

ITEM Reflection: Advice Administrative working group on border barriers

'Not adapt, but deviate'



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Maastricht University

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ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise on Demographic Changes (NEIMED), Zuyd University of Applied Sciences, the City of Maastricht, the Euregio Meuse-Rhine (EMR), and the Dutch Province of Limburg.



On 20 October 2020, the report '[Not adapt, but deviate](#)' of the Administrative Working Group on Border Barriers was delivered, which was published a little later with the parliamentary letter '[Progress on Cross-Border Cooperation](#)' in December 2020. The Administrative Working Group was asked by the Flemish and Dutch governments in 2019 to develop an approach to border barriers resulting from differences in laws and regulations. The concrete reason for this was the merger of the ports in Terneuzen and Ghent to form the cross-border North Sea Port. The basis of the administrative working group was the [inventory](#) of cross-border bottlenecks for North Sea Port carried out by ITEM on behalf of the Ministry of the Interior and Kingdom Relations (BZK) and the Province of Zeeland. Border obstacles can result from differences in regulations and procedures between the two sides of the border, which can occur in almost any area. There is a certain paradox here: border obstacles increase or become more apparent, as cross-border interactions and interconnection increase.

The Flemish-Dutch summit in Middelburg in November 2018 agreed to initiate a joint approach.¹ Removing border barriers is a joint priority in political agendas², as stated in the several joint declarations with the most recent in April 2022.³ Removing border barriers is of great importance to avoid hampering economic and social activities, which tend to be cross-border in border regions, and may result in border regions becoming peripheral. In addition, it ensures the realisation of welfare gains and synergy effects.

The question of how to realise a joint approach was addressed by the administrative working group. In the process, recommendations were made regarding instruments and governance (process and organisation). In this paper, the expertise centre ITEM highlights and reflects on some key elements of the reports.

The methodology: not adapt, but deviate

Border barriers come in all kinds and variations. The administrative working group therefore first notes that there is no single approach or solution. "*The common method in dealing with these differences is to adapt, unify or integrate (regulations) laws and regulations between member states, or to declare the regulations in force equivalent despite differences (Cassis de Dijon)*.", said the administrative working group.⁴ However, where harmonisation is adequate for differences that significantly affect the national economy as a whole or cross-border traffic, the political will and appropriateness of harmonisation will diminish for more regional cross-border issues. In that case, targeted and specific derogations from existing rules fit the bill as a more effective and proportionate solution. This diversity means that time and expertise must be invested for each border barrier to find the most appropriate solution.

The idea of targeted derogation is not entirely new. In 2018, the European Commission proposed a regulation on a mechanism to remove legal and administrative barriers in a cross-border context (the so-called 'European Cross-Border Mechanism'; ECBM⁵). On the ECBM, ITEM prepared a [Cross-Border Impact Assessment](#) in 2019. The ECBM aims to enable targeted 'project-by-project' resolution of administrative and legal bottlenecks by designating the legal provisions of one

¹ Parliamentary Papers II 2020-2021, 32851, no 53

² In this context, see also the Dutch coalition agreement: <https://www.rijksoverheid.nl/documenten/publicaties/2017/10/10/regeerakkoord-2017-vertrouwen-in-de-toekomst>. Page 47: The government is working on removing obstacles that people experience in border regions. Together with German and Belgian authorities, especially the Länder of North Rhine-Westphalia, Lower Saxony and Flanders, the main bottlenecks in the fields of infrastructure and social affairs and employment will be tackled.

³ "We are therefore committed to removing border barriers or preventing new ones. "<https://www.rijksoverheid.nl/documenten/diplomatieke-verklaringen/2022/04/19/thalassa-top-slotverklaring>

⁴ Administrative working group, p. 10

⁵ COM/2018/373 final - 2018/0198

member state as applicable. However, the proposal was not favourably received by both the Flemish and Dutch governments and is also blocked by the Council in further discussion. The Council's main criticism is the proportionality of the proposal. On the question to what extent the proposal could be beneficial in removing border obstacles in border regions, the [b-solutions initiative](#) focuses. The b-solutions initiative uses annual calls to collect border obstacles, which are then analysed by experts.⁶ An integral part of the analysis is the theoretical assessment of whether the ECBM would add value, if adopted, in resolving the border barrier.

Already the Benelux Union instruments offer some possibilities in the context of 'deviation', in particular the possibility to make binding and directly effective decisions by Decision on the implementation of a Treaty. Relevant Decisions, which the administrative working group also named, are, for example, M(2009)8 & M(2014)1 that allow ambulances to be deployed across borders and deviate with regard to national rules on flashing lights and sirens and qualifications of ambulance staff. Another example is the Albert knot, where M(2017)15 regulates noise mitigation only for this cross-border business park. A decision, however, must be based on a framework agreement or treaty that empowers the Benelux Committee of Ministers to give further elaboration via decisions.

These are solutions under the 'don't adapt, but deviate' methodology to which the administrative working group refers. It also endorses the administrative working group's conclusion that this methodology is particularly promising where it concerns private activities that have to comply with public rules and requirements. It seems less suitable where public or administrative services are concerned, even if they are not performed in public service (e.g. healthcare). The methodology further seems to require that an accurate overarching legal or administrative framework exists that provides for the possibility of 'deviation'.

The methodology also comes with a *modus operandi*. First and foremost, it involves describing each boundary obstacle clearly and concretely. What exactly is the problem and what rules are involved? The impact must also be clear; an impact analysis must show who is involved and how extensive the effect is. On the solution side, an inventory must be made of which parties are involved and whether instruments are available. Finally, proportionality (benefits versus costs) should have been assessed. A schematic approach as a roadmap, taken from the report, is shown in the annex.

The 'mechanism': multilevel governance

This process also necessitates a fixed and functional structure. So does the other 'track' examined besides the general legal differences: the (different) procedures, decision-making and consideration frameworks in cross-border projects. This involves a good connection between decentralised and central levels⁷, in which decentralised authorities and authorities in the border region concretise, analyse and prioritise border obstacles. Nevertheless, substantive involvement of the national or central level is essential to assist and resolve the issues.

This requires its own organisation, using existing structures such as the Flemish-Dutch summit and the involvement of the various authorities in it. However, there is a lack of a coherent system with power, whereby bottlenecks are actually put on the table of the policy-responsible authorities and line departments and vice versa. To this end, the recommendations are:

⁶ In recent years, ITEM has also analysed several case studies, most recently on [cross-border internships](#), cross-border [workers working from home](#), [cross-border healthcare](#), [tram staff competences](#) and the [enclaves in Baarle](#).

⁷ See also in this context previous posts by ITEM as: <https://www.maastrichtuniversity.nl/nl/blog/2021/10/grensbewoner-centraal-en-grensbestuurder-meer-positie>

A '**liaison link**' -with authority between regional or local cross-border cooperation structures and central (line) departments to put obstacles on the agenda and discuss solutions. Regional or local authorities and structures should be responsible for sorting out and concretising bottlenecks. A connecting link such as the administrative working group, in which involved administrations/governments participate, can provide the bridge to the national specialist departments. Relevant border obstacles can be put on the agenda here.

A **professional secretariat** with sufficient manpower and resources to identify obstacles, analyse possible solutions and liaise with departments or governments with policy responsibility for solution directions. As a hub, the secretariat must do the labour-intensive and often specialised work to feed the governance structure with sufficient content. It is the partner for the different stakeholders to provide content in the different steps of the process and to participate in the linking mechanism. This therefore involves the three core values to which the ITEM expertise centre also aspires: knowledge - connecting - collaborating.

Establish a **mechanism** for monitoring progress, for scaling up in case of deadlock or for decision in case of 'knots' and the official authority to take 'dossiers' to the next level if necessary.

- Regular official administrative border consultation in which the border regions, the Flemish government, the central government and the federal government are represented at high official level for the purpose of selecting files, discussing progress and identifying deadlocks and 'knots' (the administrative working group)
- Establish at least once a year a political-administrative consultation between the ministers responsible for cross-border cooperation to confirm the choice of 'dossiers' and cross-border agenda
- Attention during Flemish-Dutch summit once every two years on progress and results.

The above requires a willingness to resolve border bottlenecks for effective scaling-up.

Coherence: border barriers and border effects

The administrative working group further recommends that impacts in border regions should also be taken into account where possible when new laws and regulations are created. As of 2020, the Netherlands has the mandatory quality requirement [Border effects](#) within the Integral Assessment Framework (IAK). This means that plans for new or changes in policy and laws and regulations must take border effects into account. To support this, the ITEM expertise centre has drawn up a Guideline on Border Effects, commissioned by the Ministry of the Interior and Kingdom Relations. This makes the border effects methodology developed by ITEM practically usable for policymakers and legislative lawyers in The Hague.

Border Effects and Border Barriers also have an important similarity in methodology and process. For Border Effects, too, the contact between central and decentralised authorities should be well organised and substantive support from an expertise centre such as ITEM is desirable. A flow chart of Border Effects, as described in the Guide, is included as an appendix.

Finally, Border Effects and Border Barriers are also closely intertwined in this sense under the motto 'better prevention than cure'. An adequate application of Border Effects at the front end (*ex ante*) may prevent the casuistry of Border Barriers afterwards (*ex post*).

Benelux Union, Treaty of Aachen vs Norden: Nordic Freedom of Movement Council

The Benelux Union and its capabilities are rightly highlighted in the report. Several ITEM reports also address this.⁸ Nevertheless, it is also relevant to critically address gaps and learn from other structures and instruments, such as the Aachen Treaty between France and Germany and Nordic cooperation.

Benelux Union

In 2008, the Benelux Treaty was renewed, establishing the Benelux Union. The main objectives of cooperation concern the continuation and further development of economic union, including those under the previous treaty⁹, and sustainable development and cooperation in justice and home affairs.¹⁰ To this end, there are four legal instruments available to the Committee of Ministers:

1. Decision: this allows implementation of provisions of the Benelux Treaty. These are binding on the member states. It is therefore important that they are based on a Treaty, which assigns further implementation to the Committee;
2. Agreement: legally binding agreements between the three member states and must be implemented in national legislation;
3. Recommendations: recommendation for the benefit of the functioning of Benelux. These have no legally binding effect, but are more of an agreement and moral obligation to bring national legislation into line;
4. Directives: binding directives to the Benelux Council and the General Secretariat.

Specifically with regard to cross-border cooperation, the Benelux Convention on cross-border and inter-territorial cooperation provides a basis to facilitate and formalise cooperation. Here, project partners can decide for themselves what legal form their cooperation should take, it involves:

- The Benelux Grouping of Territorial Cooperation (BGTS; a legal cross-border entity);
- The joint body;
- The administrative appointment.

For all legal instruments, it applies only over the policy areas in which the Benelux Union has acquired competence by the Treaty partners. The principle that the much cited Decision as an instrument must find its legal basis in an umbrella treaty endorses this. This limits the applicability of the Decision instrument in terms of domains and policy areas. What would be interesting in this context would be whether an umbrella agreement or treaty could be agreed that would provide the legal possibility to derogate in broader terms.

Another aspect, not so much mentioned, is the possibility of the Benelux Union as a multilateral platform for coordination and resolution of border barriers. In the various institutions and working groups of the Benelux Union, member states already meet on a regular basis. A recommendation would be to further explore how the envisaged governance structure can be interwoven with that of the Benelux Union. Here the Benelux Secretariat General can play an important role in thinking along about solution directions within the possibilities of the Benelux Union and putting them on the agenda. An additional aspect is the possibility of rolling out the system to all land borders of the Netherlands via the Benelux Union and its cooperation with Germany.¹¹ To effectively deal with all border barriers, an eventual linking of the system to the German side should also be possible. Existing structures such as the Borderland Conference should be examined to see how they can relate to each other.

⁸ See, for example, [Statute for Limburg](#), [North Sea Port Inventory](#), [ECBM border impact file](#) and the various b-solution cases.

⁹ These are the free movement of people, goods, capital and services and the Union also includes coordination of economic, financial and social policies; and a common trade policy with other countries.

¹⁰ Article 2(2) of the Benelux Treaty.

¹¹ The German coalition agreement seeks better cross-border cooperation for the benefit of border regions. This explicitly mentions exception possibilities - so-called 'Experimentierklauseln'.

Treaty of Aachen

Regarding legal instruments and structures through an umbrella treaty, the Aachen Convention¹² can be mentioned as an example. Chapter four of the Aachen Convention has specific provisions regarding border regions and cross-border cooperation. In doing so, it firstly codifies the political declaration that cross-border cooperation and the removal of border obstacles is an important issue to which the two governments are committed (Article 13(1)). As an instrument, the second paragraph provides that local and regional authorities are given sufficient powers and resources, and if insufficient, the treaty provision facilitates that member states can introduce adjustments or *derogations*. The Treaty thus provides a legal basis for derogations. Finally, the Treaty establishes a committee consisting of stakeholders such as national, regional and local authorities, members of parliament and euro districts. The committee should identify priority projects, monitor developments in border regions, make proposals to governments and analyse the impact of new regulations on border regions (Article 14).

Nordic cooperation

Regarding governance, much can be learned from the Nordic Council, also a long-standing cross-border cooperation between Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland.¹³ Central to this cooperation are the Nordic Council of Ministers and the Nordic Council. A comparison and deeper study of 'best practices' between Nordic cooperation and the Benelux Union is very valuable. For more information on the various aspects, see, for example, the ITEM report '[Statute for Limburg](#)'.

A highly relevant part of Nordic cooperation is the [Freedom of Movement Council](#) (*Gränhinderrådet; FMC*), which falls under the Nordic Council of Ministers. At the end of June 2022, ITEM organised a working visit with the Province of Zeeland, Benelux Secretariat General and Ministry of Interior and Kingdom Relations to the FMC to learn and exchange on solving and removing border obstacles. The FMC was established in 2014 on joint initiative and consists of 10 members. Here, each country and autonomous region is represented by one member. These members are politically elected but independent. They should have an adequate political, professional and administrative background, with good networks in national administrations. In addition to the national representatives, the Secretary-General of the Nordic Council of Ministers and a representative of the Nordic Council are members. The FMC's core tasks are (1) removing current border obstacles, (2) preventing new border obstacles, and (3) promoting and improving information. The FMC identifies, analyses, prioritises border obstacles and proposes solution directions. There is an annual cycle for this, with the FMC starting annually with a kick-off and thereby setting an agenda for the year considering existing and newly prioritised obstacles as well as considering priorities under the Nordic Council of Ministers and current events. The FMC meets three to four times a year, or as necessary. In doing so, the FMC has political support and willingness with a mandate¹⁴ and the explicit intention to 'become the most sustainable and integrated region in the world'.

Crucial to this are the Secretariat and the Free Movement Database¹⁵. Together, an established mechanism exists to remove border barriers. The Secretariat supports the FMC and coordinates its work, organises meetings. The Secretariat is also substantively responsible for the Free Movement Database, in which border obstacles are recorded, analysed, prioritised and monitored. The border obstacle process and the Database are highly elaborated. Regional and local partners, especially border information points and regional committees, are responsible for reporting border obstacles.

¹² <https://www.diplomatie.gouv.fr/en/country-files/germany/france-and-germany/franco-german-treaty-of-aachen/>

¹³ Norden.org

¹⁴ Recently renewed for period 2022-2024: <https://www.norden.org/en/node/69412>

¹⁵ Available at <https://www.norden.org/en/border-database>

The secretariat assesses the border obstacles on several aspects and if suitable, the border obstacle is notified as such and further analysed. For this purpose, the secretariat may consult national authorities or request a study if necessary. The analysed obstacle then enters the Database. Prioritisation is done by the FMC, which also plays an important role in setting the agenda with national authorities.

An annual report on border obstacles is prepared for the Nordic Council meeting. Although the resolution of obstacles is voluntary in nature, monitoring does take place. This may include deeming a border obstacle as 'unsolvable'. The third annex depicts the governance structure through a figure.

How to move forward: connect and strengthen

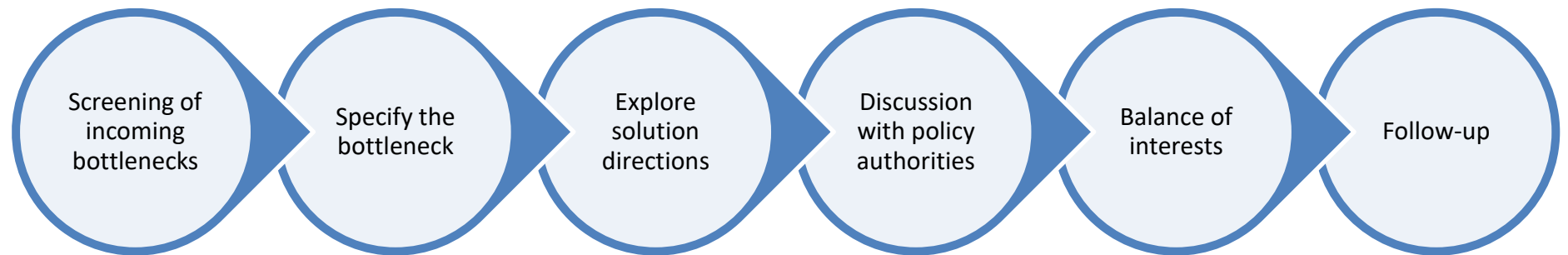
The opinion of the administrative working group provides important advice on how to resolve border obstacles more effectively. Its importance is also endorsed, as it serves not only regional but also national interests. After all, an unhindered society on and across the border increases prosperity and well-being and stimulates the quality of life in those regions. It is therefore necessary to invest in a good cross-border structure, which cannot be ad hoc but sustainable. The experiences from Nordic cooperation endorse this.

For the question of how, insights can also be gained from Nordic cooperation and the Aachen Treaty, among others. Indeed, some important elements are already available in the Dutch-Flemish cooperation. For instance, local, regional cross-border governance structures and border information points do indeed exist that can identify and suggest bottlenecks. The *Rijksheren / Commissioners of the King* are already active in prioritising themes and at ministerial level, political responsibility already exists in the Netherlands under the Minister of the Interior and Kingdom Relations.

With support, border analyses and identification, such as the FMC secretariat and the envisaged Franco-German committee, a lot of experience already exists within the ITEM centre of expertise. The ITEM expertise centre has also developed the Cross-Border Portal, which aims to present up-to-date and relevant information for cross-border cooperation and border barriers. Finally, for the proposed official administrative border consultation, important lessons can be learned from the FMC. These experiences endorse the recommendations of the administrative working group that members should be independent, but knowledgeable and experienced in the administrative and political environment, and have adequate networks in the political capitals to function as a 'link'.

Indeed, the various ingredients are in place to some extent. However, the task now is to structurally link and strengthen them with each other. This also requires investments to make the structure sustainable. With the ITEM Annual Cycle, ITEM Cross-border Portal and the expertise of the ITEM core team, ITEM is happy to contribute to this sustainability. In this sustainability, as the administrative working group concludes and the inception of the Nordic FMC and the Aachen Convention also show, a joint declaration by both governments that there is political will to reduce border barriers is needed.

Annex 1: Step-by-step methodology 'don't adapt, but deviate'



- Several bottlenecks exist when surveying governments and companies
- Shifting between bottlenecks that offer prospects and those for which a solution has too little impact or requires changes to regulations

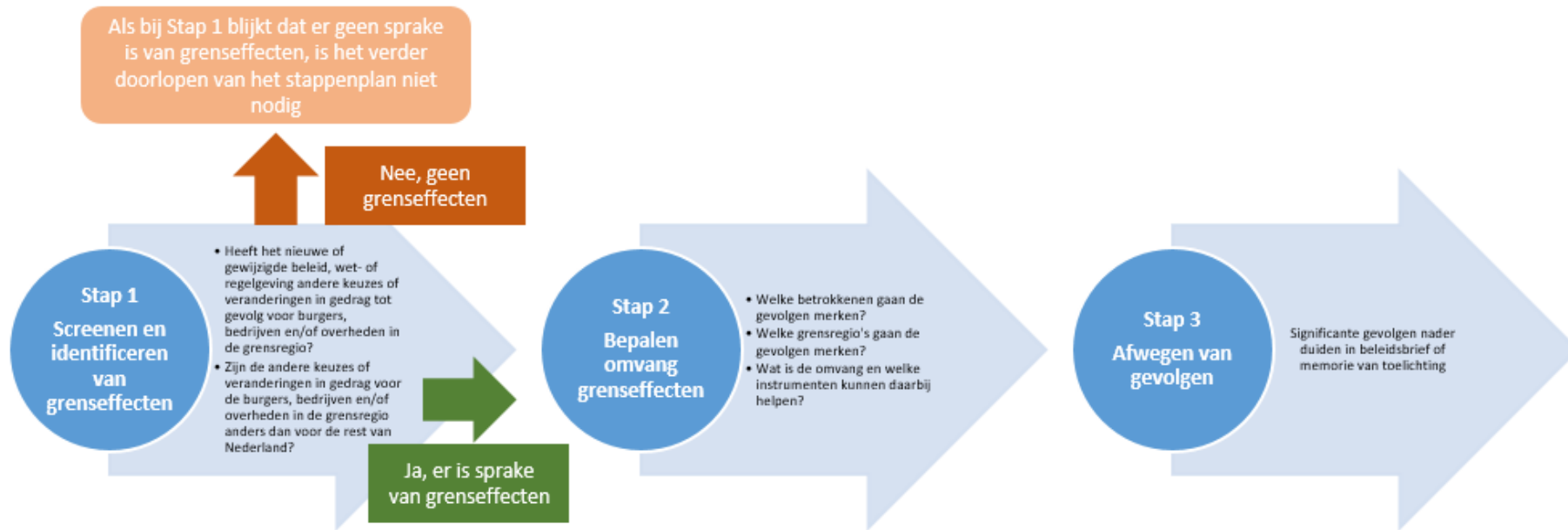
- Describe the bottleneck
- Identify which legal (treaty) provision(s) apply/are based on
- Describe who is experiencing the bottleneck (citizens, businesses, organisations, public authorities)
- Determine the scope/impact
- List the experts
- List the stakeholders
- List the interests

- With the help of experts
- Using existing tools

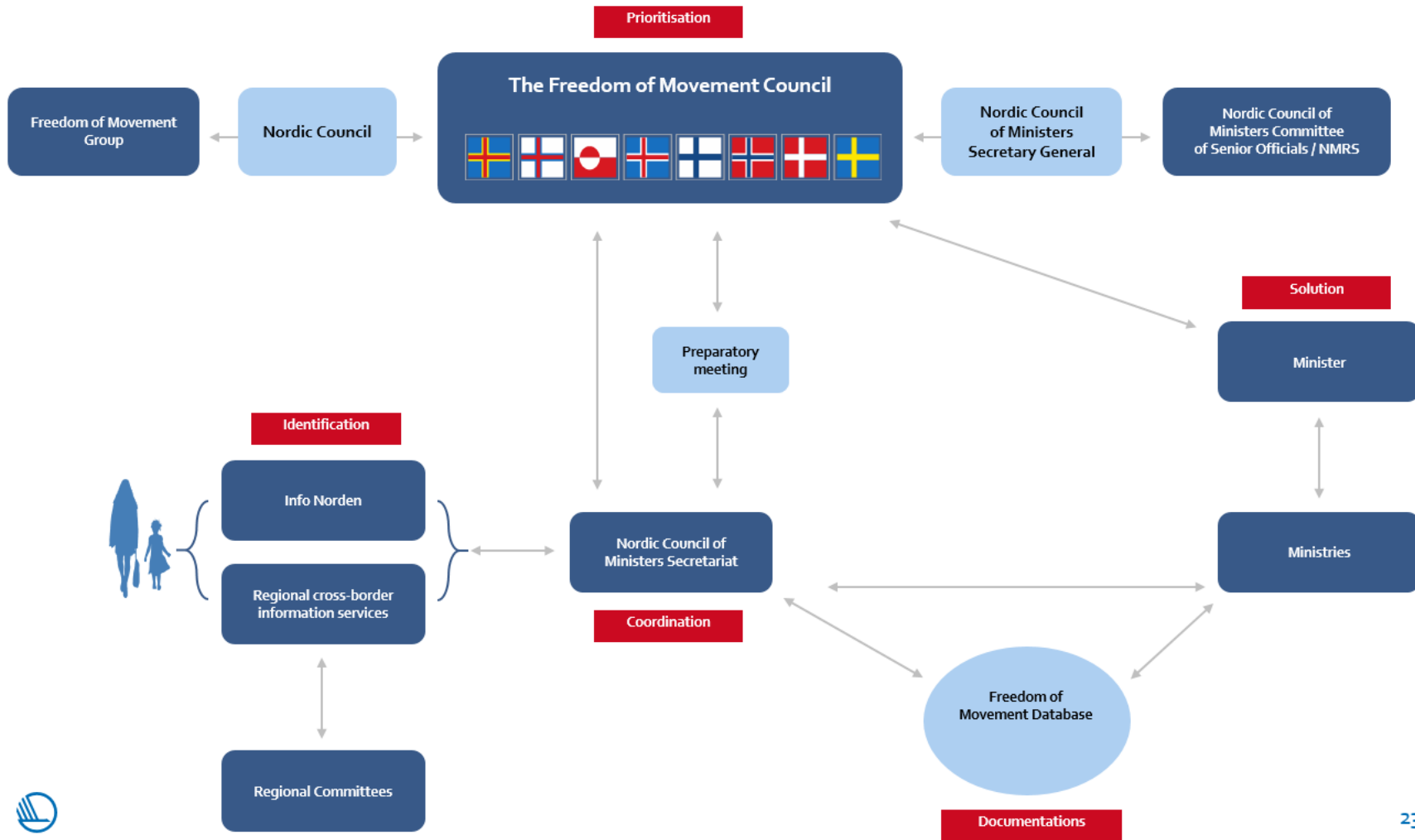
Balance of interests

Follow-up

Annex 2: Flow chart Border effects (only in Dutch available)



Annex 3: Governance structure Freedom of Movement Council - taken from presentation by Petri Suopanki





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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 Euregio (EMR) and the (Dutch) Province of Limburg.

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