Cross-border cooperation International conference in Dubrovnik
25 May 2018

Presentation by Mr Alfonso Zardi,
Council of Europe expert
Consultant in European affairs

Council of Europe legal instruments on CBC: are they useful and still relevant?

Minister, distinguished representatives of Council of Europe bodies and Secretariat, of local authorities, of associations, ladies and gentlemen.

I am sincerely honored to be with you today, in the beautiful city of Dubrovnik, to discuss cross-border cooperation in the light of the Council of Europe's relevant legal instruments and the experience of their implementation. I will do it on the basis of my experience and with a view to raising the awareness among political decision-makers, at both European and national level, of the importance of sustaining concrete action at local level with adequate legal framework and capacity building initiatives.

I am particularly appreciative of the presence among us of a member of the Croatian government – Croatia holding the rotating chairmanship of the Committee of Ministers of the Council of Europe – since this will allow for the gist of our discussions and conclusions to be brought to the attention of the Committee of Ministers, possibly leading to further action within the Council of Europe.

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I would like to start my presentation today by comparing two maps. The first one is a map produced by MOT, the French body that assists local authorities in setting up cross-border and inter-territorial cooperation initiatives and whose director-general I salute, showing all types of CBC or ITC in Europe. (2) This is very eloquent: almost no corner of Europe is void of such a co-operation.

My second document, to be seen as a sort of mirroring narrative, is also a map, showing the spread of European States' accession to Council of Europe's legal instruments promoting CBC and ITC. (3) The lightest area

represents the States that have ratified the seminal Madrid Outline Convention and it covers almost all Europe. A narrower area covers the states that have ratified the Additional, plus the Second protocol, and the darkest area, a small one, shows the States that have also accepted Protocol No 3.

Both maps convey the image of Europe as a land where cross-border cooperation and dialogue flourish and have become, over time, quite common.

The picture would be different if we should eliminate, from the first map, the co-operation initiatives and bodies prompted by and/or financed through EU's structural funds, namely the European Groupings of Territorial Cooperation, also known as EGTCs.

I will now show you a table of ratifications where you can see nose-to-nose the countries that have implemented EU Regulation No 1082 on EGTCs and those that have ratified Protocol No 3 to the Madrid Convention on Euro-regional Co-operation Groupings, or ECGs. (4) Both EGTCs and ECGs have the same purpose and very similar legal features, to be found respectively in Regulation 1082/2006, as modified by Regulation 1302/2013, and Protocol No 3 of 2009. But while Regulation 1082 covers all EU member States following its adoption by the European Parliament and the Council, Protocol No 3 has to be ratified by Council of Europe member States (parties to the Madrid Convention and not necessarily to the previous two protocols) – and this has only happened in seven States so far.

One question would then be: is Protocol No 3 really *necessary* for EU states, or is it aimed primarily at non-EU member states? Significantly, of the seven States bound by it, two, the Russian Federation and Ukraine, are non-EU States.

I will provide my answer to this question, but let's first discuss the Madrid convention, the "mother" of all conventions and regulations pertaining to cross-border co-operation in Europe.

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The Madrid Outline Convention was opened for signature in 1980. The opening for signature of a convention is the culmination of a long diplomatic negotiation which, in the case of the MOC, started in 1975.

Dates are important: they point a specific moment in history when the need was felt to "free" so to speak local authorities from exaggerated or unnecessary constraints and let cooperation develop across the borders from the bottom, at local authorities' level, and not just at the top, between sovereign states. The Europe that was "in the making" – having completed the customs union and abolished internal barriers to trade ahead of the Treaty of Rome's timescale – was set to win popular support and show that it was delivering freedom of movement and economic prosperity to all its citizens, irrespective of borders. This was also the time of repeated claims that the European Parliament be elected, at last, by universal suffrage – also to happen in 1979.

There was a symbolic pretense in the flattering of borders, at least as far the co-operation between neighboring local authorities was concerned: after all, borders had been drawn and redrawn across Europe following murderous wars so many times that they had also become not only legally intangible but morally inviolable (1975 was also the year of the fateful CSCE conference in Helsinki).

So the convention was drawn up with the support of the European ministers responsible for local self-government and adopted by the Committee of Ministers, which represents the foreign ministries.

(5, 6) The Madrid convention did not grant local authorities the "right" to engage in cross-border co-operation but rather requested the contracting parties, the states, to "facilitate and foster" it. It surrounded this modest engagement with reservations and constraints, which the Parties could use, such as the right of a State to exclude some categories of local authorities from CBC, or to grant this possibility only to municipalities falling within a stretch of land along the border, or the right for the states to conclude bilateral agreements with the neighboring states before letting their respective local authorities to start, at last, co-operating.

Notwithstanding these restrictions – fully understandable from the point of views of central States – the Madrid convention proved very successful: States not only ratified it in earnest (10 ratifications in the first 6 years, at a

time when the Council of Europe membership was 21 States) but also used very sparingly the possibilities they had to exclude entities or limit territorial strips. As to the conclusion of bilateral or multilateral conventions (I would call them: *enabling* conventions) it happened, but with a view to enhancing and facilitating the cooperation as defined in the MOC, not to restricting it.

This is the case of the first BENELUX convention and the Isselburg-Anholt and Mainz treaties which in turn inspired the Additional protocol to the Madrid convention on the legal status of CBC bodies, which again sparked a new wave of bilateral and multilateral treaties, namely the Bayonne, Karlsruhe, Brussels and Valencia treaties, containing practical and concrete modalities for effective cross-border initiatives and bodies.

In fact, only the three bilateral treaties concluded between Italy and France, Switzerland and Austria (all in 1993) were at the time examples of "precautionary" treaties carefully framing local authorities' access to cross border co-operation. Significantly, Italy never concluded a similar treaty with its fourth neighbor, Yugoslavia nor, after 1993, with Slovenia. (For the sake of completeness, also Azerbaijan, Georgia, Malta, Romania, Serbia and Slovakia made similar declarations at the time of their ratification).

In one respect the Madrid convention did not succeed as its authors had hoped: the model agreements drawn up by the Council of Europe to serve as source of inspiration for local authorities and appended to the Convention or added afterwards thereto remained mostly unused and were abandoned.

The MOC therefore proved to be a *litmus* test of trust between local authorities and the State, and a proving ground of the former's capability to engage in CBC while respecting the State's foreign policy obligations. In a matter of years, what had been envisaged as a "facility" granted to local authorities became a "right" to enter into CBC cooperation and agreements, enshrined in both the European Charter of Local Self-government (1985) and the Additional protocol (1995).

My first conclusion is therefore that the MOC has been a sort of prophetic document that has been used enthusiastically I would say, as witnessed by the blossoming of initiatives from twinning of cities to structured dialogue and cooperation which is impossible to number. The Council of Europe started collecting such information – also in the light of the obligation for the

States to inform the Secretary General about such initiatives – but had to give up, the data being too numerous and the States losing control over them.

This map, produced recently by the Association of European Border Regions, whose director general is also with us today, shows in a quite eloquent way the extension today of cross-border initiatives. (7) If the Madrid convention proved so successful and also, so to speak, so innocuous for the sovereignty of the States, why have some Council of Europe members not yet ratified it? It is not my intention to deal with the reasons each State has for not doing it, but I would recall that for some "recent" – i.e. post 1989 – member States ratifying the Madrid convention is an accession commitment still to be honored.

Lack of ratification does not prevent local authorities and communities from effectively cooperating across borders, including in this region. But ratification would provide legal security for municipalities and – for states – open the way to the acceptance and ratification of the subsequent protocols – whose practical scope and legal ambitions are equally important.

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Protocol No 2 is, so to speak, the least contentious, in as much as it equates cooperation between non-adjacent local authorities (the so called "inter-territorial" cooperation) to cooperation between local authorities having a border in common (the so called "transfrontier cooperation" in the Council of Europe parlance). In the EU terminology, they are called respectively "cross-border" and "interregional" cooperation.

(8, 9) Yet its acceptance record is not particularly brilliant and I would say that there is scope for additional ratifications.

Protocol No 3 is however another story which, without consuming too much of your time, is worth recalling.

The story begins in the early years of last decade – XXIst century's first – when in response to the request of many a Central and Eastern European State the possibility of drawing up a "single European statute" for "Euroregions" was debated. The roots of the problem are manifold and lay

in the inadequacy of both Additional Protocol and domestic legislation in regard of the legal nature of such Euroregions.

(10, 11) The Additional protocol allows for the establishment of cross-border (or even inter-territorial) cooperation *bodies* with or without legal personality and whose legal capacity and operations will be determined by the law of the State where the body has its headquarters: it could be public law or private law, and have powers linked to exercise of public authority or not.

These distinctions are not unknown in the legal order of Central and Eastern European member states but their rule-books differ a lot and are often defective or short of available options when it comes to choosing the "best" headquarter *State*.

Hence the invitation addressed to the Council of Europe to draw up a sort of "single uniform statute" for cross-border cooperation bodies that would be adopted as such and enter into force *ne varietur* in all the States interested thus avoiding the lengthy processes of amending Civil codes and other pieces of legislation in each of them.

The Council of Europe started working on a new treaty of this sort in July 2004, shortly before the European Commission tabled its proposal for a regulation – later to become Regulation 1082 – whose content and purpose were to create by EU law a new type of cross-border cooperation body (something that had never existed before).

Did the European Commission wish to encroach upon a territory where the Council of Europe had exclusive initiative so far, given the new competences granted to the Union by the Lisbon treaty? It is possible, and as it is customary in the EU law-making process, once one proposal is launched it almost inevitably goes to its end. Subject to a number of changes and additions – in particular the change of name, from "transfrontier" to "territorial" cooperation – the regulation was adopted before the Council of Europe had finished discussing its draft convention.

The latter therefore had to abandon its pretence to draw up a "single uniform statute" for Euroregions – after all, there was now one, for the EU member States – and refocused on a shorter text (with added value) and a detailed appendix with all the features of the "uniform statute". The latter

was produced in 2011 and updated in 2013; the former became Protocol No 3 in 2009 in Utrecht, and entered into force in 2013 too.

(12, 13) The existence of two similar but not identical instruments reflects on the one side the political power of the EU that "wanted" its Regulation and got it and, on the other, the counterweight on the Council of Europe of non-EU states that also wanted a tool applicable to them and between them and EU States, and not too different from the EU regulation.

In fact, while the "core" provisions on organs, supervision, budgets, staff, auditing, etc. are almost identical, the ECG has a much broader scope than the EGTC, anchored in local authorities' competences. The latter must retain the majority of voting rights in the ECG or else be dissolved. Also, territorial authorities of a non-Party State may take part in the setting up of an ECG or accede to it, provided this State has a common border with the State where the headquarters are located.

And last but not least, territorial authorities in the various member States need not have identical functions according to domestic legislation in order to become members of an ECG. It suffices that the ECG be given tasks that are "compatible" with the powers of the local authorities that are members thereof.

Once these differences are highlighted, it looks as if the body to be set up for the purpose of meeting the goals or the mission of Regulation 1082/2006 can well be an ECG, in other words, a body whose legal features are those of Protocol No 3, which are *broader* not narrower than those of an EGTC and are therefore fully compatible with Regulation 1082/2006. Since the authority entitled to "approve" the EGTC is the State, not the European Commission, it may well be that it prefers that the requirements for (the features of) an EGTC follow those of an ECG. Just two examples:

- The use of languages in an ECG is broader and more in conformity with the requirements of multi-lingual states (and neighbors) than the EGTC

- In case of litigation with a third party, an ECG can and sometimes must have recourse to out-of-court arbitration, which is legally more secure and faster than in-court litigation.

My conclusion would therefore be that for both EU and non-EU states, the ratification of Protocol No 3 would not be superfluous in comparison to the EGTC but would expand the choice of legal solutions available to local authorities.

Let me insist on another point: for the adoption of Protocol No 3 only the previous ratification of the Madrid convention is necessary, not that of any of the other two protocols. This is important, because the solutions of the Additional Protocol are complicated in practice. But you don't need to be a party to the Additional Protocol (nor to denounce it) in order to accede to Protocol No 3.

And finally, for States not yet members of the EU, Protocol No 3 would be an excellent testing ground for the establishment and operation of co-operation bodies that could, upon accession to the EU, later acquire the legal status and capacity also of an EGTC. Conversely, for States no longer belonging in the EU (I am thinking of course of the United Kingdom), the Madrid convention and Protocol No 3 would be the only way for them to be safely anchored to cross-border (and cross-channel) cooperation with the rest of Europe.

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Let me conclude. Council of Europe legal instruments on cross-border cooperation remain, notwithstanding the passing of time and with a small reservation regarding the Additional protocol (superseded, so to speak, by the more elaborate Protocol No 3), relevant and useful. They are in competition with Regulation 1082 but at a closer look this needs not be the case.

(14) I turn now to the members of the panel whose presentations will discuss some examples of CBC in practice. Let's hope the discussions will also deal with the respective merits of the two legal instruments available and allow for a better understanding of their relevance and usefulness.