined in order to have a categorizing parameter, but also in order to show how the effectiveness of these solutions does only partially depend from the constitutional structures of the countries involved.

a) Federal countries

The example considered are Germany and Austria. The examination of these two countries demonstrates how the implementation of the EGTC Regulation in federal countries could be radically different due to the peculiar constitutional structures and the respective reactions concerning this new Community instrument. Moreover, the examples of federal countries denote a further element of complexity, which is represented by the role of constituent units with regard to the implementation of the Regulation.

The adoption of national measures seems not to be particularly problematic for Germany, where the federal government has only established through an ordinance the competent national authorities mentioned in the Regulation as points of reference for the application of particular dispositions. Thus, in case the intervention of the central authority is required, sub-national subjects shall communicate with the

²²⁷ *Ibid.*, p. 123. See also, A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 121: “En consecuencia, el Estado miembro en cuyo territorio la AECT tenga su sede social *no puede impedir* el registro de este organismo jurídico alegando la inexistencia en su Derecho interno de registro específico para ello”.

Federal Ministry of Economics and Technology²²⁸. All the other competent governmental authorities are individuated according to the legislations of each *Land*²²⁹, in particular with reference to Articles 4, 5, 6, 7, 12 and 13 of the EGTC Regulation. For example, the participation of a municipal authority to an EGTC will require the approval from the respective *Land* first.

In general, the German case doesn't present peculiar dispositions, both from the federal government and from the *Länder* perspectives. This “soft” implementation applied in Germany aims at respecting the requirements of the Regulation without stressing the eventual legal problems connected to the relations between Community and national systems²³⁰. In particular, all the issues related to the competences of sub-national entities, i.e. the *Länder*, and to the tasks entrusted to an EGTC are absorbed by the national legal order and resolved through the ordinary solutions according to the existing normative dispositions. Namely, the most sensitive argument about the competence to implement the Regulation and about the sub-national legitimacy to participate to an EGTC shall be necessarily settled according to the constitutional structure of the German legal order. On this line, also the rules about the formal procedures to follow for the establishment of an EGTC and the other functioning rules (publicity, auditing, dissolution, etc.) are individuated on the basis of the EGTC Regulation and the ordinary national legislation. This attitude demonstrates a double clear intention: on the one hand, the German system doesn't emphasize too much the adoption of this new instruments, thus leaving a kind

228 See <http://www.bmwi.de/English/Navigation/root.html>. Moreover, a summarising list about all the authorities competent for each *Land* as mentioned by the Regulation is available at <http://portal.cor.europa.eu/egtc/en-US/NationalProvisions/Pages/Adopted.aspx>.

229 The documents available are from the following federal entities: Bayern (Bayerisches Gesetz- und Verordnungsblatt Nr. 29/2007); Berlin (Berliner Senatbeschluss Nr. 200/2007); Brandenburg (Gesetz- und Verordnungsblatt für das Land Brandenburg Teil II – Nr. 27 vom 19. Dezember 2007); Rheinland-Pfalz (Gesetz- und Verordnungsblatt für das Land Rheinland-Pfalz vom 30. Juli 2007); Sachsen (Gemeinsame Verordnung des Sächsischen Staatsministeriums des Innern, des Sächsischen Staatsministeriums der Justiz, des Sächsischen Staatsministeriums der Finanzen, des Sächsischen Staatsministeriums für Kultus, des Sächsischen Staatsministeriums für Wissenschaft und Kunst, des Sächsischen Staatsministeriums für Wirtschaft und Arbeit, des Sächsischen Staatsministeriums für Umwelt und Landwirtschaft, des Sächsischen Staatsministeriums für Soziales vom 2. Januar 2008); Sachsen-Anhalt (Ministerialblatt für das Land Sachsen-Anhalt vom 13. August 2007, Nr. 29); Thüringen (Gesetz- und Verordnungsblatt für das Land Thüringen vom 16. August 2007, Nr. 7).

230 Another impression came from the observation of the German governmental representative during the drafting phase of the Third Protocol to the European Outline Convention on Transfrontier Cooperation. In fact, during the meeting of the LR-IC Committee held on 23 March 2009, which has been mentioned in the previous chapter, he was quite careful about many details regarding potential legal issue connected with the implementation of the European Cooperation Grouping in Germany.

of spontaneous development of the phenomenon; on the other hand, the absence of a reluctant perspective toward the creation of new EGTCs highlights the maturity of this legal system and its reliance in the Community instrument.

Quite different is the case of Austria, where the exercise of foreign sub-national powers is rather complicated, mainly because the Austrian Constitution doesn't recognise any grouping built by public entities, notably with other foreign subjects²³¹. The adoption of the EGTC Regulation has been developed through a so-called “9+1 model”, which is given by the sum of legislative provisions from all the *Länder* and from the federal level. Up to now, only the *Länder* Vorarlberg²³² and Kärnten²³³ have adopted specific provisions, which, however, generate a system of overlapping legislations with the federal law, for example, concerning registration and supervision²³⁴. In fact, insofar as the law of each *Land* aims at implement all the aspects concerning the EGTC falling under its competences, the federal law introduces some confusing provisions. In this sense, the federal law correctly specifies the participation of the State to an EGTC, but also provides some dispositions in excess referring to the *Länder*. Namely, it affirms that the competent authority for the authorisation, registration or dissolution of an EGTC is represented within the *Länder* by the *Landeshauptmann* (Governor). Such dispositions, which are repeated about different contexts by the federal law, show a sort of excessive attention from the central government towards the federated units. In particular, this attitude, while trying to manage the relations between central and sub-national authorities, leaves some important lacks about other fundamental aspects of the EGTC such its legal nature (public or private) or its tasks. According to this general observations, the Austrian implementation of the EGTC shows all the systematic difficulties regarding the exercise of a foreign power by sub-national entities rather than a specific reluctance for the Community Regulation as such.

The two model analysed, despite the basic differences, present some common aspects with regard to the substantial aspects of the Regulation. In general, the

231 It is useful to remember that until now no international treaties have been concluded by the Austrian *Länder*.

232 Vorarlberger Landesgesetzblatt vo, 23. April 2009 Nr. 11.

233 Gesetz vom 18. Dezember 2008.

234 See the presentation by J. Maier, EGTC – A new legal instrument facilitating Cooperation beyond borders, held on the occasion of EURAC Workshop on the European Grouping of Territorial Cooperation (Bozen, 15 May 2009).

attention is drawn on the practical aspects of the EGTC's set-up (like the references to the competent authorities for the registration and for the financial control), while any statement about the competences of sub-national units, the tasks of the EGTC, the supervision of the central authorities and the legal nature of the EGTC is left apart.

b) Regional countries

At a first reading, national provisions of regional countries are much more detailed and coherent with the text of the Regulation and display more systematic dispositions. Moreover, the major supervisory role of the central authorities is visible and emphasizes several aspects of the EGTC Regulation in this sense. However, despite the more elaborated reference to specific norms of the Regulation, the national provisions emphasize certain aspects, while lacking some other important elements. The examples of Spain and Italy present some similarities.

Spain adopted national measures to give application to the Regulation (EC) No 1082/2006 through the *Real Decreto 37/2008* of 18 January 2008²³⁵. This act consists of 13 articles, a relevant part of which is the repetition of the dispositions contained in the Community Regulation²³⁶. The rest of the document establishes, according to the text of the Regulation, the procedure for the constitution of an EGTC. In particular, the duty of communication has to be fulfilled to the Ministry of Public Administrations by every Spanish entity aiming at participating in an EGTC. Furthermore, an authorisation shall come from the Council of the Government in order to give full application to the constitutive agreement of an EGTC (Art. 4). The procedure of information, however, implies also to inform other Ministries, according to their respective competences; the information to the Ministry of Foreign Affairs and Cooperation and to the Ministry of Economy and Treasury is mandatory in any case (Art. 5)²³⁷. This procedure is followed by the authorisation from the central governmental authority and is conditioned to the control of some parameters, as also affirmed by the Community Regulation: target of economic and social cohesion, conformity to the convention and statutes, capacity of the members

²³⁵ BOE núm. 17, Sábado 19 enero 2008.

²³⁶ For example, the provisions about objectives and members.

²³⁷ Article 5 is much more detailed. In particular, local communities shall also inform the Self-governing Communities in which territory they are situated.

according to their competences, conformity of the tasks of the EGTC with the competences of the members. Another form of control is managed by the Council of Ministries, which is entitled to prohibit all the EGTC's activities on the Spanish territory if violating the national law about public order, public security, public health, public morality as well as conflicting with the public interest (Art. 11). This brief examination of the *Real Decreto* suggests a couple of observations. On the one hand, the national provisions follow almost literally the Regulation. On the other hand, the intent of supervision with regard to the process of constitution of an EGTC removes the attention from other important aspects, such as the legal nature of an EGTC. In fact, the complex system of information/authorisation and the various ministerial authorities are individuated within a detailed procedure. For the rest, the Spanish document confers to the EGTC the legal nature of public personality without any other specification (Art. 2). Thus, in order to complete the further legal aspects of the EGTC Regulation, other existing national laws are required. With regard to the effects of the Regulation No 1082/2006 on the Spanish system, it has been observed that it offers, potentially, a useful basis to strengthen the already existing instruments of transfrontier cooperation. In particular, the normative provisions adopted within the framework of the Madrid Outline Convention of the CoE, such as the Bayonne Treaty, are not hindered by this new legal instrument. As far as they consist in different legal structures, an enrichment of territorial cooperation seems feasible, instead of a unfruitful competition²³⁸.

After some hindrances²³⁹, Italy has given implementation to the EGTC Regulation through the so-called *Legge Comunitaria 2008* of 29 July 2009 (Articles 46, 47 and 48)²⁴⁰. In particular, Article 46 completes some points that the Regulation has left unresolved. In particular, the EGTC constituted on the Italian territory shall have a public law-personality. It has been observed that such a provision, on the one

238 See A. EMBID IRUJO, C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, *Las agrupaciones europeas de cooperación territorial: consideraciones desde el Derecho comunitario y el derecho español*, cit., p. 192-196. See also, S. BELTRÁN, *Qué esperar de la figura de la Agrupación Europea de Cooperación Territorial (AECT) en relación a los organismos de cooperación creados por las Comunidades Autónomas*, in *Revista general de derecho europeo*, 2007, n. 14, p. 21 *et seq.*

239 The first attempt of the Italian Government to implement the EGTC Regulation has been drafted throughout a governmental decree which has been the object of a negative opinion by the Council of State (Opinion of 7 November 2007). In particular, this authority has found the decree a non-suitable form, while an ordinary law was considered the right tool.

240 “Legge 88 del 7 luglio 2009, concernente le Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee - Legge comunitaria 2008”.

hand, is more suitable in order to pursue the tasks of sub-national public authorities but, on the other hand, it could be at the same time restrictive in case the establishment of an EGTC under private law represents an alternative and valid option²⁴¹.

Going on with the analysis, the Italian provisions define the public authorities allowed to membership according to Article 3 of the Regulation. Namely, for “regional authorities” are intended all the Italian Regions and Autonomous Provinces of Trento and Bolzano and for “local authorities” those authorities mentioned at Article 2, paragraph 1 of the national law on local authorities²⁴². Despite some positive comments on this provision, it seems, according to our view, quite superfluous as far as the Regulation is already complete and clear enough: namely, it is not a discretionary choice of the national legislations to appoint the authorities entitled to be potential members of a EGTC, but, rather, the Regulation appoints national, regional and local authorities as already existing within each national system. The provisions regarding the tasks entrusted to an EGTC are also quite useless. In fact, the text of Article 46, paragraphs 4 and 5 confirms the possibility to develop actions within the Community programmes frameworks or outside these frameworks. In this case, as the Regulation also says, the activities shall comply with the objectives of economic and social cohesion. While leaving the broader space of action to the EGTC²⁴³, these dispositions do not add relevant aspects. On the contrary, the provisions regarding the adoption of the convention and the statutes seems superfluous for the reason that the Regulation already foresees adequate and directly applicable solutions²⁴⁴. The further procedure of authorization for the prospective members is rather excessive as far as it requires the consent from the Presidency of the Council of Ministries and, in addition, a mandatory opinion from the following authorities: the Ministry of the Foreign Affairs about the conformity

241 See S. ALOISIO, *Il GECT: disciplina comunitaria e attuazione italiana, un'analisi giuridica*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 113.

242 D. Lgs. n. 267/2000.

243 Remember that Article 7, par. 5 of the EGTC Regulation affirms that the Member State may limit the tasks that an EGTC may carry out with or without Community financial contribution. However, the minimum content shall respect the actions listed in Art. 6 of Regulation (EC) No 1080/2006 on ERDF.

244 Art. 46, par. 4 states that the convention and the statutes are unanimously approved by the members and subsequently drafted in public form according to Articles 2699 *et seq.* of the Italian Civil Code. The non-fulfilment causes the invalidity of the act.

with the national policy in foreign affairs, the Ministry of the Interior about the conformity with public order and public security, the Ministry of Economy and Finances about the conformity with financial and auditing legislations, the Ministry for the Economic Development about the conformity with the cohesion policies, the Council of Ministries – Department for the Community Policies about the conformity with the Community system – Department for the Regional Affairs about the conformity with the national interest. This procedure shall be completed within ninety days. The registration of the EGTC shall be accomplished within the following six months and the Presidency of the Council of Ministries shall verify the conformity of the approved convention and statutes with the proposed ones. Other provisions concern practical aspects, such as the financial details. Two observations come with regard to this authorizing procedure. From a practical point of view, it seems hard to obtain all the complete opinions from each authority within ninety days and it could have been useful to introduce a form of silent consent after the deadline has expired²⁴⁵. From a substantial point of view, all these previous controls, while respecting the wording of Article 4, paragraph 3 of the EGTC Regulation, seem excessively complex and suggest a kind of disproportionate attention toward the potential irregularities during the constitutive phase. With reference to the national dispositions about territorial cooperation in Italy, some scholars have highlighted the potential legislative overlapping between the provisions about the EGTC, the law ratifying the Madrid Outline Convention²⁴⁶ and the constitutional discipline providing the possibilities for the Regions to conclude agreements with correspondent foreign subjects²⁴⁷. To solve the potential conflict, the analysis given by the Constitutional Court is clear in the identification of the Community legislation as a different and autonomous reference for the peculiar kind of activity concerned²⁴⁸,

245 See S. ALOISIO, *Il GECT: disciplina comunitaria e attuazione italiana, un'analisi giuridica*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 114.

246 Law no. 984/1994.

247 Article 117, paragraph 9 of the Italian Constitution and the related applicative discipline (Article 6, paragraph 3 of the Law no. 131/2003).

248 In this sense, see the judgement no. 258/2004. See also, M.R. ALLEGRI, *Dalla cooperazione transfrontaliera alla cooperazione territoriale: problemi di ordine costituzionale*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 88 and R. CAFARI PANICO, *Le relazioni internazionali e comunitarie delle Regioni nella recente giurisprudenza costituzionale*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, cit., p. 247.

thus allowing a contextual coexistence of different legislations, but granting their autonomy and their separate applicability.

c) Unitary countries

The new Community instrument has not created particular problems in relation to the peculiar constitutional systems of unitary countries, notably with regard to the traditionally less autonomous functions of territorial communities.

France implemented the EGTC Regulation with the *Loi n. 2008-352* of 15 April 2008 aiming at amending the General Code of Territorial Communities. This legislative act has modified the chapter about the decentralized cooperation introducing appropriate provisions for the setting up of the EGTCs. Such an intervention is rather interesting for the reason that it adapts a general piece of legislation coherently to the new Community provisions. In this sense, the final effect appears much more rational and understandable within the legislative framework of decentralized cooperation. As it has been already mentioned in the second chapter with regard to the development of a sub-national foreign powers, the new formulation of article Article L1115-4 recites: “*Les collectivités territoriales et leurs groupements peuvent, dans les limites de leurs compétences et dans le respect des engagements internationaux de la France, adhérer à un organisme public de droit étranger ou participer au capital d'une personne morale de droit étranger auquel adhère ou participe au moins une collectivité territoriale ou un groupement de collectivités territoriales d'un Etat membre de l'Union européenne ou d'un Etat membre du Conseil de l'Europe*”. According to this general faculty conferred to territorial communities, Article L1115-4-2 handles in particular the EGTC²⁴⁹. The authorisation is conferred by the state representative (the prefect) within the region where the EGTC has its headquarters. The EGTC has legal personality under public

249 Article L1115-4-2: “Dans le cadre de la coopération transfrontalière, transnationale ou interrégionale, les collectivités territoriales, leurs groupements et, après autorisation de leur autorité de tutelle, les organismes de droit public au sens de la directive 2004 / 18 / CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services peuvent, dans les limites de leurs compétences et dans le respect des engagements internationaux de la France, créer avec les collectivités territoriales, les groupements de collectivités territoriales et les organismes de droit public des Etats membres de l'Union européenne, ainsi qu'avec les Etats membres de l'Union européenne ou les Etats frontaliers membres du Conseil de l'Europe, un groupement européen de coopération territoriale de droit français, doté de la personnalité morale et de l'autonomie financière”.

law. Moreover, Article L1115-5 contains a “closing provision”, which gives coherency to the system of decentralized cooperation of territorial communities. Namely, as far as these communities can only undertake cooperation with similar foreign entities and agreements with other States are not allowed, an exception regarding the constitution of EGTCs is necessary in order to correspond to the Community Regulation²⁵⁰. No other dispositions are foreseen with regard to the tasks of an EGTC, the authorization's procedure, the registration, etc. Thus, once recognised this peculiar sub-national power to decentralized cooperation, all the issues concerning the specific implementation of the EGTC Regulation in France seem to be connected to the respect of the competences of each territorial communities and to the international engagements of France.

The French case seems to be the only one that has adapted the new EGTC Regulation to the existing national legislation about the foreign activities of sub-national communities. Other unitary countries, instead, have adopted specific and detailed acts.

The Hungarian legislation, for example, has given application to the Community Regulation through the *Act XCIC of 2007*. This document consists of 22 articles and, in this sense, is quite elaborated. Some important dispositions concern essential aspects of the EGTC, both regarding the structures established on the Hungarian territory and the authorisation for members under the Hungarian law for structures established abroad. In particular, a grouping may not be established with the primary aim of pursuing business activities²⁵¹ and may not perform public authority activities; moreover the liability of the local government involved may not exceed the extent of its material contribution (limited liability) (Art. 2, par. 1 and 3); the Metropolitan Court shall decide the approval pursuant to Article 4, paragraphs 3 and 6 of the Regulation within the scope of a non-litigation proceeding (Art. 4, par. 1); after the accomplishment of the required procedure, the establishment of an

250 Article L1115-5: “Aucune convention, de quelque nature que ce soit, ne peut être passée entre une collectivité territoriale ou un groupement de collectivités territoriales et un Etat étranger, sauf si elle a vocation à permettre la création d'un groupement européen de coopération territoriale. Dans ce cas, la signature de la convention doit être préalablement autorisée par le représentant de l'Etat dans la région.”

251 The EGTC cannot be established in order to reach exclusive business objectives. However, business actions can be performed for reasons connected to the EGTC's activities. Namely, the grouping may perform business activities in line with the stipulations of its bylaws, provided that it does not jeopardise the aim of the grouping (Art. 7, par. 2 of the Hungarian Act).

EGTC may not be refused if the agreement and the bylaws comply with the stipulations of the Regulation and the Act, and all members have approvals pursuant to Article 4, paragraph 3 of the Regulation. From a general point of view, the Hungarian dispositions aim explicitly at resolving the blanks spaces that the Community has left for the national provisions. In fact, the Act displays in detail several formal issues concerning registration, publicity, audit, procedures in front of the competent authorities, while the substantial aspects are ruled through references to the Regulation. Regarding the membership, Hungarian sub-national authorities are considered, due to the constitutional structure of this country, as “local governments”²⁵².

The last national document under analysis is the Finnish *Act 554/2009* adopted on 24 July 2009. This act is also quite detailed. Besides some superfluous provisions²⁵³, an interesting disposition is dedicated to the tasks of the grouping. In this regard, the tasks of an EGTC are limited, according to Article 7, paragraph 5 of the Regulation, to the actions related to the territorial cooperation objective that are listed under Article 6 of the Regulation no 1080/2006 on the ERDF. The result is, as Section 3, paragraph 3 of the Act specifies, that a grouping shall be given neither tasks other than those already mentioned nor tasks exceeding the scope of the powers and duties of its members. Thus, Finland has opted for the most restrictive attributions, as provided by the Regulation. However, as already mentioned in paragraph 1.4. of this chapter, the specific activities enumerated under Article 6 of the ERDF Regulation allow some flexible interpretations. The approval for the participation is given by the Ministry of Employment and Economy according to the following conditions: the proposal for convention and statutes of the grouping shall fulfil the requirements set in the EGTC Regulation, in the national Act and in other national legislations; the tasks of the grouping are in accordance with Section 3 of the Act; there is no other obstacle referred to in Article 4, paragraph 3 of the EGTC Regulation (Section 6). Other practical provisions concern the phase of registration,

252 The Hungarian Act includes some “interpreting provisions” in this regard. Namely, Art. 18 states: “For the purposes of this Act: *local government* shall refer to the municipality of a village, a town, a town of county rank, the capital, a metropolitan district or a county”.

253 Section 2 of the first chapter, for example, affirms that “[f]or the purposes of this Act, *grouping* refers to a grouping established in accordance with the Grouping Regulation. A grouping is Finnish if its registered office is located in Finland and foreign if its registered office is located in another Member State of the European Union”.

the general functioning and the audit control. An interesting point about the conditions for the registration has to be remarked as an example of the possible contrasting national provisions. In fact, differently from the Hungarian case, a grouping where members' liability for the debts of the grouping has been limited shall not be registered in Finland (Section 9). Thus, theoretically speaking, the participation of an Hungarian local authority to an EGTC under Finnish law would be difficult. Although the example proposed represent only brief and partial hints, they suggest some interesting ideas for an overall evaluation about the national approach to the EGTC.

4.3. Observations about the national provisions

From this partial analysis of the national laws a first general consideration concerns the abstract unpredictability of all the legal aspects related to the concrete establishment of the EGTC. In fact, the possible combinations resulting from the law concerning the members and from the national law of the EGTC's headquarters, determine a complex system of applicable laws.

If the common belief about the EGTC considers this instrument as an uniform and coherent way of approach towards territorial cooperation, many expectations could be frustrated. In fact, from this point of view, the Community Regulation doesn't really solve the lamented problems of territorial cooperation deriving from the existence of different national legal systems. Namely, the question of these legal differences will be a constant element at European level and could be considered as a form of inherent characteristic of the "European legal system"²⁵⁴. In the same way as it has already been pointed out during the analysis of the EGTC Regulation, this overview on national provisions shows in concrete terms the reality of a persistent legal heterogeneity. If, theoretically speaking, the text of the Regulation doesn't allow a high degree of discretionality by Member States, however, the margins of actions left to the national provisions are broad enough to generate diversified legal effects²⁵⁵. Few aspects are particularly interesting in this regard.

254 See I. RADUCU, N. LEVRAT, *Le métissage des ordres juridiques européens*, in *Cahiers de droit européen*, 2007, vol. 43 n. 1-2, p. 111 *et seq.*

255 See INTERACT, *Handbook on the European Grouping of Territorial Cooperation (EGTC). What use for Europea Territorial Cooperation programmes and projects?*, November 2008, p. 22 *et seq.*

Firstly, the relation between the central authorities and the sub-national subjects is still linked to the inner constitutional dynamics of each national system and the EGTC Regulation doesn't weight very much in this sense. The general condition for sub-national authorities, which is bound to the respect of their competences and to the observation of the state international obligation, is a constant element in the national legislations.

Furthermore, keeping in mind the due peculiarities of federal, regional and unitary countries, other different approaches could be distinguished in the implementation of the EGTC Regulation. Namely, there are some cases in which the central authorities are rather indifferent to the potential activities of sub-national subjects within the EGTC. This is quite patent in the case of Germany, where the possible violations of the Regulation or of the national legislation are not stressed within the national implementation of the EGTC and are considered as well manageable by the legal order involved. Other cases, like France or Spain, present a moderate level of supervision towards the respective sub-national entities. This means that opportune remarks on the most important duties of local and regional authorities are provided, but without an excessive emphasis, so to show an equilibrate balance between supervision from the central authority and autonomy of sub-national subjects. The last approach, on the contrary, present a high level of attention with regard to potential exceeding actions of sub-national subjects. In the case of Italy, the mandatory advise from all those ministerial authorities seems more an attempt to discourage the establishment of an EGTC rather than to prevent possible violation of Community and national law.

A similar conclusion could be proposed also in relation to the tasks conferred to an EGTC. As far as these tasks shall comply both with the competences of the members and with the general objectives of economic and social cohesion (with the possible extreme limitation to the objective of territorial cooperation according to Art. 6 of the ERDF Regulation), different national approaches are developed. In fact, moderate or cautious preventive approaches are visible. The case of Finland is quite emblematic in this sense. However, the specific limit of Article 6 of the ERDF Regulation seems more a defensive attitude rather than a really substantial instrument to avoid unexpected developments of the EGTCs' activities.

About the arrangement of formal and procedural mechanisms for the establishment, functioning and control of an EGTC, two main national attitudes could be observed. On the one hand, some national provisions intend to rule only some basic aspects, such as the national competent authorities mentioned by the Regulation (Germany, Austria and France) or the authorization from the central authorities (Italy). On the other hand, some States regulate more in detail all the procedural elements (Hungary and Finland). In this regard, only a partial correspondence between composed and non-composed countries could be observed about the implementation of formal/procedural dispositions. In outline, it is possible to affirm that in federal countries, national provisions are less detailed, while, in regional and unitary countries the implementation of the Regulation is more elaborate. However, this could not be considered as a general rule, since there are also peculiar cases, like France is.

In general, a conclusive reflection after this analysis highlights how the national implementation of the EGTC Regulation eludes almost every attempt of classification within legal categories. Even the distinction between composed and non-composed countries, as well as the attempt to find uniform and steady practices is quite obsolete. Namely, the new Community instrument embodies all the controversial aspects of territorial cooperation, which need to be assimilated rather than removed.

4.4. EGTC set-up

At the time of writing, eight EGTCs have been established and other twenty projects are under preparation²⁵⁶. The existing EGTC structures are briefly presented in order to highlight some basic peculiar aspects, which could be useful for further observations. The single aspects, which are mentioned for each EGTC, are traced on the basis of the official documents available (conventions, statutes and publications on the Official Bulletin of the EU)²⁵⁷.

²⁵⁶ See the CoR official website about the EGTC at:
<http://portal.cor.europa.eu/egtc/en-US/Projects/preparation/Pages/welcome.aspx>.

²⁵⁷ Documents and informations are available at:
<http://portal.cor.europa.eu/egtc/en-US/Projects/already/Pages/welcome.aspx>.

- *Lille-Kortrijk-Tournai EGTC*

This structure is the first EGTC that has been created. It is established under French law between partners from France and Belgium. Different levels of authorities are involved, namely: from the French side, the State, the *région Nord-Pas-de-Calais*, the *département du Nord* and *Lille Métropole Communauté urbaine*; from the Belgian side, the Federal State, the Flemish community and region, the province of Western Flanders, the region Wallonie, the French community, the province of Hainaut and four intermunicipal associations. The main aim of this EGTC is to favour a strategic transfrontier cooperation in the geographical area concerned, thus fostering a coherent development. In this regard, the objectives of the EGTC are the promotion and the support of an effective transfrontier cooperation in order to assure strategic cooperation and dialogue, to foster the political debate, to realize projects for a common development and to facilitate the life of citizens of the Franco-Belgian conurbation²⁵⁸. In practice, the activity of the Lille-Kortrijk-Tournai EGTC is directed, with the sustain of the EU cohesion policy, towards a better coordination of the policies concerning the area, such as transports, employment, culture, etc²⁵⁹.

- *EGTC West-Vlaanderen/Flandre-Dunkerque-Côte d'Opale*

This EGTC is established under French law between partners from France and Belgium. Like for the previous example, different sub-national actors are involved and both the two States are part of the EGTC. According to the convention and the statutes the main mission of the entity is to promote and encourage an effective and coherent development within its territory and, therefore, the main objectives are the coordination and cooperation between its members, the political representation and consultation for the territory, the development of common strategic projects and the elaboration of common actions for the necessities of the population. Besides the concern towards its territory, the EGTC works at regional, national and European level as a common interlocutor for the covered geographic area.

258 Art. 3 of the Lille-Kortrijk-Tournai EGTC Statutes, available at:

<http://portal.cor.europa.eu/egtc/en-US/Projects/already/Pages/LilleKortrijkTournai.aspx>.

259 See http://www.lillemetropole.fr/index.php?p=986&art_id.

- *EGTC Pyrenees-Mediterranean*

This EGTC counts four members (Self-governing Community of Balearic Islands, Self-Governing Community of Catalonia for the Spanish side and *région Midi-Pyrenees* and *région Languedoc-Roussillon* for the French side) and is established under French law. According to Section E of the statutes, the EGTC aims at developing projects of territorial cooperation in conformity to the competences of the members and, in this regard, some peculiar fields of action are individuated. For each field, specific matters are listed: interregional economic development, research, culture, tourism, transports, common services, realisation of studies, etc. Some peculiar aspects concern activities related to the territorial objective of the EU cohesion policy (in particular within Community programmes) and the promotion of administrative, juridical and economic cooperation²⁶⁰.

- *Duero-Douro EGTC*

Established under Spanish law, this entity is composed by a huge amount of municipalities, both from the Spanish side and the Portuguese side. Three more public bodies complete the partnership²⁶¹. Despite the very detailed content of the constitutive acts, the nature and the tasks of the EGTC are very generally individuated in the development of transfrontier, transnational and interregional cooperation with the exclusive aim of economic and social cohesion (Article 4 of the statute). In this regard, the convention identifies some fields of action: equal opportunities, economic development, local development, public transport, new technologies, environment, sustainable development, tourism, culture, public health, social services, local administration, agriculture, etc.

- *Galicia-North of Portugal EGTC*

The EGTC is established under Spanish law between partners from Spain and Portugal (*Xunta de Galicia* and *Comisión de Coordinación y Desarrollo Regional de la Región Norte de Portugal*). The convention makes broad and detailed references to the EU cohesion policy as main aim of the EGTC (Article III). In this regard, the

²⁶⁰ See http://www.euroregio-epm.org/eu/AppJava/fr/sala_de_prensa/documents_oficiais.jsp.

²⁶¹ These public bodies are: *Organismo Autónomo D-ARRIBES de España, Asociación de Municipios para la Cooperación y el Desarrollo Local* (for Spain); *Associação de Freguesias da Raia e do Côa* (for Portugal).

activities are mostly identified on the basis of the Community territorial objectives, notably with reference to development and competitiveness.

- *Ister Granum EGTC*

The structure is established as an EGTC with limited liability under Hungarian law between local authorities from Hungary and Slovak Republic. According to Article II of the statutes “the primary task of the grouping is the implementation of territorial cooperation programmes and projects co-financed by the European Union”. The individuation of further tasks is quite atypical with regard to the previous examples of EGTC. Thus, the complete list of tasks allowed in order to pursue legitimate activities identifies the following fields to cope with²⁶²: “a) within the scope of its objectives, the implementation of other specific actions, programmes, projects with or without financial contribution from the European Union; b) within the framework of its independent management in order to achieve its objectives, with consideration to the limited responsibility role taken on, the continuation of company activity; c) raising awareness to the competitive advantages occurring at local and national level of the territorial cooperation targeting the strengthening of economic and social cohesion within its operational territory, as well as to its cross border competitive advantages, to the fundamental conditions for achieving these competitive advantages, the process of obtaining them and the roles Members can undertake in this; d) ensuring the human and financial resources and know-how necessary for achieving the objectives and implementing the tasks, the free flow of and data and information, and the widespread publicising of the achievements of the Grouping; e) influencing of the decisions involving regional politics within the institutional framework created by the European Union; f) in case of adequate financial conditions are ensured the establishment and operation of representation in Brussels”.

Another peculiarity concerns the provision related to the so-called “mutual recognition”, which is directed to the non-Hungarian members for the acceptance of Hungarian law (Article IX).

²⁶² The English version of this Statute is available at:
http://www.istergranum.hu/index.php?k=admin_en/data/00000000/_fix/00000001&id=0.

- *Karst-Bodva EGTC*

This grouping with limited liability is established under Slovakian law between local partners from Hungary and Slovak Republic. Aim of this structure is to foster the cross-border cooperation in order to sustain the economical, social and environmental development of the geographic area concerned. Some field of actions are especially individuated in order to develop partnership and cooperation of this communal rural zone.

- *EGTC Amphictyony*

Up to now, this Grouping is, from the geographical point of view, the most interesting. Namely, it is established under the Greek law between municipalities from Greece, Italy, Cyprus and France. The main intent is to develop a common strategy for this Mediterranean reality, which joins together non-contiguous local authorities, in order to maintain a constant environment of peace and sustainable development.

4.5. Observations about the established EGTCs

The EGTC-case presentation shows a variety of possible combinations of members, objectives and forms of cooperation. Some groupings are constituted as a natural development of existing experiences of cooperation (e.g. Galicia-North of Portugal EGTC), while other groupings are new forms of cooperation (e.g. EGTC Amphictyony). The establishment of EGTCs concerns partners belonging to almost recurrent countries, such as France, Belgium, Spain, Portugal and Hungary. This suggests that national and sub-national authorities of other countries, which have already implemented the Community Regulation, need more time to get used to this instrument. Regarding the membership, the only cases, where the State is present as a member, occur in France and Belgium, while several groupings are composed exclusively by local authorities.

From this brief outlook, it is not possible to draw typical common features of the various EGTCs. As it has been observed in several occasions, the Community Regulation combines the provision of defined legal rules with a high degree of

flexibility²⁶³. For this reason, the application of this instruments is suitable for different purposes and realities, from urban areas to natural reserves, from economic districts to rural areas and so on. Moreover, the EGTC permits to build new binding forms of cooperation, even for the case this cooperation is not covered by inter-state agreements. In this sense, also the role of the State is changed from a supervisory position to an eventual partner of territorial cooperation²⁶⁴.

From the peculiar perspective of the legal analysis, it is possible to note that the constitutive documents (conventions and statutes) are very detailed in the regulation of several aspects regarding the functioning of the grouping, in particular the working modalities of the organs and all the procedures concerned. What emerges from the examination of these documents is the clear attention for the establishment of well defined binding relations between the members, so that eventual violations could be easily managed.

Generally speaking, in order to obtain more efficient results after the constitution of an EGTC, both in general and in legal perspective, some key-formulas need to be respected. Namely, a clear agreement between the members, detailed convention and statutes, an aware choice about the headquarters of the EGTC and the respective national applicable law represent determinant factors for a better functioning. Moreover, as it has already been said several times, sub-national authorities shall remember that, in theory, Member States cannot refuse the constitution or the participation to an EGTC for reasons related to the lack of national measures of implementation.

Leaving apart the analysis about the functional aspects, some important considerations could be drawn with regard to the identification of the objectives and tasks of the EGTC. Namely, it is quite patent that the constituent documents of almost every EGTC privilege a wide definition of the tasks. Thus, from the analysis of the conventions or statutes it is quite difficult to figure out all the possible concrete activities of the respective grouping. Each EGTC is required, according to the Regulation, to set down and respect its objectives and tasks, within the limits that

263 See MISSION OPÉRATIONELLE TRANSFRONTALIÈRE (MOT), *European grouping of territorial cooperation*, Paris, 2008, p. 12.

264 See MISSION OPÉRATIONELLE TRANSFRONTALIÈRE (MOT), *Actes de la Journée d'information et d'échanges sur le groupement européen de coopération territoriale*, 16 novembre 2006, Ira de Metz, Paris, 2007, p. 66.

are explicitly defined in the Regulation itself. In brief, those limitations concern the competences conferred to each member, peculiar aspects connected to the national interests and the national legislations and the thematic perimeter of economic and social cohesion. In order to avoid possible disputes about violations of the mentioned limitations, the formulations of objectives and tasks are as wide as possible. In particular, the main technique is to proclaim the general intent to pursue territorial cooperation and then to mention some wide fields of activities. In this way, more possibilities remain, in theory, open for the concrete activities of the EGTC. Moreover, the conformity with the competences conferred to sub-national authorities according to the respective national law can be easier complied if the tasks of the EGTC are not too strictly delimited. In this sense, even if objectives and tasks seems not really clear enough, they left open progressive developments.

Despite the big amount of transfrontier cooperative experiences in Europe, two years and a half after the entry into force of the Regulation (EC) No 1082/2006 only eight EGTCs have been constituted. Of course, many other projects are under preparation and this is a positive aspect. However, the development of new structures is more cautious and restraint if compared to the initial enthusiasm. In this regard, the difficulties to fully comprehend and implement the legal nature of this instrument have played a a detracting role. In any case, the political debate about the future applications of the EGTC remain really positive²⁶⁵.

4.6. An interesting pathologic example: the Italian case about the establishment of the EGTC “Euroregion Alps Mediterranean”

The Euroregion Alps Mediterranean is composed by two French Regions (Rhône-Alpes, Provence-Alpes-Côte d'Azur) and three Italian Regions (Valle d'Aosta, Piemonte, Liguria). This territory has a long history of partnership and transfrontier relations in different fields (economy, culture, etc.)²⁶⁶. The constitution

265 See the discussions of the workshop *The added value of EGTC and possible solutions to critical points*, held on 8 October 2009 during the Open Days 2009 at the Committee of the Regions in Brussels. Informations available at:

<http://portal.cor.europa.eu/egtc/en-US/Pages/TheaddedvalueofEGTC.aspx>.

266 See COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation (EGTC): state of the play and prospects*, cit., p. 124. See also the official website of the Euroregion, at: <http://www.euroregion-alpes-mediterranee.eu/>.

of an EGTC represents a useful instrument for an experienced synergism, even if it will not represent the natural evolution of the whole Euroregion, but only of some activities. Thus, the five regions have finalised the drafting of convention and statutes for the future EGTC under French law²⁶⁷. The setting up of the grouping has known a delayed procedural phase because a curious situation has occurred in Italy. Namely, during the process for the establishment of the grouping, some legal quarrels between the Italian Government and the Liguria Region have happened. The Liguria Region confirmed its membership to the EGTC through a regional law²⁶⁸ before the final adoption and entry into force of the Italian national legislation for the implementation of the EGTC Regulation. In order to comply with Article 4, paragraph 2 of the Community Regulation, the Region notified the communication regarding its intention to participate to the EGTC to the national authority according to the existing Italian legislative provisions about the regional foreign relations²⁶⁹.

Against the regional law, the Italian Government has proposed a constitutionality recourse in front of the Italian Constitutional Court²⁷⁰. With the recourse no 30/2009 the Government contests the violation of Articles 117 and 118 of the Constitution (about the division of the competences between national and sub-national level), in particular with regard to the principle of fair cooperation, and Article 97 (about the fair operation of public administrations)²⁷¹. The reasoning is founded on a twofold motivation, which will be briefly summarized. Firstly, according to the interpretation of the Government, the EGTC Regulation leaves to the Member States the complete discretionality to authorize the participation of sub-national authorities to an EGTC²⁷². According to the same interpretation, the Liguria

267 See INTERACT, *Handbook on the European Grouping of Territorial Cooperation (EGTC). What use for Europea Territorial Cooperation programmes and porjects?*, cit., p. 65 *et seq.*

268 *Legge della Regione Liguria 16 febbraio 2009 n. 1.*

269 Article 6, paragraph 2 of the Law no 131/2003. During the absence of national provisions about for the adoption of the EGTC Regulation, the mentioned law was considered applicable according to the principle of analogy. As stated by this provision, if the central authority, after the notification from the Region, doesn't submit an opinion within the term of thirty days, the Region is allowed to conclude the agreement.

270 In is interesting to note that the question submitted to the Court concerns the constitutional conformity of the regional law and not, as it has been done in previous cases regarding other Community instruments for cooperation such as Interreg (see the judgement no 258/2004), the conflict of competences with violation of the governmental attributions by the region.

271 The text of the recourse is available at the official website of the Italian Constitutional Court at: http://www.cortecostituzionale.it/atti_promovimento/schedaRicorsi.doanno=2009&numero=30&numero_parte=1.

272 The reasoning of the Italian Government is based on the assumption that Article 16, paragraph 1 of the EGTC Regulation confer to the Member States a wide discretionality to implement the

Region should have waited for the definitive adoption of the national legislation about the EGTC. In this sense, the regional law violates the principles of fair cooperation between the State and the Regions, and the principles of reasonableness, impartiality and fair operation of the public administration. Secondly, the Government highlights that the regional law extends the competences of the EGTC as individuated according by the Community Regulation. In particular, the regional law affirms that the aim of the interregional cooperation is to “foster political, economic, social and cultural relations” and this is violating, in the governmental opinion, the main aim of the EGTC, namely the promotion of territorial cooperation within the objectives of economic and social cohesion. In this view, the regional law doesn't comply with the Community obligation and it is, therefore, unconstitutional on the basis of Article 117, paragraph 1 Const.

Although this research is not the adequate place for discussing this recourse, some considerations need to be done. Given the fact that the Liguria Region, in the absence of national dispositions about the EGTC, has complied with the provisions of the Regulation about the communication with the central authorities, the lack of an authorisation from the central authority seems more a non-fulfilment of the Government rather than a violation of the principle of fair cooperation from the Region. By the way, the State was in delay with the adoption of adequate national provisions. Furthermore, from a substantial point of view, the authorisation of the national authority cannot be considered as completely discretionary, but it is conditioned according to the text of Article 4, paragraph 3, which affirms that “the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval”. In this regard, the Italian Government has not given any statement. About the second reasoning, it seems quite doubtful the possibility to consider the development of

Community act at national level, also according to the principle of subsidiarity as affirmed within the Treaties. On the basis of the literature analysed for this research and according to our personal opinion, this reasoning is completely wrong from a legal point of view.

political, economic, social and cultural relations as a violation of the cohesion objectives: the analysis about the cohesion policy at the beginning of this chapter has demonstrated how its objectives are not so different from the formulation proposed by the regional law.

However it will end, this case is interesting in order to see the possible legal effects of the Regulation, in particular concerning the relations between national and sub-national authorities. According to our opinion, the intention for the recourse of the Italian Government is based more on a political decision rather than on an effective legal claim and demonstrates a kind of reluctance to the constitution of the EGTC. Furthermore, the issue is not proposed by the Government as a violation of the existing legal rules about the procedures which allow the regions to conclude agreements with foreign sub-national subjects and the matter about the exclusive competence of the State in foreign relations is not mentioned²⁷³. Instead, the Italian Government proposes its recourse on the basis of a misinterpretation of the legal effects of the EGTC Regulation.

However, given that the legal reasoning of the recourse seems not to find a proper legal ground and motivation in the text of the Regulation or in some other legal rules according to national provisions, this Italian case highlights a kind of immaturity of the relations among level of governments, in particular from the perspective of a “mutual loyalty principle” from the centre towards the sub-national subjects²⁷⁴. The solution that are going to be taken in order to solve this problem will be particularly relevant to observe how the legal system is able to react in this peculiar situation, notably with regard to the implementation of the principle of fair cooperation.

273 In this regard, see P. GIANGASPERO, *Specialità regionale e rapporti internazionali*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, cit., p. 108-109.

274 In this regard, no relevant national interests seem to justify the approach of the Italian Government. Thus, the principle of fair cooperation seems to have been violated not from the regional side, but from the national side, since no motivations and no privileged national interest explicitly occur. As a background, see J. WOELK, *Konfliktregelung und Kooperation im italienischen und deutschen Verfassungsrecht. “Leale collaborazione” und Bundestreue im Vergleich*, Baden-Baden, 1999, p. 276-277; despite the constitutional frameworks have progressively recognised the principle of fair cooperation in Italy, this seems to privilege more the central State than the reasons of sub-national actors.

5. Cross-cutting issues: some conclusions about the EGTC

5.1. Community law and the legal acknowledgement of territorial cooperation within the national systems

The analysis about the Italian case presented in the previous paragraph shows in concrete terms how the implementation of the EGTC Regulation involves several ambiguities and possible legal misunderstandings²⁷⁵. After the examination of the Community Regulation and its effective application it is possible to draw some general and conclusive observations about the new instrument of territorial cooperation as a whole and, in particular, with regard to its legal effects on sub-national communities. Two main cross-cutting issue concern in particular the implementation of the Regulation and have important effects on the concrete establishment of EGTCs across Europe.

The first argument handles with the relation between Community law and national law and the settlements of legal standard for territorial cooperation. The second issue deals with the “feasibility” for sub-national authorities to develop territorial cooperation through the EGTC as a form of own capability. As it is quite easily understandable, these two issues cannot be treated separately since they have a reciprocal conditional influence. Namely, the interaction between Community law, national law and the dynamics among the various level of government determine jointly the effective results concerning the EGTCs. Furthermore, these two aspects regard both the possible answer to the initial hypothesis of this research, namely the contribution of the EGTC Regulation to the development of the “law of territorial cooperation” and to the attributions of sub-national subjects in this field. According to a cautious positive approach, the Regulation has been acknowledged as a way for the development of socio-economic integration of frontier communities²⁷⁶. However, despite the correctness of this affirmation, the positive character of this instrument is much more complex and relevant. In particular, the major improvement brought by the Regulation pertains to the effects on the national legal systems. In fact, as it has

275 See M. VELLANO, *Il Gruppo Europeo di Cooperazione Transfrontaliera*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, cit., p. 433. In comparison to the draft versions of the Regulation, several provisions have acquired a more clear legal meaning.

276 M. VELLANO, *Il Gruppo Europeo di Cooperazione Transfrontaliera*, in L. DANIELE (cur.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, cit., p. 434.

been observed during the different phases of this research, territorial cooperation as such doesn't originally have a significant legal approach by the national legislations. In this regard, two preventive objections could be proposed. On the one hand, it is possible to affirm that the phenomenon of territorial cooperation doesn't really need an apposite legal framework, but could be developed in a spontaneous way as it has been for several years. On the other hand, it is also possible to say that a truly common legal approach in this field is a kind of utopia and, therefore, the eventual contribution of Community instruments is not decisive in the context of territorial cooperation. These two objections are partially true. Namely, it is a matter of fact that, being an optional solution, the EGTC Regulation doesn't replace any existing or future alternative form of spontaneous or formal cooperation between sub-national authorities. And it is a matter of fact as well that the Regulation doesn't introduce an autonomous and self-ruling set of legal measures. However, although apparently subjected to the traditional limitations of territorial cooperation, the Community Regulation displays new perspectives and responds to a strong demand from sub-national communities. As a Community normative act, the Regulation imposes, within the national systems of the EU Member States, a specific instrument for territorial cooperation. The term "impose" has been chosen on purpose. In fact, despite its optionality as a form of cooperation, the EGTC, as a legal form, is perfectly valid and applicable and cannot be refused without a reason founded in the Regulation. Thus, the EGTC shall be considered as an effective legal tool in each Member State. This quite banal statement is full of implications. Especially, all the national legal orders, from the entry into force of the EGTC Regulation, know explicitly the legal subject of territorial cooperation and have a legal framework in this field as a domestic element.

Concerning the creation of a new right for sub-national authorities, despite the existence of ambiguities and limitations, the need of a further national implementation and the relations between the Regulation and the national legislations could be considered as a sort of false-problem, namely as an operative difficulty. Or, with other words, it needs to be intended as a mere applicative issue, rather than a question on the theoretical feasibility of the EGTC. In fact, the Regulation is not, as could be the case of a directive, dependent from the national

provisions; neither its legal existence is submitted to the national implementation. Rather, it is the Regulation that is *per se* legitimising the introduction of a new legal figure and imposes national applicative measures. Furthermore, the national intervention should not be intended as a form of mere state discretionality, but as a legal effect which derives from the typical nature of territorial cooperation. From a theoretical perspective, the normative hierarchy established according to Article 2 of the Regulation resolves the relation between Community and national legislations, being the second a residual and operative factor of the first.

To be precise, two aspects of the national legal orders are relevant. On the one hand, the operative national measures for the effective functioning of the EGTC are indicated by the Regulation. On the other hand, some dispositions of the Regulation mention the respect of legal parameters related to substantial aspects within each national order. The necessary respect of substantial prerogatives of Member States, such as their constitutional structure, the division of competences between tiers of government, the national interest or the public order, etc., represent the intrinsic character of the Community integrated system as a whole, namely composed by the Community and by the Member States²⁷⁷. In this sense, the definition of a new Community instrument of territorial cooperation with direct application in each Member State has the necessary counterbalance in the respect of the national constitutional structures and principles. As a kind of analogy, with the due differentiations, the development of territorial cooperation at EU level partially remembers the development of other legal disciplines, such as human rights. Of course, the constitution of the EGTC, and territorial cooperation in general, doesn't have a fundamental value as the development of personal rights. However, the essential relevance of national prerogatives highlights some similarities in the effort to preserve own constitutional structures from the destabilizing intrusion of EU rules. This is generated by the inevitable respect of the national systems and their internal subdivision, as also remembered in Article 4, paragraph 2 of the consolidated version of the Treaty on European Union after the approval of the Lisbon Treaty²⁷⁸. In this

277 A third interpretation could be followed between the so-called monistic or dualistic principle, namely the consideration of the integration between the Community legal order and the legal system of the Member States as a "moderate dualism" (*dualismo temperato*) as proposed by M. CARTABIA, *Principi inviolabili e integrazione europea*, Milano, 1995, p. 234.

278 The text of Art. 4, par. 2 recites: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and

sense, the concrete application of Regulation 1082/2006 is emblematic and stands within this fragile equilibrium of the Community law's development within the national orders. In this regard, the legal meaning of the EGTC Regulation represents a new component for the progressive development of constitutional principles about territorial communities²⁷⁹.

From the point of view of the eventual violations of the rules provided by the Regulation, many references are made to the national judiciary authorities, in particular with regard to the violation of the national law applicable to the functioning of the EGTC. Also disputes regarding the legitimation of potential members of an EGTC are decided by national jurisdictions according to the national legislations. However, although, national courts are competent to settle disputes on the basis of the Regulation, the competence regarding the exact interpretation of this Community act pertains to the EU Court of Justice, which is the only authority legitimized to give a coherent interpretation of the Regulation.

The EGTC doesn't represent all the forms and methods of territorial cooperation, but it is a procedural instrument to establish, in the form of a codified structure, different modalities of territorial cooperation. Thanks to the entry into force of the EGTC Regulation, the concept of territorial cooperation is not only a factual experienced phenomenon, but it is a legal concept and a juridical reality within each legal order of the EU Member States. In this sense, the Member States and the national authorities are required to recognise territorial cooperation from a legal perspective and cannot avoid to deal with it. This is the real innovation of the Community Regulation; thus, not the introduction of a common legal framework for territorial cooperation, rather to have brought a widespread acknowledgement of the legal notion and the respective instrument of territorial cooperation within national systems independently from the national discretionality. In particular, although some interpretations could be inclined to conceive a certain degree of discretionality of the central authorities, according to our opinion, the relation between central and sub-

constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

279 See A. Papisca, *L'avvento del gruppo europeo di cooperazione territoriale, GECT. Nuovi orizzonti per la multilevel governance democratica*, in A. Papisca (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 11-29.

national authorities regarding the establishment of EGTCs is based on the conformity to the national legal order as a system ruled by the law and not on a discretionary approach from the central powers.

5.2. The capacity of regional and local authorities to develop territorial cooperation according to the EGTC Regulation

From the point of view of the competences of sub-national authorities the adoption EGTC Regulation doesn't change a lot. In fact, the attributions of local and regional authorities remain formally the same within each national constitutional system. However, it is undoubted that new paths are open for the development of new perspectives regarding the possibility to develop territorial cooperation.

The capacity of sub-national authorities to create (or become members of) an EGTC concerns the legitimacy of these entities to become parts of a legal person that is not necessarily governed by the respective national law. As it has been pointed out in the second chapter, this issue is primarily ruled according to each national constitutional system and national legislation. In other words, the first limitation for sub-national territorial authorities to engage in territorial cooperation deals with their substantial competences within the domestic legislation²⁸⁰. The argument has been, and still is, one of the key-questions regarding territorial cooperation. As far as the EGTC Regulation doesn't involve an expansion of these inner subject-matters (on the contrary, it emphasizes the necessity of their respect), the new situation concerns the introduction of procedural legal modalities to develop these competences in the form of territorial cooperation. In this regard, it is now possible to “close the circle” that has been opened at the beginning of this research. Thus, as it has been observed, the issue of territorial cooperation doesn't represent a field of competence, rather it is a set of various procedures. From this perspective, the EGTC Regulation creates a new and relevant alternative for sub-national communities.

Namely, it is possible to wonder if the EGTC Regulation has brought some modifications into the national systems about the feasibility for sub-national authorities to get involved in territorial cooperation. From a theoretical point of view,

280 N. LEVRAT, *Droit applicable aux accords de coopération transfrontalière entre collectivités publiques intra-étatiques*, cit., p. 235 et seq.

it is quite a hard challenge to evaluate the exact impact of the Community Regulation on the national legal orders. In particular, it is really difficult to evaluate if the Regulation is going to increase the qualitative and quantitative development of territorial cooperation. This issue is at the heart of the complex dynamic that sees, on the one hand, the positive means offered by the Regulation and, on the other hand, the limitations connected to the national systems. In fact, several problematic points are still present. In particular, the dimension of the capability of sub-national authorities to become members of an EGTC is determined according to the national systems. The main condition in this sense is represented by the preventive authorisation of Member States according to the wording of Article 4, paragraph 3 of the Regulation. Namely, the Member State concerned “shall [...] approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law [...] or that such participation is not justified for reasons of public interest or of public policy [...]”. We already noticed in this regard that the State is subject to an obligation of approval unless some circumstances occur. More than the conformity with the Regulation and the reasons of public interest and policy, the most problematic issue concerns the parameter of “national law” and its potential expansion²⁸¹.

A general conformity with the single national legislations, in particular the respect of the competences of sub-national subjects, is comprehensible, but the exact implications of this provision are not very clear. Moreover, it is possible to wonder if this “conformity to national law” includes the conformity with the national existing procedures about the sub-national foreign power. In this sense, it has already been highlighted that territorial cooperation represents a kind of separate field, especially in this case ruled under Community law. Thus, for the eventuality that the Member States condition their approval to the respect of national rules, which somehow limit or violate the provisions and the further execution of the Regulation, these national rules shall not be applied in this case and sub-national authorities shall not be requested to comply with these norms. The study commissioned by the CoR proposes a clear and interesting interpretation. Namely, “[t]he question is that of

281 S. ALOISIO, *Il GECT: disciplina comunitaria e attuazione italiana, un'analisi giuridica*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 110.

direct effect: if it exists, then the rights derived from Community law must take precedence over the interests of the Member States authority; but if the production of legal effects is made conditional on respecting certain national rules, e.g. in relation to the approval procedure provided for in Article 4(3) of the EGTC Regulation, then a prohibition under national law may take precedence²⁸². However, recognising the validity of this legal reasoning, in any case a national rule which is patently incompatible with the Regulation shouldn't be considered applicable, according to the principles of Community law.

For what concerns the question of sub-national foreign powers in particular, not so many difficulties seem to emerge for the reason that this matter is scarcely codified in the national systems. What is quite clear in this vague scenery is the autonomy of the Regulation in relation to other forms or procedures concerning the exercise of sub-national foreign powers within the various national legislations. In this regard, it seems also clear that the competence about sub-national foreign relations according to each national system should not be considered within the competences that the Regulation requires about the members of an EGTC: namely, "it is Community law founding the right to territorial cooperation without any implication of the national law about sub-national international relations"²⁸³.

The fact that Community law could constitute a self-sufficient legal base for the institutionalization of territorial cooperation between sub-national authorities is denied by the EGTC Regulation itself²⁸⁴. However, it seems not necessary that the Member State confer an apposite and explicit competence to sub-national authorities in order to set up an EGTC as far as sub-national entities act within their general attributions and under the conditions established by the Regulation.

From a concrete point of view, this issue remains anyway quite difficult to approach. The question concerning the capability of sub-national authorities to set up

282 COMMITTEE OF THE REGIONS, *The European Grouping of Territorial Cooperation – EGTC –*, cit., p. 131.

283 See S. ALOISIO, *Il GECT: disciplina comunitaria e attuazione italiana, un'analisi giuridica*, in A. PAPISCA (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 110.

284 See M. PERTILE, *Il GECT: verso un organismo di diritto comunitario per la cooperazione transfrontaliera?*, p. 124. As a general principle, Community law cannot directly alter the inner structure of national constitutional systems. However, Community acts have been recognised some indirect effects on the repartition of competences between sub-national authorities and the central State. But this seems not the case regarding the EGTC Regulation, which make explicit references to the respect of the internal articulation of States.

an EGTC requires in any case a strong relation with the national legal orders. Although this seems to frustrate the direct effects of the Regulation No 18082/2006, however, the most important legal effects are related to the provision of an alternative operative solution for sub-national authorities to deal with territorial cooperation through a new subject with legal personality²⁸⁵, which, actually, could be intended as a true right for sub-national subjects²⁸⁶. Therefore, in case an EGTC is established according to one national law, it couldn't be contested as legal subject when acting within the territory of the Community. Moreover, as far as some Member States provide local or regional authorities with modest attributions, it will be anyway difficult for those States to prohibit the constitution of EGTCs to these sub-national subjects, if not under precise legal reasons. In this sense, the development of territorial cooperation is feasible for sub-national authorities regardless of how their powers are considered – namely, inherent quality of territorial communities or “octroyé” from the State²⁸⁷ – and how limited those powers are. In practice, the exercise of territorial cooperation, as developed with the EGTC, is not submitted to the question “if” (it can exist), but to the question “how” (namely, to what extent those powers can legitimately be exercised).

After this reasoning, a general observation could be proposed as follows. The Regulation creates and a right for sub-national authorities to establish and EGTC. This right has various limitations. However, it is not the existence of this right as such, but its dimension and extension to be conditioned by the national legislations.

285 The Commission's Proposal of 14 July 2004 for a Regulation of the European Parliament and the Council establishing a European Grouping of Cross-border Cooperation (EGCC) was more clear in this sense. Namely, it provided at Article 8 that after the publication on the Official Journal of the European Union “the legal capacity of the EGCC is recognised in each Member State”. The formulation of the adopted version of the Regulation seems to have forgotten this brief statement. Although the legal effects are quite the same, the Regulation (EC) No 1082/2006 provides at Article 5 that the EGTC shall be registered and/or published in accordance with the applicable law in the Member States where it has its registered office. The EGTC shall acquire legal personality on the day of registration or publication, whichever occurs the first.

286 A. Papisca, *L'avvento del gruppo europeo di cooperazione territoriale, GECT. Nuovi orizzonti per la multilevel governance democratica*, in A. Papisca (cur.), *Il gruppo europeo di cooperazione territoriale. Nuove sfide allo spazio dell'Unione Europea*, cit., p. 15, highlights the transformation of the concept of sub-national territorial cooperation from the connotation of a mere “faculty” to the recognition of a “right”.

287 *Ibid.*, p. 14.

5.3. Is the EGTC a legal revolution for territorial cooperation?

Speaking about revolutions implies, most of the times, some hypocrisies deriving from the real meaning of the concept and its following contextualization. Namely, “revolution” means a rupture, a break with the past. A radical change. Trying to understand if the EGTC represents a revolutionary instrument in the field of territorial cooperation involves an evaluation about its relation with the previous situation. In this regard, the analysis about the specific instruments and the general context of sub-national transfrontier relations has been broad enough to suggest some ideas about the role of the EGTC Regulation. In particular, two main observations can be proposed. From a first point of view, the role of this Community Regulation within the general trend of transfrontier/territorial cooperation is situated within a progressive acknowledgement of the phenomenon, mainly within the European territorial dimension. Secondly, as a specific legal instrument, the EGTC Regulation represents an important legal achievement for the EU and its Member States. This observations are quite vague, but both of them intend to highlight the double nature of the Regulation, namely its new and original peculiarities, but also its strong connections with the previous aspects of territorial cooperation. In this sense, more than a break with the past, the EGTC Regulation is an example of additional continuity and an example of coherent evolution. In this sense, the aims of the Regulation are basically grounded in the intention to improve the past solutions of cooperation without the necessity to forget or overcome these experiences. Thus, the EGTC contains almost all the components of the past and the purposes of the future. Namely, the EGTC entails each positive character and suffers from every disease of territorial cooperation as European phenomenon. Therefore, speaking about a revolution in this field seems, at least for the moment, excessive and inexact from a conceptual point of view.

These general observations, are valid even from a legal perspective. What has been mentioned in the previous paragraphs about the role of the EGTC as a new legal frame of reference for sub-national authorities confirms the considerations proposed in this paragraph. In fact, the legal value of this new instrument is fundamentally rooted and derives from the progressive evolution of partial factors rather than from radical changes.

CHAPTER VI

CONCLUDING REMARKS

1. The state-of-the-play and the legal perspectives of territorial cooperation (in particular after the adoption of the EGTC Regulation): objective accomplished or starting point?

Territorial cooperation is a multi-form and multi-dimensional reality. Every attempt to define new legal instruments is not going to change the nature of this phenomenon and is not going to offer a uniform and definitive solution. Namely, theoretically speaking, all the different forms of territorial cooperation, both formal and informal, and all the respective legal sources coexist at European level. Despite this constant multiplicity, the concept of territorial cooperation embodies some steady elements, which have been originated from the progressive evolution of a day-to-day cooperative praxis between sub-national communities. The principle of correspondence between the inner competences and the foreign activities of territorial communities, the qualification of territorial cooperation as a legal dimension outside the frame of international law, the progressive legitimization of sub-national authorities to deal with trans-national relations, the necessary reference to national legislations with regard to the law applicable to the agreements between sub-national subjects and the peculiar public-law-dimension represent only a few common elements of the legal aspects concerning territorial cooperation.

The elaboration of legal notions in this sector has developed following the evolution of sub-national relations and the expansion of an European territorial dimension, with their limits and potentialities. In this regard, the legal approach has been required to modify the traditional notions based on the territoriality as an identifying element of the State for recognizing other centers of interest, mainly

based in the inter-regional or extra-national spaces, i.e. besides the national frontiers¹. In particular, as far as the geographical dimension has rapidly abandoned the idea of the border as a restrictive element, the political dimension has evolved from a mere functional approach towards a more integrated institutional perspective. In this sense, the adoption of some standard frameworks has been also possible because of the progressive changes within the European scenario about the role and the function of sub-national subjects. The development of legal solutions suitable for transfrontier issue has certainly revealed, and still reveals, many difficulties, which are mainly connected to (or hindered by) some national or particular interests, and require strong political commitments².

From a legal perspective, due to the lack of specific national provisions, the development of new European instruments adopted by the Council of Europe and by the European Union is currently the most important result for sub-national authorities in order to develop coherent and permanent transfrontier activities. In particular, the adoption of the Regulation (EC) No 1082/2006 on the European Grouping of Territorial Cooperation (EGTC) has changed the legal approach to territorial cooperation within the national systems. In fact, the Community Regulation has permitted to rationalize the phenomenon of territorial cooperation at national level.

In this perspective it is possible to wonder if the attempt to find standard legal solutions by the European institutions and the adoption of the most recent instruments represent the end of a long process or if future perspectives are still open. As far as the new instruments could be considered as an achieved goal for the Council of Europe and for the European Union, they do not certainly represent the final step of a long path, rather they constitute an important, but partial target during a dynamic process. In particular, the development of territorial cooperation has two big issues to deal with at this moment. On the one hand, the implementation of European instruments within national legal orders is still on the way on and it is quite problematic. In this regard, the questions concerning the legitimization of sub-national authorities and the law applicable to the relations of cooperation have still to

1 See C. BARBATI, G. ENRDICI, *Territorialità positiva. Mercato, ambiente e poteri subnazionali*, cit., p. 20 *et seq.* In this regard see also M.R. FERRARESE, *Le istituzioni della globalizzazione*, Bologna, 2000.

2 See G.N. TOGGENBURG, *La dimensione europea dell'accordo De Gasperi-Gruber: tentativo di approfondimento*, in *Federalismi.it* n. 3/2008, <http://www.federalismi.it> and B. LUVERÀ, *Oltre il confine. Euregio e conflitto etnico: tra regionalismo europeo e nuovi nazionalismi in Trentino-Alto Adige*, Bologna, 1996, p. 9 *et seq.*

cope with the conformation of national dispositions in concrete terms. On the other hand, the effective application of the new instruments is at its very beginning: the new experiences need to be tested and new projects have to be launched. In fact, the CoE's Third Protocol on the ECG has been approved but needs to be ratified in several countries and the EGTC Regulation has not been implemented by some States yet and only a few projects have been put into practice. Thus, the legal approach to territorial cooperation has reached important achievements. However, various issues are still in progress and will be constantly in this condition as far as the matter of territorial dimension in Europe will be a continuously emerging field of experience.

2. Council of Europe and European Union: competition or cooperation?

The Council of Europe and the European Union have been involved in the development of transfrontier/territorial cooperation for several years. These two institutions represent the driving force for the setting down of suitable legal instruments in the field of the relations between local and regional authorities. Different attitudes have been displayed towards the territorial dimension and towards the legal framework of sub-national cooperation. From a general point of view, it could be observed that the development of territorial cooperation is fundamental to achieve the main objectives of the two institutions, namely democracy and good governance for the Council of Europe and the European integration and cohesion for the Community³. Despite these diverse institutional natures, the interventions related to the definition of legal frameworks for cooperation have progressively converged and the most similar approach has verified quite recently with the adoption of the EC Regulation on the European Grouping of Territorial Cooperation (EGTC) and the CoE's Third Protocol to the European Outline Convention on Transfrontier Cooperation establishing the Euroregional Cooperation Groupings (ECG). The fact that such legal means have been adopted at international/Community level is quite emblematic of the legal complications at national level and demonstrates that the

³ See COMMITTEE OF EXPERTS ON TRANSFRONTIER CO-OPERATION, *Similarities and differences of instrument and policies of the Council of Europe and the European Union in the field of Transfrontier Co-operation*, Council of Europe, 2006, p. 33 *et seq.*

intervention of non-state subjects is necessary in order to solve those legal issues going beyond the national approach towards the exercise of sub-national foreign powers. In particular, the EGTC Regulation, displaying its peculiar nature of Community act with direct legal effects, has founded an explicit “rationalization” of territorial cooperation within the national legal orders. In this regard, the EGTC has some added value if compared to the application of the ECG. However, the development of this instrument by the Council of Europe at international level has not to be underestimated. Namely, it has to be kept in mind that the Council of Europe has firstly given a legal value to transfrontier cooperation between territorial communities and that the acknowledgement of a European dimension of territorial cooperation has begun within this framework. On the contrary, the European Union has only recently proposed a real legal approach in the field, thus, overcoming the previous mainly promotional approach towards interregional relations.

Regarding the EGTC and the ECG in particular, despite some fundamental differences given by the nature of the two normative acts – international law and Community law – and despite some differences in the legal details, the concrete functioning of these instruments is, in outline, almost identical and both of them are suitable for almost the same cases. In this sense, the potential concurrence between the two European institutions, notably between the Committee of the Regions and the Congress of the Local and Regional Authorities, could be an object of analysis, mainly because the two instruments are really quite competitive. In particular, the EGTC and the ECG seem to realize, in their different perspectives, the natural evolution of the so-called Euroregions. In this scenario, the Congress has strongly supported the recent constitution of two new Euroregions, namely the Adriatic Euroregion (AE) and the Black Sea Euroregion (BSE), comprehending sub-national authorities of non-EU countries⁴. From this point of view, a diplomatic viewpoint could try to dissipate the idea concerning any kind of conflict between the CoE and the EU. However, as far as some friction between these institutions is perceivable, according to our opinion, the existence of a certain degree of competition is positive if targeting to constructive results. Anyway, a mutual attempt to collaboration is

⁴ These two experiences of transfrontier Euroregions have been connoted as “Council of Europe Euroregions”; see informations available at: http://www.coe.int/t/congress/specific-programmes/Euroregion/default_en.asp.

clearly visible. In this sense, the Council of Europe has demonstrated a particular attention to the analysis of the Community Regulation before the definitive adoption of the Third Protocol in order to facilitate the compatibility of the two normative documents. Conversely, the European Union is aware of the peculiar role played by the Council in the definition of international standards about transfrontier cooperation and has recognized this role also in the Preamble of the EGTC Regulation.

Anyway, it is a matter of fact that the EU, with the adoption of the EGTC Regulation, has earlier completed the establishment of a European standard structure for territorial cooperation. Following this path, the Council has adapted its project to the EU Regulation already in force. A malicious intention could see in this approach of the CoE an attempt to duplicate the provisions established by the Regulation and to establish a direct correspondence between the ECG and the EGTC in order to propose a competitive instrument. Although such an opinion cannot be radically excepted, I consider this approach rather unfruitful. Thus, however the institutional relations are, it would be better to look at the concrete results concerning territorial cooperation and, in this sense, both the institutions, within their respective potentialities and limitations, have permitted a significant and progressive legal acknowledgement to territorial cooperation and to the sub-national dimension according to non-traditional legal categories.

3. Legitimizing sub-national authorities...

The legitimization of local and regional authorities represents a never-ending issue concerning each form of territorial cooperation exceeding the national frontiers. From a substantial point of view, the first fundamental element, which needs to be underlined as a theoretical outcome, is the principle of necessary correspondence between the internal and external competences. Namely, the capacity of sub-national actors to establish territorial cooperation consists in the exercise abroad of the attributions accorded within the respective national systems.

From the procedural point of view, as a form of exception to the exclusive

competence of the State to the exercise of foreign powers, the faculty of sub-national subjects to cooperate with homologous foreign authorities has hardly had a constitutional or legislative acknowledgement within the national systems in Europe. However, in the lack of explicit national provisions, the progressive expansion of alternative solutions and the increasing role of sub-national authorities at European level have brought, firstly, to a substantial tolerance of the phenomenon of territorial cooperation at national level and, secondly, to its progressive legitimization. The various legal systems have shown different reactions and many times the role of Constitutional Courts has been fundamental in order to admit alternative forms of international relations at sub-national level. In particular, the exclusion of sub-national foreign powers from the concepts of international law has opened new paths for the acceptance of territorial cooperation as a legitimate sub-national capacity.

Moreover, the present research has shown that territorial cooperation represents a peculiar aspect within the notion of sub-national foreign power as affirmed within the national systems. Namely, from a substantial point of view, territorial cooperation between sub-national authorities is one of the possible and different examples of sub-national foreign power. However, from a legal perspective, territorial cooperation is not necessarily ruled by the national normative provisions regarding and legitimizing the foreign sub-national relations, but it has traditionally followed autonomous paths from the traditional categories of public law. In this sense, the legal question concerning territorial cooperation has been dealt as a question of public law after a consolidated, but mostly informal or alternative material praxis. Conversely, it is possible to say that every juridical disposition admitting and regulating territorial cooperation recognizes a manifestation of sub-national foreign power. In this regard, the establishment of European standard frameworks have introduced new forms of legitimation for local and regional subjects to undertake interterritorial relations.

Despite the different reactions and adaptations of the national legal systems in relation to the expansion of this phenomenon, only a general approach from the European institutions has been capable to give an answer to the strong demand of a common legal framework for cooperation at sub-national level. If the dispositions of the Council of Europe remain limited from the legal international approach and from

the consequent prevailing position of States, the Community Regulation introduces a hierarchic normative order giving the national law a residual position. In this regard, although the Regulation requires a strong national contribution in order to enable its concrete implementation, national provisions have to cope with Community dispositions first. In particular the Community Regulation on the EGTC has created a new extra-national form of legitimation for sub-national authorities by introducing a new legal structure for cooperation based in Community law. This has been considered as a new right for local and regional authorities. However, such a right, far from altering the inner structures of EU Member States, has its counterbalance in the national constitutional dimension. As far as the legal effects of the Community Regulation are conditioned to the conformity to the national legal orders and the necessary legitimation of sub-national authorities according to their competences under national law, it is possible to speak about a “conditioned obligation” for Member States to approve the establishment of an EGTC on their territory or to give the consent for the participation of a local or regional authority to an EGTC on a foreign territory. This means that, while the respect of national constitutional and legislative dispositions represents a necessary condition for the legitimate creation of an EGTC, the accomplishment of these duties creates an obligation for States not to impede the constitution of this kind of cooperative structures between sub-national subjects. In particular, the fact that the constitution of an EGTC is determined according to the conformity to the national legal orders binds the national supervision towards sub-national authorities with legal parameters and jurisdictionally verifiable norms instead of imposing conditions that pertain to a mere discretionary act of central authorities.

Regarding the different national constitutional structures of the European countries, the phenomenon of territorial cooperation shows that the composite or unitary form of the various States is not really functional to the development of cooperation between sub-national subjects and doesn't mirror the effective quantitative and qualitative dimension of cooperation. With other words, the traditional conception, which considers the more or less wider power of territorial communities to undertake foreign relations depending from the federal, regional or unitary constitutions, is only partially applicable in the case of territorial cooperation.

In this regard, what plays an essential role is the effective and concrete establishment of cooperation, which is not really conditioned from the national constitutional structures, but, rather, by the national dynamics between levels of government and the capacity of legal orders to react to new and dynamic situations.

4 . The crucial role of “meta-legal” principles for the effectiveness of codified provisions

The general capacity of sub-national authorities to become involved in territorial cooperation is concretely resulting from the sum of all the instruments available for this kind of activities. However, as it has been exemplified in the previous paragraph with regard to the EGTC, every legal instrument designed for cooperation between sub-national subjects – at international, Community or national level – requires or provides for different, but constant, forms of state-supervision over the foreign activities of those subjects. This peculiarity has been observed in almost every legal provision regarding territorial cooperation and different mechanisms of control have been settled down, depending on the nature of the legal source concerned. For example, in the case of international law, the state supervision reaches the highest degree, whereas in the case of Community law the relation between Community acts and national legislations is more complex. Generally speaking, the national legal orders determine the attributions of competences to sub-national subjects and establish, or contribute to establish, certain procedural means for the setting up and for the concrete functioning of territorial cooperation. However, a strict definition of competences and procedures doesn't prevent or resolve every possible conflict between levels of government or physiological incongruities of the legal provisions. In this regard, since the political dimension is also involved, a mature relationship between central authorities and sub-national entities seems to be necessary in order to consent a positive development of territorial cooperation.

The adoption of European instruments cannot eradicate these necessary interactions and potential frictions, as far as the contribution of national legislations

and central authorities are in any case required. The implementation of the EGTC Regulation is quite emblematic in this sense and demonstrates the unavoidability of such a complex dimension insofar as an act of central authorities is required to allow territorial cooperation. Thus, in order to manage the relations between tiers of government and to foster mutual cooperation instead of jurisdictional conflicts, the contribution of guiding criteria is fundamental for establishing a balance within the normative provisions and the political dimension. In this regard, it is necessary to realize the limits of strict legal frameworks and to admit the essential role of guiding principles that are not directly binding.

“Meta-legal” principles consist in all those criteria, norms or rules, which are not really – or hardly – enforceable, but which have a strong programmatic or political meaning. With regard to the concrete development of territorial cooperation as an active form of multilevel governance, effective partnership and institutional coordination, two principles with a fundamental role are represented by fair cooperation and subsidiarity. Without resuming the respective origin of these two concepts, it is undoubted that they constitute common components of the European legal tradition of public law. The function of these two principles within the multi-level dynamics could be essential to prevent legal disputes.

In particular, the contribution of fair cooperation and subsidiarity represents an effective and practicable method for managing the competences-exercise and to settle inter-level relations. As far as these “meta-legal” principles (even in case they are set down in normative provisions, like in the EU Treaties) are hardly enforceable, they have also a constructive legal function. Namely, this legal character is visible when they get involved within the procedural phase of normative implementation and could serve as determinant factor for the application/interpretation of legal provisions. For example, regarding the EGTC, the notions of fair cooperation and subsidiarity could be particularly helpful in the relation between central and sub-national authorities with regard to the competences dimension or the approval for the constitution of an EGTC. In this sense, such an approach cannot eliminate the political and legal issues deriving from the existence of different tiers of government. However, a mature utilization of these “meta-legal” criteria can contribute to a better and efficient development of inter-institutional relations, in particular for overcoming

forms of state supervision and control in favor of shared and efficient forms of collaboration. Thus, the application of such concepts could be intended as a matter of opportunity to approach legal issues rather than as mere political arguments.

A step forward in this sense could be recognized in the provisions, established by the EGTC Regulation and by the Third Protocol on the ECG, which enables the participation of States as members of the new cooperative structures. In this regard, this form of membership, although being potentially a supervisory method, could also be intended as a new feasible form of partnership at the same level. A distinction of functions among different authorities should not correspond to an authoritative role towards sub-national subjects.

The development of new instruments of cooperation, in particular the EGTC, shows that the realization of a multilevel governance is not a theoretical exercise or an enthusiastic political conception, rather it is a necessary vision of the contemporary system of powers in Europe, where strict forms of government need to be implemented in the light of feasibility-oriented solutions within the composite and asymmetric European legal panorama⁵.

5. Territorial cooperation: a new “jus commune” or “acquis européen”?

As a conclusion to this research, a general evaluation about the legal status of territorial cooperation from a theoretical point of view is unavoidable. The development of transfrontier relations between territorial communities has begun and has spread out as a material phenomenon. The adoption of legal instruments and the attempt of legal categorizations have been approached later on and are progressively evolving. After a process of more than twenty years (since the adoption of the European Outline Convention in 1980), it is possible to say that a general legal frame is visible in this field. In particular, the recent adoptions of the Third Protocol establishing the ECG and the EGTC Regulation have contributed to a more

⁵ See H. COMTE, N. LEVRAT, *Aux coutures de l'Europe. Defis et enjeux de la coopération transfrontalière*, cit., p. 37-38, and see also J. MAIER, *European Grouping of Territorial Cooperation (EGTC) – Regions' new instrument for 'Co-operation beyond borders'. A new approach to organize multi-level governance facing old and new obstacles*, 2008, published at: <http://www.cor.europa.eu/pages/EventTemplate.aspx>, p. 80 *et seq.*

structured approach. In this sense, the notion of a European sub-national right to territorial cooperation has been progressively established and, although having a multi-dimensional nature, is the product of the existing legal instruments and legal sources involved in this field. Thus, the matter of territorial cooperation between sub-national authorities presents a theoretical background, which is given by the development of the concept both at European and at national level. In particular, this background results from an inductive conceptualization of the different legal dimensions. In this sense, it is possible to speak about a “law of territorial cooperation”, identified as the legal norms regulating this matter, and a “right of territorial cooperation, meaning the capacity for sub-national authorities to develop these activities. Some problematic aspects remain, however, still open.

Qualifying this legal field as a modern form of “*jus commune*” in Europe seems to be, for the moment, quite excessive, as far as it is lacking the main fundamental aspect of uniformity. Of course, some common frameworks have been progressively acquired and some theoretical concepts are becoming a common legal reality among the European States, but fundamental differentiations are still existing. In particular, the strong connections to the single national legal orders and to their peculiar constitutional identities generates a constant factor of differentiation, which constitutes the intrinsic nature of territorial cooperation. Given this, is not possible to forget or to minimize the fundamental progress which has been made in the legal perspective and the peculiarity of the European reality, where the activity of the European Union and the Council of Europe has contributed to define the legal basis of a factual situation. In this regard, the best way to qualify the current general legal nature of territorial cooperation is represented by the concept of “*acquis européen*” in broader terms, thus comprehending all the distinctive and dynamic characters, praxis and legal aspects of territorial cooperation in Europe. In this sense, all the acquired experiences, which have been achieved during the evolution of territorial cooperation between sub-national authorities, represent a fundamental contribution to the actual state of the matter and represent at the same time the ground for future evolutions.

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