

# Cross-Border Impact Assessment 2019

Dossier 3: 'European Cross-Border Mechanism' (ECBM) – An ex-ante evaluation of cross-border impact for resolving border obstacles in Belgian, Dutch and German border regions



The Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM is the pivot of research, counselling, knowledge exchange and training activities with regard to cross-border mobility and cooperation.

Maastricht University

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Dossier 3: 'European Cross-Border Mechanism' (ECBM) – An ex-ante evaluation of cross-border impact for resolving border obstacles in Belgian, Dutch, and German border regions

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The *Institute for Transnational and Euregional cross-border cooperation and Mobility / ITEM* is the pivot of scientific research, counselling, knowledge exchange, and training activities with regards to cross-border cooperation and mobility.

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## **Abbreviations**

BGTS Benelux Grouping of Territorial Cooperation

EC European Commission

ECBM European Cross-Border Mechanism

EGTSE European Grouping of Territorial Cooperation

EU European Union

FMC Free movement Council of the Nordic Council of Ministers

TEU Treaty on the European Union

TFEU Consolidated version of the Treaty on the Functioning of the European Union

# 1. Introduction

## 1.1. General

The European Union has 40 internal border regions, which account for 40% of its territory and are home to almost 30% of its population.<sup>1</sup> Over time, the EU has taken significant steps, notably in the context of European territorial cooperation, to further connectivity and create new growth and jobs in these areas. However, most of the Member States' border regions do not perform as well economically as their other regions. Many cross-border administrative and legal obstacles persist in border regions (see point 3.1.).<sup>2</sup> The inhabitants of border regions generally have less easy access to public services such as hospitals and infrastructure.<sup>3</sup> These residents also have difficulties in finding their way through the administrative and legal tangle. Therefore, EU border regions need measures to strengthen their economic, social and territorial cohesion.<sup>4</sup>

Today, there is no uniform European legal provision to resolve legal and administrative obstacles along borders.<sup>5</sup> In May 2018, in the absence of such an appropriate European legal instrument to address administrative and legal obstacles, the European Commission proposed a mechanism to resolve legal and administrative obstacles in a cross-border context: the so-called "European Cross-Border Mechanism" (ECBM). The ECBM is contained in the proposed Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context.<sup>6</sup>

In short, the proposed mechanism should contribute to the cross-border interaction between Member States, thereby reducing the number of obstacles that impede cooperation. Cross-border projects could be simplified and their implementation sped up by allowing – on a voluntary basis and with the permission of the competent authorities – that certain rules of a Member State apply in the neighbouring Member State within the specific framework of a cooperation project. The underlying idea is that territorial cooperation can further the harmonious development of the whole of the European Union, as well as economic, social and territorial cohesion.<sup>7</sup>

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<sup>1</sup> Communication from the Commission to the Council and the European Parliament, 'Boosting growth and cohesion in EU border regions', COM(2017) 534 final/2, 20 September 2017, p. 2. Available at: [https://ec.europa.eu/regional\\_policy/sources/docoffic/2014/boosting\\_growth/com\\_boosting\\_borders.pdf](https://ec.europa.eu/regional_policy/sources/docoffic/2014/boosting_growth/com_boosting_borders.pdf).

<sup>2</sup> Article 174 TFEU.

<sup>3</sup> 'Territories with specific geographical features', European Commission, DG REGIO (2009), working paper No. 02/2009 ([http://ec.europa.eu/regional\\_policy/nl/information/publications/working-papers/2009/territories-with-specific-geographical-features](http://ec.europa.eu/regional_policy/nl/information/publications/working-papers/2009/territories-with-specific-geographical-features)).

<sup>4</sup> See also: Communication from the Commission to the Council and the European Parliament, 'Boosting growth and cohesion in EU border regions', COM(2017) 534 final/2, 20 September 2017.

<sup>5</sup> There are only a few regional mechanisms, e.g. the Benelux Union and the Nordic Council. See also European Committee of the Regions, 132nd plenary session, 5-6 December 2018, 'Opinion of the European Committee of the Regions on 'Cross-border mechanism', 2019/C 85/10. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018AR3596&from=NL>.

<sup>6</sup> 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.

<sup>7</sup> Article 175, section 3 TFEU.

## 1.2. *Ex-ante* cross-border impact analysis

This dossier contains a multidisciplinary *ex-ante* analysis of the cross-border effects of the proposed European Cross-Border Mechanism on internal border regions.<sup>8</sup> The main objective of this cross-border impact assessment is to examine the legal and practical potential of the ECBM for the border regions between Belgium, the Netherlands and Germany. In particular, it examines whether the proposed EU mechanism, as a new instrument, could be useful in overcoming the specific problem of the lack of alignment between national legislations in cross-border projects. This cross-border impact assessment mainly examines the positive cross-border effects (i.e. which novelties are being introduced) and the negative cross-border effects (i.e. the bottlenecks and gaps) of the planned proposal on the concerned Dutch-German and Dutch-Belgian border regions.

## 1.3. Outline of the study

A description of the objective and the scope of the study (Section 2) is followed by an overview of the legal and administrative border obstacles and the existing range of cooperation instruments that can help to solve these obstacles (Section 3). Section 4 subsequently describes the background, objectives, scope and timeframe of the envisaged cross-border mechanism, while Section 5 assesses the main features of the proposed EU Regulation. Section 6 debates the central question regarding the legal, political and practical added value of the ECBM, compared to the existing range of cooperation instruments, particularly the Benelux instruments. This section then concludes with a list of affected cross-border projects (most of which actually occur in practice in the Dutch-Belgian cross-border harbour North Sea Port), concretely examining whether the ECBM can help to solve the identified border obstacles alongside the existing cooperation instruments. In Section 7 (and throughout this cross-border impact assessment) suggestions are provided for the clarification of the proposed EU mechanism. Section 8 presents a conclusion.

# 2. Research objectives, definitions, themes and indicators

## 2.1. Objectives/principles, benchmarks, method and indicator

In this dossier, the ECBM is – by virtue of the Regulation by which it is proposed – central to the theme of 'European integration'. More precisely, its purpose of minimising cross-border legal and administrative obstacles would represent a step closer to achieving European integration in an EU internal market. It will be examined whether the ECBM adds value to the existing arsenal of legal cooperation instruments that promote current cross-border cooperation and resolve legal and administrative border obstacles. The answer to this question will help to determine to what extent the benchmark of an EU internal market can be achieved.

The cross-border effects of the proposed EU mechanism in border regions can be examined from the perspective of 'European integration', exploring the extent to which the proposed Regulation will contribute to this integration. European integration can help to transform the EU's internal border

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<sup>8</sup> It is very useful to note the comprehensive ITEM study on the legal and practical possibilities for interregional cross-border cooperation in the border region. See: ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report – project phase 1, 9 November 2018.

regions from mainly peripheral areas into areas of growth and new opportunities. Cross-border cooperation promotes European integration, both in terms of stimulating (regional) economic growth and providing solutions to the border obstacles encountered by EU citizens and businesses when initiating cross-border projects. Citizens and businesses in border regions should be able to take advantage of the opportunities on both sides of the border.<sup>9</sup> The following assessment framework (Table 1 below) has served as a basis for analysing the impact of the proposed ECBM on border regions.

The cross-border effects on socio-economic/sustainable development, local or Euregional cohesion or cross-border governance structures were excluded from this study, since the proposed Regulation does not impact these categories directly.

Following on from the above, the principles, benchmarks and research method used in this report can be represented schematically as follows:

Table 1: Objectives/principles, benchmarks, methodology and indicator for assessing the cross-border effects of the European Cross-Border Mechanism

Objectives/principles	Benchmarks	Method	Indicator
<p><b>EU internal market</b></p> <p><b>Strengthening economic, social and territorial cohesion (Article 174/175 TFEU)</b></p> <ul style="list-style-type: none"> <li>Enhanced cooperation between Member States (Article 20 TEU; recitals 2, 8 and 9 Regulation (EC) No. 987/2009; Chapter II Regulation (EC) No. 987/2009)</li> <li>Promotion of legal and administrative cooperation and cooperation between citizens and institutions (Art. 7(1)(a)(iv) of Regulation (EU) No. 1299/2013)</li> <li>European Commission's focus on social cohesion: 'European Commission Communication: Boosting growth and cohesion in EU border regions', COM(2017) 534 final/2</li> </ul>	<p>The situation on 1 July 2019 serves as a benchmark.</p>	<p>Review of the proposed EU cross-border mechanism to resolve legal and administrative obstacles in a cross-border context.</p> <p><i>Could the proposed instrument be of interest in overcoming the lack of alignment between national legislations as a specific problem in cross-border projects? Is the proposed mechanism beneficial in reducing disparities between the levels of development of the border regions and in reducing the backwardness of the least favoured regions? Is the proposed mechanism beneficial in enabling citizens and businesses in border regions to take full advantage of the opportunities on both sides of the border?</i></p>	<p>Evaluation of the added value of the proposed Regulation for border regions BE-NL and NL-DE</p>

**2.2. Economic impact of obstacles to cross-border interaction**

The European Commission recently commissioned a study on the economic impact of obstacles to cross-border interaction on GDP and employment in border regions with EU-internal national borders. This has shown that the GDP of these regions would grow by 2% if only 20% of the existing legal and

<sup>9</sup> 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.

administrative obstacles were resolved.<sup>10</sup> Legal and administrative obstacles hinder simultaneously working on one side and living on the other side of the border. A mechanism to overcome such obstacles in border regions is a necessary tool for achieving an EU internal market, a core objective of the European Union.<sup>11</sup> It is precisely for this reason that this cross-border impact assessment is useful and that the border regions deserve special attention.

## 2.3. Demarcation of terminology

### A. Border region

The European Commission has declared the proposed Regulation applicable to 'cross-border regions' (hereafter: 'border regions').<sup>12</sup> The concept of 'cross-border region' is defined as 'the territory covered by neighbouring land border regions in two or more Member States at NUTS level 3 regions'.<sup>13</sup> In the Netherlands, these regions correspond to the COROP areas,<sup>14</sup> which are situated along the national borders.<sup>15</sup>

Border regions occupy about 40% of the territory of the European Union and are home to almost one third of the 512 million EU citizens.<sup>16</sup> At European level, the following border regions



Figure 1: Neighbouring NUTS 3 border regions along the borders of two or more Member States. Source: European Commission, COM(2017) 534 final/2, 4.

<sup>10</sup> Politecnico di Milano (2017), 'Quantification of the effects of legal and administrative border obstacles in land border regions', see COM(2017) 534 final/2, p. 6.

<sup>11</sup> See Article 3 TEU and Article 3(1)(b) TFEU.

<sup>12</sup> Article 2 of the proposed Regulation.

<sup>13</sup> Article 3(1) Regulation (EC) No. 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) (OJ L 154, 21.6.2003, p. 1).

The **NUTS**, *Nomenclature des Unités Territoriales Statistiques* (Nomenclature of Territorial Units for Statistics), is the regional classification of the European Statistical Office, Eurostat. It was introduced to have comparable regions across Europe, facilitating the comparison of European regional statistics. The NUTS classification has three levels.

For Belgium, these levels generally correspond to the following national classifications: regions (*gewesten*) (NUTS1), provinces and the Brussels-Capital Region (NUTS2) and the districts (*arrondissementen*) (NUTS3). For the Netherlands, they generally correspond to the following national breakdown: regions of the country (*landsdelen*) (NUTS 1); provinces (NUTS 2) and COROP areas (NUTS 3). For Germany they generally correspond to the following national classifications: States (*Länder/Bundesländer*) (NUTS 1), regions (*Regierungsbezirke*) (NUTS 2) and districts (*Kreise*) (NUTS 3).

<sup>14</sup> The **COROP areas** were established in 1970 by the Coordinating Committee for the Regional Research Programme (COROP). <https://www.cbs.nl/nl-nl/dossier/nederland-regionaal/gemeente/gemeenten-en-regionale-indelingen/landelijk-dekkende-indelingen>.

<sup>15</sup> These include the following (COROP) areas in the Netherlands: Oost-Groningen, Zuidoost-Drenthe, Noord-Overijssel, Twente, Achterhoek, Arnhem-Nijmegen, the entire province of Limburg, Zuidoost-, Midden- and West-Noord-Brabant and Zeeuws-Vlaanderen. On the Dutch side, this division does not coincide with the areas in which governments are members of Euroregions along our borders with Germany and Belgium: the Ems Dollard Region (EDR), the EUREGIO, the Euregio Rhine-Waal, Euregio Rhine-Meuse North, Euregio Meuse-Rhine, Euregio Scheldemond and the former Euregio Benelux Middengebied (central Benelux area).

<sup>16</sup>[http://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_deposes/rapports/2018/0414/P8\\_A\(2018\)0414\\_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2018/0414/P8_A(2018)0414_EN.pdf) (p. 38).

can be identified along the internal borders of the EU-28 and the EFTA countries<sup>17</sup> (see Figure 1).

This dossier focuses on the border regions of the Dutch-German and Dutch-Belgian territories. It will assess the added value of the ECBM in remedying the lack of conformity of legislation in these border regions when carrying out cross-border projects.

## B. Legal obstacles

The proposed Regulation refers to 'legal obstacles', which means 'any legal provision with regard to the planning, development, staffing, financing or functioning of a joint project that obstructs the inherent potential of a border region when interacting across the border'.<sup>18</sup> The aim of the ECBM is thus to provide public actors in the border regions within the EU with an effective means to address and resolve those border obstacles that hinder successful cross-border cooperation.

The **broad definition of the term 'legal obstacle'** potentially allows for any legal provision related to the planning, development, staffing, financing or functioning of a joint project to fall under the EU mechanism. The Dutch government has indicated asking the Commission for further clarification and working towards clearer delineation of the term. It is not clear from the proposal whether the European Commission aims also to bring national differences in labour law and tax law within the scope of its proposed mechanism. This also applies to minimum wage and pension schemes.<sup>19</sup> As mentioned earlier, the Dutch government demands that the negotiations must not lead to the erosion of the national competences of the Member States in, for example, the areas of labour, social security and tax legislation.<sup>20</sup>

## 3. Legal and administrative border obstacles

In order to understand the ECBM, it is useful to know, first of all, which border obstacles are intended to be targeted (Section 3.1.) and to give a brief overview of the existing cooperation instruments for removing border obstacles (Section 3.2.).

### 3.1. Border obstacles

#### A. Overview of abstract border obstacles

In the period 2015-2017, the European Commission carried out a multinational evaluation of cross-border cooperation called the EU Cross-Border Review.<sup>21</sup> On 20 September 2017, the European Commission published its 'Boosting growth and cohesion in the EU border regions' Communication.<sup>22</sup>

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<sup>17</sup> Communication from the Commission to the Council and the European Parliament 'Boosting growth and cohesion in EU border regions', COM(2018) 373 final.

<sup>18</sup> Article 3(4) of the proposed Regulation.

<sup>19</sup> Article 153(5) TFEU.

<sup>20</sup> Dutch Government, Fiche 2: *Verordening mechanisme om juridische en administratieve belemmeringen in een grensoverschrijdende context uit de weg te ruimen* (Regulation mechanism to resolve legal and administrative obstacles in a cross-border context), available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/09/24/fiche-2-verordening-mechanisme-om-juridische-en-administratieve-belemmeringen-in-een-grensoverschrijdende-context-uit-de-weg-te-ruimen>.

<sup>21</sup> European Commission, Easing legal and administrative obstacles in EU border regions – Final Report (Service Request No. 2015CE160AT013, DG REGIO, March 2017). See: [http://ec.europa.eu/regional\\_policy/nl/policy/cooperation/european-territorial/cross-border/review/](http://ec.europa.eu/regional_policy/nl/policy/cooperation/european-territorial/cross-border/review/).

<sup>22</sup> European Commission Communication, 'Boosting growth and cohesion in EU border regions', COM(2017) 534 final/2.

Its cross-border evaluation identified 239 legal and administrative obstacles that impede cross-border interaction in Europe's internal border regions and for which there currently appears to be no suitable EU instrument.<sup>23</sup> It divides these obstacles into three categories:<sup>24</sup>

- EU-related legal obstacles (Type 1) which ‘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’;
- Member State-related legal obstacles (Type 2) which ‘can be caused by different national or regional laws of EU Member States (including the non-EU countries CH, NO, LI and AD) in policy fields for which only a supporting or no EU competence does exist’;
- Administrative obstacles (Type 3) which ‘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’.

The comprehensive study by the European Commission identifies a list of intervention areas with the most legal and administrative obstacles (per policy area) in the EU’s internal border regions. Table 2 below is a schematic representation of this list.<sup>25</sup>

Table 2: List of intervention areas with the highest number of legal and administrative obstacles per policy area in the EU's internal border regions. Source: European Commission, 2017.

Policy areas	Areas of intervention
<b>Labour market and education</b>	Mobility of cross-border workers Mobility of trainees, students and teachers Recognition of diplomas or professional qualification certificates
<b>Industry &amp; Trade</b>	Exportation of goods and cross-border provision of commercial services, including e-commerce
<b>Social Security &amp; Health</b>	Access to the social insurance system Access to healthcare services and medical treatment
<b>Transport &amp; Mobility</b>	Public transport by bus, train, light rail or metro Scope and quality of regional/local and cross-border transport infrastructures and of related maintenance services
<b>Policy planning &amp; Public services</b>	Emergency and rescue services
<b>Environment</b>	Protection and management of natural resources

<sup>23</sup> The DG REGIO ‘Cross-Border Review’ initiative rested on three pillars: a study to inventory critical border obstacles and provide examples of how they have been tackled at certain borders; a public consultation; and four workshops with key stakeholders. See the Commission’s ‘online inventory’ with detailed information on the more than 200 obstacles identified between 2015 and 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>24</sup> European Commission, ‘Easing legal and administrative obstacles in EU border regions’, Final Report (Service Request No. 2015CE160AT013, DG REGIO, March 2017), p. 33-34.

<sup>25</sup> European Commission, ‘Easing legal and administrative obstacles in EU border regions’, Final Report (Service Request No. 2015CE160AT013, DG REGIO, March 2017), p. 37-38.

The European Commission's study shows that many obstacles are due to the lack of alignment between national or regional legislations, followed by administrative obstacles due to inadequate procedures or administrative practices at local, regional or national levels.<sup>26</sup> In addition, there are a number of smaller obstacles related to the existence or absence of EU legislation. The study recommends that measures be taken at different levels of government (EU or national) and in different policy and intervention areas to resolve – or at least ease – these legal and administrative obstacles. Furthermore, the study underlines that the removal of border obstacles requires (better) interaction between Member States and their border regions.<sup>27</sup>

Against this background, this dossier assesses the EU's proposed mechanism as a method to ease and resolve legal and administrative obstacles to successful cross-border cooperation.

### **B. Concrete border obstacles: North Sea Port**

North Sea Port is an excellent example of a cross-border project which faces legal border obstacles. North Sea Port is a port company that aims to manage, operate and develop a 60-kilometre long cross-border port area. North Sea Port promotes both the private interests of the companies in the port area (including maintaining economic growth; improving development opportunities for existing and new customers by coordinating spatial development and infrastructure; and seeking active collaboration with all partners involved to achieve the existing objectives related to sustainability more quickly) as well as the public interests (including the effective, safe and efficient handling of shipping traffic). Border obstacles arise through the different ways in which the Province of Zeeland (the Netherlands) and Flanders (Belgium) approach responsibilities.<sup>28</sup>

Previous research of ITEM has led to the following indicative overview of border obstacles incumbent on the operation of North Sea Port, which is the outcome of a cross-border merger:<sup>29</sup>

- Cross-border industrial area: lack of coordination and administrative burden regarding taxation and social security;
- Establishment of a cross-border port – Human Resource Management (hurdles to transfrontier work affecting the powers and position of the Harbour Master, the position of ship pilots, and salaries generally);
- Recognition of professional qualifications and powers (e.g. notably, discrepancies between the position of the Dutch Harbour Master-*Havenmeester* and the Belgian Harbour Master-*Havenkapitein*);
- Pension schemes;
- Infrastructural development related to sustainability and the circular economy (e.g. CO2 transport pipelines);
- Infrastructural development (e.g. rail/public transport);
- Environment/sustainability (transportation of liquid ship-generated waste, soil and sediment)
- Environment/sustainability – external safety (bunkering of liquified natural gas).

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<sup>26</sup> Summary report of the public online consultation 'Overcoming obstacles in border regions', 21 September 2015 to 21 December 2015.

<sup>27</sup> European Commission, 'Easing legal and administrative obstacles in EU border regions', Final Report (Service Request No. 2015CE160AT013, DG REGIO, March 2017),

<sup>28</sup> ITEM, 'Inventarisatie grensoverschrijdende knelpunten North Sea Port', Project report, 4 March 2019, p. 9.

<sup>29</sup> ITEM, 'Inventarisatie grensoverschrijdende knelpunten North Sea Port', Project report, 4 March 2019, p. 13 et seq.

These examples of border obstacles show that the cross-border port project is complex in nature. For those (selected) border obstacles that cannot be resolved using the existing instruments of the Benelux Union, the proposed ECBM might be able to offer a solution.

The study below examines whether the ECBM can provide a solution for tackling the obstacles identified above concerning the cross-border port area (see section 6.4).

### 3.2. Existing EU, regional and local collaborative instruments to overcome border obstacles

At EU level, there are a number of initiatives that seek to promote cross-border cooperation and devise solutions to border obstacles.<sup>30</sup> However, the European Commission has found that the existing EU instruments (notably INTERREG and the EGTC Regulation) often contribute to minimising financial and institutional [rather than legal] obstacles to cross-border interactions.

- Through **funding**, Interreg supports cross-border cooperation programmes in the EU's border regions.<sup>31</sup> The European Commission has established that Interreg programmes are project oriented rather than reinforcing the cooperation between border regions beyond the scopes and contributions of the projects concerned.<sup>32</sup> According to the European Commission, Interreg programmes often fail to lay a solid foundation for future cross-border cooperation and integration due to their lack of attention for sustainability.<sup>33</sup>
- **Institutional support** is provided by European Groupings of Territorial Cooperation (EGTCs).<sup>34</sup> An EGTC aims to facilitate and promote cross-border, transnational and interregional cooperation between public actors within the European Union. Although the institutional tool of the EGTC has added value for the EU and improve decision-making, objectives and strategies in cross-border cooperation,<sup>35</sup> prior research has shown that an EGTC essentially lacks substance as well as the power to resolve administrative and legal obstacles.<sup>36</sup>

There are also a number of effective mechanisms for cross-border cooperation in place at intergovernmental, interregional and local level:<sup>37</sup>

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<sup>30</sup> The Council of Europe also has at its disposal a range of instruments to promote cross-border public cooperation (e.g. the 1980 Madrid Framework Convention on cross-border cooperation, the 1991 Anholt Treaty, the Additional Protocols to the 1995, 1998 and 2009 Madrid European Framework Agreements). Since this cross-border impact assessment focusses on the European Cross-Border Mechanism, these instruments are essentially not addressed.

<sup>31</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, januari 2008, p. 16.

<sup>32</sup> European Commission, European Territorial Cooperation - Work package 11: Ex-post evaluation of the cohesion policy programmes 2007-2013, focusing on the European Regional Development Fund (ERDF) and the Cohesion Fund, Final report, (2016), p. 118.

<sup>33</sup> European Commission, European Territorial Cooperation - Work Package 11: Ex-post evaluation of the cohesion policy programmes 2007-2013, focusing on the European Regional Development Fund (ERDF) and the Cohesion Fund, Final report, (2016), p. 118.

<sup>34</sup> Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), *OJ L* 2010 of 31 July 2006, p. 19.

<sup>35</sup> European Commission, EGTC Assessment Report 2008, 15. See also the European Parliament study: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/2015/563384/IPOL\\_STU\(2015\)563384\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/2015/563384/IPOL_STU(2015)563384_EN.pdf).

<sup>36</sup> Working Group on innovative solutions to cross-border obstacles, "Background Report – July 2016-July 2017", p. 11.

<sup>37</sup> See also Communication from the Commission to the Council and the European Parliament, 'Boosting growth and cohesion in EU border regions', SWD(2017) 307 final, point 3.1.

- At *intergovernmental level*, the Nordic Council of Ministers<sup>38</sup> and the Benelux have established certain procedures for **multilateral international cooperation** to identify and tackle bilateral border obstacles.<sup>39</sup>

Through decisions and agreements, the Benelux offers concrete practical solutions for contradictory national laws or administrative provisions that impede the efficient execution of cross-border projects. It does so by providing appropriate targeted interpretations of and/or selective, targeted derogations from the relevant national legislations, without having to amend these legislations (e.g. the Benelux *Albertknoop* decision is a case in point).

The establishment of the Free Movement Council (FMC) by the Nordic Council of Ministers could serve as a source of inspiration for collecting, discussing and putting legal cross-border problems on the agenda in a more institutionalised way within the Benelux as well. Such an organisation could complement the current Benelux governance system, so that cross-border cooperation can be further developed and border obstacles can be resolved more efficiently.

- At *interregional level*, the *Oberrheinkonferenz* (the German-French-Swiss Upper Rhine Conference)<sup>40</sup> and the Greater Copenhagen and Skåne Committee have developed institutional methods for **multilevel interregional cooperation** to identify and resolve local obstacles.

In concrete terms, the above European, multilateral, international and interregional multilevel instruments contribute to the development of cross-border cooperation and the removal of border obstacles through:

- Concluding inter-state agreements (e.g. the Treaty of Anholt for the Rhine-Waal Euroregion);
- Cross-border cooperation (e.g. the EGTC/ BGTC);
- Horizontal cooperation instruments based on multilateral cooperation arrangements (e.g. the Nordic FMC and the Upper Rhine Conference);
- Existing legal instruments, e.g. Benelux instruments, particularly decisions and agreements.

Previous research has, however, revealed a need to improve cross-border cooperation at horizontal and vertical/regional levels in order to resolve border obstacles.<sup>41</sup> Cross-border obstacles not only constitute a joint problem for all EU Member States, they are also an internal problem for the countries concerned. Each Member State must resolve its border obstacles through active participation. This political responsibility of the Member States emanates from their membership of the European Union and from their explicit commitment to jointly promote freedom of movement.

Effective cross-border cooperation for the resolution of long-standing legal or administrative obstacles at the borders requires the strengthening of the existing range of European, multilateral, international and interregional multilevel instruments. Against this backdrop, i.e. of existing cooperation

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<sup>38</sup> Cooperation Treaty between Denmark, Finland, Iceland, Norway and Sweden. This Treaty was signed on 23 March 1962 and entered into force on 1 July 1962.

<sup>39</sup> See Decision of the Benelux Committee of Ministers establishing a Benelux Treaty on cross-border and inter-territorial cooperation. Available at: [http://www.benelux.int/files/2313/9600/0735/Benelux-verdrag\\_GS\\_M20142-NL.pdf](http://www.benelux.int/files/2313/9600/0735/Benelux-verdrag_GS_M20142-NL.pdf).

<sup>40</sup> <http://www.oberrheinkonferenz.org/de/oberrheinkonferenz/gemeinsames-sekretariat.html>.

<sup>41</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, 124.

mechanisms, the ECBM could be seen as a necessary complement to the EU's toolbox designed for the removal of border obstacles.<sup>42</sup>

## 4. European Cross-Border Mechanism to resolve legal and administrative obstacles

### 4.1. Background, objectives and scope

*Background* - On 29 May 2018, the European Commission presented the Proposal for a Regulation on a Mechanism to Overcome Legal and Administrative Obstacles in a Cross-Border Context.<sup>43</sup> The idea of the proposed ECBM stems from the work of the Luxembourg EU Presidency of the Council.<sup>44</sup> This initiative led to the creation of an informal working group, composed of representatives of interested Member States and the European Commission and chaired by Luxembourg and France.<sup>45</sup>

*Objectives* - Like the instrument of the EGTC, the proposed cross-border mechanism of the European Commission falls under the general objective of 'strengthening economic, social and territorial cohesion' (Article 175 TFEU). Under Article 175 TFEU, the EU is authorised to submit proposals on specific policies that benefit regions and help to strengthen economic, social and territorial cohesion. This provision equally allows for obstacles to regional and cross-border cooperation to be addressed.

The ECBM aims to provide an effective means of tackling and removing legal and administrative obstacles to effective cross-border cooperation. In particular, the mechanism concerns the removal of obstacles to the effective functioning of cross-border projects. The border obstacles in question usually arise due to – actual or perceived – conflicts between laws, ensuing from the (planned) simultaneous application of different national laws or administrative rules and procedures from both sides of the border (such as different national technical safety standards in tram-trains). Border obstacles can also arise from the different ways in which a common (legal) concept is interpreted differently on both sides of the border due to the different institutional and cultural contexts. Where the application of its own legislation would constitute a legal obstacle to the implementation of a joint project, a Member

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<sup>42</sup> Proposal for a Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context (SEC(2018) 28 final), p. 2. Available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2018/NL/COM-2018-373-F1-NL-MAIN-PART-1.PDF>.

<sup>43</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 of 29 May 2018. Available at: <https://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:52018PC0373rom=EN>.

<sup>44</sup> The Luxembourg 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/fr/eu-presidency/Informal-Ministerial-Meetings-on-Territorial-Cohesion-and-Urban-Policy-26-27-November-2015-Luxembourg-City\\_.html](https://amenagement-territoire.public.lu/fr/eu-presidency/Informal-Ministerial-Meetings-on-Territorial-Cohesion-and-Urban-Policy-26-27-November-2015-Luxembourg-City_.html). See also SWD(2017) 307 final, item 3.9, 49.

<sup>45</sup> From July 2016 to July 2017, the Working Group on innovative solutions to cross-border obstacles, co-chaired by France and Luxembourg and with the support of the Cross-Border Operational Mission [MOT], examined the feasibility and design of a new instrument. This new instrument, then called the 'European Cross-border Convention' (ECBC), was presented in 2015 under the Luxembourg Presidency. See the discussion paper for the informal ministerial meeting on territorial cohesion under the Luxembourg Presidency/[http://www.amenagement-territoire.public.lu/fr/eu-presidency/InformalMinisterialMeetings-on-Territorial-Cohesion-and-Urban-Policy-26-27-november-2015-LuxembourgCity\\_.html#](http://www.amenagement-territoire.public.lu/fr/eu-presidency/InformalMinisterialMeetings-on-Territorial-Cohesion-and-Urban-Policy-26-27-november-2015-LuxembourgCity_.html#)

State could then through the application of the ECBM choose to apply the legal provisions of another Member State for that purpose (instead of its own).<sup>46</sup>

The proposed ECBM builds on existing *governance* systems to achieve similar objectives in European border regions as the Benelux Union or the Nordic Council of Ministers discussed above.<sup>47</sup> Firstly, the ECBM aims to provide a **new instrument with a number of innovative governance elements** (namely, Cross-Border Coordination Points) to those border regions that lack comparable institutional structures and/or legal instruments to overcome administrative and legal obstacles. Secondly, the mechanism would provide a **specific legal instrument for the adaptation of national/regional legislation** during specific cross-border projects that is [even] not available in border regions with sophisticated governance tools.

*Scope* - Joint projects are projects that focus on infrastructure development and services of general economic interest that have a cross-border impact or are provided in a cross-border context.<sup>48</sup> The proposed Regulation does not clarify which aspects of infrastructure projects and services of general economic interest fall within the scope of the Regulation. According to the Dutch Government, any decision by a municipality, province or national authority of a Member State to commission a service of general interest and to organise it as it sees fit<sup>49</sup> should also be respected by municipalities or other authorities across the border.<sup>50</sup> For example, the Netherlands attaches great importance to social housing as a service of general interest, while similar services are also established in areas such as transport and care. It is not clear whether this principle of autonomy in organising services of general interest, which is in the Netherlands' vital interest, will be fully respected under the proposed Regulation.

As will be explained in more detail below, cross-border legal obstacles have arisen during the (cross-border) merger of the ports of Ghent and Zeeland sea ports into North Sea Port. In such a clearly limited geographical context, the ECBM can contribute to the establishment of effective cross-border *governance structures*, not only for new and ongoing projects, but also for the signalling, identification and easing or, where necessary, elimination of potential obstacles in cross-border regions due to existing and new legislations. In this way, the ECBM also pays particular attention to the potential cross-border effects of new policies and legislation.

#### 4.2. Timeframe for the Regulation on the European Cross-Border Mechanism

At the time of writing this contribution, in July 2019, it was still uncertain whether the proposed Regulation on the European Cross-Border Mechanism would be adopted. The new European elections in May 2019 have delayed the process, and the new European Parliament will have to renegotiate the proposal. The latest developments can be summarised as follows (Table 3):

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<sup>46</sup> Article 1 of the proposed Regulation.

<sup>47</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, 124.

<sup>48</sup> Article 3(2) of the proposed Regulation

<sup>49</sup> On the basis of Article 14 TFEU, Protocol 26 TFEU and Article 106 TFEU.

<sup>50</sup> Within the preconditions - if applicable - that apply to it based on rules of the European Commission as laid down in the 2012 SGEI package.

Fiche 2: Regulation for a mechanism to resolve legal and administrative obstacles in a cross-border context, p. 7, available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/09/24/fiche-2-verordening-mechanisme-om-juridische-en-administratieve-belemmeringen-in-een-grensoverschrijdende-context-uit-de-weg-te-ruimen>.

Table 3: Timetable of the proposed Regulation on the European Cross-Border Mechanism

<b>29 May 2018</b>	European Commission proposal for a Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context (COM(2018)0373)  <a href="https://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:52018PC0373rom=EN">https://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:52018PC0373rom=EN</a>
<b>19 September 2018</b>	Opinion of the European Economic and Social Committee 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) 373 final - 2018/0198 (COD))  <a href="https://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:52018AE2790rom=EN">https://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:52018AE2790rom=EN</a>
<b>26 October 2018</b>	Opinion of the Committee on the Environment, Public Health and Food Safety (ENVI)  <a href="http://www.europarl.europa.eu/doceo/document/ENVI-AD-629597_EN.html?redirect">http://www.europarl.europa.eu/doceo/document/ENVI-AD-629597_EN.html?redirect</a>
<b>5 December 2018</b>	Opinion of the European Committee of the Regions on the 'Cross-border mechanism' (2019/C 86/10)  <a href="https://cor.europa.eu/en/our-work/Documents/Opinions/84th-Report-CoR-Follow-up-opinions-December-2018.pdf">https://cor.europa.eu/en/our-work/Documents/Opinions/84th-Report-CoR-Follow-up-opinions-December-2018.pdf</a> (p. 79)
<b>6 December 2018</b>	Opinion of the European Economic and Social Committee  <a href="https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:52018AE2790rom=EN">https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:52018AE2790rom=EN</a>
<b>14 February 2019</b>	First reading by the European Parliament  <a href="http://www.europarl.europa.eu/doceo/document/TA-8-2019-0118_EN.html?redirect">http://www.europarl.europa.eu/doceo/document/TA-8-2019-0118_EN.html?redirect</a>

## 5. Evaluation of the main features of the European Cross-Border Mechanism

### 5.1. European Cross-Border Mechanism

#### A. Signature of a commitment or statement

The ECBM offers two different ways to apply the legal provisions of a neighbouring Member State:<sup>51</sup>

- the conclusion of a European Cross-Border *Commitment* with immediate effect (hereafter: 'commitment'), which in itself allows for a derogation from the normal rules;<sup>52</sup>
- the signing of a European Cross-Border *Statement* (hereafter: 'statement'), in which the Member State formally declares that it will adapt its usual rules.<sup>53</sup>

In order to sign a commitment or a statement, most Member States will have to complete the necessary legislative procedure. Most Member States may first have to adopt legislation allowing the competent authorities to enter into a commitment or sign a statement whereby the Member State undertakes to derogate from the 'generally' applicable national rules by 'importing' the legal provisions of a neighbouring Member State (i.e. through a commitment) and/or by adopting a formal legislative act (i.e. using a statement).

The procedure for the signature of a commitment or a statement (set out in Chapter II of the proposed Regulation) consists of the preparation and submission of the 'initiative document', to be drawn up by the initiator.<sup>54</sup> Initiators are the actors who identify the legal obstacle and trigger the mechanism by submitting an initiative document.<sup>55</sup>

When entering a commitment, the 'generally' applicable national rules remain in place. Through signing a statement, the 'generally' applicable national rules are formally amended to allow for an explicit derogation.<sup>56</sup> Statements are implemented by submitting to the competent legislative body one or more proposals to amend the national legislation, so as to provide for the necessary derogations.<sup>57</sup> In both cases, once all the planned steps have been taken, the cross-border coordination point (see Section 5.3 below) must inform the relevant cross-border coordination points in the other Member State and at European level.<sup>58</sup>

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<sup>51</sup> Preamble to section 9 of the proposed Regulation.

<sup>52</sup> Article 1(2)(a) and Preamble to section 10 of the proposed Regulation.

<sup>53</sup> Article 1(2)(a) and (b); Preamble to section 11.

<sup>54</sup> Articles 8 and 9.

<sup>55</sup> This could be:

(a) the public or private body responsible for starting (and/or carrying out) a joint project (e.g. the company responsible for public transport in Strasbourg intending to create a cross-border tram line to the German city of Kehl);

(b) local/regional authorities established or exercising public authority in a border region (e.g. the City of Strasbourg);

(c) a body created for the purpose of cross-border cooperation, whether a legal entity or not, established in a given border region or at least covering part of that region; or

(d) an organisation created on behalf of border regions to promote the interests of border regions and to facilitate the networking of actors and the sharing of experiences (e.g. the Association of European Border Regions or the *Mission Opérationnelle Transfrontalière*).

<sup>56</sup> COM(2018) 373 final, 8.

<sup>57</sup> Article 19.

<sup>58</sup> Article 18(4) and (5) and Article 19(6) and (7).

## B. Legal protection

Persons established in a border region who consider themselves wronged by the authorities through acts or omissions resulting from the application of a legal provision of another Member State arising from a commitment or a statement enjoy legal protection.<sup>59</sup> Whether through a commitment or a statement, the legislation of the neighbouring Member State will be incorporated into the legislation of the committing Member State. Thus, legal protection must fall under the jurisdiction of the courts of the committing Member State, even if the legal domicile of the person(s) concerned is located in the Member State transferring its legislation. The same must apply to appeals against the Member State whose administrative acts are being challenged.<sup>60</sup> An administrative act, for example, that allows a tram to run on German territory under French law can only be challenged before the German courts.

## 5.2. Voluntariness

The use of the ECBM is voluntary. If a Member State does not opt for the mechanism, the proposed Regulation provides that it must choose an existing method to resolve any obstacles to the implementation of a joint project in its border regions.<sup>61</sup> These may be effective mechanisms established by a Member State at national level or which this Member State has formally or informally established together with one or more neighbouring Member States (so-called opt-outs).

If the ECBM is not the method of choice, it is important to put similar effective mechanisms in place in order to amend national legislation or [regional] decrees. Derogation from or failure to apply national legislation would lead to different legal regimes coexisting within the border region. This situation would be at odds with the principle of equality before the law and would entail the risk of ‘shopping’ behaviour. In addition, it is unclear what the consequences would be if one Member State opted for implementing its own mechanism and the neighbouring Member State opted for the newly established ECBM.<sup>62</sup> Moreover, the proposed EU Regulation does not provide insight into which conditions have to be met so that a Member State could **apply its own mechanism instead of the one proposed by the EU**. Nevertheless, Member States actually have to make this choice within one year. The Dutch

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<sup>59</sup> Article 21(1) of the proposed Regulation. The proposed Regulation introduces a different approach to legal remedies for monitoring of the application of the commitment and the statement. The Explanatory Memorandum to the proposed Regulation includes an example in which an authority of the neighbouring Member State (e.g. France) has agreed to monitor the application of the amended legislation in Germany (through adopting French provisions and derogating from the generally applicable German provisions), and this authority can act on its own behalf with regard to persons established in the cross-border area. In such cases, the competent courts are the courts of the Member State in which the legal residence of these persons is situated (Article 22(1)). Thus, if a French authority can, in its own name and on its own behalf, adopt an administrative act addressed to the operator of the tram, whose legal domicile is in France (declaring that the tram operator has failed to comply with French legislation on technical requirements for electrical signals in German territory), this falls within the jurisdiction of the French courts.

However, where the competent transmitting authority cannot act on its own behalf, but only on behalf of the competent committing authority, the competent courts are those of the committing Member State, irrespective of the lawful place of residence of the person concerned (Article 22(2) of the proposed Regulation). Thus, if the French authority monitors compliance with French law, but the administrative act is adopted on behalf of a German authority, the competent courts are the courts of Germany.

<sup>60</sup> Article 21(2). For example, an administrative act allowing a tram to run on German territory under French law can only be challenged before the German courts.

<sup>61</sup> Article 4.

<sup>62</sup> See also: Ministry of Foreign Affairs, Information on new Commission proposals (2 dossiers attached) - Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018, no. 22.112 (on new Commission Proposals and Initiatives by the Member States of the European Union), p. 7. Available at: <https://zoek.officielebekendmakingen.nl/kst-22112-2694.html#ID-856550-d36e191>

government believes that this obligation is at odds with the allegedly voluntary nature of the proposal.<sup>63</sup> In addition, it is opaque if this choice of mechanism may be made by the Member States, or the cross-border regions (or, perhaps, even at project level). Furthermore, it remains unclear what would happen if one Member State chose to apply the cross-border mechanism and the other Member State chose not to. How can the relevant border obstacle be resolved in this event? It is recommendable that a clear framework of requirements will be drawn up that any existing, self-designed mechanisms have to meet.

### 5.3. Cross-border coordination points

#### A. National and regional cross-border coordination points

The proposed Regulation of the European Commission stipulates that each Member State adopting the ECBM must establish national and regional cross-border coordination points.<sup>64</sup> These coordination points must liaise with all the competent authorities in the Member State, as well as with the corresponding cross-border coordination point in the neighbouring Member State. Regarding each request for a commitment or a statement, they play a key role vis-à-vis the Member States involved.<sup>65</sup> Cross-border coordination points should respond within a specified time limit and decide whether to initiate a procedure for the adoption of a commitment or a statement, whether the obstacle is real and whether solutions are available for one or more legal obstacles. The initiator may be requested to revise or supplement their document.<sup>66</sup> Once the initiative document is considered complete, the cross-border coordination point must prepare a draft commitment or statement and again agree on this text with the other Member State within a given time limit,<sup>67</sup> before finally signing the commitment or statement.<sup>68</sup> The signed commitment or statement should be sent not only to the initiator, but also to the cross-border coordination point of the neighbouring Member State, the competent authority of the initiator's own Member State, the coordination point at EU level and the body or bodies designated by the committing Member State to issue official publications.<sup>69</sup>

The mandatory establishment of national coordination points will naturally lead to additional administrative burdens. These burdens can be reduced by building on existing institutions, means and resources. In addition, it would be advisable to clarify whether each Member State must establish its own cross-border coordination point or whether such points could also be set up (jointly) in cross-border regions. Also, the role of the coordination points should further be clarified, so as to provide a framework/procedure for organisations facing border obstacles.

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<sup>63</sup> Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018, 6.

<sup>64</sup> Article 5 of the proposed Regulation and preamble recital 13.

It should be noted, however, that the European Parliament's amendment requires all Member States to set up national cross-border coordination points. See: Report of the European Parliament 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)373). Available at

[http://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_deposes/rapports/2018/0414/P8\\_A\(2018\)0414\\_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2018/0414/P8_A(2018)0414_EN.pdf).

<sup>65</sup> Articles 10 and 11 of the proposed Regulation.

<sup>66</sup> Article 12 of the proposed Regulation.

<sup>67</sup> Articles 13, 14 and 15 of the proposed Regulation.

<sup>68</sup> Articles 16 and 17 of the proposed Regulation.

<sup>69</sup> Article 17(2)(e) of the proposed Regulation.

## B. European coordination point

The European Commission must also establish a European coordination point at EU level.<sup>70</sup> This coordination point must liaise with the different national/regional cross-border coordination points. In addition, implementing powers will be conferred on the European Commission with a view to setting up a database and laying down rules for its management, as well as to data protection and the format to be used when cross-border coordination points start submitting information on the implementation and use of the mechanism.<sup>71</sup> The database must comply with the provisions on data protection under Regulation (EC) No. 45/2001 of the European Parliament and of the Council.<sup>72</sup>

## 5.4. Choice of instrument

### A. Decision to introduce a Regulation

The European Commission has opted to propose a Regulation that is directly applicable in all Member States and, in fact, affects virtually all internal borders. A *Regulation* is general in nature, entirely binding and directly applicable in all Member States.<sup>73</sup> The instrument as per the Regulation includes the obligation for Member States to create a (two-tiered) mechanism for each border with a neighbouring Member State, in order to resolve legal obstacles in common border regions. At the same time, the instrument also allows Member States to use their own mechanisms to effectively resolve cross-border legal and administrative obstacles.

The European Commission points out that some Member States already have their own instruments with neighbouring Member States, which the proposed Regulation must take into account.<sup>74</sup> For a specific border with one or more neighbouring Member States, Member States may decide to join an existing and effective system that was formally or informally established by one or more neighbouring Member States. In this way, the European Commission is emphasising that the mechanism does not constitute a 'one-size-fits-all' approach. It is up to the Member States to create solutions that are best suited to their respective local and regional contexts.<sup>75</sup> The choice to introduce the proposed mechanism in the form of a Regulation does not stand in the way of its optional character.

### B. No Recommendation or Directive

According to the European Commission, a *Recommendation* would not be the most effective instrument, as recommendations are not binding.<sup>76</sup> Nor would a *Directive* be appropriate: although a Directive is binding for each addressed Member State in terms of the results to be achieved, it leaves the choice of form and methods to the national authorities.<sup>77</sup> Having different national implementation laws, however, could create legally complex situations producing new border obstacles, including the associated legal uncertainty and additional costs.<sup>78</sup> By allowing divergent systems to exist on both sides

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<sup>70</sup> Article 6 and preamble section 14 of the proposed Regulation. The European Commission has already set up the Border Focal Point to resolve obstacles to cross-border interaction: See also: European Commission Communication, 'Boosting growth and cohesion in the EU's border regions', COM(2017) 534 final/2, p. 7-9.

<sup>71</sup> Article 7 and preamble section 14.

<sup>72</sup> Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ* L 8 of 12 January 2001, 1.

<sup>73</sup> Art. 288, section 2 TFEU.

<sup>74</sup> SEC(2018) 268 final, 4.

<sup>75</sup> SEC(2018) 268 final, 6.

<sup>76</sup> Art. 288 TFEU, fifth paragraph.

<sup>77</sup> Art. 288 TFEU, third paragraph.

<sup>78</sup> European Commission, COM(2018) 373, pp 3-4.

of a border, a Directive might introduce new differences in border regions.<sup>79</sup> A decision to base the ECBM on a Directive would therefore be diametrically opposed to the very objective of that mechanism: to resolve border obstacles. After all, it has been indicated above that EU-related legal obstacles (type 1) represent the smallest share (of around 15%) of the 239 border obstacles identified, while the shares of Member State-related and administrative obstacles are significantly higher (at 43% and 42%, respectively).<sup>80</sup>

*Position of the Dutch Government* - The Dutch government, however, is of the opinion that with respect to its transposition into national law, a Directive would grant the Member States more room for manoeuvre than a Regulation.<sup>81</sup> According to the Dutch government, tailor-made solutions would be more difficult to achieve through a Regulation: A Regulation prescribes a certain path toward a solution, namely a mechanism that allows for the application of legal provisions of another Member State in the border region. Given the wide variety of situations in cross-border regions, the Dutch government sees a Regulation as too rigid. National governments are supposedly (quite) reluctant to abolish their own national regulations in favour of neighbouring legislation.<sup>82</sup> This leads the Dutch government to argue that the chosen format of a Regulation does not serve the objective that the Commission seeks to achieve.<sup>83</sup>

The Dutch Government believes that this objective of resolving legal border obstacles through a tailor-made approach can be better achieved by means of a Directive. A Directive can bind Member States to rally around a common goal (the removal of border obstacles), while leaving them free to decide how to achieve this goal. In this way, maximum customisation can be achieved, and incisive efforts can be made based on the common commitment to the effective resolution of border obstacles across the European Union.<sup>84</sup> According to the Dutch Government and entirely in line with the aforementioned Commission communication, a Directive would fully respect and encourage not only existing, but also new effective intergovernmental, regional and local mechanisms. A Directive would allow Member States, in cooperation with their neighbours, to decide how cross-border problems should be addressed. In this way, tailor-made solutions can be achieved.<sup>85</sup>

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<sup>79</sup> SEC(2018) 268 final, 4.

<sup>80</sup> Europese Commissie, 'Easing legal and administrative obstacles in EU border regions', Final Report (Service Request No. 2015CE160AT013, DG REGIO, March 2017), 34-35.

<sup>81</sup> Ministry of Foreign Affairs, Information on new Commission proposals (2 dossiers attached) - Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018.

<sup>82</sup> This point was further emphasized in a legal opinion (following this research report) by Mr P.E.H. (Pieter) Sels, Legal Affairs and Purchasing, Province of Limburg, indicating that such matters would be assessed in a more pragmatic way at provincial level.

<sup>83</sup> Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, p. 5, available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/09/24/fiche-2-verordening-mechanisme-om-juridische-en-administratieve-belemmeringen-in-een-grensoverschrijdende-context-uit-de-weg-te-ruimen>.

<sup>84</sup> Ministry of Foreign Affairs, Information on new Commission proposals (2 dossiers attached) - Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018, p. 6.

<sup>85</sup> Ministry of Foreign Affairs, Information on new Commission proposals (2 dossiers attached) - Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018, p. 6.

We do not share the view of the Dutch government that a Directive would lead to more customisation. After all, a Directive would force the Member States to transpose that Directive into national legislation. For Belgium and Germany, this would entail specific transpositions into both federal law and the legislation of the Regions and *Länder*, respectively. The complexities of transposing an EU Directive into national and regional legislations make it difficult to ensure the coherence between the various elements of the original instrument. Indeed, national differences in the transposition of a Directive can cause their own cross-border problems. A case in point is the recognition of professional qualifications.

## 5.5. Entry into force and reporting

The proposed Regulation is meant to enter into force on the twentieth day after its publication and is to become applicable one year after its entry into force.<sup>86</sup> The Dutch government has already indicated that a one-year period will be too short to adopt implementing legislation.<sup>87</sup> This legislative process will require at least two years. According to the Dutch government, a period of one year would suffice to create a *governance structure* only. Countries without a working problem-solving mechanism for border obstacles, however, cannot be expected to set up their own effective mechanisms within a year of the entry into force of the Regulation. Upholding this requirement would turn the freedom of choice that the Regulation offers in principle into a rather unrealistic proposition, thus hampering the development of tailor-made solutions and conflicting with the notion that the Regulation does not seek to impose a one-size-fits-all approach.

Five years after the entry into force of the Regulation, the Commission must report on its application.<sup>88</sup> The Dutch government supports this reporting obligation to assess the effectiveness as well as the added value of the instrument and to consider any necessary simplifications.<sup>89</sup> However, an evaluation five years after its entry into force would be relatively soon, given that the substance of the Regulation will not become applicable until one year after its entry into force – or even two years if the Dutch get their way.

## 5.6. Clarifications by the European Parliament

On 5 February 2019, the European Parliament adopted a legislative resolution on the proposed ECBM by 489 votes to 55, with 82 abstentions. The position of the European Parliament, which it adopted at first reading in accordance with the ordinary legislative procedure, has led to a modification and clarification of certain aspects of the European Commission's proposal.<sup>90</sup>

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<sup>86</sup> Article 26 of the proposed Regulation.

<sup>87</sup> Ministry of Foreign Affairs, Information on new Commission proposals (2 dossiers attached) - Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018, p. 10.

<sup>88</sup> Article 25 of the proposed Regulation.

<sup>89</sup> Ministry of Foreign Affairs, Information on new Commission proposals (2 dossiers attached) - Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018.

<sup>90</sup> Report 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). Available at [http://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_deposes/rapports/2018/0414/P8\\_A\(2018\)0414\\_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2018/0414/P8_A(2018)0414_EN.pdf)

*Voluntary instrument* – The European Parliament stressed that the proposed mechanism should aim at adding a **voluntary instrument** to the range of instruments available to Member States to promote cross-border cooperation.<sup>91</sup> The Member States must, as always, have the final say on whether or not to apply the mechanism.

*Joint project assessment* – The European Parliament stressed that Member States should be able to choose, on a case-by-case basis, whether to use the ECBM or an existing mechanism, i.e. for each **individual joint project**.<sup>92</sup> If the Member States were forced to make a one-off choice for an entire border region, Member States without an existing mechanism to resolve legal obstacles in a cross-border context would, in practice, be obliged to use the ECBM, thus undermining the voluntary nature of the proposal.

*Choice between the European mechanism and existing mechanisms* – The European Parliament observed that the cross-border mechanism can be applied ‘à la carte’. Each time Member States identify a legal obstacle in a cross-border context, they will have to assess whether they will be using an existing self-designed mechanism, creating a new self-designed mechanism or using the ECBM. Member States may also refuse, on duly justified grounds, to activate any mechanism to resolve a legal or administrative obstacle. There must be a thorough check by all interested parties before the ECBM is triggered and a Member State is granted permission to apply its legal provisions in another Member State. This has led the European Parliament to observe that the deadlines proposed by the Commission are too tight.<sup>93</sup> In response, certain deadlines have been extended.<sup>94</sup>

## 6. Added value of the European Cross-Border Mechanism for border regions

The central question is what the added value is of the ECBM in overcoming obstacles in a cross-border context, paying particular attention to the border regions between Belgium (Flanders) and the Netherlands and between the Netherlands and Germany. In order to identify the potential benefits of the proposed Regulation on the ECBM, we will successively assess its legal, political and practical added value.<sup>95</sup>

However, the added value of the proposed Regulation cannot be established for the EU border regions as such. Due to the legal, political and geographical complexity of border regions, this added value is

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<sup>91</sup> Report of the European Parliament 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)373), p. 31. Available at [http://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_deposes/rapports/2018/0414/P8\\_A\(2018\)0414\\_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2018/0414/P8_A(2018)0414_EN.pdf).

<sup>92</sup> See amendment to Article 1 of the proposed Regulation.

<sup>93</sup> Report of the European Parliament 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)373), p. 32. Available at [http://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_deposes/rapports/2018/0414/P8\\_A\(2018\)0414\\_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2018/0414/P8_A(2018)0414_EN.pdf).

<sup>94</sup> These include Article 15(1)(a) (sending of the draft commitment or statement) and Article 16(1) (examination of the draft commitment or statement): deadline extended from three months to six months, and Article 17(1) (examination of the response by the competent cross-border coordination point of the transferring Member State): deadline extended from one month to three months.

<sup>95</sup> This analysis is based on the ITEM research report ‘A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province’ Final report - project phase 1, 9 November 2018.

highly dependent on the existing legal framework at any given border.<sup>96</sup> If, on the one hand, explicit legal instruments already exist in the context of cross-border projects, the proposed Regulation is not likely to add much extra value. On the other hand, it could fill a gap where these explicit legal instruments are lacking. It may be especially valuable as regards the position of potential stakeholders in cross-border projects.

### 6.1. Legal added value for border regions

The legal added value of the proposed ECBM will depend on whether the proposed Regulation will produce an innovative instrument to resolve the lack of alignment between legislations when implementing cross-border projects.

#### A. Abstract assessment

As mentioned above, the proposed Article 4 of the Regulation offers the possibility of using a separate mechanism to overcome legal and administrative difficulties in the implementation of joint projects in border regions. As mentioned in more detail above, a number of Member States (including the Benelux countries) have taken individual, bilateral and multilateral initiatives to resolve legal obstacles to cross-border interaction. In our view, the mechanism to be established under the proposed EU Regulation will be becoming less interesting as self-designed cross-border solutions become much more tailored and effective in the future. In this event, Belgium and the Netherlands will prefer making use of the cross-border *governance structures* that are currently being developed with their neighbouring countries, alongside the existing cooperation within the Benelux framework and the existing cross-border cooperation instruments at local level, such as the *Gemeenschappelijk Orgaan Baarle* (i.e. the Joint Baarle Body for common municipal policy matters involving Baarle-Nassau (NL) and Baarle Hertog (B)).<sup>97</sup> This makes it important to emphasise (once more) the voluntary nature of the ECBM.

However, individual, bilateral and even multilateral mechanisms are not in place in all Member States or even along all of the borders of a particular Member State. The ECBM could have a (more) beneficial effect in border regions where self-designed mechanisms for the solution of border obstacles are absent or underdeveloped. This could, for example, be the case along the borders of Eastern European countries that have not concluded many bilateral or multilateral agreements so far. For these border regions, legislative action at EU level will clearly add value.

#### B. Concrete assessment for border regions

##### i. For the Benelux area (including the Belgian-Dutch border region)

The legal added value is assumed to be lower in the Benelux area (including the Belgian-Dutch border regions) than in many other border regions.<sup>98</sup> After all, border obstacles in this area can already be resolved using the existing Benelux legal instruments:

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<sup>96</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, p. 126.

<sup>97</sup> Ministry of Foreign Affairs, Information on new Commission proposals (2 dossiers attached) - Fiche 2: Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context, Werkgroep Evaluatie Nieuwe Commissievoorstellen (werkgroep Beoordeling Nieuwe Commissievoorstellen, BNC), Directie Integratie Europa, BZDOC-240920879-59, 24 September 2018, p. 6.

<sup>98</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, p. 126.

- *Treaty on the Benelux Union* [hereafter: the Benelux Treaty] – Belgium, the Netherlands and Luxembourg committed to intensive cooperation when forming the Benelux Union. The Benelux Treaty establishing the Benelux Economic Union, which was signed in 1958 and was due to expire after 50 years, was renewed in 2008.<sup>99</sup> The **new Benelux Union Treaty** entered into force on 1 January 2012.<sup>100</sup> Its main objectives are the promotion of cross-border cooperation between the Benelux countries themselves (as well as with other EU Member States) and offering a testing ground for the deepening of European integration.<sup>101</sup> Since 2012, the Benelux countries have endeavoured to draw upon the institutional Benelux legal framework by using existing instruments (such as the extension of the Benelux Treaty on police cooperation in July 2018) and applying innovative instruments (like the decision on the reduction of noise impact in the *Albertknoop* cross-border industrial zone).
- *Benelux Treaty on cross-border and interterritorial cooperation* (“Benelux-Verdrag over grensoverschrijdende en interterritoriale samenwerking”) – In February 2014, the responsible ministers signed a new **Benelux Treaty on cross-border and interterritorial cooperation** (hereafter: the 2014 Benelux Treaty), which entered into force on 1 January 2019.<sup>102</sup> This new Treaty updates, strengthens and replaces the previous “Benelux Convention on cross-border cooperation” (*Benelux-Overeenkomst inzake samenwerking*) of 12 September 1986, which had been in force since 1 April 1991. Through the 2014 Benelux Treaty, the Benelux countries seek to strengthen their pioneer position in terms of cross-border cooperation in the EU.<sup>103</sup> The treaty provisions are more flexible than those in the 1986 Agreement and go beyond the existing EU legislation to promote cross-border cooperation (EGTC) within the Benelux area.<sup>104</sup> The project partners are free to choose the legal form of their cooperation: the Benelux Grouping of Territorial Cooperation (BGTS), a joint body or an administrative arrangement.

The existing Benelux cooperation arrangements offer high degrees of flexibility and innovation in order to overcome legal and administrative obstacles resulting from the simultaneous application of different regimes on both sides of the border.<sup>105</sup> The noise-reduction case at the *Albertknoop* cross-border industrial site for companies located in Maastricht (the Netherlands) and Lanaken (Belgium), for example, has shown it already possible that a Benelux convention be invoked to amend national (or regional) legislation for the purpose of remedying a lack of conformity between legislations from

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<sup>99</sup> Treaty concerning the revision of the Treaty of 3 February 1958 establishing the Benelux Economic Union, 2008 (hereafter referred to as the Benelux Union Treaty).

<sup>100</sup> Available at: [http://www.benelux.int/files/2313/9230/2800/BeneluxVerdrag\\_2008.pdf](http://www.benelux.int/files/2313/9230/2800/BeneluxVerdrag_2008.pdf).

<sup>101</sup> Article 2 of the Benelux Union Treaty.

<sup>102</sup> Decision M(2014)2 of the Benelux Committee of Ministers to establish a Benelux Treaty on cross-border and interterritorial cooperation. Available at: <https://www.fdfa.be/nl/benelux-verdrag-inzake-grensoverschrijdende-en-interterritoriale-samenwerking>. Belgium ratified the 2014 Treaty on 27 April 2017, Luxembourg on 9 March 2018 and the Netherlands on 5 November 2018.

<sup>103</sup> See <https://europadecentraal.nl/praktijkvraag/wat-is-de-rol-van-het-benelux-verdrag-bij-grensoverschrijdende-samenwerking/>.

<sup>104</sup> ITEM, ‘Inventarisatie grensoverschrijdende knelpunten North Sea Port’, Project report 4 March 2019, 33. See, for example, M. Hertoghs, ‘De grens in je achtertuin – Juridische aspecten van decentrale grensoverschrijdende samenwerking van Nederland met de buurlanden’, in: M. Faure and M. Peeters (eds.), *Grensoverschrijdend recht*, Antwerpen: Intersentia, 2006, 123-141, pp. 111-115.

<sup>105</sup> ITEM, ‘Inventarisatie grensoverschrijdende knelpunten North Sea Port’, Project report 4 March 2019, p. 35. See also ITEM, ‘A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province’ Final report - Project Phase 1, 9 November 2018, p. 106.

either side of the border.<sup>106</sup> The Benelux has no clear procedures, however, that grant the initiators of cross-border projects a specific status.

Today, it may thus already be the case that the launching of cross-border projects in a certain border region is supported by a relatively stable set of cooperation instruments (such as is the case in the Benelux area). The proposed EU Regulation then provides an supplementary legal framework by granting the right of initiative to stakeholders in border regions who face legal and administrative border obstacles, once the Member States have opted for the ECBM.<sup>107</sup> These so-called initiators are granted a specific status, allowing them to submit their requests to the competent authority in their own Member State via a clear, pre-defined procedure that includes a timetable. Subsequently, it is up to the responsible authorities to decide how to resolve the border obstacles: through the EU procedure or using their own national mechanism. At present, there is no such procedure in the Benelux.

## ii. For the Dutch-German border region

Where the ECBM would offer more limited added value to the Benelux area, the proposed EU Regulation may be more interesting in the Dutch-German situation.<sup>108</sup> In principle, the Benelux legal instruments do not govern the borders with the two German states (*Länder*) of North Rhine-Westphalia (*Nordrhein-Westphalen* - NRW) and Lower Saxony (*Niedersachsen*). It should be pointed out, however, that the national governments of Germany and the Netherlands and the German states of NRW and Lower Saxony signed the Anholt Treaty on 23 May 1991.<sup>109</sup> The Anholt Treaty provides a legal basis for cross-border cooperation between the signing parties' public authorities, allowing them to institutionalise joint cross-border activities. Although the relevant states of NRW and Lower Saxony are associated with the Benelux area,<sup>110</sup> the Benelux Treaty and the Benelux conventions are not, in principle, applicable or binding.

Nevertheless, cross-border cooperation is to be encouraged. Firstly, the existing Benelux legal instruments could be used to allow the common border regions with the German *Länder* of NRW and Lower Saxony to accede to certain Benelux agreements (in particular, the Benelux Treaty on cross-border and interterritorial cooperation of 2014).<sup>111</sup> A more comprehensive solution could be for the Benelux area to intensify its cooperation with the NRW and Lower Saxony border regions, in order to develop a more extensive horizontal instrument at Benelux level: a Benelux mechanism. This Benelux mechanism could facilitate territorial cooperation beyond the sectoral legal conventions for specific cross-border problems. In this way, the ties between the states of NRW, Lower Saxony, on the one

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<sup>106</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, p. 126.

<sup>107</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - Project Phase 1, 9 November 2018, p. 127.

<sup>108</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - Project Phase 1, 9 November 2018, p. 127.

<sup>109</sup> Treaty between the Kingdom of the Netherlands, the Federal Republic of Germany, the state (*Land*) of Lower Saxony and the state (*Land*) of North Rhine-Westphalia on cross-border cooperation between territorial communities or authorities, including a Protocol, Isselburg-Anholt, 23 May 1991.

<sup>110</sup> The Benelux cooperation with NRW is based on the political declaration of 2008. Available at:

[http://www.benelux.int/files/1013/8297/6875/bnl\\_NoordrijnWestfalen\\_nl.pdf](http://www.benelux.int/files/1013/8297/6875/bnl_NoordrijnWestfalen_nl.pdf). The German states (*Länder*) of NRW and Lower Saxony have signed the Anholt Treaty (together with the Netherlands and Germany), which provides a legal basis for cross-border cooperation between the signing parties' administrations.

<sup>111</sup> Decision of the Benelux Committee of Ministers to establish a Benelux Treaty on cross-border and inter-territorial cooperation, M (2014) 2.

hand, and the Netherlands and the border provinces, on the other, could be strengthened within the existing Benelux framework.

## 6.2. Political added value

*Clearly defined procedure* - The political added value of the ECBM is of the utmost importance for border regions – especially, in that it defines a specific procedure to be followed. So far, the initiatives taken to resolve cross-border legal obstacles have been quite divergent.<sup>112</sup> It is not easy to streamline a process with well-defined roles and status of initiators and addressees, as well as clear obligations and timetables that lead to faster solutions. This certainly applies to the recognition of professional qualifications and cross-border rail infrastructure projects (see Section 6.4 below), with their complex systems of division of competences and difficulties in establishing a specific procedure.<sup>113</sup>

*Strengthening political responsibility* - Note that, in principle, the entire process of removing legal obstacles is not legally enforceable at present. There is no international treaty or competent authority to force national governments to resolve the legal obstacles identified.

Nevertheless, due to the chosen legal form (i.e. a Regulation), every EU Member State can be expected to make efforts. Member States must set up mechanisms to resolve legal obstacles for each border region shared with a neighbouring Member State. At the same time, Member States are allowed to use other effective mechanisms.<sup>114</sup> The decision to adopt the legal form of a Regulation could, in principle, make the objective of removing border obstacles legally enforceable. The political responsibility of a Member State increases once a border obstacle is identified. The obligations imposed on Member States by the Regulation would mean that a Member State could, in principle, be held (legally) liable if, for example, its justification for not signing a commitment/statement were considered insufficient in respect of the requisite legal standard.<sup>115</sup>

## 6.3. Practical added value

The proposed ECBM will ensure that the competent authorities of the Member States adopt a new mechanism or legal instrument to initiate processes that can resolve legal border obstacles much faster and with less bureaucracy than today. The new specific legal instrument includes several new *governance elements* (in particular, cross-border coordination points) for border regions with no comparable institutional structures and/or legal instruments in place for the resolution of border obstacles. It also provides an opportunity to adjust national/regional cooperation to suit the needs of specific cross-border projects.

The envisaged EU Regulation sets clear deadlines and a timetable for the functioning of the tailor-made cross-border mechanism. The regions on the Dutch, Belgian and German borders must make room for specific legal standards, meant to grant cross-border project initiators a certain status that is backed by clearly defined obligations for the competent national authorities. The proposed EU

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<sup>112</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - Project Phase 1, 9 November 2018, p. 127.

<sup>113</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - Project Phase 1, 9 November 2018, p. 127.

<sup>114</sup> 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.

<sup>115</sup> Article 16(1)(c) of the proposed Regulation.

Regulation could form a basis for developing and strengthening these tailor-made governance systems at national borders.<sup>116</sup>

#### 6.4. Case studies

In view of the question on the ECBM's concrete added value in relation to the existing Benelux instruments, ITEM has identified ten cross-border projects for each which it has assessed individually whether the ECBM could be used to align the applicable legislation with the legislation of the neighbouring country.<sup>117</sup> Building on the obstacles identified for the specific cross-border North Sea Port project (see also Section 3.1), the applicability and the added value of the ECBM can be explored.

An assessment of the application of already existing Benelux cooperation instruments and the ECBM in each of the ten, potential cross-border projects<sup>118</sup> shows that most Dutch-Belgian cross-border projects can, to a large extent, rely on the existing cooperation instruments of the Benelux Union. Depending on the concrete implementation of the project, the Benelux cooperation instruments could be used, among other things, to adapt legislation on:

- Environmental issues in cross-border industrial zones;<sup>119</sup>
- The powers of different functions (Harbour Master) at cross-border ports;<sup>120</sup>
- Automatic recognition of professional qualifications for concrete cross-border projects (schools, hospitals, etc.);<sup>121</sup>
- Cross-border transport infrastructure, in particular public procurement rules (BGTS);
- Cross-border health services, in particular liability, equipment, diplomas, driving licences;<sup>122</sup>
- Recognition of residence permits in the context of cross-border housing operations;<sup>123</sup>
- Cross-border nature areas/agricultural practices; and<sup>124</sup>
- Cross-border spatial planning (e.g. planning of wind farms near the border).<sup>125</sup>

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<sup>116</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, p. 128.

<sup>117</sup> See ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - Project Phase 1, 9 November 2018, pp. 106-110.

<sup>118</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, p. 107.

<sup>119</sup> Benelux Convention on nature conservation and landscape protection; Benelux-Decision on the 'harmonisation of policy principles and instruments'.

<sup>120</sup> The Protocol on Internal Market Barriers, added to the Benelux Treaty, gives the Committee of Ministers the power to authorise the removal of all sorts of obstacles by means of a Benelux Decision.

<sup>121</sup> Protocol on Internal Market Barriers, added to the Benelux Treaty Benelux Treaty (e.g. the 'Taxi Decision' M (1971) 52).

<sup>122</sup> E.g. the Benelux 'Ambulance Decisions' M(2009) 8.

<sup>123</sup> Benelux Convention on the abolition of customs checks on individuals.

<sup>124</sup> Benelux Convention on nature conservation and landscape protection.

<sup>125</sup> Benelux Convention on nature conservation and landscape protection guidelines for cross-border consultation on spatial planning.

Table 4: Possible adaptation of legislation based on the European Cross-Border Mechanism, assessed per cross-border project (source: ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, pp. 106-110).

Cross-border project	Adaptation of legislation: legislation of Member State A applied in the territory of Member State B	Application of existing Benelux cooperation instruments	Application of the European Cross-Border Mechanism
Cross-border industrial zone	Income tax legislation for employees	No	No
	Environmental legislation (e.g. noise pollution)	Yes	Yes
	Construction standards/fire safety regulations	No	Yes
Establishment of a cross-border port (human resource management)	Powers of different positions (harbourmaster, maritime pilots)	Yes	Yes
Recognition of professional qualifications	Automatic recognition of professional qualifications for concrete cross-border projects (schools, hospitals, etc.)	Yes	Yes
Retirement	Retirement age (legislation of last State of employment)	No	No
Cross-border transport infrastructure	Application of technical standards	No	Yes
	Public procurement rules	Yes	Yes
Cross-border health services	Liability, equipment, diplomas, driving licences	Yes	Yes
	Payments for health services	In principle, no	In principle, no
	Notification of any diseases	No	In principle, for new employees in cross-border employment
Cross-border language requirements	Derogation from national rules on language qualifications with regard to access to universities/national diplomas	No	In principle, yes, for language requirements laid down in national/regional legislation. In principle, no if these same requirements are actually imposed directly by universities
Cross-border migration projects	Recognition of residence permits in the context of cross-border housing operations (for students or asylum seekers from third countries)	Yes	In principle, no (cross-border housing projects do not address the future users of the housing (i.e. migrants) in these cases)
Cross-border agriculture and nature conservation	Cross-border nature areas or agricultural practices	Yes	Yes
Cross-border spatial planning	Planning of wind farms close to the border (i.e. legal provisions on noise and distances from houses)	Yes	Yes

Therefore, these cross-border projects do not really need the EU's envisaged cross-border mechanism. It should be noted, however, that the Benelux solution to border obstacles can only function on the

basis of existing treaties and conventions within the framework of the Benelux Union Treaty.<sup>126</sup> At present, there is no horizontal legal instrument ('mechanism') that allows for legal adaptations in cross-border contexts outside those sectoral agreements.<sup>127</sup> The analysis (see Table 4 above) shows that Benelux cooperation instruments do not apply, *inter alia*, to tax matters – which are solely regulated by intergovernmental agreements and never by any decision of the Committee of Ministers; construction standards/fire safety provisions; technical standards for cross-border transport infrastructure; and problems concerning retirement age.

The ECBM can provide added value in resolving obstacles for which the current Benelux instruments fail to offer a solution, i.e. when no specific Benelux instrument is applicable. The ECBM might offer solutions for:

- The cross-border business park: by allowing for the application of certain construction standards or fire safety provisions of Member State A within the territory of Member State B;
- Cross-border transport infrastructure, by applying the technical standards of Member State A within the territory of Member State B;
- Cross-border health services, by applying the legislation of Member State A on the notification of diseases to cross-border workers within the territory of Member State B; and
- Cross-border language proficiency, by allowing for derogations from national rules on language qualifications regarding access to universities or binational diplomas in the context of cross-border projects.

The added value of the ECBM for the existing cooperation structures in the Benelux area, in particular those in the border regions of Belgium (Flanders) and the Netherlands, might lie in the creation of an additional (horizontal) 'Benelux mechanism' that would represent the implementation of the EU mechanism at Benelux level. Such a tailored mechanism for the Benelux area could, through territorial cooperation, provide tailored solutions to border obstacles in cross-border projects.<sup>128</sup> It might lead to a new, streamlined and clear scheduling and application procedure for stakeholder-initiators who face border obstacles when setting up cross-border projects. A horizontal cross-border mechanism would encourage Member States to properly define the initiators, the addressees of the requests and the relevant timetables, also for the existing national cooperation instruments.

## 7. Recommendations

This dossier ends with recommendations for the different levels of government (both at European and national level) concerning the ECBM, so that legal and administrative border obstacles can be resolved in a (more) efficient way.

*Contributing to the optimisation of existing cooperation instruments* – First, the implementation of the ECBM should take place within the wider debate of improving existing cross-border *governance systems* on the basis of existing cooperation instruments. The identification of specific policy areas that

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<sup>126</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, 127.

<sup>127</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - project phase 1, 9 November 2018, 127.

<sup>128</sup> ITEM, 'A Statute for Limburg? Exploring the legal and practical possibilities of interregional cross-border cooperation for the Dutch border province' Final report - Project Phase 1, 9 November 2018, 128.

currently lack a legal basis for cross-border cooperation could be placed under the authority of an existing *governance system* (e.g. the Benelux Union) or cross-border entities (e.g. the EGTC/BGTC/Anholt) within the framework of multilateral instruments (e.g. the Benelux or EU) and bilateral instruments (e.g. bilateral treaties with NRW or Lower Saxony).

The added value of the ECBM (possibly as a fallback instrument) over and above the existing instruments lies in the fact that it permits the adaptation of national/regional legislation in cross-border projects. The EU cross-border cooperation mechanism could also be used for cross-border projects that are not linked to existing legal cooperation instruments or to which the existing cooperation instruments cannot be applied. A horizontal mechanism could be developed at Benelux level as well to allow for the adaptation of national/regional legislation for cross-border projects. In addition, the Benelux could arrange for legal cross-border problems to be collected, discussed and put on the agenda more systematically and in a more institutionalised setting. One way to do so is to draw inspiration from the Nordic Council of Ministers/FMC and initiate the formation of a "European Council for Free Movement" for the Benelux. Such an organisation could complement the current Benelux governance system, in order to further cross-border cooperation and resolve border obstacles more efficiently.

*Right to submit a request to a coordination point* – The national/regional coordination points in all border regions can play a major role in handling the requests of cross-border project initiators to resolve border obstacles. Stakeholders in cross-border projects who face a border obstacle should have the right to submit their requests to the national coordination points, which must then assess the admissibility and merits of these requests on a *case-by-case basis*, even if the relevant Member State subsequently withdraws from the procedure in order to resolve the case by means other than the EU Regulation.

*National implementing legislation* – National implementing legislation is necessary to ensure effective use of the ECBM. The proposed EU Regulation grants a solid status to initiators, including clearly defined powers and obligations of the competent national authorities. The border provinces must rally behind this basic notion advanced by the envisaged Regulation. It is recommended that each Member State establishes a legal model with a tailored *governance system* to achieve the objective of resolving border obstacles in cross-border projects. Under the proposed Regulation, the Member States are required to set up a (two-tiered) mechanism for each border with a neighbouring Member State, in order to resolve legal obstacles in common border regions.

In order to implement the ECBM, Member States are advised to include in their national legislations an explicit provision allowing for certain legal derogations in certain border regions. In addition, the mechanisms created at national/regional level must be brought into line with the objectives and principles of the European (and Benelux) cross-border mechanism(s). If the EU Regulation is not adopted after all, the Explanatory Memorandum and the proposal will at least have provided clear and comprehensive guidance for the supporting Member States to mutually improve interregional cooperation. For example, the border regions between Belgium (Flanders) and Germany; the Netherlands and Germany; and Wallonia and France could cooperate more efficiently by extending the Benelux instruments. Whenever regional or national cooperation fails to resolve a certain border obstacle, a multilevel, horizontal Benelux instrument could be deployed (i.e. at Benelux level) to tackle and resolve that obstacle.

## 8. Conclusion

This dossier has examined the cross-border effects of the proposed ECBM, to be imposed through a Regulation. The EU's internal border regions make an important contribution to Europe's socio-economic wealth. The envisaged EU Regulation aims to make room for the adaptation of national/regional legislation within the framework of specific cross-border projects. In cooperation with Member States, regions and other stakeholders, the ECBM could become a tailored instrument at EU level to better exploit the potential of border regions. This mechanism seeks to contribute to the removal of border obstacles through commitments or statements to be signed by the responsible authorities, including, if necessary, amendments to national legislation. EU Member States can opt for the ECBM or use existing national methods to resolve legal border obstacles. In this way, keeping the negative effects of the continued lack of territorial, legal and administrative cohesion in border regions at a minimum will have a positive impact on the European integration process.

The ECBM will give local actors the (much-welcomed) chance to increase cross-border opportunities. It will offer stakeholders/initiators who are starting cross-border projects and are facing border obstacles a new, clear and streamlined procedure in terms of timeframe and application requirements. A horizontal cross-border mechanism would encourage Member States to properly define the initiators, addressees of the requests and the relevant timetables, including for the existing national cooperation instruments. Eventually, the border obstacles ought to be eliminated in an (at least, equally) efficient way.

In principle, the ECBM would offer less added value to the Benelux countries, with their extensive *governance systems*, than it would to other Member States. The Benelux countries already have a whole range of tailor-made and effective cross-border instruments in place. Thus, the added value of the EU cross-border mechanism for the Benelux countries and border regions lies mainly in the *incentive* that it would provide to improve the current Benelux governance system even further: after all, the Benelux area has no horizontal legal instrument to make legal amendments in cross-border contexts outside the sectoral agreements. A tailor-made horizontal Benelux mechanism could therefore complement the existing Benelux governance system. The ECBM could have a most beneficial effect in border regions where the current set of instruments is less suited to resolving border obstacles (mainly Eastern/Southern European countries/border regions) due to the absence of multilateral or multilevel cooperation. As such, it would be useful for local actors who are now inventing solutions on a case-by-case basis, in particular in border regions that lack bilateral agreements or an efficient infrastructure.

However, for the mechanism to be effective, it is highly recommended that the EU provide a clear, binding framework for Member States' self-designed, existing mechanisms. Certain aspects remain unclear (namely, the scope of the border obstacles, the roles of the actors, the expectations and powers of the coordination points, the voluntary nature of the mechanism, and its consequences for the implementation). In addition, will the relevant decisions be made by the Member States, the border regions or perhaps even at project level? What if one Member State decides to apply the cross-border mechanism, but its neighbour decides differently? Should all Member States have their own cross-border coordination points, or should they offer joint services located in border regions? All in all, the concrete added value will depend on the further clarifications and definitions provided. For this

reason, the procedure, as well as certain definitions, will need to be fleshed out further. Hopefully, this will lead to a well-outlined procedure that will be clear to stakeholders seeking to use the ECBM.

A cross-border mechanism imposed by the EU in the form of a Regulation deserves our support. The implementation of a Directive would create transposition problems for decentralised countries (e.g. Belgium/Germany) and could lead to divergent national implementing legislations that may create new obstacles themselves. The options that the Regulation proposes are innovative: while offering a choice between the use of the ECBM (through commitments or statements) or a self-designed national mechanism (as an optional scheme), the Regulation will impose direct obligations on Member States to resolve border obstacles based on legislative conflicts within a concrete timeframe. The new legal statute of the cross-border mechanism as part of a Regulation ultimately aims to make the removal of border obstacles increasingly less dependent on the goodwill of administrations and authorities at various levels and their willingness to cooperate. Initiators of cross-border projects who are hindered by obstacles arising from a lack of coordination between national legal provisions will be able to follow a specific procedure, which includes a timetable for the processing of their requests, as well as more clarity about the addressees of their respective requests (i.e. the competent authorities of the relevant Member State). This empowerment of initiators will reduce the need (and the waiting) for an agreement on both sides of the border among those seeking to remedy a mismatch in the relevant legislations. Hopefully, the Member States can also be convinced of the suitability of the European Cross-Border Mechanism.

ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise and Innovation on Demographic Changes (NEIMED), Zuyd Hogeschool, the city of Maastricht, the Meuse-Rhine Euregion (EMR) and the (Dutch) Province of Limburg.

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