

# Statuut voor Limburg?

Final Report – project phase 1 (EN)

9 November 2018



Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM

# A Statute for Limburg?

Exploring the legal and practical possibilities of interregional cross-border cooperation in the Dutch border region

Final report – project phase 1 (English version)

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Het *Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM* is de spil van wetenschappelijk onderzoek, advisering, kennisuitwisseling en trainingsactiviteiten omtrent grensoverschrijdende samenwerking en mobiliteit.

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## Abbreviations

BGTC	Benelux Grouping for Territorial Cooperation
CBC	Cross-border cooperation
CBIC	Benelux Convention on cross-border and interterritorial cooperation
CCNR	Central Commission for the Navigation of the Rhine
ECBM	European Cross-Border Mechanism ( <i>EC proposal</i> )
EGTC	European Grouping of Territorial Cooperation
ECG	Euroregional Co-operation Grouping
ETC	European Territorial Cooperation (Interreg)
FMC	Free Movement Council of the Nordic Council of Ministers
FMD	(Nordic) Free Movement Database
ICPR	International Commission for the Protection of the Rhine

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## Executive Summary

### Objective and problem statement (Chapter 1)

The Provincial Council of Limburg (*Provinciale Staten*), the regional parliament, is seeking more discretion regarding cross-border cooperation (CBC) to establish a closer cooperation with the, Flanders, North Rhine Westphalia (NRW), and Walloon Region. At the Province's request, the Institute of Transnational Euregional cross border cooperation and Mobility (ITEM) is investigating the legal and practical possibilities of enhancing interregional cross-border cooperation for the Dutch border regions. The aim of this project report is to map the existing instruments that allow regional or local public entities in the EU to deviate from applicable laws for solving cross-border problems.

In contrast to these three direct neighbours, Limburg does not count among the so-called “regions with legislative power”. While the Dutch Province avails over certain decision-making and executive powers, final authority rests with the national government and legislature. The Belgian and German regional entities in turn possess considerable legislative powers and in that context also the capacity to conclude international agreements regarding certain policy fields. The relations for dealing with transfrontier problems along the border of Limburg are therefore necessarily asymmetrical. The Hague has the prerogative for concrete legal agreements with the neighbouring regions. This asymmetry gives rise to several research questions (Section 1.2) that this report aims to answer.

Throughout the report, the analysis is complemented with illustrative text boxes providing more detailed insights into practical examples of cross-border issues and short case studies on CBC initiatives.

### Assessing regional “cross-border action capacity” (Chapters 2 and 3)

We intend to determine the extent of (legal) “*action capacity*” that exists in a given region to solve *cross-border* problems. For that purpose, we first review the possibilities within the Dutch constitutional system. Next to a summary of the division of competences between the three administrative levels of the Netherlands (central, provincial, municipal), we take a closer look at the system's available legal tools that allow for experimentation (i.e. deviation from general rules): legislative opening clauses (notably, differentiation and experimentation clauses), and framework laws.

Then, we examine the rather complex distribution of competences for the country's neighbours, Belgium and Germany respectively. This is to show the extent of powers vested within the respective regions with legislative power. On that basis, we provide a comparative overview (matrix) of legislative/regulatory competences for addressing specific cross-border problems per policy field.

### Multilateral instruments that facilitate (interregional) cross-border cooperation (Chapter 4)

Chapter 4 studies different settings – at European and the regional level – where two or more Member States are cooperating systematically and inter-regionally to solve cross-border issues. We focus on a selection of examples. In each case, we take a short look at the organisational structure, the foundational legal instruments and institutional competences. Emphasis will be on discussing the respective innovative solutions for CBC that already exist in Europe to solve cross-border problems.

Structured into two parts, the study deals first with European level where both major players, the EU and the Council of Europe, have been building up respective expertise and specialised instrumentation for decades. A short review of EU cohesion policy and the available instruments in that context will provide the basis for discussing the European Commission's latest initiative for setting up a new "mechanism" to tackle administrative and legal obstacles to CBC (see below). We also take a look at the state of play in the Council of Europe, which pioneered the provision of an international legal basis for CBC already in the 1980s and has since further developed its toolbox increasing the intensity of cooperation.

In the latter case, however, the availability of these tools is of course always dependent on the respective member countries to have implemented the legal instruments on the Council of Europe. In that context, the adoption of the EGTC-Regulation by the EU in 2006 formed an important addition to the Union's toolbox that previously only focused on financial support to CBC via INTERREG. In pursuit of enhancing European social, economic and territorial cohesion, the EU thus gained an actual legal basis to provide also institutional support to local and regional actors. Here, the evident advantage over the Council of Europe's instrument is the direct applicability of the EGTC-Regulation. In recent years, however, it has become more and more apparent that it is actually cross-border obstacles of a legal and administrative nature that inhibit CBC initiatives and concrete project development most. This moved the European Commission in spring of this year to propose a new mechanism, which is discussed further below.

The second part of Chapter 4 contains case studies on regional CBC arrangements. On the one hand, we examine forms of *multilateral international cooperation* – notably, the Benelux Union, the Nordic Free Movement Council, and the two organisations set up to regulate the various aspects of river management, the International Commission for the Protection of the Rhine (ICPR) and the Central Commission for the Navigation of the Rhine (CCNR). On the other hand, we study two interesting initiatives of *multilevel interregional cooperation* – namely, the German-French-Swiss Upper Rhine Conference and the Austrian-Italian Three Provinces' Parliament. In these cases, particular attention is paid to the range of cooperation instruments available in the various regions to elucidate the different models that exist for systematically dealing with cross-border issues in a multilateral/multilevel setting.

### **A model for Limburg to address cross-border problems more efficiently? (Chapter 5)**

From the extensive overview of various European, multilateral-international and interregional multilevel cooperation arrangements for strengthening CBC, the most promising initiatives are selected to deepen the discussion on enhancing regional cross-border action capacity. Chapter 5 thus examines what could be a workable model for enhancing the capacity of Dutch border regions, and especially of the Province of Limburg, for dealing with cross-border problems more efficiently.

Accordingly, we examine further the innovative legal possibilities offered within the existing Benelux framework; the efficient governance set-up of the Nordic Free Movement Council and its obstacle elimination system; and the comprehensive integrated territorial development strategy of the Upper Rhine Trinational Metropolitan Region. Assessing the extent to which an initiative seems capable of serving as an example for other border regions for jointly dealing with cross-border problems effectively, we finally also provide an extensive discussion of the new European Cross-Border Mechanism proposed by the EU Commission.



Based on the preceding findings, the multilateral arrangements that we have identified above and that have been designed to enhance CBC and deal with cross-border obstacles in an institutionalised way, can be summarised as follows:

- *The signing of inter-state agreements* (such as the Treaty between France and Switzerland as a legal basis for the EurAirport Basel-Mulhouse-Freiburg; or the Treaty of Anholt as a basis for the Euroregion Rhine-Waal);
- *Institutionalising CBC, using an organisational form/creating a new public body* – based on European law (EGTC) or international law (Madrid Convention/Council of Europe, or the Benelux CBIC Convention/BGTC), whereby certain powers can be transferred to the new transnational body to facilitate cross-border projects and cooperation;
- *Setting up horizontal cooperation initiatives and networks based on existing multilateral structures* – either issue- or sector-specific (such as in the case of the Nordic FMC), or in the form of a territorial development planning for the entire cooperation area, including policy-specific cross-border strategies on the removal of transfrontier obstacles (such as the EGTC Lille-Kortrijk, the Upper Rhine Conference; and the two Rhine Commissions);
- *Using existing legal tools (notably, Benelux instruments – namely, decisions and agreements in combination) to apply concrete practical solutions* to conflicting national legal or administrative provisions that hinder the expedient realisation of cross-border projects, either through appropriate purposive interpretation and/or through selective targeted deviation from national legislation, without requiring an adaptation of the latter (see the example of the Benelux ALBERTKNOOP-Decision).

## Conclusion and recommendations (Chapter 6)

Based on the preceding selection of promising CBC initiatives, the conclusion evaluates the different models in terms of their potential of offering workable solutions for Dutch border provinces generally and the Province of Limburg specifically to enhance their (legal) “action capacity” for dealing with cross-border problems more efficiently. In that respect, we advance the following recommendations.

What type of legal instrument could be effective for the Province of Limburg to overcome problems related to legal obstacles in CBC? How could Limburg receive a certain mandate to play an active role in the solution of legal border obstacles? In essence, we see two different ways: the first is to give Limburg (or Dutch border provinces in general) a specific role in the application of existing multi- or bilateral instruments at the Benelux or EU level (see recommendations 1,2,3). This could include a vital role related to the EU instrument under debate (cross-border mechanism).

The second option would be the establishment of a specific national legal instrument that would provide the Province of Limburg (or all border provinces) with innovative tools to adapt Dutch legislation in the context of border obstacles (see recommendation 4).

We recommend as well analysing in more depth two recent specific cases, in order to find out which of the discussed instruments could be most effective to overcome legal obstacles. This refers to the recent merger of the harbours of Gent, Terneuzen and Flushing (North Sea Port) and to the plans of a joint paediatric surgical centre (Aachen/Maastricht/Liège).

## 1. Introduction

### 1.1 Objective and background

On 11 May 2017, the Provincial Council of Limburg (the region's parliament) adopted a motion<sup>1</sup> that aims to establish a closer cooperation with the Walloon Region, Flanders and North Rhine Westphalia (NRW). The Province, in fact, wishes to obtain more discretion regarding cross-border cooperation (CBC). More precisely, it aims to receive a *special mandate* from the national Government that would **permit Limburg to interact directly with the sovereign or mandated governments across the border as an “advanced post”**. This means that Limburg would in fact initiate and execute actions of CBC at the provincial level, while The Hague were (merely) responsible for supervising them. Such a special mandate is considered necessary to overcome the various cross-border obstacles of a legal and administrative nature that currently burden transfrontier cooperation and mobility along the Dutch border.

A so-called “Statute for Limburg” would provide the legal basis for these new and reconfigured relations between the national Government and the Province. It would bestow the latter with certain power to engage in transfrontier relations and to tackle cross-border problems *semi-autonomously*. Such a division of labour would be unprecedented in the Netherlands. A thorough study of the Province's proposition is therefore indispensable, as it will provide useful information and a fruitful basis for advancing the discussion on this initiative. It will also provide constructive recommendations as to how such a Statute could take shape.

At the request of the Limburg Province, the Institute of Transnational Euregional cross border cooperation and Mobility (ITEM) is investigating the legal and practical possibilities of interregional cross-border cooperation for the Dutch border regions. The aim of this project report is **to map the existing instruments that allow regional or local public entities in the EU to deviate from applicable laws for solving cross-border problems.**<sup>2</sup>

ITEM is a centre of expertise that operates at the convergence of research, counselling, knowledge exchange, and training activities in the domain of cross-border mobility and cooperation. The countries of the European Union are confronted with great challenges following the increasing globalisation of the economy and the internationalisation of the current and future society. ITEM is an interdisciplinary institute which was initiated by Maastricht University (UM) in cooperation with Zuyd Hogeschool, NEIMED, the (Dutch) province of Limburg, the city of Maastricht and the Meuse-Rhine Euregion.

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<sup>1</sup> Motion 835, Provincial Council of Limburg (Van den Akker and Vaessen), concerning ‘Limburg as Dutch advanced post’, 11 May 2017.

<sup>2</sup> This background report is written in English because it is intended to provide a basis for the liaison and discussion with other key stakeholders at local, regional, national, and EU level outside the Netherlands. In fact, the question of empowering border regions by means of removing legal and administrative obstacles to cross-border interaction is also high on the European agenda (and elsewhere).

## 1.2 Problem statement

This report represents an exploratory study. It investigates whether the Province of Limburg needs a specific statute to tackle cross-border issues. It is important, though, to note upfront that the Netherlands is a unitary state. Even though it has undergone processes of considerable decentralisation, legislative power is vested at the central level. This means, even though the Province of Limburg avails over certain decision-making and executive powers, final authority rests with the national Government and the country's legislature, the Second Chamber (*Tweede Kamer*).

In contrast, the direct neighbours of Limburg – Flanders, Wallonia, and NRW – count among the so-called regions with legislative power. The **relations for dealing with transfrontier problems along the border of Limburg are therefore necessarily asymmetrical**. While practical day-to-day issues can certainly be discussed at *interregional* level directly, legal **agreements with the neighbouring regions will have to be made by The Hague**. This asymmetry gives rise to a couple of questions (see below) worth including in the subsequent analysis of the possibilities for a Statute for Limburg.

Against this background, we will explore what form such a special mandate could take (considering especially the experience with similar initiatives elsewhere in Europe), and, finally, what are the prospects of this initiative being successful (considering the legal and political questions it involves). Accordingly, we will address the following research questions:

- I. How much room does the Dutch political constitutional system leave the border regions for tailor-made solutions to remove cross-border obstacles? (Chapter 2)
- II. Which legislative powers are available at regional level in the Netherlands' neighbour countries, Belgium and Germany? How can we determine what kind of (legal) "*action capacity*" exists in a given border region to solve *cross-border* problems? (Chapter 3)
- III. What kind of cooperation arrangements (governance structures and legal instruments) involving two or more European countries do already exist to address cross border issues? What kind of competences and legal solutions do these entail? (Chapter 4)
- IV. Can the cooperation arrangements, analysed above, provide a model for Limburg to enable the Dutch Province address cross-border problems more efficiently? Can we make recommendations about the applicability, feasibility and functionality of the existing tools (case studies)? (Chapter 5)

## 1.3 Structure of the report

Given the study's exploratory nature,<sup>3</sup> the subsequent investigation will start by acquiring a sense of the main problems, which Limburg is (potentially) facing in cross-border mobility and cooperation and where the competences are vested for designing appropriate solutions. Chapter 2 will provide a general overview of the administrative division in the Netherlands and more specifically of the

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<sup>3</sup> The analysis of possibilities does not aim to be exhaustive; it is rather the intention to provide a constructive overview of illustrative best practices as a basis for discussion.

distribution of competences between the national government and the regional and local level. It will also take a closer look at the Dutch political constitutional system to assess how much room it offers/allows for tailor-made solutions at local and regional level.

In fact, we intend to determine what kind of (legal) “*action potential*” exists in a given region to solve *cross-border* problems. For that purpose, we will try to map out for the Dutch border regions a comparative overview of legislative/regulatory competences for addressing specific cross-border problems per policy field. Having reviewed the competence distribution for the Netherlands in the second chapter, Chapter 3 will do the same for country’s neighbours, Belgium and Germany. On both sides, the Belgian and the German one, we find in fact so-called “regions with legislative power”. On that basis, then, we will try to depict the said comparative overview in a comprehensive matrix.

On that basis, Chapter 4 will study different settings – at European and regional level – where two or more European countries are cooperating systematically and *interregionally* to solve cross-border issues. More precisely, we will study which (multilateral) governance structures and legal instruments already exist to that effect and what kind of competences and innovative solutions these entail. For illustration, we will include text boxes with concrete case study examples.

Chapter 5 will then assess whether these cooperation arrangements discussed above could possibly provide a model for Limburg and enable the Dutch Province to address cross-border problems more efficiently. We will look at the more promising initiatives that emanate from the multilateral CBC arrangements discussed in Chapter 4, and set out for a preliminary evaluation of the applicability, feasibility and functionality of these initiatives.

The final Chapter 6 will conclude with a first estimation if these initiatives studied above can be of any use in designing the type of special mandate the Province of Limburg is seeking from the national Government to address cross-border issues. This assessment will be based on an appreciation of what prospects this initiative may have for being successful (considering the legal and political questions it involves). Accordingly, we will provide some recommendations on the suitability for Limburg to adopt a certain governance structure or to lobby for legal change in order to realise its ambitions for improving cross-border cooperation and mobility.

## 2. Administrative division of the Netherlands

To begin, it is useful to acquire first a sense of the main problems that Limburg is (potentially) facing with regard to CBC, according to different policy fields. At the same time, it will be crucial to know to what extent a Dutch border province like Limburg would then also be competent to act in order to remove the respective cross-border obstacle. Therefore, it is important to acquire first a general overview of the administrative division in the Netherlands and more specifically of the distribution of competences between the national government and the regional and local level. Additionally, it will be interesting to review briefly what impact decentralisation (and other circumstances, like the existence of the Kingdom’s overseas territories) has had on the Dutch political system in terms of making room for tailor-made solutions at local and regional level.

In 2017, the Dutch Province of Limburg celebrated the 150 years of its existence. This occasion incited Members of the Provincial Council to propose a Statute that would accord Limburg more discretion in

designing and executing the CBC with its neighbour regions (Wallonia, Flanders, and NRW).<sup>4</sup> Next to dedicating this bold initiative to the honourable historical anniversary, the Council Members called on the Provincial Executive (*Gedeputeerde Staten*) to introduce this proposition into the on-going reflections of the State Commission on the Dutch Parliamentary System (*Staatscommissie Bezinning Parlementair Stelsel*, hereafter: the State Commission) that had been set up a year earlier.<sup>5</sup>

In order to evaluate the feasibility of the Provincial Council's "advanced post"-initiative, some basic information about the division of administrative competences in the Netherlands will be helpful. That is, before we can know what is missing, we must establish what we already have. This section will therefore sum up the main features of the Dutch administrative system; consider the emergence of experimental clauses in Dutch legislation; and, then, provide some more details on the work of the State Commission.

## 2.1 Division of tasks and scope of provincial competences

Like most countries in the EU, the Netherlands is in principle a *unitary state*<sup>6</sup>. However, this classification does not exclude that the Kingdom of the Netherlands in fact brings to light a hybrid form of state organization given the existence of its Caribbean territories. Some European centralist states such as Italy and Spain actually have a number of autonomous regions on their territory (such as South Tyrol or Catalonia). In fact, we also see a **hybrid form of political organisation** in the **Kingdom of the Netherlands**:

- Some of the overseas territories have been recognized as "countries" of the Kingdom of the Netherlands, with a status of *sui generis* autonomy;<sup>7</sup> while
- Others - the so-called BES islands - are considered as special "public bodies" and are part of the country of the Netherlands, which itself belongs to the Kingdom of the Netherlands (with the possibility of becoming a "municipality" of the Dutch State).<sup>8</sup>

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<sup>4</sup> Motion 835, Provincial Council of Limburg (Van den Akker and Vaessen), concerning 'Limburg as Dutch advanced post', 11 May 2017.

<sup>5</sup> Letter from both houses of the Dutch Parliament (*Staten-Generaal*) to the Prime Minister, the Minister of General Affairs on the establishment of a State Commission on the reflection of the Parliamentary System, Parliamentary Papers No. 34430-3, The Hague, 14 July 2016.

<sup>6</sup> The term 'unitary' means the formation of a single or uniform unit. In the political context, it refers to a system of government or organisation in which the powers of the constituent parts are placed in a central body. See <https://en.oxforddictionaries.com/definition/unitary> (accessed 13/09-2018).

<sup>7</sup> Article 1 of the Statute of the Kingdom of the Netherlands provides that the Kingdom of the Netherlands shall include the countries of the Netherlands, Aruba, Curaçao and Sint Maarten.

<sup>8</sup> The law of 1 November 2017 has added a new article 132a to the Dutch Constitution. It constitutes the constitutional basis for the amendment of the Statute of the Kingdom of the Netherlands. The islands of Bonaire, St. Eustatius and Saba (BES-Islands) therefore officially became part of the Netherlands on 10 October 2010 and therefore fall under the Dutch legal system. The reason for this development was the referendums held in early 2000 on five islands of the former Netherlands Antilles on the future of the political subdivision of the Netherlands Antilles. See <https://www.nederlandrechtsstaat.nl/grondwet/artikel.html?artikel=154&category=&author=&keyword=&1=1####article154> (last viewed on 10-10-2018).



Nevertheless, for its territory in Europe the Dutch state is undoubtedly regarded as a unitary state (especially in comparison with, for example, its European neighbours).

### 2.1.1 Distribution of competences

The (European) Dutch State is considered a *decentralised* unitary State.<sup>9</sup> In 2018, the country counts 12 provinces and 380 municipalities. There is no fixed division of labour between the different administrative levels. Consequently, different levels of government can have a role in the same policy area. The Dutch legislator determines the division of tasks. The possibility of (legislative) intervention by the higher authority (*hoger gezag*) limits the autonomy of the decentralised territorial authorities.<sup>10</sup> In particular, **according to Article 3(1)(b) of the Statute for the Kingdom of the Netherlands, external relations fall within the explicit competence of the Kingdom** (see point 2.1.2 below).

This concept of a “decentralised unitary State” implies a division of competences between several *equivalent* levels of administration. The Dutch Constitution (*Grondwet*) guarantees neither a predefined division of roles nor a delimitation of tasks among these levels. This is a crucial difference with regard to federal systems where both the predetermined roles of the different administrative levels and the functional delimitation between the different administrative levels are monitored by a constitutional court. This, however, is not the case in the Netherlands. Here, one cannot deduce from the Dutch Constitution a ranking of the regional and local authorities in the material sense: it neither defines the provinces as the middle tier of government, nor does it determine that the municipalities represent the local tier of the administration. The Constitution therefore leaves the legislator considerable discretionary power to determine the organisation of the public administration through the (re)allocation of tasks.

There are therefore three equal levels of government with open management structures (the State, the province and the municipality) side by side. In fact, the three types of administrative authorities are neither considered **as a hierarchy nor as opposing authorities**.

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<sup>9</sup> Article 124 of the Dutch Constitution. See also: Article 132 of the Dutch Constitution, which emphasises the *unitary* nature of the Netherlands. This article provides a basis for the legal structure of provinces and municipalities, the supervision of their administrations and the influence of the state on their finances. The fact that the Netherlands is a *decentralised* unit is expressed in many articles of chapter 7 of the Dutch Constitution.

See <https://kennisopenbaarbestuur.nl/thema/bestuurlijke-indeling-van-nederland/> (last accessed 05-10-2018).

<sup>10</sup> Article 124 of the Dutch Constitution, the full text reads as follows:

1. The powers of provinces and municipalities to regulate and manage their own internal affairs are delegated to their own internal affairs to their administrative bodies.
2. By or under the law of parliament, provincial and municipal administrative bodies may be required to ensure regulation and administration.

Table 1: Division of tasks between the three levels of government in the Netherlands<sup>11</sup>

National government	Province	Municipality
<b>12 ministries prepare national policy and legislation</b> <b>Executive services (police, army, inspections)</b>	Spatial planning (towns and villages, industrial sites, industrial sites) and structural planning ( <i>structuurplan</i> ) <sup>12</sup> Nature & recreation Provincial infrastructure (construction & maintenance) Environment (implementation of national environmental legislation, e.g. clean swimming pool water, safe transport routes for hazardous substances) Implementation of soil, air and water legislation (Financial) Supervision of municipalities (on municipal budget & annual accounts) Supervision of water boards Ensure access to emergency ambulance transport (within 15 minutes)	Registration of residents <sup>13</sup> Public services (IDs, licences) Social domain (extended until 01-01-2015) <sup>14</sup> : - Social assistance; <sup>15</sup> - Social support; <sup>16</sup> - Youth care; Accommodation of schools, financial support for pupils in need of specific support Zoning planning ( <i>bestemmingsplan</i> ) Supervision of housing construction, agreements with housing corporations Construction and maintenance of local infrastructure (streets, roads, footpaths and cycle paths) Implementation of environmental management (e.g. waste separation) <sup>17</sup> Award of grants (e.g. to swimming pool or library) Ensuring access to industrial estates

### 2.1.2 The scope of the provincial powers

The following study is guided by the question of how the province of Limburg can expand its room for manoeuvre in cross-border relations. The focus is on identifying instruments or ways in which Limburg can *deviate from national legislation to solve cross-border problems*. It is therefore useful to first identify **the policy areas in which Limburg is competent to act**. The division of tasks between the three administrative levels is currently organised as shown in Table 1 above.

It has already been mentioned above that in the Netherlands the autonomy of the decentralised territorial authorities is limited by the supervision of the legislature. This supervisory power is intended to prevent regional and local authorities from seriously failing in their duties. Gross negligence could occur when the authority concerned acts contrary to the law or the public interest

<sup>11</sup> Based on <https://www.rijksoverheid.nl/onderwerpen/themas/overheid-en-democratie> (last accessed 05-10-2018).

<sup>12</sup> Spatial Planning Act, 20 October 2006.

<sup>13</sup> *Basic records of inhabitants*.

<sup>14</sup> *Participation Act (Pw)*, 2 July 2014.

<sup>15</sup> (Amended) *Work and Assistance Act (Wwb)*, 9 October 2003.

<sup>16</sup> *Social Support Act 2015*, 9 July 2014.

<sup>17</sup> *Environmental Management Act*, 13 June 1979.

or fails to comply with its legal obligations (*taakverwaarlozing*).<sup>18</sup> Such a neglect of duties is actually of little importance in practice and in this context; however, the more significant is the power of the Crown (the government) to annul decisions (*besluiten*) of provincial and municipal councils.

The generic supervision between the national government, the provinces, the municipalities and the water boards (i.e. the system of inter-administrative supervision in the Netherlands) has two possibilities: namely, spontaneous annulment (*spontane vernietiging*) and substitution (*indeplaatsstelling*).<sup>19</sup> In order to strengthen cross-border cooperation at regional level, therefore, the possibility of spontaneous annulment is undoubtedly important. The Dutch Provinces Act provides:

*A decree or a non-written decision aimed at any legal consequence of the provincial government can be annulled by royal decree.*<sup>20</sup>

This means that as soon as local authorities decided to pursue their own foreign policy, such decision would in principle be annulled by the Crown because of the Kingdom's prerogative on foreign relations. However, the Dutch Constitution provides that such a decision *can* be annulled<sup>21</sup>, so that the Crown's power to annul provincial and local decisions must be regarded as a *discretionary* power.<sup>22</sup> In fact, a broad concept is used here with regard to the nature of decisions that can be annulled, namely 'a decision or a non-written decision aimed at any legal effect'.<sup>23</sup> There are also two constitutional grounds for annulment, namely if a decision is deemed to be 'contrary to the law or to the general interest'. In the former case, the notion "contrary to the law" covers all legislation (including EU law, constitutional law and lower level regulations) and general principles of law. In the second case, the notion of "conflict with the general interest" must be understood as conflict with the

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<sup>18</sup> Article 132, paragraph 5, of the Dutch Constitution.

<sup>19</sup> In 2012, the Provinces and Municipalities Acts were amended to simplify the system of administrative supervision: it was considered desirable to 'reduce the supervision of provinces and municipalities and, to this end, to review the rules in the Provinces Act and the Municipalities Acts on neglect of duties and suspension and annulment and render them better applicable, so that special forms of supervision of provinces and municipalities can lapse in other laws'. See Act of 24 May 2012 amending the Provinciewet, the Gemeentewet and any other acts in connection with the revitalisation of the generic interadministrative supervision (Act on revitalisation of generic supervision), in force since 01-01-2013. The specific forms of supervision were laid down in a special law and only applied in that context.

<sup>20</sup> Article 261 of the Provinces Act, first paragraph. The original article reads; '*Een besluit dan wel een niet-schriftelijke beslissing gericht op enig rechtsgevolg van het provinciebestuur kan bij koninklijk besluit worden vernietigd.*' For municipalities, Article 268 of the Municipal Act lays down the provisions on suspension and annulment.

<sup>21</sup> The fourth paragraph of art. 132 of the Constitution forms the basis for the right of annulment: Annulment of decisions of these administrations can only take place by royal decree because of violation of the law or the general interest. Art. 132 regulates the organisation, composition and authority of local authorities in the Netherlands. The original provision of Art. 132(4) GW reads: '*Vernietiging van besluiten van deze besturen kan alleen geschieden bij koninklijk besluit wegens strijd met het recht of het algemeen belang.*'

<sup>22</sup> Broeksteeg 2009, p. 515-516

<sup>23</sup> The purpose of an annulment is to ensure the unity in the representation of decentralized tasks. Therefore, the following minimum requirements apply to a local level decision that is proposed for annulment: After the end of a suspension, it can no longer be annulled; and when a decision still needs to be approved or there is still the possibility to appeal against a decision, no annulment can take place. In practice the annulment-instrument is often requested as an alternative form of legal protection, namely when the time limits for objection and appeal have expired. However, the spontaneous annulment is not intended to serve as a means of circumventing the administrative procedure. See <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vi5u8xre2rz4> (accessed 07-11-2018).

interests of the municipality, the province or the State respectively and the pertinent interests of the inhabitants belonging to these levels of government.<sup>24</sup>

As a result of the above findings, it can be concluded that the central government must *authorise* Limburg to maintain its own foreign relations. **If the ambitions of the border province(s) to strengthen cross-border cooperation amounted to pursuing their own foreign policy, the government could quickly put a stop to such endeavours with the instrument of spontaneous annulment.** As a result, the Administrative Jurisdiction Division of the Dutch Council of State (*Raad van State*), the highest general administrative court in the Netherlands, can still cancel such an annulment decision by the government if the State Council is of the opinion that the government did not weigh the interests involved in the Royal Decree in question and that the decision was not properly motivated.<sup>25</sup>

To this can be added the following further explanation regarding the province's own powers and the legal possibilities to use them to adapt regulations in the case of cross-border cooperation:

*The Provincial Council's statutory competence is first and foremost limited to the territory of the Province. It goes without saying that provincial decrees only apply in those provinces in which the relevant parliament has issued them. In addition, an **upper limit** applies to provinces where their statutory activities interfere with national legislation. For municipalities, the provincial regulations that are relevant to them are added to this limit. Without making a distinction between autonomous regulations or regulations that have been advanced by virtue of co-government, both the Dutch Provincial and Municipal Acts contain provisions from which the upper limit can be derived. The bottom line is that regulations will automatically lapse if new, higher-level regulations are created on the same subject. In that case we speak of “**anterior regulations**”. If the term “**posterior regulations**” is used, the regulation comes into being as soon as there are already higher regulations on the same subject. Posterior regulations are only permitted if they do not conflict with higher law. **Therefore, if there is a legal or administrative impediment to cross-border projects and that impediment arises from the application of higher (than provincial) regulations, then this cannot be deviated from by means of provincial regulations.** [Emphasis added]<sup>26</sup>*

## 2.2 Reflections on the Dutch Parliamentary System

As mentioned above, the Provincial Council intended to convert the proposition of making Limburg an “advanced post” for CBC into a contribution for the on-going reflections of the State Commission on

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<sup>24</sup> For example, a decision of the municipality of Driebergen-Rijsenburg was annulled because it was contrary to the general interest (Royal Decree of 20 December 1984, Bulletin of Acts and Decrees 1984, No 691 (Driebergen-Rijsenburg)) concerning municipal policy for low-income residents, which was contrary to the national income policy. See other examples of annulments (in the revised system of interadministrative supervision are) in the Policy framework suspension and annulment. See <https://www.rijksoverheid.nl/documenten/kamerstukken/2010/07/09/beleidskader-schorsing-en-vernietiging> (accessed 07-11-2018).

<sup>25</sup> ABRvS 22 April 2009 (Spontaneous destruction of Landsbanki), JB 2009, 144, with the exception of J.L.W. Broeksteeg.

<sup>26</sup> We owe this detailed explanation to the legal advice (regarding this research report) of Mr P.E.H. (Pieter) Sels, Legal Matters and Procurement, Province of Limburg.

the Dutch Parliamentary System. This State Commission is examining whether in the light of numerous new challenges the parliamentary system of the Netherlands is sufficiently future-proof.<sup>27</sup> It is expected to publish its recommendations by the end of 2018.

In June 2018, the State Commission has issued an intermediate report with preliminary solutions to the following problems, which it had already identified in an earlier communication.<sup>28</sup> To *strengthen democracy in the Netherlands*, it proposes, for instance, complementing the current system of representative democracy with more safeguards of direct democracy (e.g. a binding corrective referendum as last resort) or facilitating voting from abroad. To *strengthen the rule of law*, it proposes giving a more prominent role to the Dutch Basic Law (e.g. by creating a Constitutional Court) and putting a maximum on donations to political parties, including from abroad. To *strengthen the Dutch Parliament*, the State Commission recommends setting up means to help resolve conflicts between the First and the Second Chambers of Parliament (e.g. joint commission)<sup>29</sup> and adopting **new rules for situations in which national politics only has limited say – notably, regarding prospective EU policy, further decentralisation of competences towards the regional and local level, and privatisations.**

In the context of this study, the State Commission's proposal to draw up Decentralisation Framework Act (*Kaderwet op decentralisaties*) could potentially provide a window of opportunity. In view of the rather far-reaching process of decentralisation undertaken in the Netherlands in recent years, the State Commission recommends that such a framework law could help remedy some of the unintended consequences that this process has brought about. In this respect, it specifies a number of **fundamental principles which the decentralisation process should live up to**. It advises that this Framework Act would then ascribe the Ministry for the Interior (MinBZK) a central coordinating and supervisory role to ensure that 'the toolbox of regional and local authorities, to whom competences are being devolved to, is in order'.<sup>30</sup>

Gaining more room for manoeuvre to address cross-border obstacles, as sought after by Limburg, can undoubtedly be classified as an additional *desired* step in the process of decentralisation in the Netherlands. If we consider the State Commission's proposal of a new Decentralisation Framework Act to have realistic prospects of materialisation, then it would certainly be recommendable that such law would explicitly include reference to and consideration for the interests of the Dutch border regions and the (possible) instruments for cross-border experimentation.

However, among Dutch legal academics there has been quite some discussion regarding the **legitimacy** of such framework laws as well as regarding other legal means of flexibilisation, such as so-called differentiation clauses. It is sensible to briefly review this discussion in order to develop an understanding of Limburg's prospects for experimentation within the Dutch constitutional system.

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<sup>27</sup> Letter from both houses of the Dutch Parliament (*Staten-Generaal*) to the Prime Minister, the Minister of General Affairs on the establishment of a State Commission on the reflection of the Parliamentary System, Parliamentary Papers No. 34430-3, The Hague, 14 July 2016.

<sup>28</sup> See <https://www.staatscommissieparlementairstelsel.nl/actueel/nieuws/2018/06/21/tussenstand-staatscommissie-mogelijke-oplossingen-om-democratie-rechtsstaat-en-parlement-te-versterken> (accessed 09-09-2018).

<sup>29</sup> Note that on 18 July 2017, the Provincial Executive (*Gedeputeerde Staten*) of Limburg sent a letter to the State Commission requesting a greater role for regional interests in both chambers of the Dutch Parliament.

<sup>30</sup> Staatscommissie Parlementair Stelsel, Tussenstand, d.d. 21 juni 2018, at 110.



## 2.3 Legal tools for experimentation: framework laws and differentiation clauses

Limburg's ambitions for gaining more autonomy in shaping cross-border relations are based on the **assumption that national legislation, including when it results from EU law making, often does not take the particular conditions of border regions into account**. Consequently, the application of these laws itself may create obstacles for cross-border interactions, particularly when it collides with the application of the laws of the neighbouring state (for example, in the case of technical standards, eligibility requirements etc.). To **overcome such conflicts**, it would therefore be expeditious for the border region to be able to “experiment” with regulatory solutions. Meaning that the local, or in this case the provincial authority would have **room to deviate** – in consideration of the neighbour's legislation – from the applicable national legislation to formulate an efficient solution to the cross-border problem.

To be sure, the idea of “legal experimentation” is not new in the Netherlands. In general, the Dutch Government has an interest in increasing the adaptive capacity of the public administration and ensuring that legislation is more “future-proof”.<sup>31</sup> To enable such adaptability and to ensure the efficiency of regulatory output, flexibility is introduced into the process of legal standard setting itself. This means, where necessary, legislation is fitted with possibilities of derogation (such as including specific waivers or exceptions, adopting a programmatic approach, or deviating by lower level regulations).<sup>32</sup> These derogative tools then enable the administration to use implementation decisions to deviate – after a broad, integral weighing of the interests involved – from material and procedural norms.

It may well be in the interest of the administration to increase the speed and efficiency of the policy-making process in this way. From the perspective of safeguarding the democratic rule of law, however, this trend towards flexibilisation of the law-making process raises important reservations. In the following, we will discuss three ways of increasing regulatory flexibility. First, we will look at differentiation and experimentation clauses and the reasons for including them in legislation. Second, we will briefly recapitulate the critical discussion of legal scholarship (in the Netherlands) regarding the doubtful legitimacy of framework legislation.

### 2.3.1 Opening clauses in legislation

So-called opening clauses enable the legislator to design the applicable laws more flexibly, going beyond a straightforward command-and-control structure. Opening clauses allow for deviating provisions – depending on the type of clause, both is possible deviation from the pertinent legislative provisions in exceptional cases or on a permanent basis. As indicated above, although the Netherlands is unitary state, it has been characterised by significant processes of decentralisation. Accordingly, we will briefly review below to what extent the Dutch legal system already provides for possibilities of differentiation and experimentation.

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<sup>31</sup> Ministry of the Interior and Kingdom Relations (BZK), Letter to Parliament “State of play Municipal Experiments Act”, reference no. 2015-0000666636, 13 November 2015.

<sup>32</sup> K.J. de Graaf and H.D. Tolsma, Flexibiliteit in de Omgevingswet: maatwerk, gelijkwaardigheid en experimenten (2014) Milieu en Recht 126.

*i. Differentiation*

One way of introducing such flexibility is through so-called “**differentiation provisions**” (*differentiatiebepalingen*). Regarding the competences of the regional and local administration, the Dutch Provinces Act permits:

*‘Laid down by or pursuant to the law, where necessary, a distinction between provinces can be made’.*<sup>33</sup>

Applied by analogy, some considerations regarding the equally worded differentiation clause in the Dutch Municipalities Act<sup>34</sup> help to reflect on this possibility for regional differentiation.

Demands for differentiation at the local level – from both politics and academia – have been around for considerable time.<sup>35</sup> There is a desire to design more tailor-made solutions at the local level, considering the diverging circumstances that Dutch municipalities find themselves in: *‘Amsterdam is not Schiermonnikoog’*.<sup>36</sup> Such demands concern:

- On the one hand, the possibility of **deviating** from the scheme of the Municipalities Act regarding **the organisation of the municipal administration**; and
- On the other, the **need to align the exercise of municipal duties** with citizens’ needs and the available administrative capacity.<sup>37</sup>

The above-mentioned clause (Article 109) of the Municipalities Act, in principle, makes differentiation possible. It forms part of the Act since 1992. It has **hardly been used in practice**, though. At the point of its adoption, it was specifically intended for giving big cities more room for manoeuvre. And, indeed, the Law regarding special measures on the problems of metropolitan areas (*Wet bijzondere omstandigheden grootstedelijke problematiek*), the so-called “Rotterdam Act”, does assign some special competences to big municipalities. But it does *not* do so by mentioning the idea of differentiation.<sup>38</sup> In fact, there seems to be only one exemplary piece of legislation, the Act on Work and Income of Artists (*wet werk en inkomen kunstenaars*) which was recognised as providing such differentiation. However, this Act only existed until 2011, when it was formally withdrawn.

Another example of a differentiation clause is Article 132a of the Dutch Constitution that deals with the above-mentioned Caribbean “Public Entities” (*openbare lichamen*):

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<sup>33</sup> See Article 106 of the Dutch Provinces Act (*Provinciewet*).

<sup>34</sup> See Article 109 of the Dutch Municipalities Act (*Gemeentewet*).

<sup>35</sup> J.L. W. Broeksteeg, ‘Differentiatie tussen gemeenten en de BES-eilanden, Een onderzoek naar art. 109 Gemeentewet als grondslag voor differentiatie’, in: P.P.T. Bovend’Eert e.a., *De verhoudingen in het Koninkrijk der Nederlanden*, Staatsrechtconferentie 2015, Oisterwijk: WLP 2016, pp. 201-218.

<sup>36</sup> *Ibid.* at 201.

<sup>37</sup> *Ibid.* at 201.

<sup>38</sup> *Ibid.* at 206.

*For these Public Entities rules can be set and other specific measures be adopted with a view to the special circumstances based on which these Public Entities differ substantially from the European part of the Netherlands.*<sup>39</sup>

It has been proposed to use this provision as an anchor for possibly granting the BES-Islands the status of “municipalities” constitutionally (and correspondingly apply the differentiation clause of the Municipalities Act).<sup>40</sup> Possible justifications for applying such differentiation to the BES-Islands could be their very specific circumstances: the limitation in the number of inhabitants (between 2,000 and 17,000), of the islands’ surface (between 13 and 288 square kilometres), and their distance from the (European) Netherlands (more than 7,000 km). The Dutch legislator, however, has so far not followed the option of recognising the BES-islands as municipalities.

Importantly, if applied, it would not be the Municipalities Act itself that provided the differentiation directly. This act is meant to continuously provide a *uniform* framework. The **legal room for differentiation is therefore rather restricted**. Generally, only co-management regulations (*medebewindvorderende wetgeving*) can differentiate between municipalities. The idea of “co-management” is the opposite of the principle of autonomy. Such co-management regulations impose on the local level the obligation to cooperate when national legislation requires the municipal authority to execute/implement aspects of this legislation (e.g. social security).<sup>41</sup> Nevertheless, the Dutch Government deliberately abstained from specifying criteria for when differentiation would be possible, to retain flexibility in its application. In contrast, the Council of State (*Raad van State*) advised that **differentiation would only be acceptable ‘if, in a certain situation, the interest of differentiation prevails over the interest of a uniform approach towards the Netherlands’ municipalities.**<sup>42</sup>

Lawyers’ concerns with differentiation evidently relate to the risk of jeopardising legal certainty and legal equality. In **terms of governance, however, legal differentiation may help problems of administrative capacity** in providing general public services (e.g. construction of district housing, or an industrial zone). To be effective in this respect, though, it has been noted that the respective differentiation clause of the Municipalities Act would have to be amended/extended.<sup>43</sup> Currently, it only allows for **functional differentiation (regarding the exercise of municipal duties)**. It is argued that a legal **provision for differentiation in the lower level’s administrative structure would also be needed** to enhance customised administrative capacity.<sup>44</sup>

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<sup>39</sup> Free translation, see original provision of Article 132a (4) of the Dutch Constitution: ‘Voor deze openbare lichamen kunnen regels worden gesteld en andere specifieke maatregelen worden getroffen met het oog op bijzondere omstandigheden waardoor deze openbare lichamen zich wezenlijk onderscheiden van het Europese deel van Nederland.’

<sup>40</sup> Broeksteeg (2016) at 202.

<sup>41</sup> Ibid. at 205.

<sup>42</sup> Ibid. at 204.

<sup>43</sup> Such an amendment of Article 109 of the Municipalities Act could/might be coupled also with a constitutional amendment of the autonomy provision (Article 124(1) of the Dutch Constitution). Ibid. at 208.

<sup>44</sup> Ibid. at 207.

*ii. Experimentation*

Next to this, the so-called “**experimentation clauses**” (*experimenteerbepalingen*) represent another type of possibility for legal flexibilisation. The following are prominent examples of experimentation clauses in Dutch legislation:

- The Dutch Participation Act (*Participatiewet*), effective since January 2015, contains such an experimental clause. Amongst others, this Act has substantially overhauled the rules for the activation of social assistance recipients. It requires flexibility because the law shifted most responsibilities in this area to the municipal level, forming a major part of the recent decentralisation efforts in the Netherlands.<sup>45</sup> Therefore, Article 83 of this Act expressly anticipates the possibility of “innovation” to render the law’s application more effective.<sup>46</sup>
- Article 23(3) of the (prospective) Environmental Planning Act (*Omgevingswet*), expected to be effective from 2021, is another example.<sup>47</sup> This comprehensive legislation combines all aspects surrounding the material living environment under one law. It offers flexibility in the conducting of “experiments” to realise the societal objectives of the legislation. More precisely, the experimental clause is meant to pre-empt future developments, technologies and practices, which the current legislation cannot naturally foresee.<sup>48</sup>
- Room for innovation is also foreseen for the organisation of the public education sector in the Netherlands – namely, in Article 176k of the Dutch Primary Education Act (*Wet op het primair onderwijs*) and Article 118t of the Dutch Secondary Education Act (*Wet op het voortgezet onderwijs*). These clauses permit derogations from the Acts’ provisions by general administrative order on an experimental basis to improve the quality, accessibility or the effectiveness of the Dutch education system.

The idea of “**experimentation**” in public administrative law refers to **the possibility of delegating the authority of temporarily special rules in derogation of the applicable legislation**. In particular, local authorities have a range of tools that allow for experimentation.<sup>49</sup> In Dutch government circles, one

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<sup>45</sup> This process has been referred to the so-called “3D-transition”, since the respective legislative package prompted three decentralisations of the social domain, namely youth care, work and income support/social assistance, and long-term care. See <https://www.rijksoverheid.nl/onderwerpen/gemeenten/decentralisatie-van-overheidstaken-naar-gemeenten> (last accessed 05-10-2018).

<sup>46</sup> Article 83(1) of the Dutch Participation Act provides: ‘In order to examine the possibilities of applying this Act more effectively with regard to workers’ activation and executing the financing more efficiently, derogations from its provisions by general administrative order (*algemene maatregel van bestuur*) are possible on an experimental basis...’. See also the Dutch Government’s Decision of 22 february 2017 establishing a Temporary Decision on Experiments in the Participation Act (*Besluit van 22 februari 2017, houdende vaststelling van het Tijdelijk besluit experimenten Participatiewet*).

<sup>47</sup> Currently Article 23.3. of the legislative proposal. See also <https://www.rijksoverheid.nl/onderwerpen/omgevingswet/nieuws/2018/07/03/belangrijke-stap-naar-eenvoudiger-en-beter-omgevingsrecht> (accessed 09-09-2018).

<sup>48</sup> De Graaf and Tolsma (2014).

<sup>49</sup> W.J.M. Voermans, M. J. Cohen and G. Boogaard, *Onderzoek naar de mogelijkheden voor experimenteerbepalingen in Rotterdamse en Amsterdamse regelgeving* (Onderzoeksrapport, Universiteit Leiden: Faculteit Rechtsgeleerdheid, juni 2015): <http://media.leidenuniv.nl/legacy/onderzoeksrapport-lokale-experimenteerbepaling.pdf>.

ascribes such methods of legal experimentation in particular the potential of increasing the **effectiveness of rule-making**.<sup>50</sup> The argument goes that democratic law-making takes time while given the rise of uncertainty and complexity in social relations, citizens demand above all simple and effective rules. Legal options for temporary experimentation are considered to increase the efficacy of rules by helping to customise them to specific needs.<sup>51</sup>

### *The Municipal Experiments Act (Experimentenwet Gemeenten)*

In this context, it is interesting to note that the Dutch Government recently launched preparations for a legislative proposal entitled the Municipal Experiments Act (*Experimentenwet Gemeenten*). The proposal represented a bottom-up approach, seeking to bestow municipalities directly with more discretion – i.e. room to experiment – in solving concrete legislation-based problems.<sup>52</sup> Interestingly, **the process of preparing this legislative proposal itself already helped to solve a considerable number of such problems** (see below). Namely, the Government had entered into a *dialogue* with the concerned municipalities following its call on the latter to submit concrete suggestions of cases that they thought required a general Experiments Act.

In fact, the Government has recently decided *not* to proceed with submitting a legislative proposal for a Municipal Experiments Act.<sup>53</sup> It appeared that such a proposal failed to add value next to the existing experimental clauses. Also, the discretionary room already available in applicable legislation seemed equally sufficient for tailor-made solutions.<sup>54</sup> Considering the variety of proposals for municipal experimentation within the existing legal framework, the responsible Dutch Minister for the Interior and Royal Affairs Ollongren noted the need to differentiate. On the one hand, there were *innovative methods that could be applied in line with applicable laws*; on the other, there were those *innovative methods that were in conflict with organic administrative law*.

Therefore, the Minister has launched a **new consultation process** where she will assess together with the Dutch municipalities and other regional authorities **which aspects of Dutch Municipalities Act (Gemeentewet) and the Provinces Act (Provinciewet) can be revised or amended** to increase the room for local customisation (*maatwerk*) and innovation. In addition, the Ministry will **examine under what conditions the Dutch constitutional framework would permit more room** for legal experimentation (*wettelijke experimenteerruimte*). In any case, such **legal experimentation must take into account the normative principles of the Dutch system of public administration**, which are based in the country's Basic Law and that have been casted into the national organic legislation on the division of the administration. Finally, given the successful consultation process regarding the proposals for municipal experiments, the **Interior Ministry now aims to further develop and foster**

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<sup>50</sup> See [https://www.kcwj.nl/sites/default/files/Factsheet\\_Experimenteren.pdf](https://www.kcwj.nl/sites/default/files/Factsheet_Experimenteren.pdf) (last accessed 05-10-2018).

<sup>51</sup> Ibid.

<sup>52</sup> Ministry of the Interior and Kingdom Relations (BZK), Letter to Parliament "State of play Municipal Experiments Act", (Reference no. 2015-0000666636, 13 November 2015).

<sup>53</sup> Ministry of the Interior and Kingdom Relations (BZK), Letter to Parliament "Revision organic legislation and experiments", reference no. 2018-0000112320, 19 February 2018.

<sup>54</sup> See Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 'Experimentenwet niet nodig voor experimenteerruimte gemeenten', Nieuwsbericht, 19 februari 2018, at <https://www.rijksoverheid.nl/actueel/nieuws/2018/02/16/experimentenwet-niet-nodig-voor-experimenteerruimte-gemeenten> (accessed 05-10-2018).



**its role as a platform for coordinating the exchange between regional and local authorities and the different ministries to tackle (alleged) legislation-based problems and the need to experiment with innovative work methods.**<sup>55</sup>

Although the Municipal Experiments Act has not made it into an actual legislative proposal, it is still useful to consider two important observations from this legislative initiative. Firstly, the consultation process, which the Dutch Interior Ministry (BZK) had launched in 2014-2015, produced an **outline for a necessity-test with regard to local initiatives for legal experimentation**. This means, several of the problems identified at municipal level that resulted from the application of national legislation could be tackled directly through one of the following channels:

- (a) Existing experimental clauses in sectoral legislation;
- (b) Finding structural solutions to persistent (large-scale) impediments; or
- (c) Recognising the impossibility of derogation due to the existence of a higher norm (e.g. constitutional, or EU law).

Secondly, the BZK-consultation process produced another set of criteria, i.e. an **eligibility-est**. These criteria underpinned the evaluation of which cases (i.e. municipal proposals) would be eligible for inclusion into the then-envisaged legislative proposal for a Municipal Experiments Act. The criteria are the following:

- i. The municipal proposal must *not be in conflict with the Dutch Basic Law, EU law, and the treaties and rules of international organisations*;
- ii. There must be *political support* for the proposal at local and national level;
- iii. The municipal proposal must relate to *one or more concrete provision(s) in national legislation*, be drafted as detailed as possible, including a clear motivation; and
- iv. The submitting municipality must have *sufficient staff capacity* to develop the proposal further and, if needed, conduct an evaluation study jointly with government officials.

It has become clear that the Interior Ministry is now consulting with concerned stakeholders on the possibilities of how both the Dutch Municipalities Act and the Provinces Act could be amended to make more room for experimentation at the local and regional level. Given the fact that **the plan of launching a legislative proposal for a Municipal Experiments Act has been considered redundant**,<sup>56</sup> launching the idea for a similar proposal on a (Border) Provinces Experiments Act (*Experimentenwet (Grens)Provincies*) would not be very constructive.

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<sup>55</sup> Ministry of the Interior and Kingdom Relations (BZK), Letter to Parliament “Revision organic legislation and experiments”, reference no. 2018-0000112320, 19 February 2018.

<sup>56</sup> The Dutch Council of State found that a legislative proposal for a Municipal Experiments Act would not add value in terms of creating room for manoeuvre for local authorities to try out innovative policy/regulatory solutions; instead, it would risk undesirable over-regulation and bureaucratisation, actually limiting the room for tailor-made solutions, and an accumulation of experimentation clauses existing side-by-side. Therefore, the Government followed the proposal of Interior Minister Ollongren not to submit the legislative proposal with the Second Chamber. See Raad van State, *Advies inzake het voorstel van wet Experimentenwet gemeenten* (Nader Rapport, nr. 2018-0000124117, Directie Constitutionele Zaken en Wetgeving, 22 februari 2018).

Nevertheless, the preceding considerations for testing experimentation proposals by municipal authorities may, by analogy, still be **useful for reviewing any future provincial proposals for deviating from applicable laws where their application results in practical (cross-border) problems in terms of their the necessity and proportionality**. In fact, the second set of criteria is **illustrative of the issues that one ought to consider when thinking about granting the Dutch border provinces, generally, and the Province of Limburg, specifically, more discretion to deviate** from national legislation for solving cross-border problems. Accordingly, these criteria can be useful in the assessment of existing models for a possible Statute for Limburg (see Chapter 5 and 6).

### 2.3.2 Framework laws (*kaderwetten*) and the fragmentation of legislative power

A third way of introducing flexibility into the law-making process is by adopting framework laws. A framework law is a law that regulates general principles, responsibilities and procedures. However, it does not contain detailed rules. In the Netherlands, framework laws are usually formal laws,<sup>57</sup> which are elaborated further by general administrative measure or ministerial regulations. There are many Dutch frameworks laws including the Working Conditions Act (*Arbowet*), the Commodities Act (*Warenwet*) and the Environmental Management Act (*Wet Milieubeheer*), see an overview of Dutch framework laws in Annex 3. About two thirds of the body of Dutch law at national level is made up of general administrative orders, so-called “orders in council” (*algemene maatregel van bestuur*, *AMvB's*) and ministerial decrees, the adoption of which the Parliament has hardly any, or no, say in.<sup>58</sup>

Given the fact that CBC often involves institutional innovation (such as the Euroregions, or the EGTC – see below), it seems sensible to consider briefly one specific Dutch framework law, namely the “Framework law on independent administrative bodies”.<sup>59</sup> After that, we will recapitulate some critique on framework laws generally that has been voiced in the Netherlands, given the enduring or even growing prominence of this legislative tool in the Dutch legal system (and elsewhere in Europe).

#### *i. The Framework Law on independent administrative bodies*

The Framework Act on independent administrative bodies (*Kaderwet zelfstandige bestuursorganen*) circumscribes the operation of “independent administrative bodies” (IABs). Unlike traditional executive agencies, these are independent bodies charged with tasks relevant to policy-making, but they are in principle not subject to direct ministerial authority. However, the Interior Minister does have some influence by exercising indirect control. In fact, the Minister is responsible for the policy of the IABs and the supervision thereof, and can be held accountable by the Dutch Parliament about the functioning of the IAB. Examples of IAB's in the Netherlands include the Central Bureau for Statistics (*Centraal Bureau voor de Statistiek*), the Chambers of Commerce (*Kamers van Koophandel*) and the Dutch Data Protection Authority (*College Bescherming Persoonsgegevens*).

Indeed, giving shape to the relationship between the IABs and the Minister, as indicated above, and the role of the minister in particular, were originally the main reasons for adopting this Framework Act on IABs. There was a specific dissatisfaction, from the perspective of Dutch parliamentary

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<sup>57</sup> This means that these laws have been made in accordance with Article 81 of the Constitution. These laws have been made by the government and Dutch Parliament jointly.

<sup>58</sup> R.A.J. van Gestel, ‘Kaderwetgeving en de verstrooiing van de wetgevende macht’ (2012) 27 *RegelMaat* 3, pp. 155-171.

<sup>59</sup> ‘Kaderwet zelfstandige bestuursorganen’, which came into force on 1 February 2007.

democracy, regarding the position of semi-executive organisations that perform tasks at a distance from the national Government. More precisely, there was a lack of clarity about the actual extent of ministerial responsibility regarding the functioning of the IAB, certain tasks were deliberately kept at distance from the responsible Minister. To solve this, the Framework Act was created.<sup>60</sup>

According to the Explanatory Memorandum, the IABs must function within an administrative system, structured in such a way that it enables political decision-making about the tasks of these bodies and political monitoring of their implementation. Accordingly, the following four objectives underpin the IAB-Framework Act:

- Organising the existing situation in which each IAB has its own applicable organisational arrangements;
- Establishing clear regulations on ministerial responsibility;
- Ensuring clarity with regard to the financial control of IAB's; and
- Increasing transparency about the occurrence and functioning of IAB's.<sup>61</sup>

Concerning the ministerial responsibility vis-à-vis the functioning of the IABs, the Framework law contains several steering instruments. For instance, the Minister has the competence to approve fees, to adopt policy rules and to review annual decisions taken by the IAB. The Framework Act on IAB's determines furthermore that the Minister has the following competences:

- Appoint, suspend and dismiss IAB directors;
- Determine the salary of the respective directors; and
- Determine the policy rules that enable the IAB to carry out its tasks properly.<sup>62</sup>

As required, the Ministry for Internal Affairs and Royal Relations evaluated the functioning of the Framework Act in 2018.<sup>63</sup> This evaluation revealed that the law's framework rules and their application contributed to the IAB's organisation as intended, they clarified the division of competences between the Minister and the IAB, and enhanced the bodies' transparency for the citizen. It was concluded that this specific law did also have the effect of a general framework law: Provisions of the Framework Act on IABs may be declared non-applicable – this option has been used in practice, for example the provision conferring upon the Minister the authority over annual decisions is excluded most often.

However, according to the ministerial evaluation, there was also room for improvement. Notably, the organisation of different laws and regulations could be improved. A number of IAB's mentioned the multitude of applicable legislation and guidelines as something that could be improved. The obligation to provide the Minister with the appropriate information is not always fulfilled by the IABs in practice

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<sup>60</sup> Ministerie van Binnenlandse Zaken en Koninkrijksrelaties Directoraat-generaal Overheidsorganisatie, 'Evaluatie Kaderwet zelfstandige bestuursorganen 2012-2016', 31 May 2018, p. 3.

<sup>61</sup> Kamerstukken II 2000/01, 27 426, nr. 3, para. 2.

<sup>62</sup> Ministerie van Binnenlandse Zaken en Koninkrijksrelaties Directoraat-generaal Overheidsorganisatie, 'Evaluatie Kaderwet zelfstandige bestuursorganen 2012-2016', 31 May 2018, p. 8.

<sup>63</sup> This was obliged according to the evaluation clause in the framework law, in Article 39 (2).

because of uncertainty about the applicable procedures and deadlines.<sup>64</sup> The evaluation results show, too, that there is a need for more information input, the exchange of information and of best practices on various topics. Additionally, there is a need for practical tools for setting the level of remuneration or compensation of members of the IAB's.<sup>65</sup>

*ii. Fragmentation of legislative power*

However, the Dutch Constitution stipulates that **legislative power is exercised jointly by the Government and the Dutch Parliament**, the States-General.<sup>66</sup> Yet, as indicated above, the growing demand for efficiency and flexibility in law-making **risks a shift of that same power from the legislature towards the executive** and public administrators. Admittedly, that risk may be mitigated by attaching procedural safeguards and involving the Parliament or societal organisations in the making of the delegated rules. But, does that not again defeat the purpose of increasing efficiency?<sup>67</sup> It is also questionable to what extent framework laws are in line with the principle of the “primacy of the legislature”, as laid down in the Netherlands’ Instructions for Drafting Legislation (*Aanwijzingen voor de regelgeving*).<sup>68</sup>

The academic legal discussion of this issue even goes as far as broaching the example of Nazi Germany, emphasising how framework laws at the time were instrumentalised and facilitated the abuse of executive power.<sup>69</sup> Nevertheless, in the post-war period and especially with the rise of European welfare states, framework legislation has become an inherent part of the legislative toolbox. It is therefore particularly criticised that there is **no evidence that the adoption of framework laws actually results in time and efficiency gains**.<sup>70</sup>

In fact, the Dutch Council of State (*Raad van State*) appears to be mostly negative about the quantity and scope of delegated provisions.<sup>71</sup> It does not seem convinced of the necessity of accelerated implementation techniques, as it asserts critically:

‘The law sets normative standards. Framework legislation, which is basically lacking any material norm, can be illustrative of legislation that has become subordinate to

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<sup>64</sup> Ministerie van Binnenlandse Zaken en Koninkrijksrelaties Directoraat-generaal Overheidsorganisatie, ‘Evaluatie Kaderwet zelfstandige bestuursorganen 2012-2016’, 31 May 2018, p. 28.

<sup>65</sup> *Ibid.*, p. 29.

<sup>66</sup> Article 81 of the Dutch Constitution. Although, this Article determines that the legislative power is both exercised by the Government as the Dutch Parliament, the Dutch Constitution also offers the possibility that legislation can be made by the government or the minister alone. This is only possible if an attribution provision in the Dutch Constitution offers the possibility of delegation to a lower regulator, such as the government or the minister. Article 89 (1) of the Dutch Constitution states that ‘Orders in council shall be established by Royal Decree’, these are the so-called: AMvB’s. Ministerial regulations (*ministeriële regelingen*) are not explicitly mentioned in the Dutch Constitution, however the competence to make these regulations fall under the category of ‘other generally binding rules adopted by the State’ of Article 89 (4) of the Dutch Constitution.

<sup>67</sup> Van Gestel (2012) at 155-156.

<sup>68</sup> See Instructions 5.22 and 5.23 of the Instructions for Drafting Legislation (Ar) Circular of the Minister-President (Ministry of Justice, 1992), see [http://wetten.overheid.nl/BWBR0005730/2018-01-01#Hoofdstuk5\\_Paragraaf5.5\\_Artikel5.22](http://wetten.overheid.nl/BWBR0005730/2018-01-01#Hoofdstuk5_Paragraaf5.5_Artikel5.22) (last accessed 05-10-2018).

<sup>69</sup> Van Gestel (2012) at 156-157, 169.

<sup>70</sup> *Ibid.* at 170.

<sup>71</sup> *Ibid.*

policy. By failing to set standards, it disregards that legislation has more functions than the simple translation of policy (that may possibly still have to be made or changed). The arguments of “flexibility and customisation” are often put forward to justify such legislation. However, **they do not justify the fact that the law is turned into a policy instrument. Framework laws do not protect citizens against the government, because they fail to set substantive norms.**<sup>72</sup>

This critique should not be easily dismissed. It highlights the dilemma of rule-making and standard-setting in a globalised world that lies in the need to balance the demand for responsive regulation apt for fast-changing circumstances in a borderless environment and the importance of safeguarding fundamental democratic values.

In conclusion, in this chapter we have summarised the distribution of competences between the three levels of the Dutch system of public administration. We have also taken a peek at the constitutional system of the Kingdom of the Netherlands, which has certainly left an impression that the **Dutch political system is not as straightforward unitary as one may think** at first sight. Quite understandably, its overseas territories enjoy a special status tailored to the needs of these (far away) island communities. Meanwhile, on the country’s European continental territory decentralisation has also increased the need of public authorities at the lower levels to experiment with deviations and innovate with regulatory solutions for problems resulting from the application of (national) legislation.

Against this background, it is important to infer that it is rather **questionable that the simple fact of sharing a border with another State**, which may be the source for all kinds of cross-border obstacles, **would be enough of a reason to justify that the Dutch border provinces be granted a special legal (constitutional) status** or exception, comparable to the one(s) granted to the Kingdom’s overseas territories. At the same time, it is promising to see that also within the unitary system of the Netherlands there is some room for legislative flexibility. Thereby, we keep in mind the need for careful design with the tools of legal experimentation to ensure proper accountability and continued democratic legitimation. While there appears thus rather limited room for an actual special statute within the Dutch legal system, considerably **more leeway seems present with regard to multilevel solutions**. This, in fact, aligns with what the European Commission recently concluded from its Cross-Border Review:

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<sup>72</sup> *Free translation* [NB], see the original quote: ‘De wet is normstellend. Kader- en raamwetgeving, waaraan vrijwel iedere materiële norm ontbreekt, kan een illustratie zijn van wetgeving die onderdeel is geworden van het beleid. Zij miskent dat wetgeving meer functies heeft dan vertaling van (eventueel nog te vormen, of nog te wijzigen) beleid doordat normering ontbreekt. “Flexibiliteit en maatwerk” zijn veel genoemde argumenten voor dergelijke wetgeving. Deze rechtvaardigen niet dat de wet verwordt tot een gewoon beleidsinstrument. Kaderwetten bieden de burger geen bescherming tegenover de overheid, omdat inhoudelijke normering ontbreekt.’ Jaarverslag Raad van State 2006, p. 57 (zie <[www.raadvanstate.nl/publicaties/jaarverslagen/](http://www.raadvanstate.nl/publicaties/jaarverslagen/)>). Quoted in Van Gestel (2012) at 155.

*‘As many stakeholders reported, border difficulties are always felt locally, although the solutions are seldom found locally. Overcoming obstacles or reducing complexity requires that all levels of government and administration work hand in hand.’<sup>73</sup>*

Simultaneously, it seems indispensable to look for, at least, bilateral or even multilateral tools that can help “empower” the Dutch border regions with a view to solving cross-border problems. The preceding summary does not provide sufficient basis to determine what kind of (legal) “action potential” exists in a region to solve *cross-border* problems because it is evidently too one-sided. Therefore, the following chapter will take a look “across the border” at the competence distribution of the neighbouring countries and regions that line up along the Dutch border – notably, Flanders and Wallonia on the Belgian and NRW and Lower Saxony on the German side.

### 3. Regions with legislative power: a look at Limburg’s neighbours

In fact, on both sides of the Dutch border, the Belgian and the German one, we encounter so-called “regions with legislative power”. After a short introduction of this notion, we will shortly explain the ways in which legislative competences are distributed in the federal systems of Belgium and in Germany, both being rather complex. This knowledge of competence distribution on either side of the Dutch border will then provide the basis for **mapping the legislative/regulatory competences for addressing specific cross-border problems per policy field and according to administrative level** (i.e. European, national, and regional). While the previous chapter has placed the Provincial Council’s initiative of turning Limburg into an “advanced post” for the Netherlands for cross-border cooperation into context, this chapter will provide the basis (comparative overview) for determining **what kind of (legal) “action potential” exists in the given region to solve cross-border problems**.

Like the Netherlands, most countries in the EU are unitary states – even though we have seen that, as in the Dutch case, hybrid forms are possible. The number of federal systems in the Union is thus more limited, but certainly not less interesting in terms of political organisation. What is indeed intriguing in the context of this study is the (partly sizable) extent of autonomy that (some of) the regional subunits of these states possess.

In order to get an idea of the diversity of these “**regions with legislative power**”, it helps looking at the membership of the Conference of European Regions with Legislative Power (REGLEG). The REGLEG is an informal political network that brings together all the regions with legislative power within the EU.<sup>74</sup> It consists of representatives of regional governments from 73 regions that are located in only eight Member States. These include:

- all nine states of the Federal Republic of Austria;
- all five regions and communities of the Federal Kingdom of **Belgium**;
- the Åland Islands, an autonomous region of Finland;
- all 16 states of the Federal Republic of **Germany**;
- all 20 regions of Italy;

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<sup>73</sup> European Commission, *Communication on Boosting growth and cohesion in EU border regions* (COM(2017) 534, Brussels, 20 September 2017) at 6.

<sup>74</sup> See [www.regleg.eu](http://www.regleg.eu) (at the point of writing the website was unfortunately not accessible, NB).



- the two autonomous regions of Portugal, i.e. the Azores and Madeira;
- all 17 autonomous communities of Spain; and
- the three countries of the United Kingdom with devolved power, Northern Ireland, Scotland and Wales.<sup>75</sup>

Besides this, another interesting examples regarding the distribution of legislative powers is the **Swiss Confederation** with its Cantons.<sup>76</sup> Since federalism was introduced in Switzerland in 1848, state powers are divided between the Confederation, the cantons and the communes. Each entity has its own tasks: The Federal Constitution lays down the powers of the Confederation and the cantons, whereas the cantons define the powers of their communes.<sup>77</sup> On that basis, the distribution of competences in Switzerland is based on the following rules and principles:

- The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation.<sup>78</sup>
- The principle of subsidiarity provides the basis for the allocation of power among the Confederation, the cantons and the communes.<sup>79</sup> The Confederation only undertakes tasks that the Cantons are unable to perform or which require uniform regulation by the Confederation.<sup>80</sup> In effect, nothing that can be done at a lower political level should be done at a higher level.
- The Confederation shall fulfil the duties that are assigned to it by Federal Constitution, while the Cantons decide on the duties that they must fulfil within the scope of their powers.<sup>81</sup>
- Regarding foreign policy decisions, the Cantons have a right to be consulted and the right to participate in international organisations, where appropriate, when their powers are affected.<sup>82</sup>
- The Cantons may conclude treaties with foreign states on matters that lie within the scope of its powers, yet without prejudice to the interests of the Confederation or other Cantons. Also, the Confederation must be informed before the conclusion of such treaties. Finally, a Canton may deal directly with lower ranking foreign

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<sup>75</sup> In 2011, REGLEG established a formal cooperation with the Conference of European Regional Legislative Assemblies (CALRE). CALRE unites seventy-four presidents of European regional legislative assemblies: the Presidents of the Regional Assemblies of Italy, Spain, Belgium, Germany, Austria, United Kingdom (Wales, Scotland, Northern Ireland), Portugal (Azores and Madeira), and Finland (Åland Islands). See <https://www.calrenet.eu/> (accessed 13-09-2018). See the Final Cooperation Agreement between CALRE and REGLEG, Brussels, 23 February 2011.

<sup>76</sup> The People and the Cantons of Zurich, Bern, Lucerne, Uri, Schwyz, Obwalden and Nidwalden, Glarus, Zug, Fribourg, Solothurn, Basel Stadt and Basel Landschaft, Schaffhausen, Appenzell Ausserrhoden and Appenzell Innerrhoden, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva, and Jura form the Swiss Confederation. Art. 1 of the Federal Constitution of the Swiss Confederation.

<sup>77</sup> See <https://www.ch.ch/en/demokratie/federalism/federalism/> (last accessed 10-10-2018).

<sup>78</sup> Art. 43a of the Swiss Federal Constitution.

<sup>79</sup> Art. 5a of the Swiss Federal Constitution.

<sup>80</sup> Art. 3 of the Swiss Federal Constitution.

<sup>81</sup> See Articles 42-43 respectively of the Swiss Federal Constitution.

<sup>82</sup> Art. 55 of the Swiss Federal Constitution.

authorities; in other cases, the Confederation shall conduct relations with foreign states on behalf of a Canton.<sup>83</sup>

- As provided for by the Federal Constitution, the Confederation is responsible for foreign and security policy; customs and monetary matters; legislation that applies nationally; and defence. The cantons are responsible for those tasks not expressly allocated to the Confederation by the Federal Constitution. In some areas, such as higher education, responsibilities are shared. Having equal status and rights, the Federal Constitution grants all Cantons room to manoeuvre with regard to the budget, the political system and taxation (since they can levy taxes).<sup>84</sup>

While the Province of Limburg evidently does not have this kind of legislative power, it is seeking the legal capacity/room for manoeuvre to address cross-border obstacles more effectively through more direct collaboration with its neighbouring regions. It is therefore helpful, first, to gain an overview of the competences vested at the regional level of the territories along the Dutch border (Flanders and Wallonia, in Belgium, and NRW and Lower Saxony, on the German side). This will help in **concretising the policy fields where it could be logical for Limburg to gain more room for manoeuvre to realise inter-territorial cooperation.**

### 3.1 Belgian Regions (*Gewesten*) and Communities (*Gemeenschappen*)

The Federal Kingdom of Belgium recently underwent the sixth State reform, which was the consequence of a protracted political crisis and the (yet) longest-lasting Belgian government formation (541 days) in 2010-2011.<sup>85</sup> A transfer of competences from the federal to the regional and communal level, including a corresponding reform of the state financing law, was one of the key features of this institutional reform (effective from 1 July 2014).<sup>86</sup>

The reform of the federal structure of Belgium had to ensure that the country's regions and communities would be strengthened in their constitutive autonomy. It included a transfer of

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<sup>83</sup> Art. 56 of the Swiss Federal Constitution.

<sup>84</sup> Title 3 Confederation, Cantons and Communes (Articles 42-135) of the Swiss Federal Constitution.

<sup>85</sup> A six party-coalition government (Christian-democratic CD&V and cdH, social-democratic sp.a and PS, liberal Open Vld and MR) could eventually be formed based on the so-called "Butterfly Agreement" co-brokered by Elio Di Rupo (PS), who then became Prime Minister. Also, the Greens (the ecologist Groen! and Ecolo, each respectively a Flemish and French-speaking party) were part of the agreement but did not join the coalition government. The Flemish nationalist party New Flemish Alliance became the largest after the 2010 elections, but it was not included in the coalition government and also not part of the agreement.

<sup>86</sup> See the Institutional Agreement on the Sixth State Reform – An Efficient Federal State and a Greater Autonomy for the Regional States, 11 October 2011. Further changes were made to: the Belgian Senate (including changes to the power of the Royal Family); the status of the Brussels-Capital Region and German-speaking Community; and the electorate of Brussels-Halle-Vilvoorde. More precisely, a political reform was considered necessary which ended the possibility that the Belgian Senate would be directly elected. Instead, it became an assembly of regional parliaments, with fewer members, and the King's children would no longer hold a seat in the Senate. Just as already existed for Flanders and Wallonia as Flemish and French-speaking communities, constitutive autonomy was also recognised for the Brussels-Capital Region and German-speaking Community. Given a long-standing bone of contention regarding the complex issue of the Brussels-Halle-Vilvoorde district, it was decided that the district's electoral constituency would be split and the judicial district of Brussels be reformed.

competences from the federal level to the communities and regions in the following domains: labour market; health services; family benefits; justice; mobility, and traffic security.

Regions thus gained more say in economic and employment competences, while communities gained responsibility for family policy. In total, competences worth about € 17 billion per year were shifted. The reform of the financing law granted the communities and regions more fiscal autonomy, while determining different financing arrangements for each level.

Against this background, for the entire territory of Belgium the federal level – the Federal Government and Federal Parliament – is competent to regulate/legislate on several matters (see Table 2 below, first column). For a number of matters/policy fields, the federal level is only competent certain parts because others have been devolved to the regional/community level.

*Table 2: Federal competences of the Kingdom of Belgium<sup>87</sup>*

Federal competences	Partial/shared competences
<ul style="list-style-type: none"> <li>▪ Federal taxes</li> <li>▪ Justice and security</li> <li>▪ Nationality, immigration and identity cards</li> <li>▪ Foreign affairs</li> <li>▪ Social security and pensions</li> <li>▪ National defence</li> </ul>	<ul style="list-style-type: none"> <li>▪ Public health</li> <li>▪ Economy</li> <li>▪ Employment</li> <li>▪ Poverty eradication</li> <li>▪ Traffic and mobility</li> <li>▪ Science</li> <li>▪ Development assistance</li> </ul>

It is certain that the federal state structure of Belgium is a complex one. It is composed of three communities (*gemeenschappen*) and three regions (*gewesten*). In the Belgian state structure, the federal, community and regional level enjoy legal equality,<sup>88</sup> but they are competent for different policy domains. This means that the **communities and regions, in fact, enjoy considerable legislative autonomy**. The Special Law on Institutional Reform of 8 August 1980 (*Bijzondere wet tot hervorming der instellingen, BWHI*) determines the distribution of competences between the Communities and the Regions, as illustrated in Table 3 below.

The three Communities – notably, the Flemish or Dutch-speaking Community, the French-speaking, and the German-speaking Community – are competent to regulate so-called “**person-related matters**”, such as culture, education, welfare, health, sports, and language.<sup>89</sup> Importantly, the Belgian Constitution (*Grondwet*) also recognises the Communities’ **power to conclude international treaties** with respect to these competences.

<sup>87</sup> Based on [https://www.belgium.be/nl/over\\_belgie/overheid/federale\\_overheid/bevoegdheden\\_federale\\_overheid](https://www.belgium.be/nl/over_belgie/overheid/federale_overheid/bevoegdheden_federale_overheid) and <https://www.vlaanderen.be/nl/vlaamse-overheid/organisatie-van-de-vlaamse-overheid/organisatie-en-bevoegdheden-van-de-federale-overheid-van-belgie> (last accessed 05-10-2018).

<sup>88</sup> There another two lower administrative layers, namely the provinces and the municipalities.

<sup>89</sup> See Articles 127 and 128 of the Belgian Constitution for the Flemish and French-speaking Communities; and Article 130 of the Belgian Constitution regarding the regulatory powers of the German-speaking Community.

Next to that, the three regions – i.e. the Flemish Region, the Walloon Region, and the bilingual Brussels Capital Region<sup>90</sup> – have the competence<sup>91</sup> to regulate “ground-related matters” such as the **environment, spatial planning, housing, mobility, infrastructure, economy and employment.**

*Table 3: Overview of competences of the Belgian Regions and the different language Communities, at the example of Flanders<sup>92</sup>*

Flemish Region ( <i>Vlaams Gewest</i> )	Dutch-speaking Community ( <i>Vlaamse Gemeenschap</i> )
<p>Spatial planning: spatial plans, construction permits, city planning, monuments and landscapes</p> <p>Housing: social housing, financial support of housing, rentals, housing taxes, etc.</p> <p>Living environment: protection, waste management, electric vehicles &amp; charging infrastructure, etc.</p> <p>Land use &amp; nature conservation: parks, forests, hunting, fishery, etc.</p> <p>Water management: drinking water, waste water, sewage, etc</p> <p>Agriculture &amp; maritime fishery: sustainability, tenancy, nutrition</p> <p>Economy: business support, trade facilities, price policy &amp; international trade</p> <p>Tourism</p> <p>Animal welfare</p> <p>Energy policy: gas &amp; electricity distribution, energy efficiency</p> <p>Municipalities, provinces, intercommunal matters: administrative supervision, urban policy, local &amp; provincial elections, etc.</p> <p>Employment: employment services, employment programmes, activation policy, economic migration, service cheques, paid educational leave</p> <p>Public works &amp; transport: roads, waterways, maritime harbours, regional airports, regional transport, driver education &amp; exams (exc. licences), sea traffic control, etc.</p> <p>Scientific research on the regional competences</p> <p>International relations regarding the own competences, development assistance &amp; international trade</p>	<p><b>Culture:</b> language use, the arts, cultural heritage, museums, libraries, media, sports</p> <p><b>Education:</b> all aspects of education policy, except for the residual federal education competences (i.e. setting the beginning/end of compulsory education, minimum standards for the granting of diplomas, and the pension scheme)<sup>93</sup></p> <p><b>Health:</b> recognition of health services providers and institutions, quality assurance of health institutions, elderly care, prevention</p> <p><b>Social support:</b> youth protection and policy, family policy and childcare, family benefits, elderly and disability policy, equality, integration of migrants, administrative supervision of voluntary services (OCMW's)</p> <p><b>Justice:</b> criminal enforcement, juvenile sanctioning law, legal assistance, law centres</p>

<sup>90</sup> In the Brussels Capital Region, the community competences are being executed by the Committee of the Flemish Community (*Vlaamse Gemeenschapscommissie*, VGC) for the capital's Dutch-speaking population and the Committee of French Community (*Franse Gemeenschapscommissie*, Cocof) for the French-speaking population of Brussels.

<sup>91</sup> Articles 39 and 134 of the Belgian Constitution.

<sup>92</sup> Based on <https://www.vlaanderen.be/nl/vlaamse-overheid/organisatie-van-de-vlaamse-overheid/de-regionale-overheden-gemeenschappen-en-gewesten> (last accessed 05-10-2018).

<sup>93</sup> Article 127 (1)(2) of the Belgian Constitution.

### 3.2 German Regional States (*Länder*)

In the Federal Republic of Germany legislative competence is split between the Federal Parliament (*Bundestag*) and the 16 regional States (*Länder*). German federalism underwent a two-step reform in 2006 and 2009. Federal legislative power exclusively regulates all matters that directly affect the federation as a whole – such as foreign and defence policy, currency issues, atomic policy, the postal and telecommunications services. The State Parliaments (*Landtage*) are responsible for all **cultural matters, notably the education system, matters of internal security, i.e. the police, building supervision, health supervision and the media.**

The German Constitution or Basic Law (*Grundgesetz*) determines that the regional States (*Länder*) are competent for the exercise of state powers and the discharge of state functions.<sup>94</sup> If one regards this provision in isolation, it appears as if the *Länder* are principally competent insofar as the German Basic Law does not provide for or permit a different arrangement. When regarding however the other individual rules for the distribution of competences, it becomes clear that **the regional States' alleged preponderance in the system of competence distribution had to cede this theoretical prevalence to the Federal Government (*Bund*).** As a result of an extensive transfer of competences in practice, the latter is effectively competent for most matters falling under the concurrent competences (see Table 4 below).

Importantly, the Basic Law does not allocate the state functions and competences according to policy fields.<sup>95</sup> Instead, it first divides the State powers in four areas: **foreign relations, legislative competence, administrative competence, and the competence for the administration of justice.** Based on this functional structure, then, for each of these areas respectively the sovereign powers are allocated between the Federal Government and the *Länder* per policy field. In our context, it is important to take a closer look at the competence for foreign relations and the legislative competence.

As regards **foreign relations**, the Basic Law assigns the prevalent role for performing these duties to the Federal Government. If an international treaty affects the special circumstances of a regional State, the Federal Government must consult with the concerned State before becoming a party to the treaty.<sup>96</sup>

Importantly, insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.<sup>97</sup> From the point of the constitution, this provision has a double function. On the one hand, it **empowers the *Länder* to conclude international treaties** by means of an exception. On the other hand, the provision thereby forms the legal basis for the necessary partial legal personality from the perspective of public international law. Additionally, the requirement of the Federal Government's approval reaffirms the latter's decisional prerogative in the area of foreign relations.<sup>98</sup>

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<sup>94</sup> Article 30 of the German Basic Law.

<sup>95</sup> That would imply that the Federal Government and the regional States would be in charge – per assigned policy field – of all tasks of the legislature, the executive and the adjudication.

<sup>96</sup> Article 32(1) and (2) of the German Basic Law.

<sup>97</sup> Article 32(3) of the German Basic Law.

<sup>98</sup> BeckOK Grundgesetz/Heintschel von Heinegg, 38. Ed. 1.3.2015, GG Art. 32 Rn. 1-33.

Concerning the legislative competence, the provisions of Articles 70 sequ., 105 and several special rules are relevant. Articles 73, 105(1) enumerate the exclusive competences of the Federal Government, while Articles 74, 105(2) of the German Basic Law detail the concurrent competences.

Article 74 complements Article 72 providing an (unsorted) catalogue of the main (not the only) concurrent competences.<sup>99</sup> In effect, many policy areas fall under the area of “**concurrent legislation**”, which basically defies a clear topical division of competences. Here, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.<sup>100</sup> This means in reverse, once the Federal Government has legislated, the regional States are in principle no longer competent to act (unless the policy area is covered by a framework competence).

There used to be the possibility of framework legislation (*Rahmengesetzgebung*). However, the relevant provision (Art. 75 of the Basic Law) was repealed with the fundamental reform of German federalism in 2006.<sup>101</sup> Instead, more focus was put on the weighing of the subsidiarity principle, leading in particular to a complex system of competence allocation under the heading of concurrent competences. The second column of Table 4 below reveals how also most of the concurrent competences have been ascribed to the responsibility of the Federal Government (note that the matters where the **Länder are predominantly still competent** have been marked in **bold**.)

There are two further exceptions. For one, regarding almost a dozen of matters, the Federation may *only* legislate, if and to the extent that the **maintenance of legal or economic unity**, or the establishment of equivalent living conditions throughout Germany require a federal approach to safeguard the national interest (see the items marked in *italics* in the second column below).<sup>102</sup> Another issue concerns the **regional States’ possibility to deviate from federal law on a defined number of subjects** (see the last right-hand table items below marked in white, highlighted in blue).<sup>103</sup>

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<sup>99</sup> Maunz/Dürig/Grzeszick GG Art. 20 IV. Rn. 67-72, beck-online.

<sup>100</sup> Article 72 (1) of the German Basic Law.

<sup>101</sup> See <https://beck-online.beck.de/Dokument?vpath=bibdata%2Fges%2Fgg%2Fcont%2Fgg.a75.htm&anchor=Y-100-G-GG-A-75#FR1> (last accessed 05-10-2018).

<sup>102</sup> Article 72 (2) of the German Basic Law.

<sup>103</sup> Based on Article 72(3) of the German Basic Law.



Table 4: Distribution of competences between the German Federation (Bund) and the regional States (Länder)

Exclusive federal competences <sup>104</sup>	Concurrent competences <sup>105</sup>
<p>Foreign affairs and defence, including protection of the civilian population;</p> <p>Citizenship in the Federation;</p> <p>Freedom of movement, passports, residency registration and identity cards, immigration, emigration and extradition;</p> <p>Currency, money and coinage, weights and measures, and the determination of standards of time;</p> <p>The unity of the customs and trading area, treaties regarding commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;</p> <p>Safeguarding German cultural assets against removal from the country;</p> <p>Aviation;</p> <p>The operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance and operation of railroad lines belonging to federal railways, and the levying of charges for the use of these lines;</p> <p>Postal and telecommunications services;</p> <p>The legal relations of persons employed by the Federation and by federal corporations under public law;</p> <p>Industrial property rights, copyrights and publishing;</p>	<p>Civil law, criminal law, court organisation and procedure (except for the correctional law of pre-trial detention), the legal profession, notaries, and the provision of legal advice;</p> <p><b>Registration of births, deaths and marriages;</b></p> <p>The law of association;</p> <p><i>The law relating to residence and establishment of foreign nationals;</i></p> <p>Matters concerning refugees and expellees;</p> <p><i>Public welfare (except for the law on social care homes);</i></p> <p>War damage and reparations;</p> <p>War graves and graves of other victims of war or despotism;</p> <p><i>The law relating to economic matters (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges and private insurance), except for the law on shop closing hours, restaurants, game halls, display of individual persons, trade fairs, exhibitions and markets;</i></p> <p>Labour law, including the organisation of enterprises, occupational health and safety, and employment agencies, as well as social security, including unemployment insurance;</p> <p><b><i>The regulation of educational and training grants and the promotion of research;</i></b></p> <p>The law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74;</p> <p><b><i>The transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise;</i></b></p> <p>Prevention of the abuse of economic power;</p> <p><b>The promotion of agricultural production and forestry (except for the law on land consolidation), ensuring the adequacy of food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts;</b></p> <p><b>Urban real estate transactions, land law (except for laws regarding development fees), and the law on rental subsidies, subsidies for old debts, home building loan premiums, miners' homebuilding and homesteading;</b></p>

<sup>104</sup> Article 73 of the German Basic Law.

<sup>105</sup> Article 74 of the German Basic Law.

Table 4 (continued)

Exclusive federal competences <sup>106</sup>	Concurrent competences <sup>107</sup>
<p>Protection by the Federal Criminal Police Office against the dangers of international terrorism when a threat transcends the boundary of one Land, when the jurisdiction of a Land's police authorities cannot be perceived, or when the highest authority of an individual Land requests the assumption of federal responsibility;</p> <p>Cooperation between the Federation and the Länder concerning (a) criminal police work, (b) protection of the free democratic basic order, existence and security of the Federation or of a Land (protection of the constitution), and (c) protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany, as well as the establishment of a Federal Criminal Police Office and international action to combat crime;</p> <p>Statistics for federal purposes;</p> <p>The law on weapons and explosives;</p> <p>Benefits for persons disabled by war and for dependents of deceased war victims as well as assistance to former prisoners of war;</p> <p>The production and utilisation of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and the disposal of radioactive substances.</p>	<p>Measures to combat human and animal diseases which pose a danger to the public or are communicable, <b>admission to the medical profession and to ancillary professions or occupations</b>, as well as the law on pharmacies, medicines, medical products, drugs, narcotics and poisons;</p> <p><i>The economic viability of hospitals and the regulation of hospital charges;</i></p> <p><i>The law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals;</i></p> <p>Maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;</p> <p><i>Road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue;</i></p> <p><b>Non-federal railways, except mountain railways;</b></p> <p>Waste disposal, air pollution control, and noise abatement (except for the protection from noise associated with human activity);</p> <p><i>State liability;</i></p> <p><i>Medically assisted generation of human life, analysis and modification of genetic information as well as the regulation of organ, tissue and cell transplantation;</i></p> <p><b>The statutory rights and duties of civil servants of the Länder, the municipalities and other corporations of public law as well as of the judges in the Länder, except for their career regulations, remuneration and pensions;</b></p> <p><b>Hunting;</b></p> <p><b>Protection of nature and landscape management;</b></p> <p><b>Land distribution;</b></p> <p><b>Regional planning;</b></p> <p><b>Management of water resources;</b></p> <p><b>Admission to institutions of higher education and requirements for graduation in such institutions.</b></p>

<sup>106</sup> Article 73 of the German Basic Law.

<sup>107</sup> Article 74 of the German Basic Law.

This overview of regional competences on the Belgian and German side of the Dutch border illustrates how **Limburg’s direct neighbours possess substantial powers when it comes to shaping interterritorial cooperation** in an autonomous fashion. At the same time, Chapter 2 has underlined some existing legal **limitations on Limburg’s room for manoeuvre from the perspective of the Dutch constitutional system**. Therefore, it is now opportune to gain a better understanding of the range of multilateral instruments that already exist in the EU and which offer promising avenues for effectively promoting cross-border mobility and cooperation.

### **3.3 Typical problems of cross-border cooperation and the complex search for possible solutions**

Based on the preceding collection of competence allocations in the Netherlands, Belgium and Germany, we will now **try to map out examples of (typical) cross-border problems and group them with the various competences** available in the three States at the different levels by means of a comprehensive matrix. This list is non-exhaustive, and all errors remain our own.

The aim of the matrix is to identify measures where adjustments in rules and regulations could result in a genuine improvement for CBC and transfrontier mobility. This scheme shall provide an overview of the distribution of competences according to policy field. More precisely, it offers a basis for identifying where the respective powers are vested to tackle specific cross-border obstacles.

Given the considerable size of the matrix, it has been decided to place it with the appendices, see Annex 4. Still, for orientation and purposes of illustration, at this point we are providing below an abstract of the matrix. This extract lists the respective legislative competences per policy fields, see Table 5 below.

Table 5: Overview of legislative competences per policy field (based on the matrix in Annex 4)

Policy area	Legislative competence
Arbeidsmarkt (arbeidsrecht en werkgelegenheid)	<ul style="list-style-type: none"> <li>▪ NL: nationaal</li> <li>▪ BE: regionaal en nationaal</li> <li>▪ DE: regionaal en nationaal</li> <li>▪ EU: gedeelde bevoegdheden (sociaal beleid, voor de in het onderhavige Verdrag genoemde aspecten; economische, sociale en territoriale samenhang), coördinatie (werkgelegenheidsbeleid)</li> </ul> <ul style="list-style-type: none"> <li>➤ EU richtlijnen</li> <li>➤ Nationale wetten en regelgeving</li> </ul>
Belastingen- algemeen	<ul style="list-style-type: none"> <li>▪ NL: nationaal</li> <li>▪ BE: regionaal en nationaal.</li> <li>▪ DE: regionaal en nationaal.</li> <li>▪ EU: gedeelde bevoegdheden (Interne Markt) mbt indirecte belasting, m.n. BTW en accijnzen (unanimiteit)</li> </ul> <ul style="list-style-type: none"> <li>➤ Belasting Verdrag tussen NL en DE (2016)</li> <li>➤ Belasting Verdrag tussen NL en BE (wordt op dit moment onderhandeld)</li> </ul>
Sociale zekerheid	<ul style="list-style-type: none"> <li>▪ NL: lokaal en nationaal</li> <li>▪ BE: regionaal en nationaal</li> <li>▪ DE: regionaal en nationaal</li> <li>▪ EU: gedeelde bevoegdheden (sociaal beleid, voor de in het onderhavige Verdrag genoemde aspecten; vrij verkeer van werknemers/Interne Markt)</li> </ul> <ul style="list-style-type: none"> <li>➤ EU Coördinatie-Verordening</li> <li>➤ Nationale wetten en regelgeving</li> </ul>
Verkeer	<ul style="list-style-type: none"> <li>▪ NL: lokaal en nationaal</li> <li>▪ BE: regionaal en nationaal</li> <li>▪ DE: regionaal en nationaal</li> <li>▪ EU: gedeelde bevoegdheid (trans-Europese netwerken)</li> </ul> <ul style="list-style-type: none"> <li>➤ EU agentschappen (lucht, water, spoorwegen) toepassing gemeensch.standards voor gezondheid en veiligheid</li> <li>➤ Nationale wetten en regelgeving</li> </ul>
Ziekenhuis/zorg	<ul style="list-style-type: none"> <li>▪ NL: nationaal</li> <li>▪ BE: regionaal en nationaal</li> <li>▪ DE: nationaal</li> <li>▪ EU: gedeelde bevoegdheid (Interne Markt)</li> </ul> <ul style="list-style-type: none"> <li>➤ Patiëntenrichtlijn, VO (EU) 883/2004</li> <li>➤ Nationale wetten en regelgeving</li> </ul>
Bedrijventerreinen/ grensoverschrijdende havens/ economie	<ul style="list-style-type: none"> <li>▪ NL: regionaal en nationaal</li> <li>▪ BE: regionaal</li> <li>▪ DE: nationaal</li> <li>▪ EU: indirect (milieuwetgeving, technische standards, vrij verkeer...)</li> </ul>

Onderwijs	<ul style="list-style-type: none"> <li>▪ NL: nationaal</li> <li>▪ BE: regionaal en nationaal</li> <li>▪ DE: regionaal en nationaal</li> <li>▪ EU: ondersteunend</li> </ul>
Migratie/verblijfsvergunning	<ul style="list-style-type: none"> <li>▪ NL: nationaal</li> <li>▪ BE: nationaal</li> <li>▪ DE: nationaal</li> <li>▪ EU: coördinatie, uniformering procedures, geen gemeensch. asielbeleid</li> </ul> <ul style="list-style-type: none"> <li>➤ Dublin III-VO (bevoegd land asielaanvraag, database vingerafdrukken), EU erkenningsrichtlijnen (uniforme status vuchteling, langdurig ingezetenen derde landen-onderdanen), Europese blauwe kaart toegang en verblijf van hooggekwalificeerde werknemers)</li> <li>➤ Nationale wetten en regelgeving</li> </ul>
Wonen	<ul style="list-style-type: none"> <li>▪ NL: nationaal</li> <li>▪ BE: nationaal</li> <li>▪ DE: nationaal</li> <li>▪ EU: indirect (klimaatdoelstellingen, mededingen), macro-economisch beleid (woningprijzen gezien als drijver bankencrisis)</li> </ul>
Milieu/ruimtelijke ordening	<ul style="list-style-type: none"> <li>▪ NL: nationaal</li> <li>▪ BE: nationaal</li> <li>▪ DE: nationaal</li> <li>▪ EU: gedeelde bevoegdheden</li> </ul>
Ambulances, Brandweer, /politie/rampenbestrijding	<ul style="list-style-type: none"> <li>▪ NL- Nationaal</li> <li>▪ BE- Regionaal</li> <li>▪ DE- Nationaal en Regionaal</li> <li>▪ EU: coördinatie (van interventies op het gebied van civiele bescherming in noodsituaties)</li> </ul>
Cultuur	<ul style="list-style-type: none"> <li>▪ NL- Nationaal</li> <li>▪ BE: Regionaal</li> <li>▪ DE: Nationaal en regionaal</li> <li>▪ EU: aanvullend</li> </ul>

In the following, we will include text boxes – like the ones below – that aim to illustrate the items under discussion by means of practical examples/short case studies. In this section, the text boxes provide examples of two sizeable new cross-border projects whose implementation would undoubtedly benefit from strengthened administrative and resolution capacities regarding CBC and the removal of cross-border obstacles.

#### NORTH SEA PORT Gent-Terneuzen-Vlissingen (Part 1)

*The North Sea Port is a 60 km long cross-border port area stretching from Vlissingen in the Netherlands to Ghent in Belgium. It is strategically located as a hub for production and distribution of all kinds of cargo categories and products, both for imports and the exports. Furthermore, it is also a transshipment port between seagoing and inland navigation.*

*The North Sea Port is managed by the Port Company. This company is formed by the merger between Ghent Port Company (Flanders) and Zeeland Seaports (the Netherlands). 8 public shareholders agreed to this cross-border merger. This includes on behalf of Zeeland Seaports in the Netherlands: the province of Zeeland and the municipalities of Borsele, Terneuzen and Vlissingen. On behalf of the Ghent Port Company in Flanders: the city of Ghent, the municipalities of Evergem and Zelzate and the province of East Flanders. Decisions of the Port Company are taken by the North Sea Port Authority in which the 8 public shareholders are represented. These shareholders are involved and informed in the shareholders' committee. This committee contains all the elected representatives of the municipal councils, the Dutch councils and the provincial councils. In addition, there is structural and bilateral consultation with the shareholders. In total, the North Sea Port Authority has 250 employees.*

*As a cross-border port, the North Sea Port aims to manage, operate and develop the port area. In this context, North Sea Port facilitates private interests of the companies in the port area. In order to do so, the North Sea Port has a number of ambitions:*

- *It wants to maintain economic growth;*
- *It wants to improve the development opportunities for existing and new customers by coordinating spatial development with the infrastructure; and*
- *It seeks to work actively with all the partners involved in order to achieve the existing objectives in terms of sustainability more quickly.*
- *In addition, the objectives of the North Sea Port also serve public interests since:*
- *It aims to ensure effective, safe and efficient handling of shipping traffic;*
- *It aims to ensure nautical and maritime safety and order in the region; and*
- *It aims to promote the development, construction, management and operation of the port area.*



#### NORTH SEA PORT Gent-Terneuzen-Vlissingen (Part 2)

*However, the responsibilities that result from this, are regulated and assessed differently by Zeeland (the Netherlands) and by Flanders (Belgium). Although, the North Sea Port is still in its initial phase of the merger, it already encountered several cross-border obstacles. These obstacles are all related to the North Sea Port, however they all deal with different issues. The following examples of cross-border obstacles can be mentioned:*

- *The responsibilities of the harbour master is based differently: for the Flemish part is it based on public law, whereas for the Dutch part it is a purely private matter. One of the tasks of the harbour master is to monitor the safety and the environment in the port area. In order to do so, it has special administrative police powers. However, due to the differences in legal basis, the supervisory staff can only exercise this supervision on their own territory (so either on the Dutch part or on the Flemish part). At the moment, a study is carried out to find a solution for this problem, however it would be evident and efficient that on both sides of the border the harbour master has the same competences and responsibilities;*
- *The employment requirements for a harbour master are completely different according to Flemish and Dutch law, such as the requirement that a harbour master must have been a captain for 10 years or longer;*
- *There is a difference in certain decision-making processes between the Netherlands and Belgium. For instance, the decision-making process for financing the rail infrastructure. There are differences in procedure, in criteria in order to qualify for appropriate funding and in budgetary and formal responsibility. This is problematic since the rail infrastructure is of crucial importance for cross-border projects, and currently it is hampering the progress of such projects;*
- *North Sea Port is an active partner of various sustainable projects, such as the cross-border project Steel2Chemicals. Here, carbon-rich residual gases from Arcelor Mittal are used as raw materials for Dow Chemical Terneuzen. However, at the moment there is no uniform regulation with regard to license processes, nationally defined environmental areas, spatial planning visions and restrictions in the cross-border transport of CO2.*

### EUREGIONAL Centre for Paediatric Surgery (Part 1)

*In 2016, the Benelux Secretariat General made several recommendations in the field of healthcare, in which it recommended the expansion of effective cross-border collaboration in the field of healthcare and the coordination of healthcare provision for specialised forms of treatment between the Benelux countries. The establishment of the Euregional Centre for Paediatric Surgery contributes directly to these goals since it establishes an intense, innovative collaboration in the field of paediatric surgery within a single expertise group. It will be the first cross-border centre in which a form of highly specialised care is concentrated. It goes far beyond a partnership between healthcare providers on the basis of patient referral alone; instead, a single integrated team will be responsible for the provision of this care at different locations, in different countries and under different healthcare systems, in line with the same high standards of quality and with the same innovative care paths.*

*This cross-border initiative has a ‘Euregional’ character since it will break through the barriers of current practices for the planning, recognition and regulation of high complex healthcare provision at a national scale. The establishment of such a Euregional Centre for Paediatric Surgery would be unique and innovative from the perspective of financing and regulations in healthcare.*

*The creation of the Euregional Centre for Paediatric Surgery would be beneficial on several levels and for multiple stakeholders in the region. The following benefits can be expected:*

*For patients:*

- *Long-term availability of highly specialised care provision in patients’ own region since paediatric surgery and specialisms dependent on this (paediatrics, paediatric intensive care and neonatal intensive care, urology, gynaecology, prenatal diagnostics, radiology, anaesthesiology, etcetera);*
- *High quality of care provision through shared care paths, quality monitoring and pooling of knowledge;*
- *Supervision throughout a lifelong care path without interruption after the age of childhood;*
- *Research and innovation: improved and new treatments, prevention of health damage.*

*For care providers:*

- *Retention of essential highly specialised skills ;*
- *Better able to deal with the lack of specialised health-care professionals, for instance through shared deployment and more attractive employer ship;*
- *Learning from each other (pooling of know-how and expertise);*
- *Improved training programmes, as a result of which more doctors will opt for paediatric surgery as specialism.*

*For regional authorities:*

- *Availability of health care and infrastructure in the region (better spread and accessibility);*
- *Improving the attraction of the EMR region: knowledge centres, health care, activities, population;*
- *Quality economic activity;*
- *Enhanced regional competitive position;*
- *Support of overall Euregional objectives.*

#### EUREGIONAL Centre for Paediatric Surgery (Part 2)

*However, in effectuating this kind of Euregional collaboration, a large number of obstacles are expected, for example:*

- *Recognition of a cross-border paediatric surgical centre within the various systems;*
- *Professional and institutional qualifications and study programmes; and*
- *Issues of data registration and extraction, for instance with regard to ICT and privacy laws.*

*As shown, the most obstacles are not within the healthcare professional's or hospital's sphere of influence, but rather of a legal nature. In order to address the different issues present in the region and the project, a working group has been established. This working group consists of Maastricht UMC+, Universitätsklinikum der RWTH Aachen, Centre Hospitalier Chretien Liège and ITEM (Institute for Transnational and Euregional cross-border cooperation and Mobility). Currently, the working group submitted a proposal for Interreg funding. If this is accepted, then the partners will draw up a more detailed project plan.*

## 4. Multilateral instruments that facilitate (interregional) cross-border cooperation

In this chapter, we will study different settings – at European and the regional level – where two or more Member States are cooperating systematically and inter-regionally to solve cross-border issues. We will consider a selection of examples, look at their organisational structure and legal instruments available to get an idea which kind of competences and innovative solutions already exist in Europe to solve cross-border problems.

For that purpose, this chapter is structured into two parts. In the first part, we will examine the European level where both major players, the EU and the Council of Europe, have been building up respective expertise and specialised instrumentation for decades. A short review of EU cohesion policy and the available instruments in that context will provide the basis for discussing the European Commission's latest initiative for setting up a new "mechanism" to tackle administrative and legal obstacles to CBC, later on (see Chapter 5). Then, we look at the state of play in the Council of Europe, which for long used to provide the main centre stage for the political promotion of transfrontier cooperation.

The case studies of the second part will follow a slightly different structure to allow ourselves getting acquainted with different organisational models that exist at regional level in Europe. Here, we will start with examining forms of **multilateral international cooperation** – notably, the Benelux Union, the Nordic Free Movement Council, and the two organisations set up to regulate the various aspects of river management, the International Commission for the Protection of the Rhine (ICPR) and the Central Commission for the Navigation of the Rhine (CCNR). Then, we will study two interesting initiatives of **multilevel interregional cooperation** – namely, the German-French-Swiss Upper Rhine Conference and the Austrian-Italian Three Provinces' Parliament. For all these cases, we will provide a short description of the organisational structure, their legal basis and the range of cooperation instruments to elucidate the different models that exist for systematically dealing with cross-border

issues in a multilateral/multilevel setting. Again, some informative concrete practical examples will be given in separate text boxes.

## 4.1 European level

### 4.1.1 EU cohesion policy - The Union's toolbox for supporting CBC

In order to achieve economic, social and territorial cohesion, the EU offers a set of effective tools that support regional and local authorities in fostering CBC and devising solutions to cross-border obstacles. These include, on the one hand, the instruments of financial support, most notably the INTERREG programmes. On the other hand, there is the more recent tool for institutional support, the European Grouping of Territorial Cooperation (EGTC).

In principle, there seems to be widespread agreement that these instruments are crucial in addressing the financial aspects and organisational questions in realising CBC in the EU.<sup>108</sup> A decisive drawback of these tools, however, is that they cannot help much in solving problems of a legal or administrative nature. This concerns especially those problems, which may not have been foreseen from the start of the common CBC project. Therefore, the European Commission has proposed the adoption of a new instrument, a so-called “mechanism”.<sup>109</sup>

Accordingly, this section will first briefly review the EU's existing toolbox for promoting CBC – i.e. its financial and institutional instruments at hand. This will provide the basis for discussing the new proposed mechanism in Chapter 5.

#### *i. Financial support instruments*

For long, a legal basis for introducing regulatory measures on territorial cooperation in the EU was lacking. That is why the EU has been primarily focussing on providing financial assistance, while political coordination of promoting CBC by legal instruments has taken place at the Council of Europe already since the 1980s (see below).

The EU's European Regional Development Fund (ERDF) was already set up in 1975. The Single European Act bolstered this with a legal mandate for the European Commission to coordinate and structure the utilization of the so-called Structural Funds, including the ERDF, in 1987.<sup>110</sup> Since then, the Treaty empowers the EU to support the strengthening of its economic, social and territorial cohesion.<sup>111</sup> In particular, it is to aim at reducing disparities between the levels of development of the various regions within the Union by making use of the Union's Structural Funds.<sup>112</sup>

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<sup>108</sup> European Commission, Communication on Boosting growth and cohesion in EU border regions (COM(2017) 534, Brussels, 20 September 2017).

<sup>109</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context (COM(2018) 373, Strasbourg, 29 May 2018).

<sup>110</sup> N. Levrat (ed), *The European Grouping of Territorial Cooperation - EGTC* (Study carried out by Groupe d'Etudes Politiques Européennes (GEPE), commissioned by the Committee of the Regions, Geneva: University of Geneva, January 2007) at 38.

<sup>111</sup> Article 174 TFEU (ex Art. 158 EC, ex Art. 130a EC).

<sup>112</sup> Article 175(1) TFEU (ex Art. 159, ex Art. 130b EC).

Further recognition of regional interests in the context of EU cohesion policy was added later to the Treaty.<sup>113</sup> In 2006, then, the Union’s toolbox for promoting CBC was considerably strengthened by providing an institutional template for creating joint cross-border bodies.

### *European Territorial Cooperation (ETC) – INTERREG*

Building on the early legal framework for the structural funds, the Commission launched the Union Initiative Programme “Interreg” – also known as European Territorial Cooperation (ETC) – in 1991.<sup>114</sup> Interreg seeks to address the specificities of border regions, overcome their specific obstacles and stimulate Member State cooperation. This is done by supporting the implementation and planning of cross-border programmes and setting-up joint institutional and administrative structures to support and encourage cooperation.

#### *Evolution of ETC funding*

Initially, Interreg was developed for programmes covering exclusively cross-border cooperation, known as Interreg A. Later, Interreg has been extended also to the other two strands of cooperation – namely, transnational (Interreg B) and interregional cooperation (Interreg C). While support for “**cross-border cooperation**” targets local neighbourly relations, “**transnational cooperation**” comprises collaboration on a wider scale. In addition, “**interregional cooperation**” focuses on improving the effectiveness of policies and instruments for regional development through networking, especially between subnational authorities and public bodies.

For more than 25 years, Interreg has funded thousands of projects and initiatives, which have contributed to European integration in border regions. In order to adapt to developing project needs, considering programme evaluation and changing policy priorities, Interreg has been deployed through five successive programming periods: Interreg I (1989-1993); Interreg II (1994-1999); Interreg III (2000-2006); Interreg IV (2007-2013); and, as currently in operation, Interreg V (2014-2020).

In the aftermath of the financial and economic crisis – notably, in response to the onset of the Euro crisis with an increased emphasis on social investment under the Juncker Commission, the EU’s structural funds were fundamentally overhauled in 2013. They now run under the common reference of the “European structural and investment funds (ESIF)” and are governed by common principles, streamlined according to common priorities.<sup>115</sup> There is now a stronger focus on results (measurable targets), simplification (one set of rules for five Funds) and conditionality (specific preconditions before funds can be channelled, compliance with EU economic rules).

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<sup>113</sup> In 1997, the Treaty of Amsterdam added to Article 307 TFEU (ex Art. 265 EC, ex Art. 198c) that “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*”.

<sup>114</sup> J. Wouters and M. Vidal, *Grensoverschrijdende samenwerking van lokale overheden: een Europees- en internationaalrechtelijk perspectief* (Working Paper No. 119, Leuven: Catholic University of Leuven, January 2008) at 16.

<sup>115</sup> See Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [OJ L 347/2013, p. 320].

This new design of EU Cohesion Policy is also reflected in the current Interreg V programming period (2014-2020). Interreg has been reshaped significantly to achieve greater impact and an even more effective use of the investments. It is now based on 11 investment priorities laid down in the ERDF Regulation.<sup>116</sup> These are aligned with the targets of the Union’s multiannual strategy of Europe 2020 strategy to achieve smart, sustainable and inclusive growth.<sup>117</sup> From a total Interreg budget of EUR 10.1 billion for the fifth period, about EUR 6.6 billion of the ERDF funds got to 60 cross-border programmes along 38 internal EU borders (Interreg V-A).<sup>118</sup>

#### *Benefits and shortcomings of Interreg*

EU cohesion policy is recognised for investing considerably in tackling economic disparities across EU regions.<sup>119</sup> It has co-financed investment in innovation, education and digital and transport networks, contributing to create a single market that boosts growth, productivity and specialisation.<sup>120</sup> It was realised, however, that the mere supporting role of the EU in the field of territorial cooperation had its shortcomings. Interreg programmes evidently did not, on their own, succeed in the creation of shared institutional or administrative structures in the field of CBC, despite explicit encouragement to that end.<sup>121</sup> In its ex-post evaluation of Interreg IV (2007-2013) in 2016, the Commission noted **several limitations** in that regard, highlighting as follows:

- Interreg programmes were rather project-focused, they do not trigger further strengthening of cooperation of border regions beyond the scope and contribution of the project;<sup>122</sup>

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<sup>116</sup> REGULATION (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal.

<sup>117</sup> Investment from the ERDF will support the following 11 objectives, whereas 1-4 are marked as the main priorities for investment: 1. Strengthening research, technological development and innovation; 2. Enhancing access to, and use and quality of, information and communication technologies; 3. Enhancing the competitiveness of SMEs; 4. Supporting the shift towards a low-carbon economy; 5. Promoting climate change adaptation, risk prevention and management; 6. Preserving and protecting the environment and promoting resource efficiency; 7. Promoting sustainable transport and improving network infrastructures; 8. Promoting sustainable and quality employment and supporting labour mobility; 9. Promoting social inclusion, combating poverty and any discrimination; 10. Investing in education, training and lifelong learning; and 11. Improving the efficiency of public administration.

<sup>118</sup> The remaining funds are allocated to transnational and interregional programmes as well as to EU external border cooperation programmes through other instruments (Instrument for Pre-Accession, European Neighbourhood Instrument). See [http://ec.europa.eu/regional\\_policy/en/policy/cooperation/european-territorial/](http://ec.europa.eu/regional_policy/en/policy/cooperation/european-territorial/) (last accessed 05-10-2018).

<sup>119</sup> European Commission, My Region, My Europe, Our Future – Seventh report on economic, social and territorial cohesion (COM(2017) 583, Brussels, 9 October 2017).

<sup>120</sup> In 2016, the European Commission evaluated Interreg, its programmes and its contribution to the elimination of cross-border obstacles. In this evaluation, it found that Interreg has contributed to alleviate specific barriers to cooperation mainly cultural, physical distance, mental and language barriers. In addition, its programmes have led to better social integration. See European Commission, *European Territorial Cooperation - Work Package 11: Ex-post evaluation of Cohesion Policy programmes 2007-2013, focusing on the European Regional Development Fund (ERDF) and the Cohesion Fund (CF)* (Final Report, ADE, contract no. 2014CE16BAT047 for DG REGIO B.2, July 2016) at 117.

<sup>121</sup> V. Borger, Territorial Cooperation in Europe: What Future for the tUL? A thesis on recent legislative developments in the area of European territorial cooperation and their possible relevance for the transnationale Universiteit Limburg (Master Thesis under the supervision of Prof. dr. H. Schneider, Maastricht: Faculty of Law, 2010) at 27. See also Levrat (2007) at 56.

<sup>122</sup> European Commission, European Territorial Cooperation - Work Package 11: Ex-post evaluation... (2016) at 118.



- Therefore, limited attention was devoted to sustainability, sustainable project results could not be guaranteed so that Interreg programmes failed to build a solid foundation for future CBC and integration;<sup>123</sup> and
- There was a lack of evidence that the Interreg programmes also reduced legal and institutional barriers.<sup>124</sup>

In effect, the fact that **the Interreg programmes did not go (much) beyond the financial encouragement of territorial cooperation was linked to the absence of a proper legal framework at European level** that regulated the setting-up of joint management structures.

*ii) Institutional support instruments*

On 5 July 2006, the adoption of Regulation 1082/2006 brought to life the European Grouping of Territorial Cooperation (EGTC).<sup>125</sup> The EGTC is a new EU legal instrument that aims to facilitate and promote cross-border, transnational and interregional cooperation between public actors throughout the Union.<sup>126</sup> The negotiations were difficult at first. But the Treaty of Nice had replaced the unanimity requirement that previously governed the Cohesion Title by the co-decision procedure of Article 294 TFEU (ex. Art. 251 EC).<sup>127</sup> Hence, the EGTC-Regulation was eventually adopted rather quickly, as it was coupled to the negotiations on the Structural Funds Regulations while being pushed by the Austrian Presidency at the time.<sup>128</sup>

In fact, the legal basis for Regulation 1082/2006 is Article 175(3) TFEU. This provision empowers the Council to adopt measures ‘if specific actions prove necessary *outside* the Funds and without prejudice to the measures decided upon within the framework of the other Union policies’ [emphasis added]. While formally separate from the EU legislation on the structural funds, it is clear that **legislation based on this provision must have the objective of strengthening the Union’s economic and social cohesion**.<sup>129</sup>

The introduction of the **EGTC represents a new approach** to address the lack of a European legal framework for **setting up joint management structures** that enhance the execution of CBC projects. It should be noted that, following a first review of the EGTC-instrument, the EU legislator undertook a revision of the applicable rules in 2013 to provide more clarity and some simplifications.<sup>130</sup> This legislative update was to facilitate the establishment and operation of the EGTCs to allow for more

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<sup>123</sup> *Ibid*, at 124.

<sup>124</sup> *Ibid*, at 19 and 101.

<sup>125</sup> 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) [OJ L 210/2006, p. 19], as amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 [OJ L 347/2013, p. 303] (*hereafter*: the Revised Regulation 1082/2006).

<sup>126</sup> In the private sector, this possibility already exists for much longer. See Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>127</sup> See also Borger (2010) at 28.

<sup>128</sup> Levrat (2007) at 63.

<sup>129</sup> Article 1(2) recognises the strengthening of economic and social cohesion as the exclusive aim of the EGTC-Regulation.

<sup>130</sup> European Commission, ‘Assessment of the application of EGTC regulation’, Final report, 20 April 2018, at v. See Regulation No. 1302/2013 of the European Parliament and of the Council of 17 December 2013, O.J. L 347, amending Regulation No. 1082/2006.

extensive use and contribute to better policy coherence. Creating additional burdens on national or Union administrations was to be avoided.

### *Main features EGTC*

The Regulation, in effect, provides a template and procedural framework to that end. Article 1 (3) states that an EGTC shall have **legal personality**, which is necessary for such a joint management structure to operate effectively. However, the provision does not clarify whether it needs to be an entity with a private or public law nature. The decision on the EGTC's legal nature is thus left to the Member States.

Importantly, in each Member State an EGTC shall have the **most extensive legal capacity** accorded to legal persons under that country's national law.<sup>131</sup> In particular, an EGTC may acquire or dispose movable and immovable property, employ staff and it may be a party to legal proceedings.

Crucial is the **question of applicable law**. This requires a decisive choice to be made, i.e. in which Member State **the European Grouping's registered office will have its seat**. It must be a Member State under whose law at least one of the EGTC's members is established.<sup>132</sup> This is highly relevant since national law characterises the EGTC-instrument to a large extent. According to Article 2 (1)(a), for those matters that are not or only partly governed by the Regulation it is an EGTC's registered office that determines the applicable national law. This law will also be applicable to the interpretation and enforcement of the Grouping's convention.<sup>133</sup> It is also this Member State that has the right to designate the competent authority to control an EGTC's management of public funds<sup>134</sup> and whose courts have the competence to wound up an EGTC.<sup>135</sup>

The **procedure of establishing an EGTC** is governed by Article 4. The decision to establish an EGTC shall be taken at the initiative of its prospective members. These are for instance national, regional or local authorities or public undertakings.<sup>136</sup> Each prospective member shall notify the Member State under whose law it has been formed of its intention to participate in an EGTC and send a copy of the proposed convention and statutes to that Member State.<sup>137</sup> After this notification, the Member State has six months to approve the prospective member's participation in the EGTC and the convention. In general, approval shall be given unless such participation is not in conformity with the Regulation, or EU law at large. The Member State can also withhold approval if such participation is not justified for reasons of public policy or public interest or when the statutes are inconsistent with the convention.<sup>138</sup> If approved, in terms of organs, an EGTC shall at least have an assembly.<sup>139</sup> This is made up of

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<sup>131</sup> Article 1 (4) of the Revised Regulation 1082/2006.

<sup>132</sup> Article 1 (5) of the Revised Regulation 1082/2006.

<sup>133</sup> Article 8 (2)(g).

<sup>134</sup> Article 6 (1).

<sup>135</sup> Article 14 (1).

<sup>136</sup> Article 3 (1).

<sup>137</sup> Article 4 (2). An EGTC is governed by a convention concluded unanimously by its members. Article 8 determines the content and requirements of this convention. In addition, Article 9 specifies the minimum requirements of the statute.

<sup>138</sup> Article 4 (3).

<sup>139</sup> Article 10.

representatives of the Grouping's members and a director, who represents the EGTC and acts on its behalf. Article 7 summarises the tasks of an EGTC.

### *Assessment of the application of the EGTC-Regulation*

As of 3 July 2018, in total 72 EGTCs have so far been registered with the EGTC Registers managed by the Committee of the Regions (CoR).<sup>140</sup> In spring 2018, the European Commission completed another evaluation of the (revised) EGTC Regulation's application. The resulting report covers the instrument's effectiveness, efficiency, relevance and sustainability.

*Table 6: Overview of EGTCs involving one or more Benelux countries<sup>141</sup>*

No	EGTC (abbreviation)	Seat	Member States	Date of constitution
<b>1</b>	Eurométropole Lille-Kortrijk-Tournai / Eurometropool Lille-Kortrijk-Tournai (Lille-Kortrijk-Tournai)	Lille, FR	<u>FR</u> /BE	<b>22/1/2008</b> (Publication)
<b>8</b>	Groupement Européen de Coopération Territoriale West Vlaanderen/Flandre-Dunkerque-Côte d'Opale	Dunkerque, FR	<u>FR</u> /BE	<b>25/3/2009</b> (Registration)
<b>14</b>	GECT INTERREG "Programme <b>Grande Région</b> " EVTZ INTERREG "Programm Großregion" (Grande Région/Großregion)	Metz, FR	<u>FR</u> /DE/ LU/BE	<b>29/3/2010</b> (R) <i>Closed 2017</i>
<b>39</b>	GECT "Secrétariat du Sommet de la <b>Grande Région</b> " / EVTZ "Gipfelsekretariat der Großregion"	Luxembourg, LU	<u>LU</u> /DE/BE/FR	<b>28/8/2013</b> (P)
<b>58</b>	GECT-Autorité de gestion programme INTERREG V A <b>Grande Région</b>	Luxembourg, LU	<u>LU</u> /FR	<b>19/10/2015</b> (R)
<b>20</b>	"Linieland van Waas en Hulst" Europese Groepering voor Territoriale Samenwerking (EGTC Linieland van Waas en Hulst)	Sint-Gillis-Waas, BE	<u>BE</u> /NL	<b>15/6/2011</b> (R)
<b>32</b>	European Grouping of Territorial Cooperation European Urban Knowledge Network Limited (EUKN EGTC)	The Hague, NL	<u>NL</u> /BE/ CY/CZ/ FR/DE/ HU/LU/ RO	<b>3/12/2012</b> (P)
<b>52</b>	ESPO EGTC – European Node for Territorial Evidence (ESPO EGTC)	Luxembourg, LU	<u>LU</u> /BE	<b>19/1/2015</b> (P)
<b>54</b>	<b>Interregional Alliance for the Rhine-Alpine Corridor EGTC</b>	<b>Mannheim, DE</b>	<u>DE</u> /NL	<b>27/5/2015</b> (P)

With regard to **effectiveness**, the EGTC instrument is considered to fulfil its tasks of supporting ETC implementation through projects and the implementation of programmes. The main benefits can be summarised as follows:

<sup>140</sup> One of these EGTCs has been closed in 2017, namely the EGTC Interreg – Programme Grande Région which acted as a managing authority for Belgian-French-Luxembourgish-German partnership cooperation for the INTERREG IV A Grande Région. It has been succeeded by the GECT-Autorité de gestion programme INTERREG V A Grand Région (DE, FR, LU). See a full list and map of the registered EGTCs at: <https://portal.cor.europa.eu/egtc/CoRAactivities/Pages/egtc-map.aspx>.

<sup>141</sup> Based on: <https://webapi2016.cor.europa.eu/v1/documents/cor-2016-04572-00-04-tcd-tra-en.docx/content> (last accessed 05-10-2018).

- The EGTC supports multi-level governance structures, enhancing “cross-border bottom-up approaches” and allowing for more intensified and higher levels of CBC;<sup>142</sup>
- The instrument helps to improve service provision in border regions, aiding the participating members in joint planning, implementation of strategies and putting their joint interests above national interests;
- EGTCs have easier access to EU funding, they seem **generally well suited for deepening and professionalising already existing broad cooperation structures** (rather than for the management of specific sectoral projects);<sup>143</sup>
- EGTCs obtain better visibility and improved acceptance by other public authorities;
- EGTCs often act as a reliable and sustainable communication channel;
- EGTCs’ capacity to provide services of general economic interest generates positive feedback effects – on the one hand, increasing the pressure for harmonisation of the legal framework across countries, and reducing the “mental effect” of national borders, on the other, thereby contributing to the development of cross-border spaces.<sup>144</sup>

The question of **efficiency**, instead, is significantly harder to assess due to a lack of reliable information about the efficient performance of the EGTC instrument.<sup>145</sup> Nonetheless, the European Commission pointed to the following reasons why the setting up of an EGTC was not approved by the Member States, when requested:

- In one case, the setting-up of an EGTC was stopped in favour of another structure, a more efficient one;
- Due to incompatibilities between national regulations, which may either lead to outright disapproval or at least a delay in approval; and
- The evidence of different objectives and structures of the partners.<sup>146</sup>

In terms of relevance and **sustainability**, some lack of activity in a few EGTCs is noted. Their inactivity, however, is mostly caused by a lack of resources including financial and human resources.<sup>147</sup>

Overall a mixed picture emerges regarding the performance of EGTCs in promoting CBC. In this regard, it is worth quoting the Commission’s latest assessment report at length:

*‘EGTC involvement in ETC has been generally supported by strengthening the legal links between the EGTC regulation and the regulations of EU Cohesion Policy 2014-2020. The*

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<sup>142</sup> In this respect, it should be noted that one drawback can be that Euroregions sometimes cannot establish an EGTC if natural persons are member of their associations, even though it is dominated by public authorities (see Article 3). European Commission, *Assessment of the application of EGTC regulation* (Final report, 20 April 2018) at 20-21.

<sup>143</sup> Borger (2010).

<sup>144</sup> European Commission, EGTC Assessment report 2008, at 8.

<sup>145</sup> *Ibid*, p. 10.

<sup>146</sup> *Ibid*, p. 11.

<sup>147</sup> *Ibid*, p. 14.

*amendment of the EGTC regulation, however, has not resulted in new EGTCs acting as MAs of ETC programmes. Apparently, the EGTC instrument is not favoured for this function, many ETC programmes prefer to establish programme authorities as they have done previously (Zillmer and Toptsidou, 2014, p. 6). Nearly half the EGTCs are now involved in implementation of ETC, mostly through partnerships in one or several projects. This is considerably higher than in 2014. However, involvement also depends on programme cycles. EGTCs very rarely make use of the option to act as single beneficiary of an operation. Experience of EGTCs shows that especially at the early stages of the 2014-2020 programming period many clarifications were needed with ETC programmes. This may have hampered further applications as single beneficiaries.*

*Overall, the involvement of EGTCs in cooperation programmes has increased a lot. In addition to the quantitative measures, EGTCs played other roles in ETC and show the increasing relevance given to EGTCs. They also play other roles in utilising EU Funds, highlighting the broad variety of uses for which the instrument is suitable. Amendment of the EGTC regulation may also have reduced the difficulties of implementing and managing territorial cooperation. However, since only a few EGTC are implementing ETC projects as single beneficiaries or are managing a programme or parts thereof, the impact seems to be limited.*

*The relevance for individual members entering EGTC agreements is underlined by frequently mentioned benefits and the increased memberships as members only tend to enter an existing EGTC if its achievements are in line with their motivations. This is supported by the number of EGTCs being set-up, which does not seem to be decreasing overall. Though some border areas may be saturated, the EGTC instrument is still relevant.*

*The relevance and sustainability does not need to be questioned because of a lack of activity in a few EGTCs. Their inactivity is mostly due to a lack of resources. This includes financial and human resources as well as capacities to successfully apply for ETC or other funding. In a few cases there is a misunderstanding, as some stakeholders believe that the EGTC instrument automatically provides access to financial resources, although the regulation clearly states that this is not the case. In consequence, the instrument may not be relevant for cross-border structures that do not have sufficient resources dedicated to continuous cross-border collaboration. This is also supported by the findings of a European Parliament study.<sup>148</sup>*

All in all, the assessment report concludes by recognising the “European added value” of the EGTC-instrument. Based on the above-mentioned benefits, this added value relates to overall improved decision-making, objectives and strategies, independence, joint forces and visibility.<sup>149</sup> In view of the

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<sup>148</sup> *Ibid*, p. 15. See also: Zillmer and Toptsidou, 2014, p. 6. The European Parliament stated that the EGTC does not solve the questions of content. For instance, in certain policy areas which require specific regulation (for example, environment), it is necessary to determine which standards will be applied. See EP Study (2015) on the EGTCs:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563384/IPOL\\_STU\(2015\)563384\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563384/IPOL_STU(2015)563384_EN.pdf).

<sup>149</sup> *Ibid*, p. 16.

drawbacks perceived in the application of the EGTC-Regulation, the report advances the following recommendations:

- Possible further clarifications and simplifications through an amendment of the EGTC Regulation;
- Further actions to better facilitate the application of the EGTC instrument; and
- Further actions to improve the assessment of the Regulation’s application.

The example of the EGTC Hospital of Cerdanya shows that the EGTC and similar structures provide

#### EGTC Hospital of Cerdanya (Part 1)

*The EGTC Hospital de la Cerdanya was created on 26 April 2010 and it opened in September 2014. This project aims to improve the provision of healthcare services in the regions of Cerdanya and Capcir by establishing a cross-border hospital for the inhabitants. There are around 30.000 inhabitants, which benefit from this project (17.000 on the Spanish side and 13.000 on the French side). It serves not only as a setting for the treatment of acute medical problems, but also as the core of a network of cross-border health services. The hospital has been equipped with 64 beds, 32 rooms, 3 operating rooms, 1 birthing room and additional multi-purpose facilities.*

*It is an initiative of the French and Spanish health authorities. In total, seven authorities participate in the project. In France, the ministry of Health and Solidarity and the National Health Insurance and the Regional Agency for hospitals of Languedoc-Rousillon participate. The Spanish participants are the municipality of Puigcerdá, the county council of Cerdanya, the Catalan department of health, the Catalan healthcare service and the Spanish Ministry of health and consumer affairs.*

*Since the Hospital is located in Puigcerdá, Catalonia, the EGTC is governed by Spanish and Catalan law, unless it is otherwise governed by the EGTC Regulation. The hospital is funded by the French social security system (40%) and the Catalan Government (60%) jointly. In addition, the EGTC is a completely independent legal entity which means that the Administrative Council can decide by simple majority of the votes that French law will apply under certain circumstances. The Administrative Council of the EGTC Hospital de la Cerdanya, composed of 25 representatives from the different member institutions and regions, is the main decision-making and control organ of the EGTC.*

*The principal success of this EGTC is that, it has been able to build a well-functioning cross-border hospital. The EGTC was a useful tool to jointly build this hospital, and now it operates successfully. By operating this hospital in Puigcerdá, distances to the nearest hospital were reduced for patients.*

stakeholders with a legal organisational framework for their joint working processes. But they do not and cannot provide substantial content, nor can they resolve administrative and legal obstacles.<sup>150</sup>

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<sup>150</sup> Working Group on Innovative Solutions to Cross Border obstacles, ‘Background report- July 2016-July 2017’, p. 11.

### EGTC Hospital of Cerdanya (Part 2)

*Importantly, though, the EGTC does not change the law: the partners encountered many problems due to the different health care systems in both countries. Many of these problems were solved, however this sometimes took a very long time. For instance, the unification of medical protocols was the easiest issue to solve. Stakeholders and the participants attended bilateral meetings to learn how the two systems worked and then they agreed to a common policy for the Cerdanya Hospital. For instance, the Catalan protocols for obstetrics follow the patient more extensively than the French one, so they opted for this one. They decided to use French protocols for radiology services as these are more exigent than the Catalan equivalent.*

*Still, other obstacles – most of legal nature – are harder to solve, since the EGTC as such cannot solve administrative and legal obstacles since it is not its objective. These problems, that are still yet to be solved, include:*

*Administrative barriers, which mainly concerns employment procedures:*

- *When the EGTC hires staff, a significant part of the staff is not hired on a permanent contract because these agents come from other health structures either in France or Spain.*
- *There is a significant difference in recognition of diplomas and recruitment requirements. French practitioners wishing to work at the EGTC Hospital have to follow the same procedure for recognition of diplomas as if they wanted to work anywhere in Spain. In addition. Recruitment rules differ between both countries, which could lead that a French applicant for a certain post may not be recruited if he or she does not fulfil the Spanish requirements.*

*Legal barriers, exists in the following cases:*

- *In case of a traffic accident in France, the victims hospitalised in the Cerdanya hospital cannot be interrogated by the French police forces.*
- *The transcription of declaration of births and nationalities of French babies born in the Cerdanya Hospital into French law.*
- *Death certificates and return of bodies to the French territory. French patients who die in the Cerdanya Hospital are considered to die abroad, which is regulated by the Convention of Strasbourg. However, the regulations of services remain to the state, which is difficult for the French funeral services to practice in Spain.*
- *Ambulance transports on both sides of the border are complex with regard to the law of the soil and the costs affecting the international transport of bodies.*
- *In case of a medical malpractice, it is unclear for French staff whether the EGTC would cover them, their French employer or a private insurance would.*



Moreover, some EGTCs located in/adjacent to the Benelux area – such as the EGTC(s) set up in the context of the Grande Région and the EGTC Lille-Kortrijk – provide inspiring examples of progressive, capable and enduring multilevel CBC initiatives.

#### EGTC(s) Grande Région

*The EGTC Grandé Region is a project in which several authorities from 4 different Member States participate. It aims to institutionalise programmes and initiatives that used to be undertaken by the participating local authorities. Before the establishment of the EGTC, the Grandé Region already formed a territory in which many CBC activities took place. These activities were funded by several Interreg projects in the period from 2000-2013.*

*However, at the 9th summit of the Grandé Region it was decided that the EGTC instrument should offer the institutional structure to coordinate the activities that are undertaken within this programme. The EGTC formally came into existence on 1 April 2010. The applicable law will be the French law, including for financial supervision, because the EGTC is incorporated in Metz, France.*

*The territory of the region covers the whole of Luxembourg, Saarland and Rheinland-Pfalz in Germany, Lorraine in France and Wallonia and the German speaking community in Belgium (known as Ostbelgien). On 1 January 2016, the Grande Région had over 11.5 million inhabitants. In total, eleven partners participate in this project, which are either national or regional authorities. Not all partners are from the same administrative level. Therefore, the EGTC brings together authorities from different administrative levels and with different competences in one institutional structure.*

*The main objective of the EGTC Grande Région is to join the former Interreg programmes into one single programme within which participating local and regional authorities can implement various joint projects. In order to provide this institutional structure, the EGTC Grande Region is the first organisation that became a Managing Authority of the Interreg IV A programme. This programme focuses on three core areas, the EGTC aims:*

- *To promote and enhance the competitiveness of the interregional economy, to support innovations and to promote the job market;*
- *To improve the quality of life, to increase the attractiveness of the individual areas and to protect the environment; and*
- *To support the acquisition and dissemination of knowledge and the use of cultural resources and to strengthen social cohesion.*

*The EGTC Grande Region implements territorial cooperation programmes or projects which focuses on the fulfilment of the above-mentioned goals. Some concrete examples of cross-border projects, which are supported by the EGTC Grande Region include:*

- *The creation of a University of the Greater Region;*
- *The cultural portal, [www.plurio.net](http://www.plurio.net), which allows users to find all the cultural events and venues in the Greater Region;*
- *The Greater Region geographical information system;*
- *The mobility portal, [www.mobiregio.net](http://www.mobiregio.net), which allows users to check the public transport options available in the Greater Region.*

### EGTC Lille-Kortrijk (Part 1)

*The Eurométropole Lille-Kortrijk-Tournai is the first EGTC that was established, which was on 28 January 2008. The EGTC is composed of 14 partners that are located in the French-Belgian border area around Lille (France), Kortrijk (Belgium, Flemish region) and Tournai (Belgium, Walloon region). With these 14 founding members representing the Member States, regional authorities and intercommunal authorities, the EGTC covers the territory of altogether 147 municipalities in the French-Belgium border region. It is built on a strategy that aims to promote integrated territorial development in relation to socio-economic development, mobility and the living environment. The legal seat of the EGTC Eurométropole is located in France, which means that the EGTC is governed by French law.*

*The EGTC Eurométropole consists of several organs. The Assembly is the main decision-making and control organ of the EGTC and it is composed of 84 representatives. The Bureau is the executive body of the EGTC and it is entrusted with the daily management of the EGTC. With regard to administrative and technical matters, the EGTC is supported by a cross-border agency. A conference of mayors has the task to ensure the effective exchange of information about projects of the EGTC between all the mayors of the Eurométropole. In addition, committees or working groups can be established to study major topics and to carry out preparatory work with regard to the formulation of a multi-annual action programme.*

*The Eurométropole aims to promote and stimulate effective CBC within its area. The EGTC especially wants to ensure that CBC in its territory becomes more consistent. In realising these goals, the Eurométropole does not limit itself to a specific topic area. Instead it has several focus areas in which CBC already takes place, ranging from education to economic development and from tourism to energy management and sustainable development. The following examples of current projects shows the diversity of the EGTC Eurométropole:*

- *A cooperation agreement has been established between certain French and Belgian hospitals;*
- *Crematoriums in the Eurométropole are also cooperating to offer the best possible services to the inhabitants of the Eurométropole;*
- *The University of Leuven and the University of Lille signed an academic cooperation agreement in Courtrai in which they commit themselves to encourage cooperation and the learning of its own language by its neighbours;*
- *The Eurométropole participates in the Interreg IV project of LKT Tourism, which promotes the exchange of information between tourism professionals. In addition, it also created the Eurométropole tourist map;*
- *An agreement has been made between Eurométropole and the national railway services, to extend the railway link between Brussels and Tournai to Courtrai, via Mouscron;*
- *The Eurométropole has created a platform on pollution, which is a permanent consultation forum. This guarantees a permanent exchange of information between the competent services of the 3 regions. In addition, it established an alerting and effective network in which joint studies and measurements are carried out with regard to pollution in the Eurométropole region.*

#### EGTC Lille-Kortrijk (Part 2)

*Next to the already existing projects, the Eurométropole has ambitious to cooperate on a higher level in order to eliminate cross-border obstacles. For instance:*

- *It envisages the creation of a common healthcare zone ;*
- *It wishes to harmonise the railway networks between the towns of Lille, Courtrai and Tournai ; and*
- *It would like to create a cross-border higher education establishment in the field of arts.*

*This diversity in focus areas is one of the reasons why the EGTC Eurométropole is used as an example of a good practice of the EGTC instrument. Due to the range of activities envisaged by Eurométropole, the EGTC Eurométropole Lille-Kortrijk-Tournai provides an adequate solution to the daily challenges of the inhabitants living a cross-border area. This EGTC ensures better coordination of policies and provides effective solutions in different fields such as commuting, cross-border health services etc. In addition, it was established before the necessary national implementation provisions were put in place. When establishing the EGTC, the partners of this EGTC took a very proactive approach in establishing the EGTC since the actual preparation phase of the EGTC took little more than a year, which is the fastest of its kind in Europe.*

*The Eurométropole EGTC does not replace its participating authorities. In principle, no competences are transferred from the participating authorities to the EGTC. These authorities will therefore have the responsibility to ensure that decisions taken by the EGTC area implemented in their respective areas of governance. However, in practice this does not seem to be a problem. One of the main successes of the Eurométropole EGTC is that it enjoys the commitment of the highest political level in the cooperation area. This is reflected by the internal structure of the EGTC: the Eurométropole enjoys the support from the mayor of Lille as president of the Assembly, together with three vice-presidents, consisting of the mayor of Kortrijk, the minister president of the Walloon region and the vice-president of the Lille Métropole Communauté urbaine. This ensures not only an extraordinary political commitment but also a long-term stability for the initiative. Therefore, it seems that political support is one of the most important elements to ensure the success of any EGTC.*

In short, we have reviewed the EU's existing cooperation instruments tailored to the promotion of economic, social and territorial cohesion. We have considered both the benefits and drawbacks of the Union financial instruments, notably ETC/Interreg, and its hitherto main tool for addressing institutional obstacles to CBC, the EGTC. Building on these insights, we will discuss the European Commission's latest initiative for setting up a new "mechanism" to tackle administrative and legal obstacles to CBC in Chapter 5 below.

#### 4.1.2 Council of Europe

The Council of Europe is one of the oldest political forums for promoting CBC among the European countries. More precisely, it has been paying special attention to the promotion of effective local democracy through inter alia facilitated co-operation between local and regional authorities across

political and geographical boundaries. In the following, we will focus on explaining the main legal tools that the Council of Europe offers in the area of promoting “transfrontier cooperation”.<sup>151</sup>

*i. The toolbox of the Council of Europe for supporting CBC*

The Council of Europe’s legal instruments in the area of transfrontier cooperation comprise four conventions, several recommendations and a handful of practical tools. This body of laws and other tools aims at making cooperation between neighbouring or non-adjacent territorial communities/authorities legally feasible and practically sustainable.

*The 1980 Madrid Outline Convention*

The European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, also known as the “Madrid Outline Convention”, can certainly be called the “mother” of European legal instruments that promote CBC. Almost four decades ago, it created – **for the first time at international level – a legal basis for intergovernmental conventions that would mandate local authorities from different countries to cooperate with each other.**<sup>152</sup> Initiated by the Council of Europe, this Convention was signed on 21 May 1980 and effective since 22 December 1981.<sup>153</sup> In total, 39 States have since become party to the Madrid Outline Convention, including the Netherlands, Germany and Belgium.<sup>154</sup>

The Convention aims to encourage States to facilitate the conclusion of cross-border agreements between local and regional authorities within the scope of their respective powers. Thereby, at the time, it sought to fill a legal gap by offering forms of transfrontier co-operation suited to the needs of cross-border communities and to provide an additional legal basis for any agreement which such authorities may conclude. Moreover, the Convention furnishes various means of supervision and control for States to ensure observance of the principle of State sovereignty.<sup>155</sup>

The envisaged cross-border agreements may, for instance, deal with regional development, environmental protection or the improvement of public services.<sup>156</sup> The Convention, however, does itself **not establish a “right” of local authorities to such cooperation.** Instead, it imposes a corresponding international obligation on the contracting States. Rather than regulating the powers given to local authorities, it requires the contracting State parties ‘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’. For this purpose,

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<sup>151</sup> The term “transfrontier cooperation” is the Council of Europe’s terminology of choice as the overall notion covering the various forms of CBC. The EU terminology centres on “cross-border” issues and cooperation. We will use these terms interchangeably, where appropriate. See Council of Europe, ‘Cross-border co-operation toolkit’, 2012, p. 33. Available at: <https://rm.coe.int/1680747160>.

<sup>152</sup> Treaty No. 106 of the Council of Europe: European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, Madrid, 21 May 1980.

<sup>153</sup> Council of Europe, ‘Explanatory Report to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities’, Madrid, 21 May 1980, para. 6.

<sup>154</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/106/signatures?p\\_auth=OnniihaM](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/106/signatures?p_auth=OnniihaM) (Status at October 2018).

<sup>155</sup> Council of Europe, ‘Explanatory Report to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities’, Madrid, 21 May 1980, para. 10.

<sup>156</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/106>.

States should consider the possibility of concluding agreements to solve legal, administrative or technical boundaries to cross-border cooperation.<sup>157</sup>

While aimed at encouraging transfrontier legal relations between public authorities (at different levels), national law retains a prominent role in this mission. According to Article 2 (1) of the Madrid Outline Convention, **transfrontier cooperation means any action designed to either reinforce or foster neighbourly relations between territorial authorities of two or more Contracting Parties and the conclusion of any agreement and arrangement necessary for this purpose.** This cooperation takes place within the domestic framework that determines the powers and competences of local authorities in line with the national law. According to the Convention, the Contracting Parties may list the local authorities and their respective responsibilities, to which the Convention applies or does not apply.<sup>158</sup> Thereby, the States can limit the scope of CBC initiatives, which could mean that regional authorities have more competences and powers under national law.

The Madrid Outline Convention was not designed as a *direct* legal basis for transnational cooperation, but **it requires instruments in the form of further intergovernmental agreements for its implementation.**<sup>159</sup> By concluding and signing bilateral treaties, States may bind local communities and authorities rights to cooperate across borders. In such inter-state agreement, the authorities concerned are identified, as well as the subjects and modalities of such cooperation.<sup>160</sup> When the local authorities implement the agreements laid down in a treaty, they must respect the domestic provisions relating to international relations and the State's general policy. They remain subject to control or supervision regarding their actions.<sup>161</sup>

In fact, this reliance on further international legal instruments for its implementation is considered one of the Convention's main shortcomings. Its provisions do not deal with the common problems related to CBC directly, but simply refers on to the legislative provisions of Contracting States. The latter are furthermore allowed to limit the scope of CBC by listing the local authorities and their competences.<sup>162</sup> Additionally, the scope of the Convention is limited to the rather vague notion of "neighbourly relations" between territorial communities or authorities.<sup>163</sup>

To address these issues, the Committee of Ministers of the Council of Europe adopted a Recommendation on good practices in and reducing obstacles to cross-border cooperation.<sup>164</sup> This recommendation lists a long series of legal, administrative and practical measures that can be devised to reduce many obstacles to CBC. For instance, it recommends that States establish an appropriate legal framework for transfrontier and interterritorial cooperation and adopt auxiliary measures

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<sup>157</sup> Article 1 of the Madrid Outline Convention.

<sup>158</sup> Article 2 (2) of the Madrid Outline Convention.

<sup>159</sup> D. Scholich (ed.), 'German Annual of Spatial Research and Policy 2007- Territorial Cohesion', Berlin/New York/Heidelberg: Springer, 2007, p. 65.

<sup>160</sup> Article 3 (1) and (2) of the Madrid Outline Convention.

<sup>161</sup> Article 3 (4) of the Madrid Outline Convention.

<sup>162</sup> *Ibid*, para. 11.

<sup>163</sup> See again Article 2 of the Madrid Outline Convention.

<sup>164</sup> Recommendation Rec (2005) 2 on good practices in and reducing obstacles to transfrontier and interterritorial cooperation between territorial communities or authorities.

concerning information, training and institutional dialogue.<sup>165</sup> In November 2009, the States Parties to the Council of Europe have committed themselves to removing obstacles to transfrontier cooperation and monitor the implementation of this Recommendation.<sup>166</sup>

Despite its drawbacks, the Madrid Outline Convention has stimulated the adoption of a number of international agreements in line with Article 3 (2) of the Convention. The Dutch-German Treaty of Anholt is one these agreements, and will briefly be presented for the sake of illustration.

### *Treaty of Anholt*

Not only the national governments of Germany and the Netherlands signed the Anholt Treaty on 23 May 1991, but also the German regional states of NRW and Lower Saxony did.<sup>167</sup> This Treaty provides a legal basis for the CBC between the Parties' public authorities,<sup>168</sup> thereby enabling the latter to institutionalise their joint cross-border activities. For this purpose, public authorities are able to create so-called "cross-border public bodies". These bodies have the competence to contract staff and to draw up their own budget. However, the option for such a cross-border body to exercise sovereign rights is clearly excluded.

Below, we will present two examples illustrative of the types of CBC that have been encouraged by/based on the Anholt Treaty.

In 1993, the Anholt Treaty provided the basis for founding the Euroregion Rhine-Waal, which became the first cross-border joint public body in Europe.<sup>169</sup> Since then, the Euroregion Rhine-Waal has developed from a single organisation for cross-border collaboration between border municipalities, to an integrated public body with a sizeable membership on both sides of the border.<sup>170</sup>

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<sup>165</sup> Part A and B of the Recommendation Rec (2005) 2.

<sup>166</sup> This was done on the occasion of the 16<sup>th</sup> session of the European Conference of Ministers responsible for Local and Regional Authorities of the Council of Europe.

<sup>167</sup> Overeenkomst tussen het Koninkrijk der Nederlanden, de Bondsrepubliek Duitsland, het Land Nedersaksen, en het Land Noordrijn-Westfalen inzake grensoverschrijdende samenwerking tussen territoriale gemeenschappen of autoriteiten met Protocol, Isselburg-Anholt, 23 mei 1991.

<sup>168</sup> On European level, the same approach is made possible under the EGTC instrument.

<sup>169</sup> Isseburg-Anholt agreement of 25 June 1991.

<sup>170</sup> <https://www.euregio.org/geschiedenis/>

#### **EUROREGION Rhine-Waal (Part 1)**

*The Rhine-Waal Euroregion is a Dutch-German public body with 55 member organisations, including municipalities, regional governments and chambers of commerce from the border region. On the Dutch side, the Rhine-Waal Euroregion's area of cooperation includes the Province of Gelderland, including the regions Arnhem-Nijmegen and West Veluwe, parts of Northeast Brabant and the northern part of the Province of Limburg. The German side covers the District of Kleve, the District of Wesel and the cities of Duisburg and Düsseldorf. Nine Dutch municipalities are part of this Euroregion, as are 20 German municipalities.*

*In the past, the municipalities of Kleve, Emmerich, Arnhem and Nijmegen had worked together in the Rhine-Waal Region Work Group. Later, they created the Rhine-Waal Council, which established the reinforcement of economic structures, the intensification of social and cultural contacts and the promotion of tourism in the border region. In 1993, based on the Anholt Treaty, the Rhine-Waal Region officially became the Rhine-Waal Euroregion. It thus formed the first cross-border public body in Europe. Today, it covers 8663 square kilometres with a population of approximately 4.2 million.*

*The Rhine-Waal Euroregion is an official public body with its headquarters based in Kleve, Germany. Its main goal is to improve and intensify cross-border collaboration, both economically and socially. It brings the partners together to cooperate, launch joint initiatives and benefit from mutual synergies.*

*The Euroregion's Council is the most important decision-making body. All member organisations are represented in the Council which consists of 136 representatives in total and meets at least twice a year. This body is responsible for making strategic decisions for the further development of the Rhine-Waal Euroregion. Furthermore, there are three Committees, which make preparations for the Council's decisions and deal with subsidy applications. The execution of the Council's decisions and the general management of the Rhine-Waal Euroregion is done by the Chairman, the Management Board and the Secretariat. The Chairman and Vice Chairman are selected from the ranks of the Euroregion, their term of office lasts four years.*

*In view of its objectives, the Rhine-Waal Euroregion establishes inter-municipal collaborations and pursues strategic cooperation with institutions and governments. One of the main problems for CBC between the members are their partially different legal frameworks. These legal problems are solved through the so-called "round table sessions" or through committees. The round table sessions are attended by members from both sides of the border and focus on a certain theme, such as emergency management control. Next to the committees – such as the German-Dutch spatial planning committee – that deal with specific items, also the GROS consultations between the Dutch Ministry of the Interior and Kingdom Relations and the recommendations of the Cross-border Economy and Labour Market Action Team (GEA) are relevant to the Euroregional development.*



#### EUROREGION Rhine-Waal (Part 2)

*The projects that are carried out under the Euroregion Rhine-Waal are ranging from climate to economic development, and from culture and tourism to healthcare and education. One example is the Kliker project in which 11 Dutch and German municipalities actively cooperate in the field of climate protection and adaptation. In this project, they cooperate on areas such as sustainable energy, renovation of buildings and adaptation to climate change. This is done by organising thematic workshops in which they receive support and advice from climate experts. In addition, the partners carry out studies for regional plans such as the establishment of a solar energy register and of methods to balance CO<sub>2</sub>. Together, the municipalities are building a Euregional climate network. A local climate roadmap 2020 will be developed for each municipality containing measures and activities necessary to reduce CO<sub>2</sub>.*

*The Euroregion Rhine-Waal also established a border information centre, which is accessible for German and Dutch people who have questions concerning the legal regulations related to work, income and social security. The border information centre provides advice to inhabitants, workers and employers. The biggest target group is cross-border commuters who are orientating themselves towards the cross-border labour market. Moreover, the border information centre works with a network of national organisations, such as the national tax authorities and health insurances. Together with these national organisations, organises the border information centre special (tax) consultation hours for citizens. It will also offer consultancy for specific target groups by request. In addition, it offers training and education to primary consultants of all the German-Dutch border information centres.*

Another interesting example is the bi-national town of Eurode and one of its pet projects, the cross-border Eurode Business Centre.

#### EURODE Business Centre (Part 1)

The Eurode Business Centre is located on the Dutch-German border and is the first cross-border business complex in Europe. It is a joint venture between the Dutch municipality of Kerkrade and the German city of Herzogenrath.

At the beginning, the Eurode Business Centre focused on companies that offered either general or specific services. Companies that offered general services included law-firms, tax advisers, business consultants and PR companies. Examples of companies that offered a more specific service are: cross-border multimedia companies, cross-border healthcare providers and high-tech innovation companies. In 1997, the idea was proposed to realise a cross-border building in which all kinds of companies could be accommodated. In addition, the located companies still experienced cross-border obstacles in their daily activities. When the Eurode Business Centre was established, the idea was that a concentration of business activities would lead to legal amendments in both systems, and ultimately to a harmonisation of the Dutch and German legal systems. In order to achieve this, the condition was that the Eurode Business Centre had to be built exactly on the state border.

On 5 June 2001, the Eurode Business Centre was opened with a commercial surface of 3,630 m<sup>2</sup>. In 2011, it had an occupancy rate of almost 100% and currently around 70 companies and organisations are located in the Centre. Since its establishment, the Eurode Business Centre has developed into a Euregional centre with expertise in economic cross-border activities.

#### EURODE Business Centre (Part 2)

Eurode is the name of the joint public body (*Zweckverband*) that the German town of Herzogenrath and the Dutch town of Kerkrade formed on 1 January 1998. This body consists of two administrative bodies, a council and an executive authority. This public body, based on the permanent cooperation between two local authorities from two different Member States, deals with key aspects of policy relating to:

- Improving the economy;
- Transport infrastructure;
- Education;
- Advice and guidance to cross-border commuters;
- Law and order; and
- Culture and sport.

Based on this long-standing cooperation, Eurode is now considered a so-called “bi-national city”. This means that it has approximately 100.000 inhabitants from two different countries who are closely interlinked through relational and functional connections.

A consequence of this bi-nationality for the Eurode Business Centre is that it is up to the companies to decide under which law they want to establish themselves. They can choose to establish themselves on the German side and therefore choose a German form of enterprise, for example, a GmbH. Or they could decide to choose for the Dutch side and use a Dutch legal form of an enterprise like a BV. Some companies have rented accommodation on both sides, which means that they are two legal entities. These companies can benefit from significant differences between Germany and the Netherlands in terms of labour law, tax law and social security law.

Next to its function as a cross-border business centre, the Eurode Business Centre also serves as an official meeting place for numerous cross-border bodies and institutions, such as the ‘Round Table of the Meuse-Rhine Euregion’. In addition, every month there are commuter advice days where commuters who live in one country and work in the other, receiving advice on their cross-border problems.

However, despite these benefits, one notable cross-border obstacle remained: it was not possible for a company to move within the building from one side to the other. For instance, to move from the Dutch side to the German side. The reason for this is that the territoriality principle was strictly enforced by various tax authorities. In order to solve this issue, Eurode wanted to realise the freedom of choice for tax law within the Eurode Business Centre. This was realised by a ‘Third Tax Protocol’, which makes it possible for companies located in the Eurode Business Centre to have the main part of the company (including staff and management) on one side of the border and a smaller part of the company on the other side, and still be allowed to pay taxes in the country in which the company’s head office is located. Although it is a great example of the flexible enforcement of different national laws in the Business Centre, the solution to the problem was a classical intergovernmental agreement between the two national governments who eventually adopted this Protocol.

#### *The Additional Protocols to the Madrid Outline Convention*

In total, the Council of Europe has so far adopted three Additional Protocols (1995, 1998, and 2009) that aim to strengthen the Madrid Outline Convention. The first two protocols will be shortly described

hereafter, while some more attention is paid to the Third Protocol which provides a new form of institutionalised CBC comparable to the EGTC.

The first Additional Protocol (1995) addresses the issue that the original Convention only codifies State obligations instead of establishing any rights to CBC for local authorities. This Additional Protocol entered into force on 1 December 1998. 24 states have become party to it, including the Netherlands, Belgium and Germany.<sup>171</sup> The Protocol recognises, under certain conditions, the subjective right of territorial communities and authorities to conclude and sign agreements with their counterparts across borders.<sup>172</sup> The decisions taken by these local authorities must be implemented by each Contracting Party and will have the same validity of decisions made independently by virtue of national law.<sup>173</sup>

Although, the Additional Protocol makes it already possible to create CBC bodies and legally recognise them as a public law entity with legal personality in a Contracting State,<sup>174</sup> it does not clarify what competences these bodies have. It solely excludes the possibility that they may take measures of general application and that they cannot limit the rights and freedoms of individuals. It also excludes levying of taxes or adopting measures contrary to domestic law. However, this Protocol does not explain the essential powers of these bodies and for which purposes they can be used. These omissions impaired the establishment of new cross-border institutions, according to a more recent report of the Council of Europe.<sup>175</sup>

The Second Additional Protocol (1998) addresses the drawback of the Convention's limited scope, being applicable to contiguous local authorities only. The 1998 Protocol extends the geographical reach to include also interregional cooperation. Since having entered into force on 1 February 2001, 23 states have become party to this Protocol, including the Netherlands, Belgium and Germany.<sup>176</sup>

Experience and research showed that cross-border activities are not necessarily limited to cross-border authorities. Local authorities geographically distant from the border and located far from each other are also interested in cross-border activities.<sup>177</sup> Hence, the Second Protocol to the Madrid Convention aims to strengthen interterritorial cooperation between European countries. Interterritorial cooperation is defined as “any concerted action designed to establish relations between territorial communities or authorities of two or more Contracting Parties, other than relations of transfrontier cooperation of neighbouring authorities, including the conclusion of cooperation agreements with territorial communities or authorities of other States.”<sup>178</sup>

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<sup>171</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/159/signatures?p\\_auth=OnniihaM](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/159/signatures?p_auth=OnniihaM).

<sup>172</sup> Article 1 of the Additional Protocol to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, No. 159, 9 November 1995, Strasbourg.

<sup>173</sup> Article 2 of the Additional Protocol.

<sup>174</sup> Article 3-6 of the Additional Protocol.

<sup>175</sup> Council of Europe, ‘Cross-border co-operation toolkit’, 2012, p. 38. Available at: <https://rm.coe.int/1680747160>.

<sup>176</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/169/signatures?p\\_auth=OnniihaM](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/169/signatures?p_auth=OnniihaM).

<sup>177</sup> Ibid, p. 39.

<sup>178</sup> Article 1 of Protocol No. 2 of the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning interterritorial cooperation, *European Treaty Series- No. 169*, 5 May 1998, Strasbourg.

Article 3 of the Second Protocol puts interterritorial cooperation on an equal footing with transfrontier cooperation. This means that non-contiguous local authorities can also rely on the Madrid Outline Convention and its Protocols. These authorities have the right to promote discussions and agreements in matters of common competence.<sup>179</sup> This right shall be recognised and respected by the Contracting States.

*ii. The Euroregional Cooperation Grouping (ECG)*

In spite of the adoption of the Madrid Outline Convention and its first two protocols, also the Council of Europe had hitherto not succeed in establishing a *common* legal framework for transfrontier cooperation in Europe.<sup>180</sup> All three agreements refer largely to national legal rules. But the Council of Europe has a very diverse membership of 45 States Parties. The Madrid Convention's continued referral to national law for settling legal questions on the treaty's application, therefore, has made it practically impossible to have a uniform law with regard to transfrontier cooperation.<sup>181</sup>

In order to remedy these shortcomings, the Council of Europe adopted the Third Protocol to its Madrid Outline Convention on 16 November 2009.<sup>182</sup> This **Protocol introduces a new instrument: the so-called “Euroregional Cooperation Grouping” (ECG)**. This instrument is designed to complement the current legal framework of the Council of Europe and meant to help overcome the existing legal and non-legal barriers to transfrontier and interterritorial cooperation in Europe.<sup>183</sup> The Protocol entered into force on 1 March 2013. Until today, only seven States have ratified the Treaty. **The Netherlands and Belgium only signed the treaty but have not ratified it.** Germany did ratify the Treaty on 8 November 2012.<sup>184</sup>

The instrument may be new, but the reliance on national law for its form and application – quite understandably in the context of the Council of Europe – persists.<sup>185</sup> Article 2 (1) of the Third Protocol determines that the ECG shall be a legal person, governed by the domestic law of the Member State in which it has its headquarters. Since an ECG possess legal personality, it may enter into contracts, hire staff, acquire movable and immovable property and start legal proceedings.<sup>186</sup> Subsequently, Article 2 (3) states that the law applicable to the type of corporate entity chosen for the ECG by its members must be laid down in the agreement establishing the ECG. It is **up to the members of the**

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<sup>179</sup> Article 2 of Protocol No. 2.

<sup>180</sup> Borger (2010).

<sup>181</sup> GEPE, 'The European Grouping of Territorial Cooperation -EGTC- A study carried out by Groupe d'Etudes Politiques Européennes (GEPE) under the supervision of Professor Nicolas Levrat and commissioned by the Committee of the Regions', Geneva: University of Geneva, 2007, p. 36 and 37.

<sup>182</sup> Protocol No. 3 of the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings, *European Treaty Series- No. 106*, 16 November 2009, Utrecht.

<sup>183</sup> Council of Europe, 'Explanatory Report to Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-Operation Groupings (ECGs)', *Council of Europe Treaty Series- No. 206*, 2009, p. 2.

<sup>184</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/206/signatures?p\\_auth=OnniihaM](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/206/signatures?p_auth=OnniihaM).

<sup>185</sup> While the issue of applicable law is a rather complicated one under the EGTC-Regulation, 'because of the Union nature of the cross-border instrument and the at times confusing ranking order of law laid down in the Regulation. The subject seems more straightforward as far as the ECG is concerned as the third protocol is in essence an instrument of international law. For it to function properly it requires ratification and subsequent implementation in the national legal orders of CoE Member States.' Borger (2010) at 137.

<sup>186</sup> Article 2 (5) of the Third Protocol to the Madrid Outline Convention.

**ECG to choose the type of legal entity that suits their needs best, having regard to the solutions available in the legal order of the State in which the headquarters will be located.**<sup>187</sup> Furthermore, the 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 the members belong.<sup>188</sup>

Details on the membership of an ECG is given in Article 3(1).<sup>189</sup> Territorial communities or authorities are described as ‘communities, authorities or bodies exercising local and regional functions and regarded as such under domestic law.’<sup>190</sup> In contrast to the EGTC, **an ECG may also be open to territorial authorities belonging to a third country, i.e. a State that has not ratified this Protocol, provided that they belong to a State adjacent to a State where the ECG headquarters are established.** This is only possible if an agreement between these two States allows so.<sup>191</sup>

In addition, similar to Article 2 (2) of the Madrid Outline Convention, the latter’s Third Protocol also permits the Contracting Parties to declare which of the entities qualifying in principle for ECG membership under Article 3(1) they wish to exclude from the scope of the protocol.<sup>192</sup> This is to avoid that territorial entities hitherto not entitled to CBC under national law would find a way to do so by appealing to the Third Protocol. Furthermore, Protocol No. 3 tries to ensure that special interest organisations (like Chambers of Commerce, or others) that may be authorised to participate in an ECG,<sup>193</sup> cannot overrule territorial communities or authorities in the Co-operation Grouping’s policy development and decision-making processes. Accordingly, Article 3(3) stipulates that territorial communities or authorities of the Contracting Parties shall have the majority of voting rights to exercise the control over the ECG. This provision keeps in line with Council of Europe legal instruments that endorse territorial and functional cooperation as the main purpose of these public entities as they perform tasks in the general interest of their populations.<sup>194</sup>

According to Article 4 (1) of the Third Protocol, the ECG shall be established by a written agreement between its founding members. This agreement must specify the members, the name of the ECG, the address of its headquarters, the duration, object and tasks of the ECG and its geographical scope.<sup>195</sup> The prospective members must submit all appropriate documentation to prove that the necessary

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<sup>187</sup> Council of Europe, ‘Explanatory Report to Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-Operation Groupings (ECGs)’, *Council of Europe Treaty Series- No. 206*, 2009, p. 4.

<sup>188</sup> Article 7 (2) of the Third Protocol to the Madrid Outline Convention.

<sup>189</sup> Article 3 (1) of the Third Protocol specifies that the following entities may qualify for ECG membership: Territorial communities or authorities of a Contracting Party; the Member State concerned of the Council of Europe itself; and legal persons established for the specific purpose of meeting needs in the general interests, not having an industrial or commercial character.

<sup>190</sup> Article 2 (2) of the Madrid Outline Convention.

<sup>191</sup> Article 3 (2) of the Third Protocol to the Madrid Outline Convention.

<sup>192</sup> Article 16(1) of the Third Protocol to the Madrid Outline Convention.

<sup>193</sup> Regarding the legal persons mentioned under Article 3 (1) of the Third Protocol, the provision authorises their participation in an ECG ‘if their activity is financed mostly by the State, by a territorial community or authority or similar body; or their management is subject to the control of these entities; or half of the members of their administrative, managerial or supervisory functions are appointed by the State, a territorial community or authority, or similar body.’

<sup>194</sup> See Explanatory Report to the Third Protocol, at 4-5; see also Borger (2010) at 132.

<sup>195</sup> Article 4 (3) of the Third Protocol to the Madrid Outline Convention.

procedures or formalities required by the applicable national legislation have been respected.<sup>196</sup> Then, they are also under a duty to inform, notify or obtain authorisation from the relevant national authorities about their intention to conclude a founding agreement or to join an existing ECG.<sup>197</sup> This requirement, however, may be waived by each Contracting State in general, or for specific categories of territorial communities or authorities or for specific types of cooperation.<sup>198</sup> Approval may be refused if membership of the ECG would violate the Protocol itself, provisions of national law or when it would be contrary to the public interests or public policy of the Party concerned.<sup>199</sup> Article 4 (7) of the Third Protocol determines that the ECG's founding agreement must be registered or published in the headquarter State and in the other States here members are located, in accordance with the applicable national law.

The Council of Europe does not specify which organs an ECG should contain. It provides maximum flexibility to the founding members, since Article 5 (3) of the Third Protocol merely states that 'an ECG's statutes should contain rules on its organs and their tasks'. In principle, the ECG could be used for a broad range of issues covering corporations, but also on more specific issues such as cross-border transport or disaster prevention.<sup>200</sup> The same flexible approach is taken to determine the tasks of the ECG.<sup>201</sup> Article 7 (1) of the Third Protocol lays down that the ECG shall perform the tasks that its members entrust to it. Nevertheless, the tasks of the ECG are somewhat limited by Article 7 (3) of the Third Protocol:

- The tasks of an ECG shall not concern the exercise of regulatory powers; or
- The ECG shall not be empowered to take measures which affect the rights and freedoms of individuals; or
- The ECG shall not impose tax levies.

In addition, Article 7 (4) of the Third Protocol determines that 'the ECG may not exercise competences that territorial communities or authorities exercise as agents of the State to which they belong.' An exception to this is if the ECG was duly authorised to exercise these powers in which it exercises competences that State members of the ECG confer upon it.

As indicated above, given the Third Protocol's continued reliance on national law,<sup>202</sup> **'prospective members will have to carefully scrutinize the legal setting of CoE Member States that potentially qualify as headquarter countries in order to create an environment in which their ECG will function**

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<sup>196</sup> Article 4 (2) of the Third Protocol to the Madrid Outline Convention.

<sup>197</sup> Article 4 (4) of the Third Protocol to the Madrid Outline Convention.

<sup>198</sup> Article 4 (6) of the Third Protocol to the Madrid Outline Convention.

<sup>199</sup> Article 4 (5) of the Third Protocol to the Madrid Outline Convention.

<sup>200</sup> Council of Europe, 'Explanatory Report to Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-Operation Groupings (ECGs)', *Council of Europe Treaty Series- No. 206*, 2009, p. 6.

<sup>201</sup> Council of Europe, 'Explanatory Report to Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-Operation Groupings (ECGs)', *Council of Europe Treaty Series- No. 206*, 2009, p. 6.

<sup>202</sup> See, for instance, amongst others, Article 1(2) on the ECG's objectives; Article 4(7) on the ECG's founding agreement; Article 7(1) on the ECG's tasks; and Article 9(3) on the liability of the ECG's organs for any breach of law committed in the exercise of their functions.

**to its maximum potential** is therefore of special relevance for the third protocol as well.<sup>203</sup> While the members of an ECG will be able to define their cooperation to a considerable degree through the agreement and the statutes, the ECG will be principally subject to the law of the headquarter State. Therefore, similar to the EGTC-instrument of the EU, there is not one uniform ECG that will be applicable all over the European continent. This conclusion is even more relevant for the ECG instrument, given a stronger reliance upon the national law of the headquarter State.<sup>204</sup>

On the comparison between the Council of Europe's (CoE) ECG and the EU's EGTC, it is worth quoting Borger (2010) at length:

*'As far as the comparison with the EGTC is concerned, some interesting differences are ascertainable. First of all, the third protocol offers more possibilities for third countries to participate in cooperation initiatives with territorial authorities or other entities stemming from CoE States. Secondly, the third protocol is less prescriptive than the EGTC Regulation as regards the way in which certain matters have to be regulated in the agreement and the statutes. Especially when it comes to the issue of the organization's internal organization and its organs, the ECG offers more freedom to its members than the EGTC instrument. Furthermore, the ECG relies to an even greater extent on national law than the EGTC. The most important difference seems however to exist between the possible objects of the instruments and the tasks they may perform. The third protocol intends to offer as much freedom as possible to prospective members as regards the tasks an ECG may perform. The EGTC, on the other hand, is principally limited to the promotion of economic and social cohesion and the implementation of programmes or projects (co-) financed by the EU through the ERDF, ESF and/or the Cohesion Fund.*

*Nonetheless, the similarities between the two instruments are much more prominent. Often identical wording is used by both the third protocol and the EGTC Regulation. CoE States that are also a member of the EU will probably only have to modify the implementing legislation for the EGTC Regulation in some minor respects in order to fulfill their implementation duties under the third protocol. In this regard it is interesting to mention that the more drafts of the third protocol were presented by the Committee of Experts, the more the instrument resembled the EGTC Regulation. At several instances the Explanatory Report to the third protocol even mentions the EGTC instrument. According to the draftsmen of the protocol the ECG is intended to be fully compatible with EGTC instrument. Territorial communities or authorities and the other entities concerned are at freedom to use either the ECG or EGTC. The two instruments do not exclude each other and prospective members are at freedom to choose, having regard to the objectives of their cooperation and the means at their disposal, one of them.'*<sup>205</sup>

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<sup>203</sup> Borger (2010) at 138.

<sup>204</sup> Ibid. Borger (2010, 138) specifies further: 'Another element that forms a barrier to the ECG's uniform nature forms the fact that there will not be one court that has the final responsibility to interpret the third protocol's requirements. The third protocol, being an international law instrument, will be interpreted in last instance by the highest national court possible. Notions such as „public interest“ or „public policy“, for example, may have a different meaning depending on the national legal system concerned.'

<sup>205</sup> Borger (2010) at 141-142.



All in all, the Madrid Outline Convention and its Protocols offer a solid framework for CBC. However, it does heavily rely on domestic law and it does not solve the legal and administrative obstacles that they are facing when cooperation with cross-border regions. Also, usually the conclusion of an international agreement is required to put the envisaged cooperation structures in place.

The Third Protocol introduces a legal instrument which solves part of the above-mentioned problems. However, both the Netherlands and Belgium did not ratify this instrument. Therefore, this instrument **could only find possible application between Germany and the Netherlands, if the headquarters of such an ECG was established in Germany and an agreement between these two States allowed Dutch participation** (see Article 3 (2) of the Third Protocol). If a Dutch border region opted for this solution, then German law would be applicable to the ECG given the location of its headquarters (see Article 2 (4) of the Third Protocol).

## 4.2 International and regional level

Having reviewed the range of promotional instruments for CBC at the European level, we will now turn to the regional level. Below we will examine, first, various forms of **multilateral international cooperation**, i.e. the Benelux Union, the Nordic Free Movement Council, and the two organisations set up to regulate the various aspects of river management, the International Commission for the Protection of the Rhine (ICPR) and the Central Commission for the Navigation of the Rhine (CCNR), and then a couple of illustrative initiatives of **multilevel/interregional cooperation** – namely, the German-French-Swiss Upper Rhine Conference and the Austrian-Italian Three Provinces' Parliament.

### 4.2.1 The Benelux Union

The Benelux Union (BU) is a prime example of European enhanced cooperation. Since the 1940s Belgium, the Netherlands and Luxemburg have been maintaining and deepening their formal relations. What started as a customs union (1944) represents today a structure of intense cooperation beyond an economic union. Following a renewal of its legal base in 2008,<sup>206</sup> the BU is now based on a set of broad principles and objectives.<sup>207</sup> In the following, we will discuss its organisational structure and legal framework, focusing on which means and structures the BU disposes of to facilitate and enhance CBCM. Thereby, we will also consider the current political climate in which Benelux cooperation is taking shape and what form the BU's relations with its neighbours – notably, NRW – takes.

#### *i. Organisational structure of the Benelux Union (governance model)*

The adoption of the new Benelux Treaty, effective from 2012, has simplified the institutional structure that underpins the Benelux Union. It is now governed by **five main institutions**, namely the Benelux Committee of Ministers, the Council, the Parliament, the Court of Justice and the General Secretariat.

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<sup>206</sup> See the Treaty on the revision of the treaty of 3 February 1958 establishing the Benelux Economic Union, of 2008 (hereafter: the Benelux Union Treaty or BU Treaty).

<sup>207</sup> Cf. J. Wouters and M. Vidal, *De Benelux: Tijd voor een Wedergeboorte?* (Intersentia, 2006).

### *The main institutions of the Benelux Union*

The **Benelux Committee of Ministers** is the highest decision-making body of the BU. It consists of at least one ministerial representative of the three countries, whereby the composition of the Committee of Ministers can change according to the item leading the agenda. The Committee determines the political guidelines and priorities of cooperation for the BU,<sup>208</sup> and is responsible for the execution of the treaty establishing the Benelux Union.<sup>209</sup> For that purpose, it has the following instruments at its disposal:

- Drafting **agreements** (*overeenkomsten*) that are to be concluded by the Contracting Parties and to be ratified according to the constitutional requirements of each Party;
- Approving **(binding) decisions** (*beschikkingen*) on the execution of the 2008 treaty establishing the BU that are directly binding on the Contracting Parties; and
- Adopting **(non-binding) policy recommendations** (*beleidsaanbevelingen*), and **internal directives** (*interne richtlijnen*) to the Council and the General Secretariat.

The Committee of Ministers will be presided in rotation by a Belgian, Luxembourgish or Dutch member for the period of one year. Currently, Belgium holds the Presidency for 2018. Furthermore, the Committee can delegate tasks to ministerial working groups.

The **Council of the Benelux** is composed of high-level civil servants seconded from the responsible ministries. Also here, the composition of the Council may change according to the topical priorities on the agenda. It is the highest administrative organ of the BU, its main task is doing the preparatory work for the Committee of Ministers.<sup>210</sup>

The BU's **Inter-Parliamentary Council**, the so-called "Benelux-Parliament", was established by a separate treaty, effective from November 1955. The Benelux-Parliament counts 49 members in total, respectively from Belgium (21 delegates), Netherlands (21 delegates), and Luxembourg (7 delegates). These parliamentary members inform and advise their respective governments regarding all matters related to the BU. They also have an advisory role regarding the adoption of treaties, agreements and protocols.<sup>211</sup>

On 20 January 2015, the three Contracting Parties signed a new Treaty on the Benelux Inter-Parliamentary Council. This new Treaty strengthens the right to interpellation, i.e. the possibility of summon a minister to an emergency debate, and improves the functioning of the Benelux-Parliament. The Inter-Parliamentary Council does not (yet) have the competence of (co-)decision-making. The 2015 Treaty is not yet in force, as it is still pending ratification in Belgium.<sup>212</sup>

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<sup>208</sup> The Committee of Ministers adopts the common multiannual work programme based on the coordinated proposal of the general Secretariat (Article 3), the budget according to the procedure in Article 22, the Benelux annual work plan as well as the BU's yearly report.

<sup>209</sup> Article 6 of the 2008 Treaty on the revision of treaty of 3 February 1958 establishing the Benelux Economic Union.

<sup>210</sup> Articles 12-14 of the BU Treaty.

<sup>211</sup> Articles 15-16 of the BU Treaty.

<sup>212</sup> The Netherlands ratified the 2015 Treaty on the Benelux Inter-Parliamentary Council on 9 July 2015, Luxembourg did on 26 February 2018.

The Treaty on the establishment and the statute of a **Benelux Court of Justice** was signed on 31 March 1965. This Treaty determines the Court's composition, jurisdiction and the working method.<sup>213</sup> The Benelux Court of Justice was installed on 11 May 1974. Its permanent seat is now Luxembourg (since December 2016), where it holds its regular sessions,<sup>214</sup> while the Court's Registry is located with the General Secretariat in Brussels. In its minimum composition, the Benelux Court of Justice counts nine judges, six substitute judges and three advocate-generals.<sup>215</sup> The three member nationalities are equally distributed among all these functionaries.<sup>216</sup>

The Court of Justice is responsible for the **uniform application of the common legal rules** of the Benelux.<sup>217</sup> For this purpose, it is competent to receive questions regarding the interpretation of the Benelux legal rules,<sup>218</sup> to adjudicate on (some of) them, and to play an advisory role. However, the Benelux Committee of Ministers has the power to exclude certain orders from the Court's jurisdiction.<sup>219</sup> Effective from December 2016, the competences of the Benelux Court have been extended.<sup>220</sup> Notably, the Court has been accorded the competence of adjudication, which is currently only granted for the field of intellectual property regarding marks, designs and models (next to the existing power to rule on cases of public servants employed by the Benelux).<sup>221</sup> It is possible that in future, also other policy fields come within the adjudicating competence of the Court by means of an additional treaty. Given the expansion of the Court's competences, also its structure has been adapted. It has now three chambers, the first one receiving preliminary questions, executing the advisory function and receiving appeals from the Second Chamber; the second is exclusively charged with the task of adjudication; and the third is competent for the cases on the administrative appeals from the staff of the BU or the Benelux Office for Intellectual Property.

The **General Secretariat of the Benelux** provides the common central administration of the BU. Its seat is Brussels. It is run by a three-headed College of General Secretaries – the Benelux Secretary-General, and two Adjunct-Secretaries-General, each of them representing the nationality of one of Benelux countries. The General Secretariat initiates, supports and monitors the Benelux cooperation in view of the three priority themes, the economy, sustainability, and security.<sup>222</sup>

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<sup>213</sup> Articles 17 of the BU Treaty.

<sup>214</sup> Article 2 of the 1965 Treaty on the Benelux Court of Justice.

<sup>215</sup> Article 3 of the 1965 Treaty on the Benelux Court of Justice.

<sup>216</sup> The Court's members come from the highest judicial instances of their respective countries, the Supreme Court (*Hoge Raad*) of the Netherlands, the Belgian Court of Cassation (*Hof van Cassatie*), and the Supreme Court of Justice (*Cour supérieure de Justice*) of Luxembourg. Next to their tasks for the Benelux Court, the judges may remain active for their national courts.

<sup>217</sup> Article 1 (2) of the 1965 Treaty on the Benelux Court of Justice.

<sup>218</sup> A list of these common legal rules is available on the website of the Benelux Court of Justice: [http://www.courbeneluxhof.be/nl/rechtsregels\\_intro.asp](http://www.courbeneluxhof.be/nl/rechtsregels_intro.asp) (last accessed 02-10-2018).

<sup>219</sup> Article 1 (6)-(7) of the 1965 Treaty on the Benelux Court of Justice.

<sup>220</sup> See M(2011)09 Protocol on the amendment of the 1965 Treaty on the Benelux Court of Justice, of 15 October 2012.

<sup>221</sup> For that purpose, the Benelux Convention on Intellectual Property of 25 February 2005 has been amended by the Protocol of 21 May 2014, effective from 1 June 2018.

<sup>222</sup> Articles 18-23 of the BU Treaty.

*Political priorities*

The expansion of Benelux cooperation beyond the economic terrain is also reflected in the name: the organisation is now principally referred to as the Benelux Union and no longer the Benelux Economic Union. **Three broad themes** currently structure the macro-regional cooperation in the Benelux. The primary focus is on the **Internal Market and the economy**, on the one, and **justice and home affairs**, on the other hand. Meanwhile, **sustainability** is regarded rather as a cross-cutting theme. These priority themes guide the formulation of the common work programme, which is decided upon by the Committee of Ministers every four years.<sup>223</sup> This joint work programme ensures a stronger political ownership (than before the renewal of the Benelux Treaty) from the three member countries. It is then elaborated further through annual work plans prepared by the Benelux General Secretariat in Brussels.<sup>224</sup>

Sustainability and digitalisation are the broad priorities marking the Benelux work programme 2017-2020. The Benelux countries aim to create synergies regarding the following policies:<sup>225</sup>

Policy field	ECONOMY & INTERNAL MARKET	JUSTICE & HOME AFFAIRS
Planned actions	<ul style="list-style-type: none"> <li>Facilitating work in a borderless labour market</li> <li>Safeguarding future-oriented mobility</li> <li>Completing the Internal Market</li> </ul>	<ul style="list-style-type: none"> <li>Joining forces between police, justice &amp; other services</li> <li>Acting jointly in crisis management &amp; disaster relief</li> <li>Acting jointly in fraud prevention</li> </ul>

More concretely, according to the Benelux Annual Work Plan, the Benelux countries have envisaged the following joint policy actions to be achieved in 2018:<sup>226</sup>

Policy field	ECONOMY & INTERNAL MARKET	JUSTICE & HOME AFFAIRS
Planned actions	<ul style="list-style-type: none"> <li>Deepening the Internal Market in the retail, telecom and transport sectors</li> <li>Making transports and logistics more sustainable and spurring digitisation</li> <li>Enhancing the circular economy</li> <li>Supporting the energy transition and provide a laboratory for EU energy cooperation</li> <li>Making working across the border simpler &amp; streamlining legislation</li> </ul>	<ul style="list-style-type: none"> <li>Deepening police cooperation, intensifying topical cooperation, crisis management, asylum &amp; migration</li> <li>Fiscal cooperation &amp; fraud prevention, social cooperation &amp; fraud prevention, other forms of fraud prevention</li> <li>Improving the living environment, tackling cross-border challenges</li> </ul>

<sup>223</sup> See the current Benelux work programme 2017-2020.

<sup>224</sup> See the current Benelux Work Plan 2018.

<sup>225</sup> Benelux General Secretariat, Work Programme 2017-2020 – Pioneering Cooperation (The Benelux Secretary-General, Brussel, January 2017).

<sup>226</sup> Benelux General Secretariat, Annual Work Plan 2018 – An Ever Greener and Younger Benelux (The Benelux Secretary-General, Brussel, January 2018).

*ii. The Benelux legal framework and its cooperation instruments*

The Netherlands, Belgium and Luxemburg signed the first Treaty on the establishment of the Benelux Economic Union between the countries of the Benelux in 1958. This original treaty was due to expire after 50 years, prompting the participating governments to renew the treaty base for the Benelux cooperation.

*Benelux treaties*

On 17 June 2008, they signed the **new Benelux-Treaty**, designed to take into account new features of the Benelux cooperation, such as in the area of security, and the new federal state structure of Belgium.<sup>227</sup> Together with a political declaration and a Protocol on the privileges and immunities of the Benelux Union, the renewed Treaty on the Benelux Economic Union entered into force on 1 January 2012.<sup>228</sup>

The new Treaty expressly recognises the possibility of CBC between the Benelux countries as one of its **two main objectives**. The other objective concerns the strengthening of Benelux-cooperation as a platform of experimentation for deeper European integration.<sup>229</sup> The Treaty underlines the possibility for the Benelux states to cooperate with other European Member States or regional cooperation structures.

In February 2014, the responsible Benelux Ministers signed a **new Convention on the cross-border and inter-territorial cooperation (CBIC)**.<sup>230</sup> This new treaty updates and strengthens the previous Benelux-Agreement on cross-border cooperation of 12 September 1986 (in force since 1 April 1991). With this Convention, the Benelux countries wish to revive their pioneering role on CBC in the context of the EU.<sup>231</sup> On 1 May 2018, the renewed Convention has entered into force.<sup>232</sup> Initially, it only applied between Belgium and Luxembourg.<sup>233</sup> Yet, recently also the Netherlands has ratified the 2014

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<sup>227</sup> The Treaty on the revision of the Treaty of 3 February 1958 establishing the Benelux Economic Union, of 2008 (hereafter: the Benelux Union Treaty or BU Treaty).

<sup>228</sup> The new Treaty has been concluded for an indefinite period. It does however provide for the option that a member country, after a first period of ten years, may withdraw its membership with a notice period of three years.

<sup>229</sup> Article 2 of the BU Treaty reads: ‘1. De Benelux Unie heeft tot doel de samenwerking tussen de Hoge Verdragsluitende Partijen te verdiepen en uit te bouwen, opdat deze verder een voortrekkersrol kan vervullen binnen de Europese Unie en de grensoverschrijdende samenwerking op alle niveaus kan versterken en verbeteren. 2. De Benelux Unie richt zich met name op: a) het voortbestaan en de verdere ontwikkeling van een economische unie, die een vrij verkeer van personen, goederen, kapitaal en diensten omvat en die een afgestemd beleid op economisch, financieel en sociaal gebied betreft, met inbegrip van een gezamenlijk beleid in de economische relaties met derde landen; b) de duurzame ontwikkeling, waarin een evenwichtige economische groei, maatschappelijke bescherming en de bescherming van het milieu worden verenigd; c) de samenwerking op de gebieden van justitie en binnenlandse zaken.’

<sup>230</sup> Order M(2014)2 of the Benelux Committee of Ministers establishing a Benelux Convention on cross-border and inter-territorial cooperation.

<sup>231</sup> See <https://europadecentraal.nl/praktijkvraag/wat-is-de-rol-van-het-benelux-verdrag-bij-grensoverschrijdende-samenwerking/> (last accessed 02-10-2018).

<sup>232</sup> Belgium ratified the 2014 Convention on 27 April 2017, Luxembourg did on 9 March 2018.

<sup>233</sup> The 1986 Agreement (Order M(86)4) is thereby repealed between Belgium and Luxembourg, as is Order M(97)2 including the Protocol of 22 September 1998 supplementing the Agreement on CBC.

Convention,<sup>234</sup> which means that all three member countries can now use the following instruments to strengthen their mutual cross-border cooperation and, possibly, also that with their neighbours.

### *Benelux instruments for CBC*

The 2014 Benelux-Convention on CBIC provides a basis for enabling the concerned governments and public institutions, especially those located in border regions, to cooperate without limitations and in an environment of legal certainty. Compared to the 1986 Agreement, these new treaty provisions are more flexible and go beyond what is provided by EU regulations to promote CBC in the Benelux region. Public authorities and other actors can thus start cross-border projects in more areas than before (such as culture, health services, or security), including those with more direct benefits for citizens. For this purpose, project partners may determine themselves which legal form their cooperation should take. The three existing forms will be continued:

- the Benelux Grouping for Territorial Cooperation (BGTC);<sup>235</sup>
- the joint body; and
- the administrative agreement.

Furthermore, the new Convention explicitly endorses the **cooperation with the neighbouring states** of the Benelux. Germany, France and the United Kingdom may in fact themselves (or parts thereof) become a Party to the 2014 Benelux Convention.<sup>236</sup>

In fact, the 2014 Benelux Convention on CBIC combines the advantages of the EGTC-Regulation of the EU and the old 1986 Benelux-Agreement. The latter already enabled municipalities, provinces and associations to cooperate without the prior authorisation from the national government.<sup>237</sup> It also already allowed that the cooperating parties transferred certain competencies to their CBC venture, without being obliged to install a director over their cooperation.<sup>238</sup> Inspired by the EGTC-Regulation, under the new Convention national authorities and public law institutions may now also participate in a BGTC.<sup>239</sup> The question of applicable law has also been somewhat simplified – namely, that of the country where the CBC venture’s seat is registered.<sup>240</sup> Another innovation of the 2014 Convention is the possibility that the seat of the CBC venture may be moved to another State without being dissolved first.<sup>241</sup>

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<sup>234</sup> Article 26 (6) of the 2014 Convention. See <https://zoek.officielebekendmakingen.nl/dossier/35021/kst-35021-1?resultIndex=0&sorttype=1&sortorder=4> (last accessed 30-10-2018).

<sup>235</sup> Article 3 of the 1986 Benelux-Agreement on CBC.

<sup>236</sup> Article 27 of the 2014 Benelux Convention on CBC.

<sup>237</sup> Article 2 (1) of the 1986 Benelux-Agreement on CBC.

<sup>238</sup> Article 3 of the 1986 Benelux-Agreement on CBC.

<sup>239</sup> This concerns those public authorities defined in Article 1 (4) of the DIRECTIVE 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

<sup>240</sup> Article 11 (1) of the 2014 Benelux Convention on CBC. For the Netherlands, Article 3 (3) of the 1986 Benelux-Agreement on CBC continues to apply, as long as it has not ratified the 2014 Convention.

<sup>241</sup> Article 15 of the 2014 Benelux Convention on CBC. This possibility is not included in the 1986 Benelux Agreement on CBC.

To date, the Benelux counts about 18 treaties and conventions. See a list of the existing multilateral binding (i.e. treaties, conventions) and non-binding (memoranda of understanding, declarations of intention) instruments in Annex 8. Raising awareness on these intergovernmental (sectoral) agreements is important because they may in principle have the potential of providing a legal basis for resolving a specific cross-border problem. This procedure will be discussed in some detail below in Chapter 5. In preparation of this later discussion, the following Table 7 below already provides an indication of the operational instruments (such as decisions, recommendations etc) per policy field, which the Benelux have at their disposal for designing targeted and topical CBC arrangements.

Table 7: Non-exhaustive overview of Benelux cooperation instruments<sup>242</sup>

Policy field	Benelux instrument (decisions, recommendations, guidelines)	Total
Waste & Circular economy	M(2017)17, M(2015)16, M(1986)07 M(2016)12	4
Ambulance services	M(2016)8, M(2014)01, M(2012)05, M(2009)08	4
Labour mobility & Professional qualifications	M(2014)17 M(2018)6, M(1971)17, M(1966)26	4
Budget policy	M(1983)06, M(1972)100, M(1963)25	3
Taxes & fiscal cooperation	M(2016)9, M(2012)01, M(2006)05, M(1970)08, M(1963)12	5
Sustainable development	M(2017)15, M(2015)10, 2014_SG-S_60rev3, M(1992)11, M(1988)08, M(1986)14, M(1983)26, M(1981)04, M(1980)12, M(1978)16, M(1974)12	11
Cross-border pastures	M(2017)4, M(2012)17, M(1990)07	3
Grensoverschrijdend park	M(2017)6, M(2011)04, M(2007)05, M(2001)01, M(1992)03, M(1987)10	6
Harbour & maritime shipping	M(2016)6	1
Intellectual property	M(2017)13, M(2015)1, M(2014)8, M(2014)14, M(2013)3, M(2009)07, M(2007)08, M(2006)06	8
Hunting & bird protection	M(2015)8, M(2015)9, M(2014)03, M(2010)04, M(2007)03, M(1999)10, M(1998)04, M(1996)08, M(1990)06, M(1983)17, M(1983)16, M(1983)03, M(1977)08, M(1970)07	14
Education	M(2018)1, M(2015)3	2
Police & justice affairs	M(2006)05, M(1993)06, M(1990)13, M(1973)31, M(1971)28, M(1971)21, M(1971)20, M(1970)14, M(1969)03	9
Social security & fraud prevention	M(1995)08 M(2015)7	2

One of these Benelux Decisions is M(2017)15 dealing with the limitation of noise pollution originating from companies located in the cross-border industrial zone *Albertknoop*. This Benelux Order has

<sup>242</sup> This overview is composed from a manual compilation on the basis of the Benelux Legal Database (collected based on “keywords”, see <http://www.benelux.int/nl/juridische-databank>, status 10-10-2018). See the full list of instruments, including their titles (in Dutch), in Annex 9.



recently gained prominence in territorial cooperation circles for its **innovative solution to a typical cross-border problem created by diverging national technical standards.**

**ALBERTKNOOP** cross-border industrial zone between Maastricht (NL) and Lanaken (BE)

*The strategic trans-border project, Albertknoop, was set up in 2009 to develop a multimodal and regional industry park in a sustainable and integrated manner in the remaining open border region between the Dutch city of Maastricht and the Flemish municipality of Lanaken. This project fits within the Albert Canal Economic Network, which designated this area as an important region for the future spatial economic development of Flanders and the Euregion. The border between Belgium and the Netherlands runs through this project area. The **ambition of the Albertknoop project is to coordinate policy recommendations and regulations in the area of environment, noise, industry, nature and infrastructure.***

*Project partners are the provinces of Belgian and Dutch Limburg, the City of Maastricht, the Lanaken municipality, and the company NV De Scheepvaart. Among these partners, a **border region manager** is appointed to push forward and coordinate this complex cross-border project.*

*All local partners are able to submit spatial policy plans to the Steering Committee of Albertknoop, which places the issues on the agenda. This Committee is the main decision-making body and consists of representatives of the provinces of Belgian and Dutch Limburg and the municipalities of Lanaken and Maastricht. Regarding problem identification and resolution, an area-focused approach is pursued that devotes special attention to problems that are inherent in the region, and to solutions being presented on the basis of qualities and potentialities offered by the region.*

*A project team implements the selected projects. Next to endeavours with a rather joint long-term vision, work is also done on specific projects by specific working groups. These working groups underline the fact that the trans-border project of Albertknoop goes beyond the mere establishment of a cross-border industry park. For instance, the Working Group Mobility is working on a new fast tram link joining the cities of Hasselt (Belgium) and Maastricht (the Netherlands) or the Cross-Border Working Group is currently researching the strongly diverging housing markets in the border region connected to Flanders and the Dutch Province of Limburg.*

*A great example of the **effective coordinating function of this cross-border multilevel project structure** is the Decision “Albertknoop” on the reduction of noise pollution from companies established in the cross-border industrial zone. Because of this decision, the Flemish municipality of Lanaken and the Dutch municipality of Maastricht now have a **joint assessment framework for noise regulations** on the cross-border business park Albertknoop. The ratio behind this was that the noise standards that apply for companies differ between the Netherlands and Flanders. As a result, entrepreneurs who set up a company and submit a license application would be judged differently depending on its location in relation to the border. Both **the Flemish as the Dutch legislation did not offer a unilateral solution for the way in which differences in noise levels in border areas must be dealt with.** Therefore, it was decided to adopt this Benelux decision, which provides **noise standards only applicable for the cross-border business park Albertknoop.** The decision is based on the Benelux Treaty on the protection of nature and landscapes of 8 June 1982.*

*This solution is unique in Europe and it provides a level of flexibility for entrepreneurs and efficient noise management for local residents. In addition, it also creates legal certainty for both residents and for companies. Residents are guaranteed that the **agreed noise standards are effectively respected.** Whereas, companies are able to establish themselves effectively within the cross-border business park, since it is **clear what conditions with regard to noise they need to fulfil.***

Next to these legal possibilities, the Benelux have also been proactive in developing and expanding some promising governance structures that can enhance transfrontier relations and mobility through political coordination and alignment at the operative-technical level. Fostering CBC is one of the Benelux Union’s main objectives. Give the dynamic of CBC and the Benelux countries’ desire to play a pioneering role in European integration, it is rather logical that the will and engagement for cooperation do not stop at the outside borders of the three member countries. In other words, CBC for the Benelux also extends to regular exchange and collaboration with border regions, other international organisations, and cross-border cooperation structures.

In fact, Article 24 till 27 of the Treaty establishing the Benelux Union underline the organisation’s openness towards other countries and organisations. In this spirit and on that legal basis, the BU has, on the one hand, lend policy and administrative support to informal networks, such as the Euro Contrôle Route, or the Pentalateral Energy Forum. On the other hand, it has maintained and developed a structural cooperation with their German neighbour, NRW, which we will describe in some more detail below.

### *iii. Cooperation with North-Rhine Westphalia (NRW)*

The Benelux cooperation with NRW is based on a Political Declaration that was mutually adopted in 2008. In terms of content, this cooperation extends over the following policy fields (Table 8 below).

*Table 8: Overview of priority policy areas for the cooperation between the Benelux and NRW<sup>243</sup>*

Policy area	Cooperation actions
<b>Traffic and transport</b>	<ul style="list-style-type: none"> <li>▪ Intelligent transport systems</li> <li>▪ Railways agenda</li> <li>▪ Longer and heavier truck combinations (LHV)</li> </ul>
<b>Energy policy</b>	<ul style="list-style-type: none"> <li>▪ Cross-border energy supply and security of supply</li> <li>▪ Supporting the energy transition</li> </ul>
<b>Labour market</b>	<ul style="list-style-type: none"> <li>▪ Promoting the mutual recognition of professional diplomas</li> <li>▪ Supporting the universities in setting up cross-border study programmes in the framework of a cross-border knowledge region</li> <li>▪ Strengthening the cross-border labour market and a (digital) employment service with a cross-border dimension</li> <li>▪ Establishing the comparability of labour market data, as a basis for identifying and eliminating bottlenecks in cross-border mobility through a common cross-border labour market policy</li> </ul>
<b>Internal security, crisis management &amp; disaster prevention</b>	<ul style="list-style-type: none"> <li>▪ Intensifying the police cooperation (operational support, common training &amp; education, tackling cyber crime, ...)</li> <li>▪ Cooperation of NRW in an information and expertise centre for the fight against organised crime (namely, biker gangs) in the Euregio Meuse-Rhine</li> <li>▪ Strengthening and improving the cooperation between crisis centres during natural disasters</li> <li>▪ Improving the cross-border emergency medical services</li> </ul>

<sup>243</sup> See Benelux General Secretariat, Benelux Jaarplan 2018 – Een steeds groenere, en jongere Benelux, January 2018.

In practice, the cooperation between NRW and the Benelux has progressed well since 2008. Next to intensifying additional bilateral engagements (since the new NRW Government took office in 2017), NRW officials have also been actively participating in the respective topical Benelux working groups to varying degrees. Legally, it is not possible that NRW becomes a party or participates formally in Benelux decision-making. This, however, does not prevent the German regional State to commit politically to Benelux initiatives, where it considers that appropriate. For instance, NRW has committed to the directives given in the Benelux RECOMMENDATION M(2014)17 regarding cross-border labour mobility.

Article 27 of the 2014 Benelux Convention on CBIC provides the neighbours countries (and regions with corresponding powers) – including Germany/NRW – the possibility of formally becoming a party to this Convention.

#### **4.2.2 Nordic cooperation and the Free Movement Council – *Gränshinderrådet***

This section deals with the Nordic multilateral cooperation, another rather longstanding form of regional cooperation in Europe. It comprises the five Nordic Countries: Denmark, Finland, Iceland, Norway and Sweden as well as their autonomous regions, the Faroe Islands (Denmark), Greenland (Denmark) and the Åland Islands (Finland).<sup>244</sup> Nordic cooperation today covers a broad range of areas, including culture; sustainability; equality, human rights and other legal matters; the economy; climate and development etc.

Subsequently, we will look at the interparliamentary Nordic Council and the intergovernmental Nordic Council of Ministers – the most prominent institutions of Nordic cooperation. First, we will briefly discuss the institutional structure, including the composition, organisational structure, decision-making processes and competences of these two regional bodies. Second, we will review the main legal instruments that underpin Nordic cooperation. This will be followed by an examination of the Free Movement Council and its so-called “obstacle elimination system”, which will be continued in some more detail also in Chapter 5.

##### *i. Organisational structure of Nordic cooperation*

Already in the 1950s, the Nordic countries agreed that joint consultations, complemented – if necessary – by coordinated action, was the best way to develop, promote and implement Nordic cooperation on a permanent basis. This formalised Nordic cooperation has been taking place in the Nordic Council and the Nordic Council of Ministers. These bodies are independent, but they are strongly interlinked. Both will be discussed separately below.

##### *Interparliamentary cooperation: Composition of the Nordic Council*

The Nordic Council is the locus for parliamentary cooperation, serving as a forum for fostering cooperation among the Nordic countries’ national parliaments. It was set up by Denmark, Iceland, Norway and Sweden in 1952, following a Danish proposal on creating a consultative body where

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<sup>244</sup> T. Etzold, ‘The Case of the Nordic Councils’, Mapping Multilateralism in Transition no. 1- International Peace Institute’, 2013, p. 1.

Nordic parliamentarians would meet on a regular basis.<sup>245</sup> Finland joined in 1955. A decade later, there was a need and desire for a permanent treaty on Nordic cooperation which resulted in the adoption of the so-called “Nordic Constitution”, better known as the Helsinki Treaty.<sup>246</sup> This Treaty formalised Nordic cooperation on the level of public international law.

The Nordic Council counts 87 members in total. They are elected members of the national parliaments and are nominated by the party groups. There is no possibility for direct elections to the Nordic Council. Denmark, Finland, Sweden and Norway each have 20 seats. Among the Danish representatives, there are two from the Faroe Islands and two from Greenland, while Finland has two representatives from Åland. The Parliament of Iceland appoints seven elected members.<sup>247</sup>

### *Organisational structure of the Nordic Council.*

The Nordic Council consists of three main organs:

- The Council’s Presidium,
- The Plenary Assembly, and
- The different Committees.<sup>248</sup>

The first organ, the Plenary Assembly, is the main decision-making body.<sup>249</sup> Since the powers of the Nordic Council (see below) are exercised by the Plenary Assembly, it consists of all 87 members. The mandate of the members lasts for one year. The Plenary holds two annual meetings: the Ordinary Session in autumn and the Theme Session in spring, which are each held respectively in the country holding the yearly presidency of the Nordic Council.<sup>250</sup> These sessions are public<sup>251</sup> and a minimum of 44 elected members need to be present during the sessions.<sup>252</sup>

The second body, the Presidium, serves as the political leadership of the Nordic Council. It is the highest decision-making body of the cooperation between the Sessions of the Plenary. The Presidium is responsible for the Nordic Council’s activities and coordinates information and decisions to national parliaments and international organisations.<sup>253</sup> It designs the annual action plan and the President represents the Nordic Council in public. In addition, it is also responsible for several political and administrative matters, including foreign affairs, defence and security policy and the budgets of the

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<sup>245</sup> Ratification of the Proposal of the Danish Prime Minister, Hans Hedtoft, at the Nordic Interparliamentary Association’s 28<sup>th</sup> delegate meeting of 13 August 1951.

<sup>246</sup> Treaty of Cooperation between Denmark, Finland, Iceland, Norway and Sweden [hereafter: the Helsinki Treaty]. This Treaty was signed on 23 March 1962 and entered into force on 1 July 1962.

<sup>247</sup> Art. 47 of the Helsinki Treaty.

<sup>248</sup> Art. 50 of the Helsinki Treaty. See also: Section 1 of the Rules of Procedure of the Nordic Council.

<sup>249</sup> Section 3 of the Rules of Procedure of the Nordic Council.

<sup>250</sup> Section 2 of the Rules of Procedure of the Nordic Council.

<sup>251</sup> Art. 51 of the Helsinki Treaty.

<sup>252</sup> Section 18 of the Rules of Procedure of the Nordic Council.

<sup>253</sup> Section 4 of the Rules of Procedure of the Nordic Council. According to section 13 of the Rules of Procedure of the Nordic Council, the Sámi parliaments in Finland, Norway and Sweden, the ethnic minority, have a so-called ‘observer status’. This means that – via the Sámi Parliamentary Council – they have speaking rights during general debates and as otherwise determined by the Presidium.

Council and the Nordic Council of Ministers.<sup>254</sup>The Presidium is appointed for a term of one year by the Plenary Assembly in their autumn session. It consists of a President and a maximum of 15 elected members. Each country and different political opinions are represented in the Presidium.<sup>255</sup> The Presidency of the Council rotates between the Nordic countries annually.<sup>256</sup>

The third type of body is represented by the standing committees, which conduct most of the political work in the Nordic Council. Each committee must consist of 16 to 18 members.<sup>257</sup> Next to a Control Committee<sup>258</sup> and an Election Committee,<sup>259</sup> there are currently four topical committees:

- The Committee for Knowledge and Culture in the Nordic Region,
- The Committee for a Sustainable Nordic Region,
- The Committee for Growth and Development in the Nordic Region, and
- The Committee for Welfare in the Nordic Regions.

These committees are responsible for the preparatory work within their areas of competence prior to the final consideration by the Nordic Council. They consider and prepare the proposals of the Plenary Assembly with a view to submitting them to the presidium or to a Session.<sup>260</sup>

At the same level of the committees, the elected members of the Nordic Council are also entitled to form so-called “party groups”. These groups were established in the 1980s to foster cross-border cooperation between political parties of the same or similar nature, going beyond the mere cooperation along national boundaries. The idea behind this establishment of party groups is that it strengthens the political impact on Nordic cooperation and it emphasizes the joint Nordic nature of the cooperation. Such a group must have a minimum of four members from a minimum of two different countries.<sup>261</sup> Currently, there are five different party groups: (i) the Left-wing Socialist Green group, (ii) the Social Democratic group, (iii) the Centre group, (iv) the Conservative group and (v) the Nordic Freedom. Each party group has its own secretariat and secretary.<sup>262</sup>

Last but not least, the Nordic Council Secretariat in Copenhagen supports the work of the Presidium, the committees and other working parties. It consists of a Secretary-general and is supported by fifteen staff members.

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<sup>254</sup> Section 27 of the Rules of Procedure of the Nordic Council.

<sup>255</sup> Art. 52 of the Helsinki Treaty and section 22 of the Rules of Procedure of the Nordic Council.

<sup>256</sup> Art. 52 of the Helsinki Treaty.

<sup>257</sup> Section 34 of the Rules of Procedure of the Nordic Council.

<sup>258</sup> The Control Committee exercises control over activities funded by the Nordic Council and conducts audits. Section 6 of the Rules of Procedure of the Nordic Council.

<sup>259</sup> The Election Committee draws up lists of nominations and organises all elections held during the Plenary Sessions. Section 7 of the Rules of Procedure of the Nordic Council.

<sup>260</sup> Section 5 of the Rules of Procedure of the Nordic Council.

<sup>261</sup> Section 8 of the Rules of Procedure of the Nordic Council.

<sup>262</sup> <https://www.norden.org/en/information/about-party-groups>. Last accessed: 16 September 2018.

### *The competences of the Nordic Council*

The Nordic Council has the power to initiate proposals and to provide advice on matters and issues relating to cooperation between all or some of the member countries and areas.<sup>263</sup> During the sessions of the Nordic Council, the members of the Nordic Council make decisions on issues that they call on the Nordic governments to implement. Art. 45 of the Helsinki Treaty determines that the Nordic Council is allowed to adopt recommendations or to issue statements to one or more of the Governments of the Nordic Council or to the Council of Ministers.<sup>264</sup> The Nordic Council should also be given the opportunity to state its views on major issues of Nordic cooperation.<sup>265</sup>

In effect, the Nordic Council can only issue non-binding recommendations to the Council of Ministers and the governments of the Nordic countries. In that way, it exerts (soft) control, expresses criticism and takes initiative. Hence, the Nordic Council can be seen more as an instrumental institution for finding solutions to common problems in the region and as a forum for debate, information exchange and opinion forming about items of Nordic cooperation generally, and about cross-border issues specifically.<sup>266</sup>

### *Intergovernmental cooperation: Composition of the Nordic Council of Ministers*

In 1971, the Nordic Council of Ministers was established as a separate intergovernmental institution to serve as a cooperation venue for the governments of Scandinavian countries.<sup>267</sup> The Nordic countries' prime ministers officially head the Nordic Council of Ministers.<sup>268</sup> In principle, they meet for informal consultations at least twice a year.

However, the prime ministers have delegated this power to the national Ministers for Cooperation. The latter convene in **the Ministerial Council for General Nordic Cooperation, which provides the pivot of formal intergovernmental Nordic cooperation**. As mentioned above, the Nordic countries' have delegated the general decision-making authority within the Nordic Council of Ministers from the level of prime ministers to the Ministers for Nordic Cooperation. Additionally, the Nordic Committee for Cooperation coordinates the day-to-day practice of the Council. This Committee consists of high-level officials from the Nordic countries' ministries of foreign affairs. As a rule, it meets eight to ten times a year. In fact, within its mandate of day-to-day coordination, the Committee is also responsible for the corresponding decision-making.<sup>269</sup>

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<sup>263</sup> Art. 44 of the Helsinki Treaty.

<sup>264</sup> The chairperson of the Plenary Assembly or five elected members of the Nordic Council can submit a proposal. There are two procedures how such a proposal can be adopted. First, the Plenary Assembly can adopt a proposal with a two-third majority of the votes during a session. Second, the Presidium can adopt a proposal if at least half of all members, or in matters, which concerns only certain countries, half of the representatives, from these countries are represented. In the event of a tied vote, the chairperson decides.

<sup>265</sup> Art. 46 of the Helsinki Treaty.

<sup>266</sup> T. Etzold, 'The Case of the Nordic Councils', Mapping Multilateralism in Transition no. 1- International Peace Institute', 2013, p. 2.

<sup>267</sup> The 1962 Helsinki Treaty was amended to ratify the Council of Ministers as the official intergovernmental body in the Region.

<sup>268</sup> Art. 61 of the Helsinki Treaty.

<sup>269</sup> More information available at: <https://www.norden.org/en/information/about-nordic-committee-co-operation-nsk>. (last assessed 16 September 2018).

The Nordic Council of Ministers operates through several ministerial councils. Currently, there are ten permanent ones and one ad-hoc council of ministers. Each council of ministers is responsible for one specific or several policy areas. For instance, the Nordic Council of Ministers for Labour consists of the national ministers for employment and labour. The work area of this Council ranges from employment issues to labour law and the working environment.<sup>270</sup>

The main organ of the Nordic Council of Ministers is the Presidency, which rotates between the member states on an annual basis.<sup>271</sup> The country holding the Presidency of the Nordic Council of Ministers also holds the chair for the meetings of the Ministers for Nordic Cooperation. Subsequently, the President is also responsible for the coordination of the intergovernmental cooperation by defining priority themes.

Each Presidency defines three specific priorities for its annual working period (see below). Next to that, it also has to observe six general themes: Three horizontal ones ought to be mainstreamed into Nordic policy-making generally. Then, there are three cross-cutting themes tailored to **the objective of cooperation itself**. Since *cooperation* forms the heart of the Nordic countries' relations, it does not only serve as a means to an end but evidently also as an end in itself.<sup>272</sup>

Current presidential priorities	General horizontal themes	Cross-cutting cooperation priorities
<b>Sustainable development in rural areas</b>	Gender equality	The Arctic
<b>Innovative and resilient regions</b>	Children and youth	Integration
<b>Sustainable cities and urban development</b>	Economic, social and environmental sustainability	Administrative reforms

The work of the Nordic Council of Ministers is supported by various committees of senior officials and working groups. The committees are composed of senior experts in a specific field. For instance, there is a Nordic Committee of Senior Officials for Gender Equality. The working groups, in turn, consist of civil servants from the Nordic States. These are also divided into groups of their area of expertise. The Marine Group, for example, supports the Nordic countries to collect data and establish a scientific basis for Nordic initiatives to prevent and combat pollution in the marine- and coastal

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<sup>270</sup> Next to this Council there are the following: (a) Nordic Council of Ministers for Sustainable Growth, (b) Nordic Council of Ministers for Digitalisation, (c) Nordic Council of Ministers for Fisheries, Aquaculture, Agriculture, Food and Forestry, (d) Nordic Council of Ministers for Culture, (e) Nordic Council of Ministers for Gender Equality, (f) Nordic Council of Ministers for Legislative Affairs, (g) Nordic Council of Ministers for the Environment and Climate, (h) Nordic Council of Ministers for Health and Social Affairs, (i) Nordic Council of Ministers for Education and Research, and (j) Nordic Council of Ministers for Finance.

See: <https://www.norden.org/en/taxonomy/term/745>. Last accessed: 16 September 2018.

<sup>271</sup> As a general rule, the Presidency of the Nordic Council and that of the Nordic Council of Ministers is never held by the same country in a particular year.

<sup>272</sup> A. Giertl et al., *Analysis of the Nordic Model – Study on the Nordic Council* (Project “Legal accessibility among the V4 countries”, Visegrad Fund, 30 July 2018) at 14.



environments.<sup>273</sup> Furthermore, the administrative duties of the Nordic Council of Ministers are undertaken by its Secretariat operating in Copenhagen.

### *The competences of the Nordic Council of Ministers*

The main task of the Nordic Council of Ministers is to coordinate intergovernmental cooperation. It is responsible for the implementation of common policies and projects. Articles 64 and 65 of the Helsinki Treaty require that the Council of Ministers shall:

- Submit an annual report to the Nordic Council about the Nordic cooperation and plans for future cooperation;
- Submit its proposals for budgetary disposition to the Nordic Council for its consideration; and
- Report to the Nordic Council on the measures taken in respect of the Council's recommendations and other representations.

Each country has one vote in the Nordic Council of Ministers. It can only make decisions unanimously, except for procedural matters that may be settled by a simple majority.<sup>274</sup> The decisions made by the Nordic Council of Ministers are binding on each country. However, decisions on matters requiring parliamentary approval according to one of the constitutions of the member countries, are not binding for that country until approved by its Parliament.<sup>275</sup>

### *ii. The legal framework and cooperation instruments*

Effective already from 1962, the Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden – the Helsinki Treaty – has been amended several times.<sup>276</sup>

### *The Helsinki Treaty*

As the main aim of Nordic cooperation, the Helsinki Treaty stipulates the following:

*'The High Contracting Parties shall endeavour to maintain and develop further cooperation between the Nordic countries in the legal, cultural, social and economic fields, as well as in those of transport and communications and environmental protection. The High Contracting Parties should hold joint consultations on matters of common interest which are dealt with by European and other international organisations and conferences.'*<sup>277</sup>

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<sup>273</sup> For an overview of the council formations, committees, and working groups of the Nordic Council of Ministers, see the Appendices of the V4 study on the Nordic Council, *ibid.* at 60 sequ.

<sup>274</sup> Art. 62 of the Helsinki Treaty.

<sup>275</sup> Art. 63 of the Helsinki Treaty.

<sup>276</sup> The Agreements that amended the original text of the Helsinki Treaty were signed on 13 February 1971, 11 March 1974, 15 June 1983, 6 May 1985, 21 August 1991, 18 March 1993, and 29 September 1995. The most recent amendments entered into force on 2 January 1996. See <https://www.norden.org/en/information/helsinki-treaty> (last accessed 10-10-2018).

<sup>277</sup> Art. 1 of the Helsinki Treaty.

The Treaty then lays down a number of individual provisions for each of these fields, i.e. specifying the respective requirements for sectoral cooperation. For instance, for the field of legal cooperation one provision holds that the Nordic countries ‘shall continue their co-operation in the field of law with the aim of attaining the greatest possible uniformity in the field of private law’.<sup>278</sup> Another stipulates rather broadly that they ‘shall seek to achieve a co-ordination of legislation in such areas, other than the aforementioned, as are considered appropriate’.<sup>279</sup>

Or, the provisions on cultural cooperation are also quite illustrative of the substantive cooperation clauses that the Treaty contains and thus also of the considerable material scope of the so-called “Nordic Constitution”. For one, the Helsinki Treaty states regarding the recognition of diplomas:

*‘The High Contracting Parties should coordinate that part of the public education system that provides qualifications for certain occupations and professions. The qualifications provided by such education should, as far as possible, be recognised and accepted in all the Nordic countries. Requirements relating to supplementary education and training necessitated by national conditions may, however, be prescribed.’<sup>280</sup>*

These substantive cooperation clauses of the Treaty are complemented with the following specifications regarding the different forms that Nordic Co-operation may take:

- Holding joint consultations on a permanent basis and, where necessary, take co-ordinated measures;<sup>281</sup>
- The various institutionalised forms in which Nordic co-operation shall take place;<sup>282</sup>
- Provisions resulting from co-operation between two or more Nordic countries may not be altered by any Party without prior notification;<sup>283</sup> and
- In matters pertaining to Nordic co-operation, the principle of public access should be observed to the greatest extent possible.<sup>284</sup>

One of these provisions, in fact, stands out particularly and is therefore worth mentioning separately. Article 42 of the Helsinki Treaty provides:

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<sup>278</sup> Art. 4 of the Helsinki Treaty.

<sup>279</sup> Art. 6 of the Helsinki Treaty.

<sup>280</sup> Art. 10 of the Helsinki Treaty. Another illustrative example is Article 13, which provides: ‘In order to support and strengthen cultural development, the High Contracting Parties shall promote free Nordic adult education and exchanges between the Nordic countries in the fields of literature, art, music, theatre, film and other areas of culture, and in so doing, utilise the opportunities provided by radio and television.’

<sup>281</sup> Art. 39 of the Helsinki Treaty. More precisely, joint consultations and coordinated measures shall be used to implement Nordic co-operation and develop it further within the terms of this Treaty and other Agreements.

<sup>282</sup> Art. 40 of the Helsinki Treaty. These institutions include: the Nordic Council, the Nordic Council of Ministers, the ministerial meetings, special co-operative bodies, as well as the specialised public authorities of the Nordic countries.

<sup>283</sup> Art. 41 of the Helsinki Treaty. Notification is, however, not required in urgent cases or where the provisions concerned are of minor importance.

<sup>284</sup> Art. 43 of the Helsinki Treaty.

*‘Public authorities in the Nordic countries may correspond directly with one another on matters other than those which, by their nature or for other reasons, should be dealt with through the agency of their Foreign Services.’<sup>285</sup>*

This is a rather broad provision, in principle, empowering public authorities across the Nordic countries and apparently irrespective of their level of administration to cooperate with each other all matters, except those being the subject of diplomatic relations. This level of detail in an international treaty on CBC, as described above, indeed seems rather unique.

On that basis, having acquired a general overview of the organisation of institutionalised Nordic cooperation and its legal framework, we will now consider its “cooperation instruments” in more detail. More precisely, we will look at one specific formation within the Nordic Council of Ministers – i.e. the so-called Free Movement Council (FMC). This is of particular interest in the light of our research questions because it represents a sophisticated governance mechanism tailored to the pragmatic resolution of cross-border obstacles.

### *The Free Movement Council*

The Free Movement Council [hereafter: FMC] is dedicated to promoting cross-border cooperation and facilitating the mobility of the people among the Nordic countries. It operates within the framework of the Nordic Council of Ministers for Co-operation. The FMC was established in 2014 at the initiative of the Nordic Prime Ministers. In the pertaining declaration, they stated ‘we [...] agree that the promotion of freedom of movement in order to create jobs and growth in the Nordic countries is one of the key challenges faced by Nordic cooperation’.<sup>286</sup>

#### *A. Composition and tasks of the Free Movement Council*

In principle, the FMC is an advisory body composed mainly of **experts**. In total it consists of 10 members. All Nordic countries and autonomous regions appoint one national member. These national members are **individuals with adequate political, professional and administrative backgrounds and able to contribute nationally to the elimination of boundaries for individuals and companies in the Nordic Region**. In addition to these national members, the FMC also holds a seat for the Secretary-General of the Nordic Council of Ministers as well as for a representative from the Nordic Council.

In order to promote and facilitate freedom of movement in the Nordic Region for individuals and businesses, more information should be gathered and border obstacles should be eliminated. Based on this premise, the FMC has three main missions:

- *Breaking down* existing border obstacles;
- *Preventing* new border obstacles to occur; and
- *Enhancing* and improving information efforts.

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<sup>285</sup> Art. 42 of the Helsinki Treaty.

<sup>286</sup> Declaration by the Nordic prime ministers on the work against border barriers on 29 October 2013. It should be noted that this is a non-official translation, however it was used in a presentation of the Nordic Council of Ministers. See: [http://www.espaces-transfrontaliers.org/fileadmin/user\\_upload/documents/WG\\_Innovative\\_Solutions/WG\\_CB\\_obstacles\\_Brux\\_28\\_09\\_16\\_PPT\\_Nordic\\_Council.pdf](http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/WG_Innovative_Solutions/WG_CB_obstacles_Brux_28_09_16_PPT_Nordic_Council.pdf).

The main objective of the FMC is to facilitate and ensure that individuals in the Nordic region do not face limitations in their free movement. To achieve this goal, the FMC is responsible for:

1. **Gathering and analysing border obstacles**, in order to uncover boundaries to free movement in the Nordic Region. This is done in close cooperation with local stakeholders, regional information services and local authorities;
2. **Demanding solutions for these obstacles**, which is the key work of the FMC. Here, a proposal to eliminate the concerned obstacle is made, followed by an appropriate solution;
3. **Encouraging and monitoring the national ministries and governments to cooperate** and resolve border obstacles. These authorities have the tools to solve cross-border obstacles. After the problem is eliminated, the FCM continues to monitor the steps and achievements made by the member states.<sup>287</sup>

To fulfil these tasks, the FMC's mission is focused on the topics of the labour market; social welfare; and education.

Each year, the FMC starts with an annual kick-off meeting, where the members summarise the results of the previous year and draft the annual working plan. In this working plan, they select, among others, the cross-border obstacles that have to be eliminated in the given year. In total, the FMC holds four regular meetings every year in which it reports on the status of the elimination process.

The work of the FMC is supported by several Committees of Senior Officials and Working Groups. In order to solve cross-border obstacles in the Nordic countries, the FMC cooperates on three levels with a number of institutions and organisations, as follows:

- Regional services and committees;
- National and local institutions; and
- Different ministerial councils of the Nordic Council of Ministers, for instance the Council of Ministers for Labour or the Council of Ministers for Health and Social Affairs.

Based on this general overview on Nordic cooperation and the institutional framework of the FMC, we will discuss the workings – considering also its benefits and drawbacks – of the FMC in more detail in Chapter 5.

#### 4.2.3 International cooperation at the basis of the river Rhine

When looking at different forms of multilateral cooperation, it is also interesting to look at more specific sectoral forms of international cooperation in Europe. Therefore, we will consider the two organisations that have been set up, on the one hand, for the navigation and, on the other, for the protection of the river Rhine.

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<sup>287</sup> Giertl et al/V4 study on the Nordic Council (2018) at 17.

In fact, there are no national or international boundaries for water: through the Rhine, the water crosses nine States before it finds its way into the North Sea. On its passage there, the water is used in various ways. Therefore, both, the different types of river usage and the protection of the Rhine required regulation. For these purposes, the Central Commission for the Navigation of the Rhine and the International Commission for the Protection of the Rhine were established respectively. The next section will discuss the Central Commission for the Navigation of the Rhine, its composition and its competences. After that, the same approach will be taken to examine the International Cooperation for the Protection of the Rhine.

*i. The Central Commission for the Navigation of the Rhine – CCNR*

Dating back to 1815, the Central Commission for the Navigation of the Rhine (CCNR) is the oldest international organisation in modern history. The CCNR encourages the implementation of initiatives to guarantee the freedom of and to promote navigation on the Rhine. It provides an institutional framework for addressing the issues concerning inland navigation on the Rhine and for solving them. In fulfilling these tasks, it works in close cooperation with other international organisations working in the area of European transport policy and with non-governmental organisations active in the field of inland navigation.<sup>288</sup> Its legal foundation is the so-called Mannheim Convention, i.e. the Revised Convention for Navigation on the Rhine of 17 October 1868.<sup>289</sup>

*Geographical and material reach of the CCNR*

The CCNR's member states include Germany, Belgium, France, the Netherlands and Switzerland.<sup>290</sup> Complementary to its permanent membership, the CCNR created an “observer status” in 2001 to encourage the participation of States not formally included in its activities, according to its mandate.<sup>291</sup> Currently, eleven States have observer status: Austria, Bulgaria, Luxembourg, Hungary, Slovakia, the Czech Republic, Romania, the United Kingdom, Ukraine, Poland and Serbia.

The territorial applicability of the Mannheim Convention is rather complex. Upstream, the scope of application starts at the point where “natural navigation” begins. According to the Swiss authorities, this point is located at the middle bridge upstream from the Port of Basle.<sup>292</sup> Downstream, the Mannheim Convention applies down to the sea, on all the waterways used for commercial navigation and that lead from the Rhine to the sea, or to Belgium.<sup>293</sup> Moreover, the entire width of the river is subjected to the Mannheim Convention, including the banks, port waters as well as the quays and storage areas.<sup>294</sup>

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<sup>288</sup> Note that not too long ago an Interregional Alliance for the Rhine-Alpine Corridor EGTC has also been founded, which the various administrative entities from the Netherlands, Belgium, and NRW (and of course the other Rhine State) are party to. See <https://egtc-rhine-alpine.eu/> (last accessed 05-10-2018).

<sup>289</sup> Revised Convention for Rhine Navigation of 17 October 1868 as set out in the text of 20 November 1963.

<sup>290</sup> *Ibid*, the Preliminary remarks, para. 1.

<sup>291</sup> Resolution on observer status for third states or intergovernmental organisations of 3 January 2001.

<sup>292</sup> Article 1 of the Mannheim Convention.

<sup>293</sup> Article 2 of the Mannheim Convention.

<sup>294</sup> Article 8. 27 and 31 of the Mannheim Convention.

### *Organisational structure of the CCNR*

As mentioned above, the CCNR counts five members: Germany, Belgium, France, the Netherlands and Switzerland. Each State is represented in the plenary meeting. Observer States may participate in the plenary meetings of the CCNR.<sup>295</sup> During the plenary meetings, the CCNR adopts most of its decisions. These meetings are held twice a year, in the spring and the autumn. In this context, each State may designate four full commissioners and two substitutes accompanied by a delegation secretary and a number of national experts.<sup>296</sup> The plenary meeting is chaired by the president of the CCNR.<sup>297</sup> This is a commissioner, appointed for a period of two years rotating among the Contracting Parties.<sup>298</sup> The president represents the CCNR, which means that he or she no longer represents a member state.<sup>299</sup>

The CCNR can establish working bodies and committees which are necessary for its activities. These bodies can be set up on either a permanent or a temporary basis. They are chaired by a Commissioner or Deputy Commissioner according to a two-yearly rotation among the Contracting Parties.<sup>300</sup> Each working body or committee consists of national experts<sup>301</sup> and is set up for a specific task with specific competences.<sup>302</sup> The difference is that committees are comprised of national experts designated by them, whereas the composition of the working body depends on the missions entrusted to them; they may also include external qualified persons. In general, both types of body prepare plenary meeting's resolutions. There are ten committees such as the Preparatory Committee, the Police Regulations Committee and the Committee on Social Issues, Employment and Professional Training. In addition, there fifteen working bodies such as the Working Party on the Inspection Regulations or the Working Party for Infrastructure and Environment.<sup>303</sup> Observer States may take active part in the committees and working parties, except for the Preparatory Committee and the Budget Committee.<sup>304</sup>

The CCNR is supported by a Secretariat located in Strasbourg. It prepares the work of the different bodies and ensures that decisions are implemented. It also makes sure that documents are circulated, resolutions are published, meetings are organised and translations are carried out. The Secretariat is headed by the Secretary-General, the Assistant Secretary-General and the Engineer in Chief.<sup>305</sup> They have a special status and are therefore appointed by the CCNR for a renewable four-year term. The other members of the Secretariat are recruited under contract by the Secretary-General. All the members of the Secretariat enjoy privileges and immunity as decided in Resolution of 10 May 1978 between the French government and the CCNR.<sup>306</sup>

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<sup>295</sup> Resolution on observer status for third states or intergovernmental organisations, 1 January 2003, Third Protocol, para 2.

<sup>296</sup> Article 43 of the Mannheim Convention and Article 11 of the Rules of Procedure.

<sup>297</sup> Article 13 (1) of the Rules of Procedure.

<sup>298</sup> Article 44 of the Mannheim Convention.

<sup>299</sup> Article 13 (2) of the Rules of Procedure.

<sup>300</sup> Article 44ter of the Mannheim Convention.

<sup>301</sup> Article 20 of the Rules of Procedure.

<sup>302</sup> Article 17 (1) and (2) of the Rules of Procedure.

<sup>303</sup> <https://www.ccr-zkr.org/11030200-en.html>.

<sup>304</sup> Resolution on observer status for third states or intergovernmental organisations, 1 January 2003, Third Protocol, at 2.

<sup>305</sup> Article 2 of the Rules of Procedure of the Secretariat of the CCNR.

<sup>306</sup> Article 6 of the Rules of Procedure of the Secretariat.

### *The legal framework and cooperation instruments*

Although the CCNR and its Mannheim Convention both deal specifically with navigation, there are no specific rights to navigation in the Convention. Article 3 of the Mannheim Convention only states that member states must refrain from imposing any toll, tax, duty or charge based directly on the fact of navigation. Still, the Mannheim Convention provides furthermore for several principles that deal with the following aspects of navigation:

- Principle of freedom of navigation<sup>307</sup>;
- Principle of the unity of the scheme<sup>308</sup>;
- Principle of equal treatment<sup>309</sup>; and
- Principle of maintaining and improving the navigable waterway.<sup>310</sup>

Next to the abovementioned rules for ensuring free navigation, the Mannheim Convention also provides rules on order. The CCNR has adopted several regulations to ensure the safety of navigation on the Rhine. These regulations cover different subjects, namely:

- Technical prescriptions concerning vessels<sup>311</sup>;
- Rules on the people involved in inland navigation<sup>312</sup>;
- Rules governing traffic conditions<sup>313</sup>; and
- Rules governing the transport of dangerous substances.<sup>314</sup>

### *Competences of the Central Commission for the Navigation of the Rhine*

As indicated above, the CCNR's main decisions are made during the plenary meeting. Under Article 45(b) of the Mannheim Convention, the CCNR is given the power to adopt regulations necessary for the safety of navigation on the Rhine. Each member state has one vote in the plenary meeting. Although the observer states may participate in the plenary meetings, they are not entitled to vote.<sup>315</sup>

The adopted regulations may cover any aspect concerning the safety and prosperity of navigation on the Rhine. The status of the resolutions depends on the voting behaviour by the member states. **Resolutions that are adopted unanimously shall be binding**, unless a member state informs the CCNR within one month that it yet refuses approval or that it needs to await the approval of its legislative bodies. If the resolutions are adopted by only a majority of the votes, then it remains a recommendation which means that it is not binding.<sup>316</sup>

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<sup>307</sup> Article 24 of the Mannheim Convention and Additional Protocol No. 2.

<sup>308</sup> Article 23 of the Mannheim Convention.

<sup>309</sup> Article 2 of the Mannheim Convention. See also for instance Article 4 of the Mannheim Convention.

<sup>310</sup> Article 2 and 3 of the Mannheim Convention.

<sup>311</sup> For instance the Regulation on the inspection of vessels on the Rhine.

<sup>312</sup> For instance the Regulation on navigating personnel.

<sup>313</sup> For instance the Police Regulations.

<sup>314</sup> For instance the AND Regulations.

<sup>315</sup> Resolution on observer status for third states or intergovernmental organisations, 1 January 2003, Third Protocol, at 2.

<sup>316</sup> Article 46 of the Mannheim Convention.



In addition, next to its ability to adopt (binding) resolutions, the CCNR also has the competence to examine complaints of failures to comply with either the Mannheim Convention or the (binding) adopted resolutions by the national authorities.<sup>317</sup> A complaint can be lodged by a member state, a natural or legal person and any public law organs which have “a legitimate interest” against actions of a member state.<sup>318</sup>

*Judicial bodies: domestic tribunals and courts and the Chamber of Appeal of the CCNR*

Next to the more legislative tasks, the Mannheim Convention also offers means of legal redress in disputes relating to the Rhine. For this purpose, each member state is required to establish so-called *Rhine navigation tribunals* in first instance and courts of appeal competent to deal with these issues.

Both judicial bodies have jurisdiction in criminal matters with regard to infringements regarding navigation and river policy and in civil matters for instance concerning damage caused by boat masters or payment of dues for pilotage.<sup>319</sup> The judgements of both judicial bodies are binding and shall be enforceable in all the other States ‘with due observance of the procedure prescribed by the laws of the land in which they are enforced’.<sup>320</sup> If one of the parties of the case does not agree with the decision of the Tribunal it can appeal to the national courts of appeal.<sup>321</sup>

As an alternative to lodging an appeal to the national courts of appeal, the parties may also decide to **bring the appeal directly before the CCNR**. This means that an international body has the competence similar to the national courts of appeal. Until 1968, the decisions on appeal were prepared by the Secretariat of the CCNR and adopted unanimously by the Member States’ delegations at the plenary sessions of the CCNR. This changed by the Strasbourg Convention of 20 November 1963, which established an international court, the Chamber of Appeal.<sup>322</sup>

The CCNR’s own Chamber of Appeal is composed of five independent judges and five substitutes, i.e. one judge and one substitute from each member state. The substitute judge take the place of the appointed judge, if he or she is unable to attend.<sup>323</sup> They are appointed for a period of six years by the CCNR based on a list proposed by each of the Member States.<sup>324</sup> Most have either a legal background or experience of navigation on the Rhine. According to the CCNR, this makes the Chamber of Appeal **a specialised court better suited than a national court for dealing with issues that relate to the navigation of the Rhine**.<sup>325</sup>

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<sup>317</sup> Article 45 (a) of the Mannheim Convention.

<sup>318</sup> Article 3 of the Rules of Procedure of the Complaints Procedure.

<sup>319</sup> Article 34 of the Mannheim Convention.

<sup>320</sup> Article 40 of the Mannheim Convention.

<sup>321</sup> Article 37 of the Mannheim Convention.

<sup>322</sup> Strasbourg Convention of 20 November 1963 amending the Revised Convention for Rhine Navigation signed at Mannheim on 17 October 1868, brought into force on 14 April 1967.

<sup>323</sup> Article 1 of the Rules of Procedure of the Chamber of Appeals. Available at: [https://www.ccr-zkr.org/files/regl-interieur/regl-de-procedure-CA\\_nl.pdf](https://www.ccr-zkr.org/files/regl-interieur/regl-de-procedure-CA_nl.pdf).

<sup>324</sup> Article 45bis of the Mannheim Convention.

<sup>325</sup> See <https://www.ccr-zkr.org/12050200-en.html>. The decisions of the CCNR are published through the [www.iwt-law.eu](http://www.iwt-law.eu) database.

*ii. The International Commission for the Protection of the Rhine – ICPR*

Next to regulating the navigation of the Rhine, one can also witness international cooperation for the protection of the Rhine. For a legal basis, this cooperation draws on the one hand upon the International Convention on the Protection of the Rhine; on the other, it is additionally based in various EU directives, such as the European Water Framework Directive and the European Flood Management Directive. This subparagraph will only discuss the Convention on the Protection of the Rhine.

The Convention on the Protection of the Rhine was signed by Germany, France, Luxembourg, the Netherlands, Switzerland and the European Community on 12 April 1999.<sup>326</sup> These countries are also the members of the International Commission for the Protection of the Rhine (ICPR). Furthermore, for the benefit of river protection, the ICPR members also cooperate with Austria, Liechtenstein, the Belgian region of Wallonia and Italy.<sup>327</sup>

*Organisational structure of the ICPR*

The Convention determines the composition of the ICPR. The latter consists of the delegations of the member states. Each member state appoints its delegates, one of whom shall be the head of the delegation.<sup>328</sup> Article 7 (3) of the Convention determines that the Commission shall be chaired for three years by each delegation in turn in the order of Contracting Parties as listed in the preamble. The delegation chairing the Commission shall appoint the Chairman. This person shall not act as spokesman for his delegation, but he or she shall represent the Commission.<sup>329</sup> The delegates of the ICPR are organised in the Plenary Assembly.

The Plenary Assembly shall meet at least one session per year. It is the main decision-making body of the ICPR. Extraordinary plenary sessions can be called upon on the Chairman's initiative or at request of at least two delegations. At latest two months before the Plenary Assembly, the Chairman will draft the agenda and communicate it to the heads of delegation. Each delegation has the right to have items included on the agenda.<sup>330</sup>

The Plenary Assembly and its meetings take place annually together with the Coordination Committee (CC) of the Rhine. This **body was created by the Ministers of the States in the Rhine in 2001 to coordinate the implementation of the EU Directives in the international Rhine river basin district.**<sup>331</sup> The CC is composed of representatives of the governments of the Contracting Parties to the ICPR (Germany, France, Luxembourg, the Netherlands and Switzerland) and representatives of the governments of Austria, Liechtenstein, and the Belgium Region Wallonia. Italy is formally part of the

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<sup>326</sup> International Commission on the Protection of the Rhine, 'International Convention on the Protection of the Rhine', 12 April 1999, Bern. Available at: [https://www.iksr.org/fileadmin/user\\_upload/Dokumente\\_en/Convention\\_on\\_the\\_Protection\\_of\\_the\\_Rhine\\_12.04.99-EN\\_01.pdf](https://www.iksr.org/fileadmin/user_upload/Dokumente_en/Convention_on_the_Protection_of_the_Rhine_12.04.99-EN_01.pdf).

<sup>327</sup> <https://www.iksr.org/en/international-cooperation/about-us/>.

<sup>328</sup> Article 7 (1) of the Convention.

<sup>329</sup> Article 6 (2) of the Convention.

<sup>330</sup> Article 9 of the Convention.

<sup>331</sup> Rules of Procedure and Financial Regulations for the Cooperation of the International Commission for the Protection of the Rhine with the Coordinating Committee Rhine, para. 1 of the Preamble.

international river basin district Rhine; however, due to the small geographical share in the catchment, it does not participate in the CC.<sup>332</sup>

The Conference of Rhine Ministers comprises the competent ministers of Germany, France, Liechtenstein, Luxembourg, the Netherlands, Austria, Switzerland and Wallonia in charge of water protection in the Rhine catchment area and the European Commission. These ministers meet regularly through the Conference, which takes decisions in matters of political importance and establishes the basis for coherent, coordinated programmes of measures. Its decisions are binding for the governments concerned.<sup>333</sup>

In addition, there are also several working and expert groups who are dealing with more technical and specific topics. The Strategy Group (SG) is the umbrella organisation that prepares decisions of the joint sessions of the Plenary Assembly and the CC and of the Conferences of Ministers. Also, it coordinates the technical work of several working and experts groups.<sup>334</sup> In total, there are three working groups: the Working Group on Flood and Low Water, the Working Group Water Quality and Emissions, and the Working Group Ecology. Each working group has a clearly defined mandate. Each president of the working groups regularly reports on the state of work and eventual problems to the SG. Furthermore, each working group is in turn supported by several experts groups.<sup>335</sup>

Finally, the ICPR also has a permanent secretariat, which shall carry out the tasks entrusted to it by the ICPR and is headed by an executive secretary.<sup>336</sup> The Secretariat is located in Koblenz and is obliged to be impartial. It supports the above-mentioned bodies and prepares the contents of all meetings. The Secretariat is in charge of the organisation, the public relations and it serves as contact for experts and persons interested.<sup>337</sup>

### *The legal framework and cooperation instruments*

The central aims of this Convention are to preserve, improve and develop the Rhine ecosystem sustainably.<sup>338</sup> Besides that, the treaty is also to ensure the production of drinking water, improve the sediment quality, prevent general flood, and help to restore the North Sea.<sup>339</sup>

In order to achieve these aims, the Contracting Parties should cooperate and inform one another about the actions taken in their territory to protect the Rhine. They should implement international measuring programmes and studies of the Rhine ecosystem, and carry out analyses concerning pollution. They may furthermore initiate autonomous actions that they deem necessary to protect the

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<sup>332</sup> Article 1 of the Rules of Procedure.

<sup>333</sup> <https://www.iksr.org/en/international-cooperation/about-us/organisation/>.

<sup>334</sup> ICPR Organigram and Mandates 2016-2021, 'Mandate Strategy Group 2016-2021', p. 3.

Available at: [https://www.iksr.org/fileadmin/user\\_upload/Dokumente\\_en/Mandates/ICPR\\_mandates\\_en.pdf](https://www.iksr.org/fileadmin/user_upload/Dokumente_en/Mandates/ICPR_mandates_en.pdf).

<sup>335</sup> *Ibid*, p. 5, 7, 8-11 and 13.

<sup>336</sup> Article 12 (1) of the Convention.

<sup>337</sup> <https://www.iksr.org/en/international-cooperation/about-us/secretariat/>.

<sup>338</sup> Article 3 (1) of the Convention.

<sup>339</sup> Article 3 (2) to (5) of the Convention.

river in their territory; in the event of an incident, they need to inform the ICPR and the Contracting Parties liable to be affected.<sup>340</sup>

In order to implement this Convention and monitor the implemented measures, the Convention established the ICPR.<sup>341</sup> According to Article 6 (2) of the Convention, the **ICPR shall have legal personality. In the territory of the member states, it shall enjoy the legal capacity conferred on legal persons by domestic law.**

In their joint annual Plenary Assembly and CC meeting, the ICPR prepares resolutions to be passed by the Conference of Rhine Ministers.<sup>342</sup> If these decisions concern the coordinated implementation of EU Directives in the Rhine river basin or the proportionate budget, then the decisions are taken unanimously by the joint Plenary Assembly and the CC.<sup>343</sup> All other decisions are taken in the Plenary Assembly, where each delegation has one vote and also these decisions shall be taken unanimously.<sup>344</sup>

#### *Decision-making and competences of the ICPR*

As mentioned before, the ICPR is able to make proposals for individual measures and programmes of measures.<sup>345</sup> These decisions shall be communicated to the Contracting Parties, in the form of recommendations, which shall be implemented in accordance with the national law of these member states.<sup>346</sup> The **ICPR may decide that these recommendations are accompanied by a timetable or that they are implemented in a coordinated manner.**<sup>347</sup>

The ICPR also monitors the implementation of its decisions. **Member states have to report regularly** to the ICPR on the legislative, regulatory and other measures that they have taken to implement these decisions. In addition, they must also report the results of the implemented measures and any possible arising problems when implementing these measures.<sup>348</sup> If a member state cannot implement the ICPR's decision, in full or in part, it shall report this to the ICPR and provide its reasons. The ICPR can then **decide to take measures to assist the implementation** of the decisions in that member state.<sup>349</sup>

As mentioned before, only the Conference of Ministers is able to adopt binding decisions. However, the decisions adopted by the Plenary Assembly and the CC also need to be implemented in the national system in accordance with the national laws. The ICPR actively monitors the implementation of these decisions.

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<sup>340</sup> Article 5 of the Convention.

<sup>341</sup> Article 6 (1) of the Convention.

<sup>342</sup> Section 1.3 of the Plenary Assemblies PLEN-CC. Available at: <https://www.iksr.org/en/international-cooperation/about-us/organisation/plenary-assembly-plen/>.

<sup>343</sup> Article 2.2 of the Rules of Procedure.

<sup>344</sup> Article 10 (1) and (2) of the Convention.

<sup>345</sup> Article 8 (1) (b) of the Convention.

<sup>346</sup> Article 11 (1) of the Convention.

<sup>347</sup> Article 11 (2) of the Convention.

<sup>348</sup> Article 11 (3) of the Convention.

<sup>349</sup> Article 11 (4) of the Convention.

#### 4.2.5 The German-French-Swiss Upper Rhine Conference – *Oberrheinkonferenz*

The principal responsibility for transfrontier cooperation in the Upper Rhine region is the so-called the Upper Rhine Conference (*Oberrheinkonferenz, ORK*). This institution ensures the on-going cooperation between the governmental and administrative authorities of three countries, Germany, France, and Switzerland. It initiates a multitude of projects and sees to their implementation. Next to it, the Upper Rhine Council (*Oberrheinrat*) represents the interregional assembly of political elects and acts as an advisory body on regional issues, also vis-à-vis the national governments of the participating States and the EU.

In the Upper Rhine region, cross-border relations and sectoral cooperation began to grow in an informal fashion after the end of WWII. The construction of the binational airport Basel-Mulhouse and the establishment of a joint administration of the Harbour of Kehl were first milestones in that context. Cross-border relations between German, French and Swiss local authorities then gradually expanded into the foundation of common cooperation structures, the associations Regio Basiliensis (1963) und Regio du Haut-Rhin (1965). The CBC at institutional level commenced with the organisation of biannual meetings between the Heads of the administrations in the Upper Rhine region entitled the "Conférence Tripartite permanente de coordination régionale" (1971-1975). The latter served primarily the mutual exchange of information.<sup>350</sup>

The Bonn Agreement of 1975, then, formalised the trinational cooperation and provided it with an institutional framework (see below). An institutional reorganisation in 1991 turned the Upper Rhine Conference into the central organ for information and coordination of cooperation in the cross-border region that it is today. This successful administrative cooperation in the area was complemented by setting up the Upper Rhine Council for political cooperation among parliamentarians in 1997. At the dawn of the new millennium, then, under the Basle Agreement the concerned governments and regional authorities reaffirmed their continued commitment to cooperate (see below). At that point, more authorities acceded the cooperation structure. Today, the geographic realm of the Upper Rhine Conference covers the following authorities:<sup>351</sup>

- The Départements Bas-Rhin and Haut-Rhin, the Region of Alsace, and the French State, on the **French** side;
- On the **German** side, four regions and county districts from the State of Baden-Württemberg (Middle Upper Rhine, Southern Upper Rhine, Lörrach, and Waldshut); and six regional and local administrations for the State of Rhineland-Palatinate (Southern Palatinate, Südliche Weinstraße, Germersheim, Landau, Dahner Felsenland, and Hauenstein).
- The Cantons of Solothurn, Basle-City, Basle-Country, Aargau and Jura on the **Swiss** side.

In the following, we will describe the organisational structure of institutionalised CBC in the Upper Rhine region. Then, we will briefly review the corresponding legal bases and pertinent cooperation instruments. This will provide the basis for taking a closer look at the new governance

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<sup>350</sup> See <https://www.oberrheinkonferenz.org/de/home.html> (last accessed 05-10-2018).

<sup>351</sup> Article 2 of the Basle Agreement.

structure that the respective cooperation partners have set up in 2010, the so-called Trinational Metropolitan Region (RMT-TMO) of the Upper Rhine, in Chapter 5.

*i. Organisational structure of the Upper Rhine Conference*

As an institution designed to promote CBC, the **Upper Rhine Conference** is organised like a pyramid. The joint **Governmental Commission** for the Upper Rhine is at the top, this implies cooperation between the foreign ministries of the three countries. The Commission is responsible for dealing with those matters of CBC that cannot be dealt with at the (inter)regional level, i.e. by the Upper Rhine Conference.<sup>352</sup> It can issue recommendations to the participating governments, for instance, on treaty revision.<sup>353</sup> If necessary, it may prepare drafts for the parties' intergovernmental agreements or request the Upper Rhine Conference to prepare such drafts or recommendations.<sup>354</sup>

The Government of each member country shall appoint a maximum of eight members. They will make up the three delegations based on which the Commission operates.<sup>355</sup> Some of their members shall also be members of the Upper Rhine Conference. The Commission shall meet once per year on one of the member territories. Its official working languages are German and French. The Commission shall be dealing with cross-border questions in the following areas:<sup>356</sup>

- Spatial planning;
- Environment;
- Regional economic policy;
- Energy;
- Traffic and communications;
- Labour and social issues, especially for cross-border workers;
- Start-up of industrial and agricultural businesses;
- City planning, settlements, housing, land policy;
- Education, professional and occupational training, research;
- Health;
- Culture, leisure, sports, and tourism; and
- Disaster relief.

The Commission's operation may furthermore be supported by the services of experts, such as competent representatives of line ministries or from the regions. In fact, the Commission relies on the support of the Upper Rhine Conference to fulfil its tasks.<sup>357</sup> Therefore, it ought to (endeavour to) coordinate its meetings with those of the Upper Rhine Conference.<sup>358</sup> In terms of political bodies and committees, the Conference consists of a Presidency; a Coordination Committee ensuring the

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<sup>352</sup> Article 4(1) of the Basle Agreement.

<sup>353</sup> Article 4(3) of the Basle Agreement.

<sup>354</sup> Article 4(2) of the Basle Agreement.

<sup>355</sup> Article 5 (1) and (2) of the Basle Agreement.

<sup>356</sup> Point 2 of the Bonn Agreement.

<sup>357</sup> Article 3(1) of the Basle Agreement. The Commission shall be informed regularly about the work and decisions of the Upper Rhine Conference, see Article 7.

<sup>358</sup> Article 6 of the Basle Agreement.

supervision by the responsible parties; a Joint Secretariat; 11 working groups,<sup>359</sup> and 36 expert committees.

On 6 March 1996, a **Joint Secretariat** was established to intensify the collaboration between the different organs of the Upper Rhine Conference. It is staffed by one permanent delegate from each country, and supported by an assistant. The Joint Secretariat is charged with the following tasks:

- Coordination between the working groups, expert committees, and the decision-making bodies of the Conference, while maintaining regular contact between the Conference and the other actors involved in CBC;
- Organisation of the plenary and presidency sessions of the Upper Rhine Conference;
- Implementation of the Decisions (*Beschlüsse*) of the Conference and the presentation of annual activity reports;
- Public relations for the Conference; and
- Supporting the Conference President in his role as the spokesperson of the Upper Rhine Conference and the dissemination of its written outputs.<sup>360</sup>

As an institution, the German-French-Swiss **Upper Rhine Council** is formally independent. It was founded in 1997, to complement the Upper Rhine Conference, by improving cross-border information and enhancing political cooperation in the area.<sup>361</sup>

The Council is the interregional assembly for political representatives, consisting of 71 elects (including Members of regional State Parliaments, of regional councils, and counties, district administrators).<sup>362</sup> The composition of the Council's four regional delegations includes Baden-Württemberg (26 Members), Alsace (26 Members), the Swiss North-West (11 Members), and Rhineland-Palatinate (8 Members). The plenary convenes at least twice a year. The Upper Rhine Council can adopt resolutions, opinions, and protocols (plenary). In most cases, it issues its recommendations and postulations through resolutions.

The Council has been operationalised in 1998 with the intention of increasing the democratic legitimacy of the trinational cooperation structures. After all, the elects represented in the Council are the ones competent for approving the necessary funds for CBC at municipal or regional level. However, so far the Upper Rhine Council possess neither its own budget nor a permanent secretariat. Its administration is usually managed by the respective authority, which holds the annual presidency of the Council.

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<sup>359</sup> Ibid.

<sup>360</sup> See <https://www.oberrheinkonferenz.org/de/oberrheinkonferenz/gemeinsames-sekretariat.html> (last accessed 05-10-2018).

<sup>361</sup> Agreement on the establishment of the Upper Rhine Council (hereafter: Foundation agreement (*Gründungsvereinbarung*)): <https://www.oberrheinrat.org/de/der-oberrheinrat/gruendungsvereinbarung.html> (last accessed 05-10-2018).

<sup>362</sup> Article 3 of the Foundation Agreement.



ii. *Legal framework and cooperation instruments*

The intergovernmental Convention of Bonn of 22 October 1975 provided the first legal landmark of the trilateral cooperation in the Upper Rhine area.<sup>363</sup> This international agreement lay the foundation for building an organisational infrastructure tailored to the support of neighbour relations and cross-border issues in the area. It thus provided an institutional framework to the earlier regional cooperation initiatives. This included the creation of the Governmental Commission (*Regierungskommission*) that was supported by two regional committees (*Regionalausschüsse*) one for the Upper Rhine region's northern basin, the other for its southern one, which were later merged (1991). In that way, the German, French and Swiss Governments declared their commitment early on towards organising an interregional CBC, maintain regular contacts and jointly deal with the cross-border questions of all partners.

While not specifically linked to the Upper Rhine region, the 1996 Karlsruhe “Quattropôle” Agreement on cross-border cooperation is still worth mentioning.<sup>364</sup> It is an international agreement that aims at facilitating and promoting cross-border cooperation between local communities and public bodies from France, Germany, Luxembourg and Switzerland while respecting local legislation and international engagements (e.g. yearly organisation of Luxembourgish courses in the neighbouring regions on the basis of yearly agreements).<sup>365</sup> Given the increasing importance of regional and municipal cooperation across borders, a solid legal basis is required. By signing the Karlsruhe Agreement the Contracting Parties sought to enhance legal certainty in the formal arrangements for CBC in the area.<sup>366</sup>

After that, the legal basis of the Upper Rhine Conference was subjected to an update. The Bonn Agreement was eventually replaced by the Agreement signed by the Governments of Germany, France and Switzerland on 21 September 2000 in Basle.<sup>367</sup> This renewed treaty reconfirmed the role of the Governmental Commission as an intermediary of the Conference towards the respective governments regarding the questions that cannot be answered in a domestic-regional context. As mentioned above, the Basle Agreement extended the Conference's mandated area.<sup>368</sup> The Agreement has been concluded for an indefinite period. Any party may terminate this Agreement at the end of a calendar year by means of written notification addressed to the other parties, and giving at least six months' notice.<sup>369</sup>

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<sup>363</sup> Agreement between the Governments of the Swiss Federation, the Federal Republic of Germany and the French Republic on the establishment of a Commission designed to examine and resolve neighbourhood issues, signed in Bonn on 22 of October 1975.

<sup>364</sup> Karlsruhe Agreement of 23 January 1996 between the governments of the German Federal Republic, the French Republic, the Grand Duchy of Luxembourg, and the Swiss Federal Council (*Schweizerischer Bundesrat*), acting on behalf of the Cantons Solothurn, Basle-City, Basle-Country, Aargau and Jura, on the cross-border cooperation between regional authorities and local public offices.

<sup>365</sup> See [https://eacea.ec.europa.eu/national-policies/eurydice/content/bilateral-agreements-and-worldwide-cooperation-40\\_mk](https://eacea.ec.europa.eu/national-policies/eurydice/content/bilateral-agreements-and-worldwide-cooperation-40_mk) (last accessed 05-10-2018).

<sup>366</sup> See <https://www.saarland.de/3885.htm> (last accessed 05-10-2018).

<sup>367</sup> Article 10 of the Basle Agreement.

<sup>368</sup> Agreement between the Swiss Federal Council, the Government of the Federal Republic of Germany and the Government of the French Republic on Cross-border Co-operation in the Upper Rhine Region, 21 September 2000.

<sup>369</sup> Article 9 of the Basle Agreement.

The following are examples of initiatives undertaken by the Upper Rhine Conference to address cross-border issues:

- Interregional cultural cooperation has been given shape and concretisation through a trinational museum pass, it is based on and managed by the joint association Museum-Pass-Musée;<sup>370</sup>
- Organisation of cross-border projects for children and young people from 12 to 25 years with the help of a joint Youth Fund, set up in 1998, contributing to the kids' sensitisation for language and intercultural matters and an increased popularity of the CBC structures generally;<sup>371</sup> and
- Creation of a “European University”, building on a long-standing tradition of cooperation (30 years) between five universities from Baden-Württemberg, Switzerland and France, facilitating students' study terms abroad, curricula in at least two languages, common research programmes, joint research infrastructure, and better access to EU funding.<sup>372</sup>

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<sup>370</sup> Joint Secretariat of the Upper Rhine Conference, Press release, Edenkoben, 4 May 2018:

[https://www.oberrheinkonferenz.org/de/oberrheinkonferenz/downloads.html?file=files/assets/ORK/docs\\_de/Medien/Presemiteilung\\_ORK\\_4.05.18.pdf](https://www.oberrheinkonferenz.org/de/oberrheinkonferenz/downloads.html?file=files/assets/ORK/docs_de/Medien/Presemiteilung_ORK_4.05.18.pdf).

<sup>371</sup> Ibid.

<sup>372</sup> See <https://www.welt.de/regionales/baden-wuerttemberg/article174258003/Am-Oberrhein-soll-eine-Europaeische-Universitaet-entstehen.html> (last accessed 05-10-2018).

#### **EUROAIRPORT Basel-Mulhouse-Freiburg**

*EuroAirport Basel-Mulhouse-Freiburg is an international airport near Basel, Mulhouse and Freiburg. The airport is located in France, on the administrative ground of the municipality of Saint-Louis near the Swiss and German borders. It is one of the few airports in the world that connects two countries. The airport is located on French territory, however by agreements between France and Switzerland in 1946, the land has become partly Swiss. In 1949, these agreements were ratified in the so-called ‘Französisch-Schweizerischer Staatsvertrag’ [hereafter: F-S Treaty]. Due to this treaty, both countries have access to the airport without any customs or other restrictions.*

*The F-S Treaty stipulates that France was responsible for providing the land, while the Swiss canton of Basel-Stadt would cover the construction costs. In general, French law applies to the entire territory of the airport, unless expressly provided otherwise. The French government is responsible for traffic control, the management of runways and general radio services. The airport building itself is divided into a Swiss and a French part. Article 2 of the F-S Treaty states that within the Swiss section, the Swiss authorities have the competence to apply Swiss legislation and regulations. Within this area, the Swiss authorities also have the right to apply Swiss legislation on customs, medical services and police. However, the French police are allowed to carry out random checks, including in the Swiss part of the airport.*

*Because Switzerland joined the Schengen Convention in March 2009, a Schengen and a non-Schengen zone was created. The border control is managed by both French and Swiss border officers. This means that passengers will either receive a Swiss or French stamp, depending on which officer they have approached.*

*The EuroAirport Basel-Mulhouse-Freiburg is a limited liability company established by the French and Swiss governments. Due to the fact that the airport is established by a bilateral treaty between France and Switzerland, also means that agreements on other areas and arising problems must be solved by official agreements between both governments. For instance, a great number of specialised firms have established their activities on the Swiss side of the airport, where they have benefited from favourable tax conditions. In 2010, a union representing former employees of a Swiss company filed a lawsuit in France. The Court of Cassation ruled that the French labour law should apply in this zone. This created concern in companies and politicians that the French labour law should be applicable and that many companies would leave the airport. In March 2012, a framework agreement was signed between the French and Swiss authorities meaning that EuroAirport was able to maintain its existing practices, in order to retain the companies in the area. However, this did not solve the problem entirely. Therefore, in December 2017, a new tax system was adopted for the airport with respect to taxes paid by Swiss companies, which operate at the airport. These agreements clarify which taxes, companies working at the airport must pay to the Swiss and French government.*

#### CROSS-BORDER Tramway between Strasbourg (FR) and Kehl (DE)

*The Tram Strasbourg-Kehl is the extension of a tramway line of Strasbourg tramway network (France) to the small German city of Kehl. Its main objective is to facilitate the movement of residents and to play a leading role in the development of cross-border links between France and Germany.*

*Before the tramway was built, the main public transport link between Strasbourg and Kehl was bus number 21. It is the busiest bus line of Strasbourg, and the number of passengers has increased by 65% between 2007 and 2012. In addition, about 36.000 vehicles travel from Strasbourg to Kehl every day for work.*

*To provide an affordable solution for cross border commuters and other travellers, the cities cooperated in building a tramline linking the two cities. A key concern were the ticket rates, since it was rather problematic to fit tramway fares into the public transport pricing schemes that are already available in both cities. At last, Strasbourg and Kehl decided to create a common tariff zone for cross-border transit in order to solve the problem of ticket pricing. An integrated fare area allows travellers to use a single ticket to access different means of transport or different transport operators within a coverage area. The tramline began operating in early 2017 across a new bridge.*

*Despite the fact that the tramline is operating, it took more than ten years to complete the extension of the Strasbourg tram line to Kehl. This was due to the main obstacles faced when planning and operating this project. One obstacle is already mentioned above: the issues with regard to pricing and ticketing. In addition, there were also other problems. For instance, there were differences in standards between both countries. This is solved by stating that the tram should meet both the German as the French technical standards.*

#### 4.2.6 The Austrian-Italian Three Provinces' Parliament – *Dreier Landtag*

South Tyrol is a region of Italy that enjoys autonomous status. It borders with Austria, which it officially was part of until 1918, the end of WWI when the border region was signed over to Italy. That this abrupt partition continues to be problematic and the territorial status of South Tyrol disputed is proven by a recent fall-out between Italy and Austria. Much to the irritation of the former, the Austrian government, a coalition between ÖVP and the populist right-wing FPÖ, is currently preparing a law that would offer Austrian nationality to the citizens of South-Tyrol. About 70 % of South Tyrolians are German native-speakers. Ladin, a Reto-Roman dialect, is also spoken in the Region. The law in preparation is a follow-up to a corresponding promise of the Austrian Government made in its coalition agreement of December 2017.<sup>373</sup>

##### *i. Organisational structure of the Three Provinces' Parliament*

The Dreierlandtag is a joint assembly of the South Tyrolean Landtag, the Tyrol Landtag and the regional parliament of the Autonomous Province of Trento. The Vorarlberg Parliament takes an observer status within the framework of the tripartite Landtag and participates in the joint parliamentary meeting with its president and its members as well as the members of the extended presidium. The Vorarlberg

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<sup>373</sup> ANP, 'Italië wijst Oostenrijks plan Zuid-Tirol af', HP/DE Tijd, 8 September 2018: <https://www.hpdetijd.nl/nieuws/italie-wijst-oostenrijks-plan-zuid-tirol-af/> (last accessed 04-10-2018).

Parliament has the right to apply for full membership at any time. The *Dreierlandtag* has been established in 1991.<sup>374</sup>

Regarding the operative bodies of this interprovincial assembly, the Interregional Landtag Commission is responsible for agenda-setting. It consists of 21 members. It includes the presidents of the three parliaments and six deputies per state parliament. When they are appointed, the composition of each Landtag should be taken into account. The Commission plays an important role in the decisions to be taken, since it sets the agenda of the meetings of the *Dreierlandtag* by deciding which of the Members' applications shall be admitted to be discussed during the meeting. There has to be a majority of the Commissioners who vote in favour (quorum is that more than half of the representatives of one of every Landtag is present) and then the application is included in the agenda. On a proposal of its members, the Commission may also amend the applications submitted and then the amended form is submitted to the Dreier Landtag.

The *Dreierlandtag* itself consists of the Deputies of the Provincial Councils of the Autonomous Province of Trento and the Autonomous Province of South Tyrol (Bolzano), the Members and State Government officials of the State of Tyrol, the members of the Presidium and the parliamentary group leaders of the Vorarlberg Parliament. This body examines the applications submitted that have been included in the agenda by the Commission.

Regarding its procedure, the *Dreierlandtag* meets every two years, alternating between South Tyrol, Tyrol and Trentino.<sup>375</sup> The deputies of the South Tyrol Landtag, the Trentino Landtag and the Tyrolean Landtag and the members of the government of the province of Tyrol can submit applications for items of discussions to be placed on the agenda. Each state parliament cannot bring more than ten applications. Regarding the timing of application, the organisation's rules determine that they must be submitted the latest, 45 days before the Commission's meeting preparing the agenda for the biannual session of the Dreierlandtag.<sup>376</sup>

Concerning the voting procedure, as a rule, all three parliaments vote together. However, at request of the majority of the present members of one of the three *Landtage*, a separate vote per Landtag may be held. Important to note is that neither the votes in the *Dreier Landtag*, nor in the Commission allow for abstention from voting. This means that they can only vote against or in favour of a proposal, **a neutral position is not possible. This is because of the Italian legal system, which does not allow deputies to abstain from voting. Therefore, this provision was included in both Rules of Procedure.**<sup>377</sup>

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<sup>374</sup> See Art. 1 (2) and (5) of the Rules of Procedure of the Dreier Landtag.

<sup>375</sup> Art. 1 (1) of the Rules of Procedure of the Dreier Landtag.

<sup>376</sup> However, if 2/3 of the Commissioners present agree, then motions may still be filed during the Commission meeting, provided that the maximum of ten applications of each State has not been reached. In addition to the total of 30 applications, requests for urgent assistance may be submitted no later than eight days before the meeting of the Dreier Landtag. On the admissibility of these applications, the Commission decides by a 3/4 majority of the members present.

<sup>377</sup> See Art. 9 of the Rules of Procedure of the Dreier Landtag.

*ii. The legal framework and cooperation instruments*

In view of the responsibilities entrusted to the Three Provinces' Parliament, the *Dreierlandtag* 'deals with **cross-border issues** and other issues and can pass resolutions in the matters under discussion'.<sup>378</sup>

A total of **218 decisions have hitherto been adopted in the areas of education, culture and youth, economic and rural development, transport and environment, social affairs, health and work, cross-border cooperation and institutional affairs.**

Concerning the **status of the decisions** of the *Dreierlandtag*, regarding those applications that have been approved, the *Dreierlandtag* obliges the provincial governments to take actions. These decisions are sent to the provincial governors of the Autonomous Provinces of Sud Tyrol (Bolzano) and Trento and Tyrol to take the necessary steps within their area of responsibility. Most of the resolutions passed by the *Dreierlandtag* are resolutions obliging or requiring governments to take action. **These provincial governors must periodically send reports to the provincial assemblies on the implementation of the approved applications.** The first report must be sent one year after the last meeting and the second report 60 days before the following meeting of the *Dreierlandtag*.

Importantly, though, the decisions are, as for the parliaments themselves, not legally binding for the state governments. They represent a sort of order, a compelling yet technically non-binding instrument in recognition of the different competences that exist in the three regions. Nonetheless, each *Landtag* is held to convert and implement the approved interregional resolutions. In fact, the latter need to be converted into regional policy where due consideration should be taken by the different competences of the Autonomous Provinces of Sud Tyrol and Trento and the Land Tyrol.

Those applications that are addressed to other institutions, such as central governments, are forwarded by the presidents of the Landtag to the competent authorities.

The following are some illustrative examples of the *Dreierlandtag's* decision-making:

- Decision No 1 on the challenges for dealing with refugee situations in the European region of Tyrol / South Tyrol / Trentino.
- Decision No 2 concerning the implementation of the decisions.
- Decision No 3 on the development of broadcasting of radio and television signals in German, Italian and Ladin in the provinces of Trento, Bolzano and Tirol.
- Decision No 4 concerning culture and choirs.
- Decision No 5 on recognition of diplomas.
- Decision No 6 on promoting the culture of the European region.
- Decision No 7 on the transatlantic trade and investment partnership of TTIP.
- Decision No 8 on the protection of biodiversity in the European region and the promotion of adventure parks and social agriculture.
- Decision No 9 on the preparation of a joint action plan for the European Region of Tyrol for research and education in the field of agriculture and food science.
- Decision No 10 concerning umbrella brand Berg product.

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<sup>378</sup> Art. 1 (3) of the Rules of Procedure of the *Dreierlandtag*.

Based on these findings, it is opportune now to delve into a more detailed discussion of some of these arrangements and their respective potential for enhancing regional action capacity for CBC.

## 5. A model for Limburg to address cross-border problems more efficiently?

Chapter 4 has provided an extensive overview of various European, multilateral-international and interregional multilevel cooperation arrangements for strengthening CBC. This chapter sets out to discuss a **workable model that can increase the capacity of Dutch border regions, and especially of the Province of Limburg, for dealing with cross-border problems more efficiently**. For that purpose, we have selected from the overview above what we consider the **most promising initiatives** in terms of the extent to which an initiative seems *capable* of serving as an example for other border regions for jointly dealing with cross-border problems effectively.

In that respect, it is useful to note the literature discussing the evolution of CBC that puts emphasis on the increasing need for capacity-building for institutionalised forms of CBC. Considering the trend of increasing convergence and institutionalisation in European CBC, it is recognised that **cross-border institutions function rather as “platforms” than as real administrative units**:

*‘it becomes more and more evident, that cross-border institutions today are more platforms than real administrative units, allowing for the very pragmatic search for joint solutions to common local problems resulting from the increasing border-crossing socioeconomic dynamics (Wille, 2012; Beck, Thevenet & Wetzel, 2009), in areas such as transportation, spatial planning, environmental protection, risk prevention, citizen’s advice and health cooperation, etc. rather than for the definition and implementation of big strategic ambitions.’<sup>379</sup>*

In other words, the **need for multilevel and, especially, horizontal interaction in CBC is increasingly recognised**.<sup>380</sup> Manifold challenges, however, often constrain horizontal interaction in CBC policy-making.<sup>381</sup> Therefore, the **need for capacity-building** among concerned actors is emphasised.<sup>382</sup> This includes capacity-building through training and facilitation – including the development of basic/cross-sectoral skills (knowledge about neighbour country, methodological and linguistic skills); specialised training (offering neutral platform of exchange on policy-oriented topics); and the improvement of competences on European affairs for local and regional authorities.<sup>383</sup>

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<sup>379</sup> J. Beck, Prospects of Cross-Border Cooperation in Europe: Capacity-Building and the Operating Principle of “Horizontal Subsidiarity” (2013) XI *Mednarodna revija za javno upravo* (Slovenian International Journal of Public Administration) 1, pp 7-24, at 8.

<sup>380</sup> Beck denotes this as the development of the principle of “horizontal subsidiarity”. Ibid.

<sup>381</sup> Beck (2013) identifies seven of those challenges, relating for example to drawbacks in functional interfaces for cooperation between partners from different institutional backgrounds, lack of effective knowledge management, or the lack of integrated territorial development strategies (just to name a few). Ibid. at 8-9.

<sup>382</sup> See also J. Beck, ‘Territorial Institutionalism – Capturing a Horizontal Dimension of the European Administrative Space’ (2018) *Journal of Borderlands Studies*, pp 1-27.

<sup>383</sup> Beck (2013) at 10-11.



The **TEIN - Transfrontier Euro-Institute-Network**<sup>384</sup>, which ITEM is a member of, by now convenes 14 institutes specialised in CBC. TEIN focuses on expanding the knowledge base and building up training capacity on cross-border questions at an EU-wide level. It does so, amongst others, by composing a comprehensive overview of the need for the professionalization of actors in cross-border cooperation, the exchange best practices, and developing a joint certification system for cross-border training.

Against this background, for delving into the evaluative discussion below, it is first helpful to set the scene by briefly reviewing the Dutch Government's current position regarding CBC.

### 5.1 Setting the scene: The Dutch Government's position on CBC

Seven of the twelve provinces of the Netherlands are located on the border. The Dutch Government recognises the importance of cross-border administrative cooperation in the border regions (and beyond) to boost the development and growth potential of these regions. Also, given the trends of increasing regionalisation and decentralisation, more and more societal issues – such as security, environmental protection and employment – are more and more affected by regional policy.

Therefore, the Dutch Ministry of Internal Affairs and Royal Relations and the Ministry of Foreign Affairs have been running a joint project on strengthening cooperation with the country's neighbours for almost ten years. The *Grensoverschrijdende samenwerking* (GROS)-project aims to eliminate specific bottlenecks in the Netherlands' border regions with Belgium and Germany, and thereby to stimulate CBC and the mutual exchange of knowledge.<sup>385</sup>

Since October 2017, State Secretary R.W. (Raymond) Knops, responsible for Internal Affairs and Royal Relations, is in charge of the GROS-initiative and, thus, the contact point on CBC matters for Dutch Government. In support of this function, the Interior Ministry set up a specialised secretariat – the GROS-Secretariat – that maintains working relations with the neighbouring countries and coordinates CBC respectively, also at regional level.<sup>386</sup>

Complementary to the Government's politico-administrative commitment to CBC, an Action Team on “Cross-Border Economy and Work” (*Actieteam Grensoverschrijdende Economie en Arbeid*, GEA) was set up in October 2015. The Action Team's (one-year) mission was to advance cross-border economic and labour relations and give an impetus for working and doing business across the border. The GEA-Team's final report, including an Action Plan of 40 action points, were published in January 2017.<sup>387</sup>

In line with agreements made in this context, State Secretary Knops presented the annual progress report on the GEA Action Plan in April 2018.<sup>388</sup> In the pertaining letter to the Dutch Parliament, Knops

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<sup>384</sup> See [www.transfrontier.eu](http://www.transfrontier.eu).

<sup>385</sup> The GROS-project was launched following the advice of the Dutch Council for Public Administration (*Raad voor het Openbaar Bestuur, Rob*) in 2008.

<sup>386</sup> See <https://kennisopenbaarbestuur.nl/thema/grensoverschrijdende-samenwerking/> (last accessed 10-10-2018).

<sup>387</sup> M.E. Huizing (voorzitter GEA), ‘Grenzen slechten, regio's verbinden, mensen bewegen’, Rapportage Actieteam Grensoverschrijdende Economie en Arbeid, 30 januari 2017.

<sup>388</sup> Ministry of Interior Affairs and Royal Relations, Letter to the Parliament concerning cross-border cooperation (No. 2018-0000244202, 20 April 2018).

sketches the framework conditions for the Dutch engagements in tackling cross-border obstacles, as follows:

- The State Secretary stresses amongst others the significance of capable institutions such as the cross-border information points (*grensinformatiepunten*), see Annex 6, and the cooperation between public employment services.
- He also recognises the **importance of cross-border impact assessments** for future policy initiatives and legislative proposals, for which he relies on the support of ITEM to conduct pertinent studies on concrete policy cases.
- Knops furthermore addresses the example of the recently created Dutch-Flemish North Sea Port (see text box above, under Section 3.3), stressing this **cross-border project's potential as a testing ground to highlight regulatory differences between the Netherlands and Flanders and thus prompt an intensification of cross-border administrative cooperation** between the two.
- Based on the above, he underlines the current initiative of the Dutch Government on developing a **sustainable governance structure for deepening the bilateral relations**, strengthening and extending the cooperation arrangements with the neighbouring regions – notably, NRW, Lower Saxony, and Flanders (e.g. by fostering regular consultations at multiple administrative levels).<sup>389</sup>
- Finally, Knops also highlights the **Government's willingness to build further on the valuable cooperation structures already existing at Benelux level and in the framework of the EU**; recognising the need for tailor-made approaches that use the leeway offered by Benelux conventions/agreements and by the Treaty of Anholt, which serves as a legal basis for furthering CBC with the German authorities.

Not only do these considerations display **the Dutch Government's general openness towards CBC**. More importantly, the State Secretary stresses the need to act through both “*removing barriers to CBC*” and “*supporting cross-border initiatives*”.<sup>390</sup> This shows the national Government's **express commitment on taking a more comprehensive and responsive approach towards solving the specific problems of border regions** and enhancing their development potential.

This window of opportunity should be used for devising a **model for Dutch border regions that can generate (legal) “action potential” based on multilateral-multilevel CBC arrangements for**

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<sup>389</sup> The enhanced CBC governance structure has been further elaborated in recent ministerial communications to the Second Chamber. Ministry of Interior Affairs and Royal Relations, Letter to the Parliament concerning cross-border cooperation (No. 2018-0000776224, 19 September 2018).

<sup>390</sup> In his recent letter to the Second Chamber, State Secretary Knops underlines: ‘Het **slechten van grensbarrières** en het creëren van gunstige(r) randvoorwaarden vormen volgens het kabinet een noodzakelijke maar niet voldoende voorwaarde voor het benutten van grensoverschrijdende kansen. Het gaat bovenal om daadwerkelijke grensoverschrijdende initiatieven die burgers, bedrijven en instellingen (willen) ontplooiën. Het kabinet zal daarom in de tweede plaats waar nodig en mogelijk **concrete initiatieven voor samenwerking in grensover-schrijdende projecten in grensregio's ondersteunen**. Dit kan door specifiek op passend niveau afspraken te maken met buurlanden, door wet- en/of regelgeving aan te passen, door kennis beschikbaar te stellen, door samenwerkingspartners bij elkaar te brengen. Bovendien kunnen integrale, op de benutting van het zogenoemde regiobudget gerichte, regionale proposities mede betrekking hebben op grensoverschrijdende initiatieven.’ Ibid. at 6.

**eliminating cross-border obstacles.** The subsequent sections will discuss which aspects of the Benelux model, the Nordic FMC model, and the Upper Rhine TMR model may provide valuable impetus to Limburg’s development potential in particular.

## 5.2 The innovative potential of the Benelux model – solving cross-border problems for its citizens

To recall, fostering CBC between its member countries directly, and between the latter and the neighbouring states is one of the two main objectives of the BU. The other is providing an experimental platform for deepening European integration. Since the entry into force of the renewed Benelux Treaty on 1 January 2012, the Contracting Parties have made gradual efforts to use the institutional framework and existing instruments more efficiently. Although there have been some doubts along the way,<sup>391</sup> most recently the Dutch Government has – as stated above (Section 5.1) – reaffirmed its commitment towards using the Benelux framework for promoting CBC.

In particular, there have been specific efforts of developing and streamlining the international organisation’s governance structures,<sup>392</sup> and using the Benelux legal framework in a more targeted expedient way to address cross-border issues. On the one hand, the Benelux countries still make use of the traditional means of concluding agreements to enhance CBC, such as the recent renewal of the Benelux Treaty on police cooperation (July 2018).

On the other hand, they also employ more innovative ways by tailoring the application of Benelux legal instruments to the removal of obstacles that hinder the effective implementation of joint cross-border projects, such as recently demonstrated the Decision on noise pollution reduction in the cross-border industrial zone of the Albertknoop (see the text box, Section 4.2.1). Elements that seem to have contributed to the successful resolution of the border obstacle (i.e. overcoming the differences in the national noise regulations) in this case have been:

- The comprehensive multilevel set-up of the cross-border project structure;
- The establishment of a joint assessment framework for noise regulations by the project partners; and
- Using the Benelux Treaty on nature conservation and landscape protection of 8 June 1982 as a legal basis for adopting the respective decision that resolved the conflict in noise regulations.

**The existing Benelux cooperation instruments, as described in Section 4.2.1 above (and in the Annexes 8 and 9), therefore reveal a promising scope for flexibility that could help to bridge legal**

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<sup>391</sup> See Dutch Ministry of Foreign Affairs, *Letter to the Parliament on the Evaluation of the Benelux Union-cooperation from Dutch perspective* (Directorate European Affairs, No. DEU-0021/13, 13 February 2013); and Ministry of Foreign Affairs, *IOB Evaluation Relations, results, and efficiency – Evaluation of the Benelux Union-cooperation from the Dutch perspective* (Inspection Development Cooperation and Policy Evaluation, IOB, No. 372, November 2012); see also J. Wouters and M. Vidal, *Kritische stemmen over de Benelux-samenwerking: een Belgisch-Vlaams perspectief* (Working Paper No 154, Institute for International Law, KU Leuven, April 2013).

<sup>392</sup> See, for instance, the extensive use of administrative working groups – based on Article 12(b) of the BU Treaty – that are assigned by the Benelux Council at the beginning of every year with the adoption of the Benelux Annual Plan, as specified in [http://www.benelux.int/files/1915/1661/6691/BENELUX\\_Jaarplan\\_2018\\_NL-DEF.pdf](http://www.benelux.int/files/1915/1661/6691/BENELUX_Jaarplan_2018_NL-DEF.pdf) (last accessed 05-10-2018).

**conflicts and administrative obstacles resulting from the simultaneous application of different regulations from either side of the border.** Based on this finding, for this study, we developed fictional cases in order to test the potential application of legal instruments (see Table 9 below). The following cases were presented to the General Secretariat of the Benelux in order to describe whether in the case of a certain cross-border project the adaptation of legislation in accordance with the legislation in the neighbouring country would be possible.

Table 9: Ten potential cross-border projects where legislation could (or could not) be adapted in accordance with the legal framework of the Benelux Union, and considering the possible application of the proposed ECBM<sup>393</sup>

Case description	Possible application Benelux cooperation instrument?	Possible application of EU Cross-border Mechanisms (Commission Proposal)?
<b>Case 1: Cross-border business park</b>		
<b>The application of income tax law of Member State A on the territory of Member State B for employees</b>	<ul style="list-style-type: none"> <li>▪ No specific Benelux-instrument seems applicable in this case</li> <li>▪ In the Benelux framework, tax matters can only be regulated by intergovernmental agreements, never by a Decision of the Committee of Ministers</li> </ul>	<ul style="list-style-type: none"> <li>▪ ECBM probably not applicable</li> <li>▪ This is a horizontal issue rather than linked to a specific project</li> </ul>
<b>The application of environmental legislation (for instance, noise) of Member State A on the territory of Member State B</b>	<ul style="list-style-type: none"> <li>▪ See Art. 4 of the Benelux-Convention regarding nature conservation and landscape protection, this provides a legal basis to regulate certain matters by means of a Benelux Decision (<i>Benelux-beschikking</i>) “taking into account the proper circumstances of each country or parts thereof”. Hence, a Benelux-Decision can also be used for the “harmonisation of policy principles and instruments” (“harmonisatie van de beleidsuitgangspunten en -instrumenten”, Art. 2) for circumscribed border areas. Concrete applications of this provisions are, for example: <ul style="list-style-type: none"> <li>▪ Benelux Decision M(2017)15 regarding the limitation of noise pollution originating from undertakings located in the business park ALBETRKNOOP (resolution of differences between the Flemish and Dutch noise legislation; Flanders engages to apply the Dutch method of “inward noise zoning” and agreements are made about maximum noise levels and regarding prior mutual consultation; while the respective noise regulations remain effective and integrally valid as they are).</li> <li>▪ Benelux Decision M(83)26 concerning mutual assistance in the recognition of damage caused by cross-border effects</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Technical standards are potentially one of the most promising areas where they are not yet regulated at EU level</li> </ul>

<sup>393</sup> This assessment is a first indication done by ITEM after informal talks with Benelux and Commission experts. It is certainly not a definite legal advice. The ongoing debate on the instrument ECBM allows probably in the near future a better assessment of the future applicability.

	<p>from groundwater extraction (<i>grondwateronttrekking</i>); (resolution of differences between Belgium and the Netherlands regarding the rules on calculating the damage from the effects of groundwater extraction; this is a practical solution requiring mutual consultation/dispute settlement, which equally does not entail the cross-border application of national regulations; the Decision applies exclusively to the Belgian-Dutch border area; in 1984 and 1988 it was extended to cover also CBC relating to the granting of authorisations and the delimitation of groundwater protection areas; in 1992 the Decision also became respectively applicable to the border area between Belgium and Luxemburg; it has recently been applied following damage caused in the Flemish-Dutch border area).</p>	
<p>The application of certain building standards or fire safety provisions of Member State A on the Territory of Member State B</p>	<ul style="list-style-type: none"> <li>▪ No specific Benelux-instrument seems applicable in this case</li> </ul>	<ul style="list-style-type: none"> <li>▪ Yes, because of the technical nature if related to new projects</li> </ul>
<p><b>Case 2: The establishment of a cross-border harbour</b></p>		
<p>The application of legislation of Member State A with respect to the competences of different functions (Harbour master, ship pilots) on the territory of Member State B</p>	<ul style="list-style-type: none"> <li>▪ A possible approach could be using the Protocol on Internal Market obstacles (<i>Protocol inzake “Belemmeringen”</i>) added to the Benelux-Treaty, which empowers the Committee of Ministers to authorise –with the help of a Benelux-Decision – the removal of all kinds of barriers to free movement that may have been eliminated <i>de jure</i> for the entire Benelux but may become particularly apparent in certain (policy) areas (for a recent example, see the Benelux-Decision M(2016) 6 concerning the mutual recognition of the proof of the professional occupation for seafarers</li> </ul>	<ul style="list-style-type: none"> <li>▪ Yes, if a new cross-border harbour was created, the ECBM could be a potential tool</li> </ul>
<p><b>Case 3: Recognition of professional Qualifications</b></p>		
<p>The automatic recognition of certain professional qualifications of Member State A in Member State B (<i>outside the range of EU</i>)</p>	<ul style="list-style-type: none"> <li>▪ See above; such measures are usually not restricted to a single border area; see also the Benelux-Decision “<i>taxi-beschikking</i>”(M (1971) 52), which still permits chauffeurs today to operate in</li> </ul>	<ul style="list-style-type: none"> <li>▪ Yes, see above</li> </ul>

<i>legislation) for concrete projects (cross-border projects of schools, hospitals, etc.)</i>	<ul style="list-style-type: none"> <li>▪ the neighbouring country with their national tax permit (the previous applicable Benelux Decision M(1969)23 was restricted in geographical scope to certain border municipalities)</li> </ul>	
<b>Case 4: Pension</b>		
<i>The application of the pension age of Member State A in Member State B in accordance with the question where an employee worked when reaching the retirement age.</i>	<ul style="list-style-type: none"> <li>▪ No specific Benelux-instrument seems applicable in this case</li> </ul>	<ul style="list-style-type: none"> <li>▪ Seems out of scope</li> </ul>
<b>Case 5: Cross-border transport infrastructure</b>		
<i>The application of technical standards of Member State A on the territory of Member State B</i>	<ul style="list-style-type: none"> <li>▪ No specific Benelux-instrument seems applicable in this case</li> </ul>	<ul style="list-style-type: none"> <li>▪ Yes, technical standards</li> </ul>
<i>The application of public procurement rules of Member State A on the territory of Member State B in the case of a cross-border transport project</i>	<ul style="list-style-type: none"> <li>▪ A so-called BGTC can publicly procure according to national law of the country where the grouping has its statutory seat; executive powers can be transferred to a BGTC to an extent that is not possible for EGTCs; now that the 2014 CBIC Convention has been ratified by all Benelux members, BGTCs can be established between partners of all three countries</li> <li>▪</li> </ul>	<ul style="list-style-type: none"> <li>▪ Yes, although this is of course already possible under EGTCs. Questions with respect to the EU legislation if the choice of one legislation would restrict access to public tenders</li> </ul>
<b>Case 6: Cross-border health services</b>		
<i>Application of legislation in the field of i.e. liability, equipment, diploma's, driving licenses of Member State A on the territory of Member State B</i>	<ul style="list-style-type: none"> <li>▪ See the so-called “Ambulance-beschikkingen” for Belgium-Netherlands and Belgium-Luxemburg respectively; the Benelux Decision M(2016)8 introduced a specific solution to regulatory differences between BE and LUX regarding required driving licences; with respect to BE-NL, Art. 5 of Benelux Decision M(2009)8 an ambulance which fulfils the legal requirements of its home country shall be treated in the same way as an ambulance authorised under the law of the receiving state; these regulations are only applicable if the ambulance cars are being used according to the requirements of the respective decisions</li> </ul>	<ul style="list-style-type: none"> <li>▪ yes</li> </ul>



<p><b>The Application of legislation of Member State A with respect to payments for health services on the territory of Member State B</b></p>	<ul style="list-style-type: none"> <li>▪ In this case, no specific Benelux-instrument appears to be available, but possibly a solution could be based on the additional Protocol “Obstacles” (Benelux-Protocol “<i>belemmeringen</i>” (see above), by analogy with the EU Patients Directive (which is also based on the freedom of movement principle and not on the very limited EU competence for public health).</li> </ul>	<ul style="list-style-type: none"> <li>▪ Seems to be covered by European law (social security coordination + cross-border health care directive), probably no application of ECBM</li> </ul>
<p><b>The Application of legislation of Member State A with respect to illness reporting on the territory of Member State B for cross-border workers</b></p>	<ul style="list-style-type: none"> <li>▪ No specific Benelux-instrument seems applicable in this case</li> </ul>	<ul style="list-style-type: none"> <li>▪ If workers employed by a new cross-border service, probably yes</li> </ul>
<p><b><u>Case 7: Cross-border Languages requirements</u></b></p>		
<p><b>Deviation from national rules on language qualifications with respect to access to universities, or in the case of bi-national diplomas as part of a cross-border project.</b></p>	<ul style="list-style-type: none"> <li>▪ No specific Benelux-instrument seems applicable in this case</li> </ul>	<ul style="list-style-type: none"> <li>▪ Potential application: where the language requirements are laid down in national/regional legislation.</li> <li>▪ Possibly not where those same requirements are actually set out directly by the Universities...</li> </ul>
<p><b><u>Case 8: Cross-border Migration projects</u></b></p>		
<p><b>Recognition of residence permits of Member State A on the territory of Member State B in the context of cross-border housing projects (for third country national students or asylum seekers)</b></p>	<ul style="list-style-type: none"> <li>▪ Although it seems theoretically possible in the contemporary context, the Benelux-Agreement on the abolition of border controls on individuals (<i>Benelux-Overeenkomst “Personencontrole”</i>) might offer a possible solution here hier misschien een oplossing voor bieden (see Art. 8); in implementation of the Agreement, a Decision could be adopted to establish a common system/approach to the entry, transit and expulsion of foreigners; this normally concerns the three Benelux-countries as a whole; this Agreement, in fact, forms the legal basis for the Benelux to act as one entity vis-à-vis third countries as regards visa and re-admission matters.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Probably not. A cross-border housing project would not cover those who then "use" the housing, i.e. the migrants</li> </ul>

<b>Case 9: Cross-border Agriculture and Nature Protection</b>		
<p><b>The application of nature legislation of Member State A on the territory of Member State B in the case of cross-border natural sites, or cross-border farming practices</b></p>	<ul style="list-style-type: none"> <li>▪ See the Benelux-Convention of nature conservation and landscape protection, mentioned above. The pertaining Benelux Decisions can also be used for the recognition of a protective status for cross-border nature parks of valuable landscapes; the most renowned example is probably the transfrontier park De Zoom-Kalmthoutse Heide; the recognition of such a protection statute requires amongst others the alignment of programmes for the management and protection of the respective areas, the regular exchange regarding the implementation of these programmes, and consultation about initiatives and intended developments that may affect the concerned cross-border areas.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Yes, if this is in the case of a new specific cross-border project</li> </ul>
<b>Case 10: Cross-border spatial-planning</b>		
<p><b>The application of legislation of Member State A on the territory of Member State B in the case of wind park planning close to the border (i.e. legal provisions with respect to noise and distances to houses)</b></p>	<ul style="list-style-type: none"> <li>▪ See the Benelux-Convention of nature conservation and landscape protection, mentioned above. In this framework, this issue was also under discussion during the adoption of the Albertknoop-Decision; however, wind turbines have been excluded from this Decision because the pertaining legislation is fundamentally different than that concerning “normal” noise regulations</li> <li>▪ Regarding spatial planning, a guidelines have been developed within the Benelux-framework concerning cross-border planning consultations; this is a practical-political instrument (not a legal one) for dealing with differences in the respectively applicable Flemish and Dutch procedures</li> </ul>	<ul style="list-style-type: none"> <li>▪ Yes, if this is in the case of a new specific cross-border project</li> </ul>

### 5.3 A comprehensive governance model à la Nordic Free Movement Council?

Having provided a general overview of Nordic cooperation and the institutional framework of the FMC in Section 4.2.2 above, below we will consider the functioning of the FMC in more detail.<sup>394</sup>

Following its establishment in 2014, the FMC has recently been approved a second mandate period based on its successful operation so far. In fact, the FMC relies on strong political support. Its underlying principle of free movement forms a priority in the Nordic Council of Ministers' action plan and the Nordic Prime Ministers' express intention to "become the most integrated region in the world".

The FMC's success can certainly be attributed to two factors, in particular, the devoted engagement of select professional and well-networked individuals on the one, and the apparently efficient functioning of a comprehensive "obstacle elimination system".

#### 5.3.1 Problem definition – First stages in the FMC's obstacle elimination system

In order to actively eliminate cross-border cooperation, the FMC has developed the so-called "obstacle elimination system". This procedure consists of several stages, namely identifying, reporting, analysing, prioritising, eliminating the cross-border obstacle and monitoring the adopted measures. This sub-paragraph will discuss these stages. Special emphasis will be paid to the Free Movement Database (FMD), which plays an important role in the obstacle elimination system. The last stages – prioritising, eliminating and monitoring – will also be discussed separately since individual members of the FMC are responsible for this important task. The obstacle elimination system not only makes it easier for various institutional settings to be alert to cross-border obstacles, but it is also designed to eliminate unnecessary bureaucracy.<sup>395</sup>

As mentioned above, the obstacle elimination system starts with identifying and reporting of legal cross-border obstacles. In order to identify these obstacles, it cooperates with local and regional partners. These are information point offices and regional committees financed by the Nordic Council of Ministers and different professional organisations, which are involved in cross-border activities.<sup>396</sup> Only these local and regional partners are able to identify and report cross-border obstacles. In order to examine whether the identified cross-border obstacle is eligible for this elimination system, they must follow a checklist which has been developed by the FCM.

At this stage, deliberate **emphasis is put on the necessity of problem definition**.<sup>397</sup> According to the Nordic Council of Ministers, a cross-border problem eligible for the obstacle elimination system must

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<sup>394</sup> The authors gratefully acknowledge the useful elaborations on and constructive discussions regarding the functioning of the Nordic FMC with the FMC's sitting Chairwoman Ms. Eva Tarselius Hallgren and Mr. Claes Håkansson, Senior Adviser Freedom of Movement, and other national and European experts on CBC at the invitation of the Province of Limburg, on 27 September 2018 in Brussels.

<sup>395</sup> Giertl et al/V4 study on the Nordic Council (2018) at 19.

<sup>396</sup> *Ibid*, at 20 and 21.

<sup>397</sup> First of all, when one of the above mentioned frontline information service workers believe that they have found a new cross-border obstacle, they first have to check whether such a problem is not already registered in the FDM (will be elaborated on in the following paragraph). If it is not already registered, they have to determine whether the problem has a cross-border dimension and whether it is a legal obstacle.

be linked to ‘a law, a public rule, practice or custom that limits the mobility of individuals and companies in their freedom of movement and activity across Nordic countries’. This means that obstacles arising for instance from incorrect information, language differences or a lack of knowledge are not regarded as border obstacles for the purpose of this database.<sup>398</sup> Those obstacles that have no cross-border dimension or no legal nature, also fall outside the scope of this system. When these requirements are met, the local and regional bodies can report the respective new problem to the Secretariat of the Nordic Council of Ministers.

After a problem has been reported to the Secretariat, the latter will determine whether the obstacle is located between the public and the private sector and that it is not subjected to state security or other special strategic public regulations. If the obstacle lies completely in the private sector or it has been issued for reasons of state security, then the identified border obstacle again falls outside the scope of the obstacle elimination system. When an obstacle is found to be eligible for the further elimination process, the identification process is completed and the Secretariat of the Nordic Council of Ministers accepts the new border obstacle.

Following the acceptance, more information is gathered about the problem – a **key process of quality assurance regarding the content of the FMC database and a means of ensuring national ownership**, since it relies on the expertise of the ministries in the countries concerned. This is done by consulting various authorities and experts and by creating a study or analysis of the identified obstacle.<sup>399</sup> Only once the “final description of the obstacle” is explicitly approved by the responsible national ministry, the Secretariat will register it in the obstacle database.

After the registration of the obstacle in the FMD, there is a four-month period for the countries to check the facts included in the database. Consequently, the member countries are legitimised to find a solution in order to remove the registered obstacle.

### 5.3.2 The Free Movement Database – Ensuring the political ownership of cross-border problems

The FMD provides an information platform for newly identified legal cross-border obstacles, as fed into the system via the different Nordic information services and processed by the Secretariat of the Nordic Council of Ministers.<sup>400</sup> At the same time, it also contains (still) those obstacles that have been successfully solved as well as those that have been declared unsolvable. The FMD is seen as **the core of the obstacle elimination system since it provides one single description of the problem**

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<sup>398</sup> Nordic Centre for Spatial Development, ‘Nordic Cross-border Cooperation Committees and Cross-border Authority Integration- Nordic Working Group 2: Globalisation and Cross-border Cooperation’, *Nordregio Electronic Working Paper*, Vol. 3, 2010, p. 17.

<sup>399</sup> In particular the concerned national ministry is in charge of collecting further information about the identified obstacle. In its report to the Secretariat, it needs to address the following questions: a) Why did the border obstacle occur?; b) What are the problems caused by the obstacle and who is affected? Here, they need to elaborate whether member countries are affected, or entrepreneurs, businesses or individuals, etc.; and c) What are the possible solutions to eliminate this cross-border obstacle?.

<sup>400</sup> The database is accessible via: <https://transition.norden.org/en/nordic-council-of-ministers/ministers-for-co-operation-mr-sam/freedom-of-movement/freedom-of-movement-database>.

**formulated on political level.**<sup>401</sup> This means that the national minister who is “in charge” of an identified cross-border obstacle will be held to account every year for the correct and up-to-date description of the problem (but will also be “rewarded” with the possibility of taking credit for the successful elimination of an obstacle in the FMC’s annual report).

Users and visitors are able to search for identified obstacles in the FMD.<sup>402</sup> The FMD is offered in six languages: Danish, English, Finnish, Norwegian, Icelandic and Swedish. However, the description of the case is only available in Swedish.<sup>403</sup> Important to note is that the database is not only limited to obstacles involving one of the Nordic countries and autonomous regions. Cross-border obstacles that also affected other countries than the Nordic countries are also registered.<sup>404</sup> Accordingly, the FMD serves multiple tasks for different types of users:

- It allows various institutions to keep track of the elimination process;
- Local and regional offices can check whether a problem that they came across is already registered in the database;
- It allows to synthesise the knowledge about border obstacles since it shows structural and geographical patterns in the registered problems;
- It encourages the relevant responsible ministries or authorities to actively eliminate cross-border obstacles.

### 5.3.3 The obstacle elimination process – Prioritisation and elimination

These elaborate procedural requirements and information management conditions, described above, are ultimately all tailored towards the system’s main purpose: the elimination of registered cross-border obstacles. Importantly, though, both the FMC’s obstacle elimination system and the participation of the Member countries therein is **voluntary** in nature. There is no international treaty or authority competent to force the national government to solve the registered obstacles. The entire system is in principle based on political declarations.

Therefore, the responsibility for solving these obstacles is not legally enforceable, it is solely based on a willingness to cooperate. This is also one of the reasons why there is **no formal procedure for the prioritisation and elimination stage**. Since it is not binding on the member countries, it is impossible to set uniform rules, because each country has its own legislation. This facultative character, however,

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<sup>401</sup> Each obstacle is registered in a standardised structure consisting of several categories, including: the title; a brief introduction of the obstacle; description of the obstacle; comments from the relevant governments; the persons that are affected by the cross-border obstacle; if applicable/already available, the proposed solution; whether the obstacle is prioritised or not; the status of the obstacle within the elimination process; the category of the obstacle; the serial number of the obstacle; the countries that are affected by the cross-border obstacle; the responsible contact person of the FMC; and the latest updates.

<sup>402</sup> Visitors can filter different categories and for instance only search for only Norwegian obstacles or obstacles, which are prioritised by the Nordic Council of Ministers.

<sup>403</sup> A registered obstacle can also be printed as a report, which includes an additional summary and basic information about the obstacle elimination system. According to Giertl et al/V4 study (2018), this possibility broadens the use of the FMD since it also provides for a report which is used for all types of meetings and decision making processes.

<sup>404</sup> These countries include Belarus, Belgium, Canada, China, the Sami language area of Estonia, France, Germany, Hungary, Japan, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Russia, the United Kingdom and the United States.

does not mean that little or no effort can be expected from the Nordic countries. From the moment that a cross-border obstacle is registered, the political responsibility of the member country is assumed. This implies that **by registering an obstacle in the FMD, this problem not only becomes a common problem of the Nordic countries, but also an internal problem of the concerned member country**. It is in the interest of that member country to solve the problem, and therefore they are willing to actively participate in the obstacle elimination system. This **political responsibility** of the member countries stems from the fact of their membership in the Nordic Council and the Nordic Council of Ministers and their express commitment to promote jointly the freedom of movement.

As regards the ranking of the relevance/urgency of obstacles, there are two stages or rather levels of prioritisation. The FMC is the first to prioritise among the registered obstacles. Thereby, it focuses on those border problems arising in the following fields: labour market, social security, businesses, education and laws that impede the mobility of individuals or companies. Next to the mentioned policy fields, other reasons for prioritisations are cross-border issues that reflect the agenda of the current Presidency of the Nordic Council of Ministers or obstacles that affect all Nordic countries. Within this framework, the FMC is currently giving priority to 30 out of 100 identified obstacles.

At the second individual level, each member of the FMC ought to prioritise three to five barriers to cross-border mobility each year.<sup>405</sup> Each member of the FMC should make sure that his or her prioritised obstacles remain a priority and are solved. This is done by organising preparatory meetings at national level and following through with the representatives of the concerned ministries and authorities (including advice on potential solutions).<sup>406</sup> The main mission is to dismantle cross-border obstacles through agreements or policy changes brought about by the responsible authorities – including, where necessary through amendments of the national legislation.<sup>407</sup> Recent amendments to the FMC's mandate (in the context of renewing its term in office) helped to improve FMC members' access to national ministers and enhance prioritisation.<sup>408</sup>

Most of the registered obstacles are related to social and health services (34%). 19% involves the labour market and 14% is related to the field of taxation and financial issues. There is also a significant amount of so-called "random problems" (15%). These problems cannot be placed in one of the

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<sup>405</sup> Those individual priority obstacles are selected during the annual kick-off meeting, alongside the drafting of the FMC's annual work plan.

<sup>406</sup> The main objective of these meetings is to inform the representatives about this obstacle and to advise and facilitate decision-making on the elimination of this obstacle. This means that members of the FMC have a guiding role in making sure that national ministries collaborate in order to solve cross-border obstacles.

<sup>407</sup> The decisions on the elimination of cross-border obstacles are usually taken at national level. If a registered cross-border obstacle cannot be solved, then the relevant national ministries must issue a corresponding conclusion that it cannot be solved. After the decision of elimination is made, the FMC monitors the steps taken by the member countries. It offers support in implementing the solution, for instance, by assisting when problems arise or by preparing cost analysis of the elimination. Additionally, the FMC members continue to check whether the implementation measures have been sufficient and effective to solve the cross-border obstacle in practice. For the monitoring work, it is also important that the Nordic cross-border obstacle elimination system relies on rigorous reporting.

<sup>408</sup> Each individual member of the FMC reports to the FMC on its meetings and submits annually a report to the Ministers of Cooperation. The Presidency of the FMC reports annually on its work and progresses made to the Prime Ministers of the Nordic Countries. In addition, at each annual kick-off meeting the annual report is drafted which summarises the achievements made and highlights the prioritised registered obstacles. These reports are published by the Nordic Council of Ministers on their official website, however they are only available in Swedish.

categories. They are more specific in nature, for instance, travelling with guide dogs, weapon licences or driving licenses. In total, all Nordic countries have been affected 376 times by all 100 obstacles. The most affected country is Sweden, with 76 obstacles.

### 5.3.4 FMC as an efficient multilevel governance model

It needs to be acknowledged that the Nordic Council of Ministers provides a sophisticated way of dealing with cross-border mobility problems. Despite the system's elaborate structures, it is said actually to help reduce administrative burdens, rather than increasing them, because it builds on existing institutions and resources and aids in rendering them more result-oriented and efficient.

Hence, this approach of the Nordic Council has been characterised as adequate and proportional for a limited number of countries with a high level of interaction.<sup>409</sup> In mid-2018, there were 100 obstacles registered in the database. 34% of these registered obstacles were solved, 54% remained unsolved and 12% of the obstacles were dismissed. These dismissed obstacles are dismissed for formal or political reasons. However, they remain in the FMD for future opportunities or possibilities to solve them.

The process of (individual) prioritisation has delivered the most solutions to cross-border obstacles. Between, 2015 and 2016, 17 of the 36 prioritised border obstacles by the FMC members were solved. However, those registered obstacles that are prioritised by the FMC itself are more difficult to solve. Only two priority obstacles have been solved so far. This result can be explained by the fact that most of the FMC's prioritised obstacles are more complex, for instance due to the number of countries affected.

The preceding discussion therefore shows that the **Nordic FMC and its obstacle elimination system represent elements of a sophisticated multilevel governance mechanism**. Building on a complex yet efficient procedural framework, much seems to depend on the devoted engagement of the FMC members and emphasised personal responsibility of respective Nordic ministers (e.g. through the FMC's annual report). However, when it comes to the actual resolution/removal of cross-border obstacles, the system also reveals its limits, when concrete legal conflicts inhibiting cross-border mobility remain dependent on legislative change.<sup>410</sup> There is also no Nordic framework law that would permit deviation from national legislation and the application of the neighbouring Nordic country for the resolution of legal border obstacles.

### 5.4 A German-French-Swiss governance model – the Upper Rhine Trinational Metropolitan Region

The Trinational Metropolitan Region (TMR) of the Upper Rhine includes the sub-regions of Alsace, Baden, South Palatinate, and the North-West of Switzerland. It provides a common culture, living and economic space for about 6 million inhabitants. Many private and public initiatives support mobility, education, research and environmental protection in the three countries' region.

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<sup>409</sup> The Working Group on Innovative Solutions to Cross-Border Obstacles, 'Background report: July 2016-July 2017', p. 15.

<sup>410</sup> See the FMC's list of prioritized border obstacles in the V4 study on the Nordic Council, 37-41.



The Upper Rhine Conference and the Upper Rhine Council are the main partners in the TMR of the Upper Rhine.<sup>411</sup> The TMR was founded in 2010 and now provides the officially recognised roof of the Upper Rhine cooperation structure.

Following an earlier initiative of the Région Alsace, since 1988 the so-called “three-countries congresses” (*Dreiländerkongresse*) at the Upper Rhine are held every two years, focusing on one specific cross-border topic. Participants from the political, economic and the scientific sphere usually attend next to representatives from companies, professional associations, civil society, the public administrations and the media. These trinational congresses offer an open forum and give new impulses for the institutional CBC.

The following topics have so far been covered by the biannual congresses:

- Traffic, Kehl 1988;
- Culture, Strasbourg 1989;
- Environment, Basle 1991;
- Economy, Karlsruhe 1992;
- Youth, education, and profession, Strasbourg 1995;
- Craftsmanship and commerce, Basle 1997;
- Spatial planning, Neustadt a. d. Weinstraße 1999;
- Being a citizen at the Upper Rhine, Strasbourg 2002;
- Media and communication at the Upper Rhine, Basle, 2004;
- Future of the Upper Rhine in the enlarged Europe, Freiburg 2006;
- Towards a model for development and cooperation, Strasbourg 2008; and
- Education, research, innovation in the Upper Rhine region, Basle 2010<sup>412</sup>

Like other functional border regions, also the Upper Rhine region is more than the respective administrative districts and territorial competences of the existing institutions. This trinational network with stakeholders from all spheres of life **aims to develop a common strategy for the future that helps modelling the cross-border region of the Upper Rhine in an innovative way, developing it sustainably and positioning it as a unique region in Europe and in the world on the map.**<sup>413</sup> More precisely, the main actors have been seeking to establish an *innovative governance model* that is capable of adapting to any kind of partnership. This ought to serve as the basis for carving out the region’s strengths, utilising fully the potential of its entire territory, and developing new encompassing cooperation dynamics.<sup>414</sup>

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<sup>411</sup> The four Eurodistricts of the region – Eurodistrict Pamina, Eurodistrict Strasbourg-Ortenau, Eurodistrict Region Freiburg-Centre and South Alsace, and the Trinational Eurodistrict Basel – are formally connected to the Upper Rhine Council, having a seat on the Executive Board.

<sup>412</sup> See <http://www.rmtmo.eu/de/de/rmt-tmo/das-konzept-der-trinationalen-metropolregion-oberrhein/dreilaenderkongresse.html> (last accessed 05-10-2018).

<sup>413</sup> See <http://www.rmtmo.eu/de/metropolregion.html> (last accessed 05-10-2018).

<sup>414</sup> See <http://www.rmtmo.eu/de/de/rmt-tmo/das-konzept-der-trinationalen-metropolregion-oberrhein.html> (last accessed 05-10-2018). On 9 December 2010, the representatives from the concerned political organs and the CBC in the area, and from the four pillars of the medium-term strategy signed the Founding Declaration of the Trinational Metropolitan Region Upper Rhine. The undersigned equally invited the national representatives and those of the EU to

Against this background, practical steps were taken from 2006 towards concretising this idea of strengthening and empowering the joint cross-border governance structure. Starting with a first targeted brainstorming in that year, concrete impulses were given at the 11<sup>th</sup> Three Countries' meeting in January 2008 by adopting a Joint Declaration on establishing the "Trinational Metropolitan Region Upper Rhine" (TMR).<sup>415</sup> Importantly, this does not aim at creating just another new administrative layer. It is more about:

- Strengthening existing structures by improving the coordination between the traditional actors;
- Opening up towards new partners to enable and create platforms and networks;
- Jointly exploiting the region's development potential; and
- Jointly channelling the existing resources towards an effective interregional deployment.

To achieve these objective, the Upper Rhine area must devise a joint development strategy for the medium term. As the initiator claim the uniqueness of this initiative and that its decisive innovation potential remains unmatched in Europe, the TMR has been building up an **innovative governance structure based on four basic pillars representing respectively the political, economic, academic/educational, and civil society interests.**<sup>416</sup>

On the occasion of the presentation of the European Commission's Green Paper on Territorial Cohesion in March 2009, the Upper Rhine cooperation model is recognised as one of the most dynamic in Europe. In February 2010, the TMR receives the official support of the German-French Agenda 2020. It was given further recognition by the German-French-Swiss governmental consultations in Offenburg in December 2010.<sup>417</sup>

Building on the 2008 Strasbourg Declaration, the **joint interregional development strategy** of the Upper Rhine for the implementation of the concept of the trinational metropolitan region builds on the following four pillars:<sup>418</sup>

**Political Pillar:**

- a. The political pillar convenes the traditional cooperation partners of the Upper Rhine region – namely, the Upper Rhine Conference and the Council, the Euro Districts and the city network.
- b. It facilitates the inter-institutional coordination, using a more integrated way of communication to make the administration more efficient.

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support the TMR's multiple stakeholders in their endeavours towards funds, popularity and development of the TMR and its international standing.

<sup>415</sup> Ibid.

<sup>416</sup> See <http://www.rmtmo.eu/de/de/rmt-tmo/das-konzept-der-trinationalen-metropolregion-oberrhein/das-ziel.html> (last accessed 05-10-2018).

<sup>417</sup> See <http://www.rmtmo.eu/de/de/rmt-tmo/das-konzept-der-trinationalen-metropolregion-oberrhein/meilensteine-der-tmo.html> (last accessed 05-10-2018).

<sup>418</sup> <http://www.rmtmo.eu/de/de/rmt-tmo/das-konzept-der-trinationalen-metropolregion-oberrhein/der-weg.html>

- c. It sets the framework for new proposals on a more transparent distribution competences between decision-making structures and bodies.
- d. This pillar incites reflections on the current governance system with a view to achieving a more targeted and efficient functioning that will safeguard the advancement of the Upper Rhine region.

**Economic Pillar:**

- e. The economic pillar envisages the TMR to contribute to the development of a competitive, sustainable economy that is based on the innovation and complementarity of its actors.
- f. In particular economic stakeholders (including Chambers of Commerce, Chambers of Crafts, development agencies, clusters etc.) jointly seek to achieve sustainable growth; promote the establishment of cross-border economic clusters; support the creation of jobs through a better integrated labour market; promote cooperation in the tourism sector; strengthen economic cooperation in strategic future sectors like the Green Tech-sector; increase the competitiveness and innovation capacity of the Upper Rhine area; and ensure a joint economic branding and marketing at European and international level.

**Scientific Pillar:**

- g. The scientific pillar convenes universities, academic institutions of applied sciences, and research centres for a joint strategic engagement.
- h. It promotes and structures the development of the Upper Rhine area into an “innovation and knowledge region”, as defined on the Common Declaration of the 12<sup>th</sup> Three Countries’ Congress 2 December 2010.
- i. It foresees the creation of a network between all relevant stakeholders to strengthen the CBC in the field of education, research and innovation.
- j. It frames the need to promote research and innovation, particularly through the transfer of technologies and knowledge, by advancing the Upper Rhine area at national, European and international level as a “region of excellence”.
- k. This pillar aspires to turn the Upper Rhine region by 2020 into the most dynamic knowledge-based, cross-border economic area of Europe.

**Civic Pillar:**

- l. The civic pillar originates from the works of the Trinational Citizens’ Fora, which connect citizens interested in cross-border topics, associations, other organisations, private sector foundations and official institutions with each other.
- m. It aims at the creation of a “Citizens’ Border Region benefitting from the experiences, opinions and proposals of the concerned citizens in the different areas of the Upper Rhine territory.
- n. This pillar also pursues the development of a (stronger) feeling of belonging in a common living environment.

This medium-term strategy provides a roadmap for achieving the common objectives of the TMR. It sets the basis for further work programmes and agreements between the various partners. The TMR is intended to expedite the successful implementation of joint projects, and enable new dynamics in the Upper Rhine area.

## 5.5 The proposed ECBM as a complementary process – an option for Limburg?

In Section 4.1.1 above, we have reviewed the EU's existing cooperation instruments tailored to the promotion of economic, social and territorial cohesion. We have considered both the benefits and drawbacks of the Union financial instruments, notably ETC/Interreg, and the Union's hitherto main tool for addressing institutional obstacles to CBC, the EGTC. Building on these insights, we will now discuss the European Commission's latest initiative for setting up a new "mechanism" to tackle administrative and legal obstacles to CBC.

The Commission proposal is the follow-up to an initiative by the Luxembourg EU presidency of the Council, which built on the conviction: 'the EGTC regulation is a big achievement, but not sufficient in itself to overcome all legal and regulatory obstacles in cross-border cooperation that are faced by local authorities as well as EGTCs themselves'.<sup>419</sup> In response to this initiative a special Working Group was set up composed of Member State and EU Commission representatives, under the Chairmanship of Luxembourg and France.<sup>420</sup> At the same time, the Commission itself also undertook a broad stakeholder consultation and Cross-Border Review.<sup>421</sup> Here, too, the results revealed an emphasis on the existence of legal and administrative cross-border obstacles for which apparently no appropriate EU instrument was currently at hand.

Following an outline of its endeavours and ambitions with regard to boosting growth and cohesion in the border regions of the EU in autumn 2017, the European Commission issued a **proposal for a Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context in May** this year.<sup>422</sup> Hereafter, we will first briefly review some of the key findings of the Commission's Cross-Border Review and, then, discuss the main motivation for and features of the legislative proposal for a new EU regulation. Then, we will give a short evaluation of the proposed EU mechanism in the light of the findings studied above and consider the proposed Regulation's prospects of success of being adopted.

### 5.5.1 EU typology of cross-border obstacles

From July 2015 to February 2017, DG REGIO conducted intensive research and dialogue with border stakeholders, national authorities of Member States and partner countries and regional/local authorities. These endeavours – known as the Commission's "Cross-Border Review" – culminated in

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<sup>419</sup> The Luxembourgian Government, 'A tool for the attribution and application of specific provisions for the improvement of cross-border cooperation (Article 3 of the IT-LV-LU Trio Presidency)- Input paper for the Informal Ministerial Meeting on Territorial Cohesion under the Luxembourg Presidency', Luxembourg, 26 November 2015, p. 4.

Available at: <https://amenagement-territoire.public.lu/dam-assets/fr/eu-presidency/Events/26-27-November-2015 - Luxembourg-City/Material/IMM-Territorial- LU-Presidency ---Input-Paper-Action-3.pdf>.

<sup>420</sup> From July 2016 to July 2017, the Working Group on Innovative Solutions to Cross-Border Obstacles, co-chaired by France and Luxembourg, with the support of the Transfrontier Operational Mission [hereafter: MOT] investigated the feasibility and design of a new tool. This new tool, the then so-called "European Cross-Border Convention" (ECBC), was presented under the Luxembourg Presidency in 2015. See Input paper for the Informal Ministerial Meeting on Territorial Cohesion under the Luxembourg Presidency/ <http://www.amenagement-territoire.public.lu/fr/eu-presidency/Informal-MinisterialMeetings-on-Territorial-Cohesion-and-Urban-Policy- 26-27-November-2015 -LuxembourgCity .html#>.

<sup>421</sup> European Commission, Easing legal and administrative obstacles in EU border regions – Final Report (Service Request No 2015CE160AT013, DG REGIO, March 2017).

<sup>422</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context', COM (2018) 373 final, 29 May 2018.

the adoption of the Commission Communication "Boosting Growth and Cohesion in EU Border regions", adopted on 20 September 2017.<sup>423</sup>

The Cross-Border Review revealed the existence of 239 legislative and administrative obstacles that inhibited transfrontier interaction in European internal border regions.<sup>424</sup> One of the Commission's main conclusions was that existing EU instruments (notably, INTERREG and the EGTC-Regulation) helped dealing with financial and institutional obstacles to CBC. But they were not adequate to resolve legal and administrative obstacles that currently inhibit cross-border interaction and successful project implementation decisively. The Commission's analysis produced the following typology of obstacles (see Table 10 below), specifying the nature of diverging legal standards and administrative peculiarities that may collide in CBC.

*Table 10: Typology of legal and administrative cross-border obstacles identified in the EU Commission's Cross-Border Review*<sup>425</sup>

Type a cross-border obstacle	Description
<b>EU-related legal obstacles (Type 1)</b>	Obstacles that 'can be caused by the specific status of an EU-border or by EU legislation in policy fields for which an exclusive or shared EU competence does exist'.
<b>Member State-related legal obstacles (Type 2)</b>	Obstacles that 'can be caused by different national or regional laws of EU Member States (incl. the non-EU countries CH, NO, LI and AD) in policy fields for which only a supporting or no EU competence does exist'.
<b>Administrative obstacles (Type 3)</b>	Obstacles that 'can be caused by a non-willingness to address certain problems in a cross-border context, by an asymmetric cooperation constellation or a lack of horizontal co-ordination or by different administrative cultures or official languages on either side of a common border'.

On that basis, the extensive analysis pointed to 10 fields of intervention that were most affected by legal and administrative obstacles (per policy area) in the internal border regions of the EU:

- "Mobility of cross-border workers" (Labour Market & Education),
- "Exportation of goods and cross-border provision of commercial services, including e-commerce" (Industry & Trade),
- "Access to social insurance system" (Social Security & Health),
- "Access to health care services and medical treatment" (Social Security & Health),
- "Public transport by bus, rail, light rail or metro" (Transport & Mobility),

<sup>423</sup> European Commission, COM(2017)534.

<sup>424</sup> The DG REGIO initiative "Cross-Border Review" was structured around three pillars: a study, to provide an inventory of critical border obstacles together with examples of how these have been addressed on certain borders; a public consultation; and four workshops with key stakeholders. See the Commission's "online inventory" [see 'Launch fullscreen'] with detailed information of the over 200 obstacles identified between 2015-2017:

[http://ec.europa.eu/regional\\_policy/en/policy/cooperation/european-territorial/cross-border/review/#1](http://ec.europa.eu/regional_policy/en/policy/cooperation/european-territorial/cross-border/review/#1).

<sup>425</sup> Based on European Commission, Easing legal and administrative obstacles in EU border regions – Final Report (Service Request No 2015CE160AT013, DG REGIO, March 2017) at 33.

- “Emergency and rescue services” (Policy Planning & Public Services),
- “Mobility of trainees, students and teachers” (Labour Market & Education),
- “Recognition of diploma or professional qualification certificates” (Labour Market & Education),
- “Scope and quality of regional/local and cross-border transport infrastructures and of related maintenance services” (Transport & Mobility),
- “Protection and management of natural resources” (Environment).<sup>426</sup>

The study concluded, amongst others, with recommendations with respect to the governance levels (EU-level and Member State-level) that should take action under the different policy areas and fields of intervention for removing or at least alleviating legal and administrative obstacles and highlighted the need for improved cooperation between the Member States’ central governments and their border regions.<sup>427</sup> It also offers an attempt of refining the concept of cross-border obstacle, by analysing the effects and the wider impact of legal or administrative obstacles.<sup>428</sup>

### 5.5.2 Aim and content of the Commission’s proposal

Like the instrument of the EGTC, the Commission’s proposal falls under the overall objective of strengthening economic, social and territorial cohesion, equally being based on Article 175 TFEU. This so-called European Cross-Border Mechanism (ECBM) that it proposes is targeted at public actors in the Union’s border regions. It is intended to offer them an effective means to tackle and eliminate legal and administrative obstacles that hinder the successful implementation of CBC. More precisely, the ECBM will target the **removal of obstacles to the effective operation of cross-border projects, which emanate from the – actual or alleged – conflict that occurs from the (planned) joint application of diverging national legislations or administrative rules and procedures from either side of the respective border**. We distinguish between an actual conflict that may, for example, be caused by different national standards regarding the technical security requirements of tram trains, on the one hand. On the other, an alleged conflict may lie in the diverging ways of how a common (legal) concept may be interpreted differently on either side of the border due to the respectively different institutional and cultural contexts.

In principle, the Commission’s proposal builds on the **recognition that there already exist a number of effective governance systems designed to fulfil comparable aims in European border regions, such as provided by the Benelux Union or the Nordic Council** (discussed above). Therefore, the primary motivation for proposing the ECBM has been the objective of offering a new capable mechanism with some innovative governance elements (i.e. cross-border coordination points) to those border regions where there are *no* comparable institutional structures and/or legal instruments available for resolving said obstacles. A second motivation is to provide a specific legal tool for the adaptation of national/regional legislation in case of specific cross-border projects that is today in its horizontal nature generally not available even at borders with elaborated governance tools.

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<sup>426</sup> Ibid. at 37-38.

<sup>427</sup> Ibid. at 39.

<sup>428</sup> Ibid. at 48 (figure 5).

It is true that as a legal instrument, the Commission has chosen for a regulation that would be directly applicable in all Member States and, in effect, virtually affecting all their internal borders. Yet, at the same time, the EU Executive emphasises the *optional* character of the mechanism that it proposes, which it justifies is suitable in spite of its choice for the form of a regulation. **The Commission does not consider a directive as the basis for establishing the ECBM to be the most effective instrument, as it would in fact increase the likelihood of creating new cross-border barriers through divergent national implementing legislation.**<sup>429</sup> “EU-related legal obstacles (type 1)” (see Section 5.5.1 above) have been the cause of around 15 % of the 239 cross-border barriers identified in DG REGIO’s Cross-Border Review.<sup>430</sup> Although the share of Member States-related (43 %) and administrative obstacles (42 %) is significantly higher, the choice of a directive as the basis of the ECBM would thus be in direct conflict with the objective of this new EU instrument (in particular the removal of cross-border obstacles).

As regards the content of the proposal, it contains the following main features. The ECBM would be a voluntarily applicable, legal tool, available to both local and regional authorities and stakeholders. According to the Commission proposal, it would be possible to opt-out for a specific border and use its own instruments to solve legal obstacles. If Member States chose to apply the EU instrument, it would be necessary to choose to one of the two different forms:<sup>431</sup> a European Cross-Border *Commitment* [hereafter: the Commitment]; or a European Cross-Border *Statement* [hereafter: the Statement].<sup>432</sup>

Member States shall either opt for this Mechanism or they should use existing ways to resolve legal obstacles.<sup>433</sup> Article 1 (2) (a) of the Proposed Regulation determines that if a Commitment is opted, then this is self-executive. This means that certain legal provisions of one Member State are to be applied on the territory of the neighbouring Member State.<sup>434</sup> The Statement would require a legislative procedure in the Member State.<sup>435</sup> Here, the authority concluding the Statement should make ‘a formal statement that it will trigger by a certain deadline the legislative procedure necessary to amend the normally applicable national law and to apply, by way of an explicit derogation, the law of a neighbouring Member State’.<sup>436</sup> In practice, these measures would allow the competent authorities to apply the administrative or legal rules and provisions of another country in a defined area of application along the border for a certain time.

In addition, each Member State which opts for the Mechanism is obliged to set up a national and regional Cross-border Coordination Points.<sup>437</sup> The Commission should also set up a coordination point at Union level.<sup>438</sup> It is today (September 2018) not evident that the regulation will be adopted by

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<sup>429</sup> European Commission, COM(2018) 373, pp 3-4.

<sup>430</sup> European Commission, Easing legal and administrative obstacles in EU border regions – Final Report (Service Request No 2015CE160AT013, DG REGIO, March 2017) at 34-35.

<sup>431</sup> *Ibid*, preamble para. 9.

<sup>432</sup> *Ibid*, Article 1 (2) (a) and (b).

<sup>433</sup> *Ibid*, Article 4.

<sup>434</sup> *Ibid*, preamble para. 10.

<sup>435</sup> *Ibid*, Article 1 (2) (b).

<sup>436</sup> *Ibid*, preamble para. 11.

<sup>437</sup> *Ibid*, preamble para. 13.

<sup>438</sup> *Ibid*, preamble para. 14.



Council and Parliament before the elections in 2019.<sup>439</sup> It is likely that the process will be delayed and that the new European Parliament will negotiate on the matter.

### 5.5.3 ECBM a solution for Limburg?

Could the new regulation be of value for the Province of Limburg? Would it be an important tool with respect to the particular problem of overcoming the mismatch of legislation in cross-border projects? Currently, the proposal on the ECBM is negotiated in the European Parliament (Rapporteur van Miltenburg, D66)<sup>440</sup> and in the respective Council working group under the Austrian presidency. The Dutch Government formulated concerns in a first position (described in the “BNC Fiche 2”).<sup>441</sup> Notably, the Dutch government is of the opinion that a directive would be more appropriate leaving space for the Member States in the phase of transposition into national legislation. National governments evidently take (considerably) issue with the idea of repealing national regulations in favour of applying neighbouring legislation. A regulation is seen as too rigid given the very different situations in border regions.<sup>442</sup> It states:

*‘The Netherlands considers that the chosen form of a regulation does not meet the proposed objective that the Commission wishes to achieve. The objective – removing legal border obstacles through tailor-made solutions – can, according to the Dutch Government, be better achieved by a directive. A directive would be able to bind the Member States to a common objective (the removal of cross-border obstacles) but leaving it open for the Member States to choose how this objective would be achieved. This would be the way to achieve the maximum of customisation while imposing in general a legal obligation to implement effective solutions regarding cross-border obstacles.’<sup>443</sup>*

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<sup>439</sup> In view of the EP elections, the Dutch Foundation “NoBorder” (*GeenGrens*) has recently called on the Dutch political parties to consider the need of strengthening the valuable position of Dutch border provinces in national and European perspective and a list of action points regarding cross-border problems in their upcoming election campaigns. See Stichting GeenGrens, *Grensprovincies maken Nederland groter en sterker in Europa*, Maastricht, 23 september 2018.

<sup>440</sup> European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context (COM(2018)0373 – C8-0228/2018 – 2018/0198(COD)), Committee on Regional Development, Rapporteur: Matthijs van Miltenburg, 25 September 2018).

<sup>441</sup> Ministry of Foreign Affairs, Information on new Commission proposals (2 Files attached) – Fiche 2: Regulation mechanism to resolve legal and administrative obstacles in a cross-border context, Working group Evaluation New Commission Proposals (*werkgroep Beoordeling Nieuwe Commissievoorstellen*, BNC), Directorate Integration Europe, BZDOC-240920879-59, 24 September 2018.

<sup>442</sup> This point has been emphasised in the legal advice (regarding this research report) provided by Mr P.E.H. (Pieter) Sels, Legal Matters and Procurement, Province of Limburg, pointing out that this issues would certainly be approached more pragmatically at provincial level.

<sup>443</sup> Freely translated from the original: ‘Nederland is van mening dat de gekozen vorm van een verordening niet aansluit bij het doel dat de Commissie wenst te bereiken. Het doel – via maatwerk juridische grensknelpunten wegnemen – kan volgens het kabinet beter bereikt worden via een richtlijn. Via een richtlijn kunnen lidstaten geconformeerd worden tot een gezamenlijk doel (het opheffen van grensoverschrijdende belemmeringen) waarbij het lidstaten vrijstaat hoe dit bereikt wordt. Op deze manier kan op maximale wijze maatwerk worden verkregen en wordt er via een inspanningsverplichting wel slagvaardig gewerkt aan het oplossen van grensoverschrijdende belemmeringen binnen de gehele.’ Ibid. at 5.

The Dutch Government is furthermore of the opinion that the focus on legal obstacles would be not the appropriate approach in the context of the Dutch border. In case the Regulation will come into force, the Government would prefer to use Article 4 of the proposed Regulation that offers the Member States the possibility to solve border obstacles by existing “mechanisms”. Meaning, the Dutch Government is of the opinion that the currently improved governance system would be of better value.

This position is to some extent surprising since it is not obvious that the proposed ECBM-Regulation could be a threat to the present improvements of the domestic cross-border governance system and the potential future “homemade” solutions to border obstacles. As explicitly stated, Article 4 of the Regulation states that Member States can opt for an existing process, for instance, the solution of border obstacles by a “national mechanism”. In this respect, the Dutch Government and its partners in Germany and Belgium (or in the Benelux) are even less restricted than many other Member States where own “mechanisms” are much weaker. In this respect, the current EGTC Regulation (described in Section 4.1.1) is a case in point: compared to other Member States, there are only a very small number of EGTCs with Dutch partners. Apparently, the added-value of the legal instrument was not that convincing in the Dutch case. One important reason for that is certainly, that many cross-border organisations were already established on the basis of other sophisticated domestic cross-border agreements or treaties, be it bilateral (the Anholt Treaty with Germany) or multilateral (in the Benelux).

Therefore, the conclusion could be that the future “mechanism”-Regulation is also less interesting for the Dutch practice, if own cross-border solutions are in the future much more tailor-made and effective. (This is also why the Dutch Government puts so much emphasis on the need to better accentuate the voluntary character of the Commission’s ECBM-proposal.) However, this does not mean that the ECBM could not be much more beneficial for other border regions where the legal and political conditions are so far less favourable with respect to the solution of border obstacles. This could be for instance the case at the border of Eastern European Countries where not many bilateral or multilateral treaties exist so far.

Even more surprising in the Dutch Government’s position is the idea of a directive that should trigger more tailor-made solutions. This could mean in the case of the neighbouring countries that the Netherlands, Belgium and Germany had to transpose the directive into national legislation. In the case of Belgium and Germany, this would even mean a specific transposition into federal legislation and additionally the legislation of the Regions/Länder. It actually does not seem to be so easy to streamline such a complex process of national/regional transposition in order to secure the consistency of the different pieces of legislation. There are examples where national differences in the transposition of an EU directive still lead to cross-border problems. This can be described, for instance, for the field of recognition of professional qualifications.

In order to analyse the potential benefits of the proposed Regulation for the Province of Limburg, our approach is to distinguish between a legal, political and practical added-value.

The added-value in this sense cannot be determined for EU border regions as such. Due to the legal, political and geographical complexity of border regions, the added-value depends of course very much on the existing legal framework at a certain border. Where there are already explicit legal instruments in the case of border projects the new Regulation might not be so important, whereas in other

situations it would fill a current gap. This refers also to the position of potential stakeholders of cross-border projects. Whereas the procedures to start cross-border projects are supported in one border region by a rather stable cross-border governance system (i.e. Nordic Council of Ministers, Benelux), **the ECBM-Regulation would ensure future initiators a certain status vis-à-vis the political arena.**

#### *Legal added-value*

The legal added-value then is dependent on the question, whether the Regulation will establish an innovative tool with respect to overcoming the mismatch of legislation in the case of cross-border projects. The assumption is that the legal added-value in the Dutch situation is smaller than in many other border regions. Meaning that border obstacles can already today be solved by existing legal instruments. This has been impressively shown in the earlier chapters with respect to the legislative background established under the Benelux Treaty (see Sections 4.2.1 and 5.2.1).

As shown for instance in the case of the Albertknoop cross-border business park, adaptation of national (or regional) legislation in order to overcome the mismatch of legislation has been already possible on the basis of a Benelux agreement. The initial list of potential cases presented in Section 5.2.1 (see Table 9 above) show that under the realm of the Benelux Treaty, Dutch-Belgian cross-border projects could already benefit today from a sort of “mechanism” where the EU regulation is not necessarily needed.

Nevertheless, the analysis also shows that the Benelux-solution to cross-border obstacles can only operate on the basis of existing agreements under the Benelux Treaty. **What is missing so far is a horizontal legal instrument (“mechanism”) to make legal adaptations in a cross-border context possible beyond the sectoral agreements.** If the Dutch government would be of the opinion that tailor-made solutions would be more appropriate than the EU mechanism, one could promote the update of the Benelux legal toolbox by adding a “Benelux mechanism”. As shown in the case of the BGTC (the Benelux variant of the EGTC), it is not unusual that the Benelux is establishing a tailor-made legal instrument based on the ideas and principles of EU legislation.

Given the comparatively fortunate situation in the case of the Benelux, one could conclude that the future EU Regulation would be of greater added-value for the Dutch-German situation. The Benelux instruments do not apply at the border with the two German Länder NRW and Lower Saxony. The Land NRW is associated with the Benelux but this does not mean that the Benelux Treaty and the Benelux agreements are all applicable. The further development of the Benelux toolbox could accordingly mean that NRW (the relevant Land with respect to the Province of Limburg) could consider to join certain Benelux agreements, such as the 2014 Convention, offering solutions to legal border problems. As a more comprehensive solution, the Benelux could develop the just mentioned horizontal legal instrument (a sort of Benelux Mechanism) in cooperation with the Land NRW.

Beyond Benelux, it would certainly also be an option to discuss the role of legal instruments between the Netherlands and Germany as part of the broader debate on the future governance system and tailor-made alternatives to the EU regulation.

#### *Political added-value*

Perhaps even more interesting in the context of the ECBM, is the potential political added-value. There are already legal instruments as described above to overcome legal obstacles. What is very innovative as part of the new “mechanism” Regulation, is the right of initiative that is given to stakeholders in

cross-border regions who are dealing with specific cross-border projects. These initiators have a certain status and they can follow a certain procedure with a timeframe for their request. This is the case if Member States opt to follow the procedure of the EU mechanism. Even in the Benelux, there is so far no clear procedure if initiators of cross-border projects and face legal problems and want the competent governments to solve them. There is, too, a clear addressee for the request of initiators: this is the competent authority in the own Member State.

From the perspective of the Province of Limburg, **the establishment of a specific procedure that has to be followed could be very important**. So far, initiatives launched by the Province to overcome legal border obstacles have been rather diverse. As in the case of the recognition of professional qualifications, it is not easy to initiate a streamlined process with defined initiators, addresses and a certain timetable. In this field the processes are, for instance, characterised by the initial difficulty of establishing a clear process. This is certainly also true for the problems of different cross-border rail-infrastructure projects where cross-border competences are very often complex and hinder an effective process.

This potential political added-value is of utmost importance for cross-border regions. Even if the Dutch Government retains its position that a tailor-made, own mechanism (in cooperation with the neighbouring countries) would be much more efficient, also **that proper mechanism will have to address the question of the role and position of initiators and the need for designing effective processes with clear obligations and timetables that lead to faster solutions**.

#### *Practical added-value*

This would be ultimately the final practical added-value: any new mechanism or legal instrument should trigger processes where competent authorities could solve legal obstacles much faster and less bureaucratic as today. That reducing bureaucracy by creating something new is possible has in fact been demonstrated above by the analysis of the Nordic Free Movement Council (Sections 4.2.2 and 5.3).

Therefore, the idea of the European Commission to work with clear deadlines and a timetable is certainly also an interesting aspect of any tailor-made mechanism at the Dutch-German-Belgian border. The Province of Limburg should support especially the idea that initiators of cross-border projects will get a solid status supported by clearly defined obligations of competent national authorities. The Dutch border provinces should certainly support the idea of an EU Regulation and ascertain that this will not prevent the Dutch Government from developing and strengthening the tailor-made governance systems at the own borders.

### **5.6 Summary multilateral arrangements for enhancing CBC and dealing with cross-border obstacles**

Based on the preceding selection of promising CBC initiatives, the next chapter will discuss what model could help enhance the (legal) “action capacity” of Dutch border-provinces, generally, and the Province of Limburg specifically, for dealing with cross-border problems more efficiently. This subsection therefore provides an overview of the multilateral arrangements, which we have identified above and that have been designed to enhance CBC and deal with cross-border obstacles in an

institutionalised way.<sup>444</sup> The multilateral and interregional possibilities, analysed above, for removing cross-border barriers include:

- **The signing of inter-state agreements** (such as the Treaty between France and Switzerland as a legal basis for the EurAirport Basel-Mulhouse-Freiburg; or the Treaty of Anholt as a basis for the Euroregion Rhine-Waal);
- **Institutionalising CBC, using an organisational form/creating a new public body** – based on European law (EGTC) or international law (Madrid Convention/Council of Europe, or the Benelux CBIC Convention/BGTC), whereby certain powers can be transferred to the new transnational body to facilitate cross-border projects and cooperation;
- **Setting up horizontal cooperation initiatives and networks based on existing multilateral structures** – either issue- or sector-specific (such as in the case of the Nordic FMC), or in the form of a territorial development planning for the entire cooperation area, including policy-specific cross-border strategies on the removal of transfrontier obstacles (such as the EGTC Lille-Kortrijk, the Upper Rhine Conference; and the two Rhine Commissions);
- **Using existing legal tools (notably, Benelux instruments – namely, decisions and agreements in combination) to apply concrete practical solutions** to conflicting national legal or administrative provisions that hinder the expedient realisation of cross-border projects, either through appropriate purposive interpretation and/or through selective targeted deviation from national legislation, without requiring an adaptation of the latter (see the example of the Benelux ALBERTKNOOP-Decision).

It has become clear that there is a need for capacity-building among concerned actors to enhance the horizontal interaction in CBC, on the one hand, and the design and promotion of effective *multilevel* CBC solutions, on the other. In particular the latter option seems appropriate for empowering regional actors, while the former would allow for a more targeted engagement in tackling cross-border obstacles. All in all, the issue of enhancing CBC becomes in effect a question of making the benefits of European integration more tangible – not only in terms of spurring (regional) economic growth but also in terms of delivering solutions to concrete obstacles that affect European businesses and citizens, particularly cross-border commuters, in their daily lives.

## 6. Conclusion and recommendations

The mission of this exploratory project report has been to investigate the legal and practical possibilities of interregional cross-border cooperation for the Dutch border regions. In the preceding chapters, we have first sketched out Limburg's room for manoeuvre within the Dutch constitutional system (Chapter 2). We have mirrored this against the comparatively extensive powers of its neighbour regions, Flanders and NRW (Chapter 3). Against this background, we have mapped a

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<sup>444</sup> See also the final report resulting from the European Commission's Cross-Border review, including a non-exhaustive overview on general practices that can be applied – individually or in combination – for eliminating or alleviating legal and administrative obstacles in different policy fields. European Commission, Easing legal and administrative obstacles in EU border regions – Final Report (Service Request No 2015CE160AT013, DG REGIO, March 2017) at 51-52.

selection of **instruments that currently already allow regional or local public entities in the EU to adopt tailor-made solutions to cross-border problems** on a structural basis (Chapter 4).

This has led us to conduct a preliminary evaluation (Chapter 5) of the more promising initiatives that emanated from the multilateral CBC arrangements described earlier. Accordingly, we have considered the question of applicability (to what extent is the initiative directed at solving comparable problems) and of feasibility (would such a model fit within the Dutch constitutional system and the cooperation structures which the Netherlands is part of) for the European Commission's new proposed mechanism (ECBM), the revived cooperation framework of the Benelux, the holistic governance model of the Nordic FMC, and the strategic model of the TMR Upper Rhine.

On that basis we will now conclude with a **first estimation of the functionality of these models** (i.e. whether, considering the legal framework, the discussed models offer a realistic prospect for solving cross-border problems in the local context). More precisely, this report tries to answer the question **to what extent these models (or aspects thereof) are suitable for being "imported" into the context of the Dutch border regions to help the Province of Limburg gain more leeway for resolving cross-border obstacles** through CBC.

## 6.1 Summary of main findings

### 6.1.1 Unilateral instruments to solve the mismatch of legislation

In chapter 2, we have summarised the distribution of competences between the three levels of the Dutch system of public administration. We have also taken a peek at the constitutional system of the Kingdom of the Netherlands, which has certainly left an impression that the **Dutch political system is not as straightforward unitary as one may think** at first sight. Quite understandably, its overseas territories enjoy a special status tailored to the needs of these (far away) island communities. Meanwhile, on the country's European continental territory decentralisation has also increased the need of public authorities at the lower levels to experiment with deviations and innovate with regulatory solutions for problems resulting from the application of (national) legislation.

Against this background, it is important to infer that it is rather **questionable that the simple fact of sharing a border with another State**, which may be the source for all kinds of cross-border obstacles, **would be enough of a reason to justify that the Dutch border provinces be granted a special legal (constitutional) status** or exception, comparable to the one(s) granted to the Kingdom's overseas territories. At the same time, it is promising to see that also within the unitary system of the Netherlands there is some room for legislative flexibility. Thereby, we keep in mind the need for careful design with the tools of legal experimentation to ensure proper accountability and continued democratic legitimation.

Even if a unilateral adaptation of legislation would be possible under innovative Dutch legislation, legal cross-border obstacles are very often dependent on the good will of both sides across the border. This means, **a mismatch of legislation asks for adaptations of legislation from both partners**.

While there appears thus rather limited room for an actual special statute within the Dutch legal system, considerably **more leeway seems present with regard to multilevel solutions**. This aligns with the conclusion of the European Commission's Cross-Border Review that highlighted overcoming cross-border obstacles required all levels of government and administration to work hand in hand.

### 6.1.2 Multi-level instruments

As shown above, it seems indispensable to look for bilateral or multilateral tools that can help “empower” the Dutch border regions with a view to solving cross-border problems. The natural option with respect to the Dutch-Belgium border as shown in Section 4.2.1 is the framework of the Benelux Treaty and the respective framework agreements and conventions.

The Benelux provides a toolbox that allows its Members to adapt legislation in certain policy fields covered by Benelux legislation. There are even instruments – as the BGTC – that is only now available since the Netherlands ratified in September 2018. **While the BGTC already offers considerable room for transferring certain powers to this transnational body to enhance cross-border cooperation, the Benelux does not (yet) provide clear procedures (as foreseen by the EU mechanism) that grant initiators of cross-border projects a specific position.**

Next to the Nordic Council of Ministers, the Benelux can be described as a most sophisticated multi-lateral governance system of a group of EU Member States that also establishes a solid basis for intergovernmental and inter-parliamentarian (Benelux Parliament) cooperation. However, the Nordic Council of Ministers has organised the collection, discussion and agenda setting of legal cross-border problems in a more systematic way with the establishment of the “Free Movement Council”. It would be certainly possible to integrate such a tool into the present Benelux organisation. It would supplement the present tools, especially the above-mentioned framework agreements that establish to a certain extent legal flexibility vis-à-vis border obstacles. It could provide inspiration for further developing the Benelux governance structures and bolster them with a clearer topical orientation and emphasis on the goal of advancing “cross-border mobility”.

Since Germany and its relevant Land NRW (and Lower Saxony) are not full members to the Benelux, there is no uniform governance system and legal toolbox at the border of Limburg. This means legal and procedural complexity with respect to border obstacles. As shown in Section 4.1.2, the Treaty of Anholt and the present GROS system (Section 5.1) offers another cross-border governance system with additional legal instruments that allow for instance the establishment of cross-border entities.

In particular the Land NRW has already close and special relations with the Benelux, based on the Political Declaration of 2008. In the current favourable political climate, it seems expedient that an even closer association could be possible in the near future. In this respect, NRW could sign up to some of the sector framework agreements – especially, to the 2014 Benelux CBIC Convention. That would make solutions possible as in the case of the Albertknoop business park (NL/BE).

Besides this, the present diversity with respect to the German and Belgian border could – in turn – be an important reason to support additional solutions at the level of the EU. The proposed EU regulation can be regarded as a short-cut for the Province of Limburg to benefit from a single instrument for the two foreign borders. The regulation would certainly not substitute the Benelux cross-border or the Dutch-German governance system. It rather can be regarded as a supplementary instrument to adapt national legislation.



## 6.2 Recommendations

### *General recommendation*

What type of legal instrument could be effective for the Province of Limburg to overcome problems related to legal obstacles in CBC? How could Limburg receive a certain mandate to play an active role in the solution of legal border obstacles? In essence, we see two different ways: the first is to give Limburg (or Dutch border provinces in general) a specific role in the application of existing multi- or bilateral instruments at the Benelux or EU level (see recommendations 1,2,3). This could include a vital role related to the EU instrument under debate (cross-border mechanism).

The second option would be the establishment of a specific national legal instrument that would provide the Province of Limburg (or all border provinces) with innovative tools to adapt Dutch legislation in the context of border obstacles (see recommendation 4).

We recommend as well analysing in more depth two recent specific cases, in order to find out which of the discussed instruments could be most effective to overcome legal obstacles. This refers to the recent merger of the harbours of Gent, Terneuzen and Flushing (North Sea Port) and to the plans of a joint paediatric surgical centre (Aachen/Maastricht/Liège).

### *Recommendation 1: Multi- and bi-lateral instruments as a first choice*

In order to solve bilateral or multi-lateral problems with respect to legal cross-border obstacles, bi-lateral or multi-lateral instruments are in the first place regarded as the first choice. Successful adaptation or harmonisation of certain pieces of legislation in a specific cross-border situation will only be possible if there is a broad dialogue across the border.

Even if Dutch legislation – via a certain horizontal experimental legislation or a special “Statute for Limburg” would offer new possibilities for the Province of Limburg or other border provinces to deviate in certain circumstances from Dutch legislation, the question is still whether this type of adaptations is also possible for the partners in the neighbouring countries.

Many solutions ask for “good will” on both sides of the border and the adaptation of legislation in the case of a specific project, not only on one side. An improved general governance structure where these types of challenges are intensely discussed could be regarded as a prerequisite for successful cross-border solutions. Therefore, the present political process related to a future new cross-border governance structure, is an essential element of the debate where the Province of Limburg together with other border-provinces already has a firm position.

Any proposed legal instrument (as a certain Dutch law on experimentation) has to fit into the broader cross-border governance context. In the case of the Province of Limburg, that means that one important question is whether already existing cross-border instruments could play a more prominent role stemming from multi-lateral arrangements (mainly the Benelux, but also EU, Council of Europe) and bi-lateral arrangements (as bi-lateral treaties with DE (NRW, Niedersachsen) and Flanders/Wallonia) and whether the Province of Limburg (and the cross-border provinces as such) will have more influence on the application of these instruments.

## *Recommendation 2: Optimize the application of Benelux instruments*

Given the fact that the Benelux has already developed a multi-lateral legal and governance framework for the solutions to cross-border obstacles, the question is how the Province of Limburg could benefit more from the legal instruments offered under the Benelux treaty and play an active role to support their application. As shown in chapter 4.2.1, the adaptation of legislation in the case of certain cross-border projects have been already possible via the instrument “*Benelux Beschikking*” and based on the Benelux Treaty or additional framework agreements. The advantage of the Benelux solutions is that they are relatively “light” with respect to the bureaucratic and political process, especially in comparison with specific bi-lateral treaties.

There are four interesting options to improve the Benelux-capacities, also to the benefit of Limburg and other border-provinces.

- Firstly, as a next step one could identify the policy areas where new Benelux agreements could broaden the scope of mutual adaptation of legislation in the context of cross-border border projects. Practical examples with respect to noise legislation (Albertknoop, NL/BE) or driving licences for ambulances (BE/LUX) already show that this already works today in practice and could be also interesting for policy areas where there is today no legal basis with a special Benelux agreement. In addition, the list of potential cross-border projects show that according to the Secretariat of the Benelux adaptation of legislation could be considered with Benelux-instruments in more cases than perhaps expected.  
In order to benefit from this, a more structured relation between the Benelux and Limburg/border-provinces should be established. In order to do so, Limburg has to increase its own capacities in order to support the use of the existing Benelux instruments for municipalities, companies or citizens in Limburg who are searching for cross-border solutions.
- Secondly, we recommend a debate about the need for a horizontal Benelux instrument for the adaptation of legislation of cross-border projects not related to a specific policy sector covered by Benelux legislation. In fact, this could describe a certain “mechanism” similar to the idea of the EU proposal but only under the Benelux-Treaty. It would need to be examined if such a “Benelux mechanism” might even be adopted as an additional protocol to the 2014 CBIC Convention.
- Thirdly, we recommend to bring the Land NRW closer to the Benelux by joining Benelux agreements and open up the way for the described “lighter” solutions under the Benelux framework. This should be discussed in the broader context of the future governance system and the relations between the central Dutch government, the Province of Limburg and NRW.
- Fourthly, the Benelux should further develop its governance structure based on the example of the Nordic Free Movement Council. This could streamline the analysis and clear definition of border obstacles, establish a responsible body and define clear procedures if Benelux solutions are possible.

Concerning all four options, it should be discussed how border provinces in general and the Province of Limburg specifically could get a stronger role in the respective implementation. This also demands a certain level of administrative capacities in order to fulfil such a future role adequately.

*Recommendation 3: EU cross-border mechanism as an essential element of the future options*

Any legal instrument for Limburg, NL or in the Benelux context has to be assessed according to its position vis-à-vis the currently discussed EU regulation on a cross-border mechanism (chapter 5). The European Commission has indeed proposed an instrument that could help to support the basic need of the Province of Limburg, namely legal flexibility in areas where the mismatch of Dutch and foreign legislation is an obstacle to successful cross-border cooperation. The aim of the proposed regulation is to create room for the application of certain legal standards of one Member State in another Member state in the framework of a clearly defined project.

The instrument could be for the Province of Limburg (as for other border provinces) a useful tool as an element of the broader toolbox for cross-border cooperation. As shown in the study, there are other tools like an effective governance system (with allocation of specific responsibilities as in the case of the Nordic Council of Ministers, chapter 4.2.2), or the establishment of cross-border entities as described in chapter 4.1.1 (via EGTC, Anholt, Council of Europe tools). However, with respect to legal cross-border adaptations, the “mechanism” could have an added-value with respect to existing tools.

In this case, it would be helpful if the Dutch government would consider a more constructive position with respect to the position formulated today (October 2018).

The new proposed ‘mechanism’ describes in the first place a procedure with an innovative right of initiative for regional stakeholders that want to start a cross-border project and face legal problems. This procedure addresses responsible governments who have to react in accordance to a certain timeframe and decide how they decide to solve the problem (via the procedure of the regulation or with an own ‘mechanism’). An essential element for initiators – as for instance municipalities in Limburg – would be to have the right to make a request to a national coordination point even if in a later stage the national government decides to handle the case via other means than the EU regulation. In this sense, EP Rapporteur Matthijs van Miltenburg in his initial draft report (October 2018) has emphasised the voluntary nature of the mechanism but insisted on a case-by-case decision-making and the establishment of cross-border coordination points with respect to all borders. This could also open up possibilities to give the Province of Limburg (and other border provinces) a defined position in coordination points and strengthen their role in cross-border governance.

In the current situation, there are neither in the Benelux context nor in the Dutch-German situation clear procedures for the adaptation of legislation in cross-border projects. In particular, this aspect could be of great added-value for stakeholders in Limburg with cross-border infra-structure projects. The Dutch border Provinces could emphasize especially this procedural advantage. Even if the final version of the regulation limits the obligations of the Member States with respect to the final application of the mechanism: the right to start an official request coming from stakeholders in border regions could have a very positive effect.

The future shape of this regulation is of course essential for any other proposed national legal instrument. In this respect, a unilateral provision in Dutch law that could enable certain legal deviations in a certain border area (as the Province of Limburg), would even match with the intentions of the EU regulation. It would in the first place give more room for solving problems via the use of own instruments/mechanism (as described as an option).

Hence, the decision for an instrument that is tailor-made for the situation of the Province of Limburg (or border provinces) is not an alternative to an EU mechanism or Benelux solutions but complimentary. The final shape has to be designed according to developments at the EU and Benelux level.

- If there is a multi-lateral instrument that is satisfying the needs, one could focus on the task to make the application of the EU instrument as effective as possible with the Belgian and German partners. Even if the regulation is blocked in the Council since too many Member States do not support the idea, there could be the option of enhanced cooperation where only a smaller number of Member States (at least nine) go ahead. From the perspective of Limburg, this would be certainly a group of Member States around the Benelux with Germany and France as important partners.
- If the mechanism would only partially solve the problems at the Dutch border, the aim could be to transfer the idea to the Benelux level and establish a more comprehensive horizontal Benelux instrument.
- In both cases, additional national (experiment) legislation had to be as complimentary as possible to the EU and/or Benelux solutions.
- If the EU instrument is not at all fulfilling the basic needs of the situation in NL and if there is no possibility of developing a more specific multi-lateral tool at the level of the Benelux, the needs of a full-fledged legal instrument for the Province of Limburg is evident.

In all scenario's, a prerequisite for the successful application of any legal instrument will be an effective cross-border governance system.

#### *Recommendation 4: What type of unilateral legal instrument in the framework of Dutch law?*

Additionally to the multi-lateral/bi-lateral approach we have considered various possible forms of unilateral legal instruments in the framework of Dutch law.

Our first recommendation in this regard is not to plead for a specific legislative instrument for the Province of Limburg (Statute for Limburg) but for a legislative instrument specifically drafted for all Provinces when involved in cross border cooperation projects. This legislative instrument can be drafted as a framework law. It also could be inspired by the opening clauses with deviating provisions or the so-called experimentation clauses. As an example one should have a closer look into the experiences with the "Municipal Experiments Act". Even if the government now decided not to continue the legislative process as far as this specific municipal experience act is concerned the experience has shown that already problems could be solved by entering into a dialogue between government and the concerned municipalities. A similar process could be installed with the border provinces.

Additionally, our recommendation is that this national Dutch statute which should be drafted with the specific aim of facilitating cross border co-operation projects, should be in clear line with the by the EU Commission proposed “mechanism”. Such a national legislative act could in such a case fulfil the requirements of an implementation act necessary when the European mechanism would enter into force. Even if the EU cross border mechanism is drafted in the legislative form of a Regulation certain national implementation will be necessary to guarantee the effective use of such an instrument. Therefore such a national instrument as we propose to be enacted for the facilitation for cross border co-operation projects for all Dutch border provinces could fulfil this purpose.

Next to meeting the requirements of an implementing act for a European mechanism, any unilateral legislative solutions must also meet the requirements of the Dutch constitutional system. On the one hand, the content of a possible Framework Law on Decentralisations must create actual scope for local authorities (Limburg) to act more freely. In this respect, a careful design of the instruments for legal experimentation must be warranted that helps ensuring proper accountability and democratic legitimacy. On the other hand, a provincial experiments law on cross-border cooperation must also explicitly allow the special status of Limburg. After all, the Crown must always *grant* the provincial councils the power to conduct foreign policy.

#### *Recommendation 5. Two test-cases for new legal tools*

Currently, there are two very important cross-border projects where legal obstacles are to be expected. We recommend to do further research on the two cases in order to analyse which of the mentioned solutions in this report would be adequate to overcome the problems.

##### **A) The North Sea Port Gent-Terneuzen-Vlissingen**

It is our recommendation concerning this project to make a very careful analysis which problems can already be solved using the existing BENELUX instruments. As the example of the industrial zone between Maastricht (NL) and Lanaken (BE) Albertknoop has shown many of the problems might be solvable on the basis of the existing BENELUX instruments. This analysis should come first.

In case there are, however, areas which cannot be covered and therefore solved by BENELUX instruments, the hereby proposed national instrument (s) might offer the solution. As such a harbour project is of such complexity a very detailed analysis is necessary. Lessons might have to be drawn from the experiences of the EUROAIRPORT Basel (CH)- Mulhouse (FR)- Freiburg (DE).

##### **B) The Euregional Centre for Paediatric Surgery**

The Euregional Centre for Paediatric Surgery is an example, which cannot be solved purely on the basis of the BENELUX existing instruments as NRW/Germany is not a party to this legal framework. Therefore, it is hereby our first recommendation to consider in cooperation with NRW and where necessary the Federal German Government the application of the BENELUX instruments (BENELUX+).

Furthermore, the possible usefulness of the EU mechanism for such an initiative should be discussed and tested. Additionally, again the proposed national Dutch legislative act should be considered precisely in light of such a project.

Our recommendation is therefore to support research for an in-depth analysis of such an initiative with the aim finding the solutions for this cross border cooperation project in the framework of the existing tools and suggesting new instruments or solutions on national level but also taking into account the EU initiative for a cross border cooperation mechanism.

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