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Prospects for effective transfrontier co-operation in Europe

Governance Committee
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Summary

Frontier regions play a crucial role in European integration and cohesion. In these regions the mobility of people, goods and services, as well as the obstacles to their mobility, can be easily seen and monitored, which is why they have been referred to as laboratories of European integration.

This report follows a stock-taking conference on 'Multi-level Governance in Transfrontier Co-operation' which was co-organised by the Congress Governance Committee and the Euro-Institute on 30 May 2012 in Innsbruck, Austria. It lays down some theory behind transfrontier co-operation and how actors in this co-operation have developed a positive pragmatism to overcome the legal and administrative challenges they face.

Increasingly, borders are not seen as barriers but as a source of unused potential co-operation for citizens on either side of the border. A 360 degree perspective in territorial planning in frontier regions can lead to shared public infrastructures and services. However, to overcome the challenges of such a close co-operation, training and capacity building programmes need to be specifically tailored to meet each frontier regions' specific characteristics..

¹ L: Chamber of Local Authorities / R: Chamber of Regions
EPP/CCE: European People's Party Group in the Congress
SOC: Socialist Group
ILDG: Independent Liberal and Democratic Group
ECR: European Conservatives and Reformists Group
NR: Not registered

Prospects for effective transfrontier co-operation in Europe

RESOLUTION 363 (2013)²

1. The perception of national borders in Europe is changing. Today they are regarded less and less as barriers and obstacles and increasingly as potential sources of co-operation that can benefit citizens on either side of the border. This co-operation involves targeted collaboration between individual and institutional actors coming from different jurisdictions but located in the same transfrontier territory. The aim is to solve problems and develop synergies based on the social, economic and natural characteristics of the territory.
2. Europe is on the threshold of a transfrontier co-operation of a completely new dimension, due to its investment in territorial cohesion and a new generation of actors, who are seeking more concrete results to this co-operation. There is a new spirit of pragmatism when it comes to transfrontier issues, a practical search for joint solutions to common local problems resulting from the increasing border-crossing socioeconomic dynamics, in areas such as transportation, spatial planning, environmental protection, risk prevention, citizen's advice and health co-operation.
3. Europe's economic downturn is also generating a renewed interest in transfrontier co-operation with its potential for developing complementary fields of specialisation and sharing infrastructures with local and regional actors from the neighbouring state. There are huge potential savings to be made from such a rationalisation of resources.
4. Many of the obstacles to effective transfrontier co-operation lie in the diversity of the politico-administrative systems concerned, the technical nature of the work and the fragmentation of knowledge in this sector. Developing horizontal co-operation between partners from very different institutional and administrative cultures often entails a considerable change in traditional and deep-rooted working methods.
5. Unlocking the huge potential of effective transfrontier co-operation will require sustained capacity building and training programmes and a pooling of the existing expertise in order to co-ordinate and make the best use of research resources and to develop indicators to measure the impact of co-operation activities. The development of model legal clauses for thematic bilateral agreements could also facilitate such co-operation.
6. The Congress welcomes the entry into force on 1 March 2013 of Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euro-regional Co-operation Groupings (ECGs), and the forthcoming appendix to this treaty, which will contain practical solutions to facilitate the creation or functioning of Euro-regional Co-operation Groupings. These groupings, composed of local authorities and other public bodies, will serve to put transfrontier and inter-territorial co-operation into practice for their members,
7. The Congress believes that it has a valuable role to play in bringing together the European actors working on transfrontier co-operation issues, co-ordinating and facilitating capacity building activities, providing a forum for dialogue and exchange and assisting with the dissemination of results, ensuring that lessons are shared to the benefit of all.
8. Therefore the Congress resolves to:
 - a. organise in 2014 a conference of the main European actors working on transfrontier co-operation issues, with a view to agreeing an action plan to:
 - i. establish a pool of expertise on transfrontier co-operation issues;
 - ii. co-ordinate research in this area, including data collection and the development of indicators;

² Debated and adopted by the Congress on 30 October 2013, 2nd sitting (see Document [CG\(25\)9PROV](#) explanatory memorandum), rapporteur: Breda Pečan, Slovenia (R, SOC).

iii. develop capacity building and training programmes;

b. review the implementation of this action plan in 2017.

9. The Congress asks national associations of local and regional authorities and the national delegations to:

a. support this work and examine how to further develop transfrontier co-operation in territories within their own borders;

b. encourage the respective national authorities to sign and ratify Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euro-regional Co-operation Groupings (ECGs);

c. disseminate this Protocol and the forthcoming appendix to their members.

10. The Congress asks its Governance Committee to:

a. appoint a thematic spokesperson to follow this issue;

b. evaluate the replies from the associations and the national delegations;

c. continue to follow and to contribute to the work of the intergovernmental sector on this issue.

Prospects for effective transfrontier co-operation in Europe

EXPLANATORY MEMORANDUM

1. Introduction³

1. Border regions play an important role in the context of European integration: 40% of the European Union (EU) territory is covered by border regions and approximately 30% of the EU population lives there. Out of the 362 regions registered by the Council of Europe in its 47 member states, more than 140 are transfrontier regions.⁴ The effects of the progress of European integration can be studied here: horizontal mobility of people, goods and capital are very obvious in border regions, but so are the remaining obstacles to this horizontal mobility. This is why border regions have often been described as the laboratories of European integration.

2. Beyond this EU-wide dimension, border regions are characterised by a very specific structural situation: natural and/or socio-economic phenomena like transport, labour market, service-delivery, individual consumption, migration, criminality, pollution, commuters and leisure-time behaviour, typically have a transfrontier dimension, directly both affecting and linking two or more neighbouring states in a given border territory. These negative or positive spill-over effects of structural or everyday policy problems require a close transfrontier co-operation between those actors, which are competent and responsible for solving problems within the institutional context of the respective neighbouring state. The wide range of possible inter-institutional and problem-specific constellations in Europe's border regions, however, does not allow a uniform classification of what the characteristics of these type of regions look like: not all border regions, for instance, are isolated rural territories facing important structural problems which are ignored by the respective national government. In recent years many border regions have become important junctions of the socio-economic exchanges between the neighbouring states and their historical role as "crossing points" has been positively reinforced.

3. A common element of transfrontier regions in Europe is that transfrontier co-operation has a long tradition in the old member states of Europe, and that it is rapidly gaining significance for the new border regions, especially in the Eastern and South Eastern European regions. This history, constant changing institutional challenges and the specific preconditions have in each case led to the development of specific solutions to the respective transfrontier governance issues. In contrast to the national context, where territorial co-operation is taking place within a uniform legal, institutional and financial context, transfrontier governance is characterised by the challenges faced when two politico-administrative systems which have a distinctive legal basis and share a different degree of vertical differentiation both in terms of structure, resources and autonomy of action work together.

4. With regard to terminology, this report is based on the following definitions:

- Transfrontier territories are spaces that cover and interlink jurisdictions belonging to different neighbouring states. They are constructed by the social, economic or cultural interactions between inhabitants or institutions that cross and transcend the frontiers represented by these jurisdictions. Their limits are not necessarily determined by administrative or political boundaries but rather by the scope and the structure of these functional interactions themselves (principle of variable geometry). Transfrontier territories are therefore not regions in the sense of territorial units, equipped with administrative and or, legal power, representing the decentralised or de-concentrated politico-administrative sub-level of a (national) jurisdiction, but rather the results of a social construction.
- Transfrontier co-operation is the explicit and targeted collaboration between individual or institutional actors coming from different jurisdictions but located in the same transfrontier territory, with the aim of solving a problem or developing a potential which is related to the social, economic or natural characteristics of the transfrontier territory.

³ Prepared with the contribution of Joachim BECK, Director of the Euro-Institute, Kehl, Germany (www.euroinstitut.org).

⁴ Ricq, Ch. 2006: *Handbook of transfrontier co-operation*, Strasbourg (Council of Europe)

5. When speaking of local or regional actors, this report refers to the local or regional politico-administrative sub-levels of the member states of the Council of Europe (i.e. local and/or regional authorities in the sense of the Madrid Outline Convention⁵).

2. The seven challenges of transfrontier policy making

6. A recent joint research cycle carried out by the Institute for transfrontier co-operation (Euro-Institute) and the University of Strasbourg, identified two generalised patterns of transfrontier policy making in Europe. A first conclusion was that there has been a certain convergence of the practical functioning of transfrontier co-operation in Europe. This convergence is mainly caused by the procedural logic of the financial programmes led by the European Commission on European Territorial Co-operation (ETC) ie. "Interreg" which has led to more or less unified practices regarding the implementation of elements like the partnership-principle, the principle of additionality, multi-annual programming based on SWOT-analysis, project-based policy making, project-calls and financial control. Consequently the last two decades have seen a general pattern of transfrontier co-operation policy making, characterised by a shift from informal exchanges to more concrete projects, from general planning to a more concrete policy- implementation, from rather symbolic to real world action, from closed informal networks to more transparent and official institutions.

7. A substantial contribution in this regard was made by the Council of Europe with its 3rd Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs), signed in Utrecht in 2009 (CETS No. 206). Together with the European Grouping of Territorial Co-operation (EGTC), developed two years earlier by the EU for the programming period 2007-2013, the ECG gives new opportunities for strengthening and concretising the increasing number of territorial co-operation schemes along and across borders in Europe, offering a new common legal instrument especially for transfrontier co-operation taking place at the inter-local and inter-regional level.

8. In addition, the role and the perception of the very concept of the border has changed considerably: the separating function is less important today but increasingly giving way to an integrated 360° perception of the transfrontier territory and its unused potentials. At this level it is not so much the impact of the European programmes as such, but rather the change in the perception of the local and regional actors themselves, which after years of sometimes frustrating experiences, has led to a certain positive pragmatism with regard to transfrontier issues: it is becoming more and more evident, that transfrontier institutions today operate as platforms rather than real administrative units, allowing for the pragmatic search for joint solutions to common local problems resulting from the increasing border-crossing socioeconomic dynamics, in areas such as transportation, spatial planning, environmental protection, risk prevention, citizen's advice and health co-operation, rather than for the definition and implementation of big strategic ambitions.

9. The research project also identified a second general pattern, which is represented by seven central challenges of transfrontier co-operation policy making, determining and often still hindering – however with differences regarding their intensity and combination – the horizontal interaction in transfrontier territories everywhere in Europe:

- Developing functional equivalences between different politico-administrative systems: How to develop functional interfaces that allow for successful co-operation between partners coming from different institutional domestic backgrounds with regards to distribution of power and resources, professional profiles and sometimes even the scope and the legitimacy for transnational action as such?
- Creating effective knowledge-management for the transfrontier territory: How to generate and use valid information about the characteristics, the real world problems but also the potentialities of a transfrontier territory in a 360° perspective, how to base future action on a sound and integrated empirical basis and thus avoid a negative "garbage can model" practice of transfrontier policy making (ad hoc solutions developed by individual actors, based on individual preferences in search for an ex post justification and a real world problem).
- Transferring competencies from principals to agents: How to reduce the dependency of transfrontier actors and policy making on the respective domestic context by identifying fields of transfrontier action that best can be implemented by a transfer of real administrative and functional competence from the national jurisdictions towards transfrontier bodies with sufficient administrative, financial personnel capacity, how to design decision-processes in this regard?

⁵ European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS 106).

- Optimising the interaction between actors: How to turn the confrontation of different cultures, attitudes, expectations, assumptions, values, interests, etc. into a productive working context, which allows for the avoidance of mutual blockages and the development of innovation and real added-values instead; how to integrate actors representing different sectors (public, private, societal) and cultures into existing patterns and structures of co-operation, how to create and manage inter-sectoral synergies in a transfrontier perspective?
- Finding the right level of organisation and legal structure: How to find the right degree of institutionalisation and the right legal form for different transfrontier tasks by developing a good balance between open network and classical organisational approaches when structuring the transfrontier working context; how to avoid both the case of institutional sclerosis and informal/individual arbitrariness?
- Capturing and measuring the added value and the territorial impacts: How to pre-assess transfrontier impacts of different policy options before taking action on the preferred one; how to develop and inform specific indicators allowing for a better demonstration of the specific added value of the integrated transfrontier action compared to an action taken by the neighbouring jurisdictions separately?
- Increasing the sustainability beyond a simple multi-project approach: How to avoid the case of multiple unco-ordinated sectoral projects which creates fragmented transfrontier activity for a certain time (funding) period only, by strengthening the target orientation and selectiveness of transfrontier policy development based on integrated (eg. inter-sectoral) territorial development strategies.

10. It is evident that the seven challenges cited above are at the same time the central fields for any capacity-building approach responding to the needs of a future multi-level governance perspective of transfrontier co-operation. This includes not only the question of how individual actors or members of institutions can better be trained in order to cope with these challenges. Rather the overall systemic question is on the agenda: how the entire transfrontier co-operation system can be improved and professionalised in order to reach a new level of quality, which allows for a better development of the endogenous potentials of this type of territory within the context of the overall objective of territorial cohesion in Europe.

11. It is promising to see, how the definition of the concept of 'capacity building', developed by the United Nations Development Programme (UNDP) within a rather different context, can inspire such a reflection on the future of transfrontier policy making in Europe. According to UNDP,⁶ capacity building or capacity development "encompasses [...] human, scientific, technological, organisational, institutional and resource capabilities. A fundamental goal of capacity building is to enhance the ability to evaluate and address the crucial questions related to policy choices and modes of implementation among development options, based on an understanding of environment potentials and limits and of needs perceived by the people of the country concerned." Accordingly, capacity building has to cover three levels:

- the creation of an enabling environment with appropriate policy and legal frameworks;
- institutional development, including community participation;
- human resources development and strengthening of managerial systems.

12. As these three elements refer directly to the seven challenges of transfrontier co-operation identified above, it is important that the concept of capacity building is further developed within the context of transfrontier co-operation in Europe. Border territories everywhere have specific characteristics. A wide range of social and economic phenomena have a 'transfrontier dimension, in areas as different as transport, labour markets, service delivery, consumption patterns, migration, criminality, pollution, commuter movements, tourism and leisure time activities. All of these require close transfrontier co-operation between neighbouring states. However, unlike in the national context, where territorial co-operation takes place within a uniform legal, institutional and financial framework, transfrontier co-operation faces the challenge of managing different politico-administrative systems which have a distinctive legal basis and are usually characterised by different degrees of vertical differentiation in terms of structures, resources and autonomy of action.

13. After an experience of over 50 years, Europe is now on the threshold of transfrontier co-operation of a completely new quality. With the new cohesion policy of the European Union, which, in addition to a differentiation of governance both vertically and horizontally, attaches greater importance to territorial cohesion and the extent of impacts of actual transfrontier actions, but also due to a new generation of actors, who are more interested in results than procedures, many border territories will have to redesign and strengthen their pattern of co-operation. At the same time, transfrontier co-operation should continue to be

⁶ United Nations Committee of Experts on Public Administration (2006), *Definition of basic concepts and terminologies in governance and public administration*, E/C.16/2006/4, New York,

developed and enhanced by capacity building structurally and functionally, reflecting the real importance of border territories for the future European integration process.

3. Multi-level governance and the future of transfrontier co-operation

3.1 Implications of multi-level-governance in a transfrontier context: horizontal subsidiarity as a new operating principle

14. The principles of territorial sovereignty of the respective national state are still a barrier, and sometimes a source of conflict, for successful transfrontier co-operation in Europe. Even legal instruments aiming at a better structuring of the transfrontier co-operation by creating co-operation groupings with a proper legal personality, such as the European Grouping of Territorial Co-operation (EGTC), do not allow for an independent trans-national scope of action: regarding budgetary rules, social law, taxation, legal supervision etc. the details of the practical functioning of a European Grouping of Territorial Co-operation (EGTC) depend fully on the domestic law of the state, in which the transnational grouping has finally chosen to take its legal seat.

15. Even in those transfrontier territories where the degree of co-operation is well developed, transfrontier co-operation is therefore rather a transnational politico-administrative subsystem, created by and composed of the respective 'domestic' national partners involved. Institutions, procedures, programmes and projects of transfrontier co-operation depend in practice on decisions, which are still often taken outside the closer context of direct bi- or multilateral horizontal co-operation. In most transnational constellations, including where federalist states are participating, transfrontier policy making cannot be based on a transparent delegation of proper competences from the domestic partners towards the transnational actors, but the domestic partners must still rather recruit, persuade and justify their actions and their legal and financial support for each and every individual case. The 'external' influence on such a sub-system of co-operation is important.

16. Transfrontier co-operation can therefore be interpreted as a typical principal-agent constellation: with the principals being the national institutional partners of this co-operation (regions, state organisations and local authorities), representing the legal, administrative, financial and decisional competences and interests of their partial territory, and the agents being the actors (transfrontier project partners, members of transnational bodies or specific institutions, programme officers and co-ordination officers) responsible for the preparation, the design and the implementation of the integrated transfrontier policy. Therefore, transfrontier co-operation always has both an inter-institutional and an inter-personal dimension, requiring the co-operation of both corporate and individual actors with their specific functional logic, motivated by special interests in each case.

17. The reference level of this sub-system is founded through a perception of transfrontier territories as functional and contractual spaces capable of responding to shared problems in similar and converging ways, so they are not political regions in the strict sense of the term. On the other hand, the fact that transfrontier co-operation is not replacing, but depending on the competence and the role of the respective national partners does not automatically mean that this co-operation is less effective than territorial co-operation taking place within the domestic context. Research on multi-level policy making in Europe has shown that a productive entwinement and networking of different actors coming from distinct administrative levels and backgrounds can be as effective as classical institutionalised problem solving. Yet, the institutional and functional preconditions of transfrontier co-operations are far more complex and exposed to various conditions. The central criterion for the evaluation of successful transfrontier governance is, nevertheless, both the degree of mobilisation and participation (structure and quality) of the relevant institutional and functional actors and the effectiveness of the problem-related output which this subsystem of co-operation is producing.

18. Governance is one of the central concepts being discussed in the practical and theoretical field of transfrontier co-operation today. However, the definition of the term governance is quite often not clear in its use. It seems therefore, before referring to the concept as a basis for reflection on prospects of transfrontier co-operation, useful to consider its initial conceptual definition.

19. In its more generic definition, governance refers simply to the different mechanisms which generate order within a given population of actors in a specific policy field. This can happen through unilateral adaption (market), command and obedience (hierarchy), negotiation and functional interaction (networks) or through a common orientation of behaviour based on generalised practices of a society (norms, values).

20. A second analytical dimension must be distinguished in this respect:

- the procedures that lead to such collective order (decision processes, rules of decision making, styles of policy making) which can be defined as governance in the narrow sense of the term and
- different forms of how these processes are organised (classical institutions versus non-hierarchical networks), which can be defined as government in the narrow sense of the term.

21. A third analytical component can be added, in order to fully understand the concept of governance, and which seems very important especially from the point of view of territorial development: this is the practical shaping of governance. Two dimensions must be distinguished in this regard:

- the horizontal dimension which refers to the types of actors involved (governmental, non-governmental, society, private) and,
- the vertical dimension which refers to the different territorial levels involved (local, regional, sub-national, national, European).

22. In most literature on European governance, especially in the case where the notion of multi-level governance is highlighted, the vertical dimension is predominant. Mostly, both in literature as in practice, multi-level governance is perceived and discussed not only in a normative way but also, especially in the case of territorial and then transfrontier-co-operation being part of the European integration process, with a special focus on the 'vertical' dimension: different territorial levels should better co-operate in order to better take into account the fact that in most states (thematic) power is shared between different territorial levels and that this internal differentiation is more and more extended to, and thus becomes impacted by, the European level of policy making. What is overlooked in many recent reports and political statements on the future of transfrontier co-operation in Europe, however, is the horizontal dimension of multi-level governance. Especially for the case of transfrontier territories this dimension is very important. In order to demonstrate its potential for a prospective interpretation of cross-border co-operation, the governance concept can be linked with another conceptual dimension of European policy making, which is the principle of subsidiarity.

23. The interlink between the multi-level-governance concept and the principle of subsidiarity can lead to a new and prospective operating principle for transfrontier co-operation. Much has been said and written about the principle of subsidiarity, in the context of European integration. With the reform of the Lisbon Treaty, it was written into Article 5, paragraph 3. In particular, national parliaments now have at their disposal two major instruments: an early warning mechanism and the possibility of introducing an appeal, before the European Court of Justice, for violation of this principle. In scientific and praxeological debates on European integration, it can be seen however, that the concept of subsidiarity, but also subsidiarity as a normative concept, is almost exclusively used in a vertical perspective: a higher state level (in this case European) can in this way only intervene when a lower level (in this case a national or even subnational level) cannot act better or would be overwhelmed in the implementation of tasks in a particular area of expertise.

24. However, in terms of ideas, the concept of subsidiarity is historically rooted in a more horizontal perspective, namely as a general maxim that the individual responsibility of a small entity (individual, private individual, small groups) should take precedence over that of larger entities (groups, community, higher organisational forms such as the state); according to such a perspective, the public sector must therefore only be active when the individual, societal organisation or association, the economy, etc. cannot perform as well or better. Today, subsidiarity can be considered as a general principle of social organisation, however, in the theoretic perception of the state, the obligation of support by the larger entity in the event of excessive demands is given precedence over the action of smaller productive units. This has led to the emergence of alternative secondary concepts as far as the "burden of proof" is concerned.

25. If we consider the transfrontier territories in Europe and the co-operation being carried out there as a specific horizontal form of European integration, it is conceivable to also (re)interpret the principle of subsidiarity in this sense: subsidiarity in transfrontier co-operation thus means the horizontal relationship between the transfrontier territory and the stakeholders which intervene there in relation to its national territories out of which it is formed. Consequently, the smallest entity would always take precedence over the larger entity when an assignment related to the transfrontier territory (development project or problem solving) will be more successfully carried out at the decentralised horizontal level. Conversely, larger entities could only have authority when the smaller entity cannot better complete the transfrontier assignment.

26. In the field of transfrontier co-operation, an understanding of subsidiarity when interpreted "horizontally" would mean that the existing division of powers needs to change, since member states and/or their sub-national structures are not primarily responsible for transfrontier affairs, in fact they only have responsibility

when the transfrontier (corporate) stakeholders of the smaller entity cannot properly exercise their transfrontier territorial responsibility. Conversely, this would naturally presuppose that the smallest entity is put in an institutionally, materially and functionally appropriate position so that it can perform properly its assignments in the transfrontier area. By setting up the requisite functional, transfrontier administrative capacity, similar to the transfrontier approaches to action in a national context such as urban communities or urban areas, one could go beyond the still very frequently held idea that transfrontier issues are often regarded, at least by the “domestic authorities” involved, as little more than “voluntary”, localised, etc. and thus, merely a “secondary” policy field – compared to the very important issues to be handled with real competence at home.

27. It is evident that such a principle of horizontal subsidiarity in transfrontier co-operation cannot mean that the larger entities transfer state sovereignty to the transfrontier area for the benefit of the smallest, which would then be transformed into an autonomous, transfrontier state entity of its own. This is a *sine qua non* condition for the participation in and support of member states to the sensitive border regions in Europe but also in all of the established European border regions. At community borders, the aspirations of minorities or separatists to autonomy should not be reinforced through the principle of horizontal subsidiarity. What we are actually referring to here is a requisite new division of labour between transfrontier territories and their national partners which helps the transfrontier territory to implement more efficiently transfrontier assignments and which is justified in view of possible problems and potential. Furthermore, the smaller entities should retain as much scope for action as possible so they can solve themselves their specific transfrontier challenges through the decentralised development of their own customised and flexible methods.

28. In the perspective of a systemic capacity-building approach it seems desirable to strengthen and enlarge the scope of action of the sub-system of transfrontier-co-operation in Europe. Overcoming the seven challenges cited above would require multi-level governance that leads both to a much closer and more integrated co-operation and a much clearer functional division of labour between the different levels of co-operation. In such a perspective the EU-level would anticipate impacts of future EU-initiatives on the transfrontier territories at an early stage and would allow for a better inter-sectoral co-ordination between the different thematic policy areas and institutional competences which have a logical border crossing dimension. Integrated policy making would require, for instance, at the level of the European Commission standing inter-service groups on transfrontier co-operation, which are then themselves interlinked with relevant groups of the Committee of the Regions, the European Council and the European Parliament. At the level of the Council of Europe this would imply also to better integrate the horizontal issue of transfrontier co-operation within the existing thematic working structures.

29. The member states (and their territorial subdivisions) would on the other hand support transfrontier co-operation actively and would allow for flexible solutions to be developed on the borders. This would lead to a new operating principle, which we have referred to as ‘horizontal subsidiarity’. Whenever a policy field that is relevant for horizontal exchange cannot be harmonised at the European level, member states should try to address the question via direct co-ordination with their neighbouring states. The term ‘horizontal subsidiarity’ means, in this respect, that with regards to transfrontier policy-issues the ‘smaller’ transfrontier unit should have the possibility to solve a problem or handle a question prior to the intervention of the “bigger” national jurisdiction. This would then require that the smaller unit become enabled by the provision of the necessary legal flexibility: experimental and opening clauses in thematic regulations and exemptions based on *de minimis* rules (whenever a cross-border phenomenon does not exceed a certain level of magnitude – e.g. 5 % of the population being commuters, 3% of the students studying at the neighbouring university, 2% of patients asking for medical treatment with a doctor beyond the border – an exception to the national rules will be allowed).

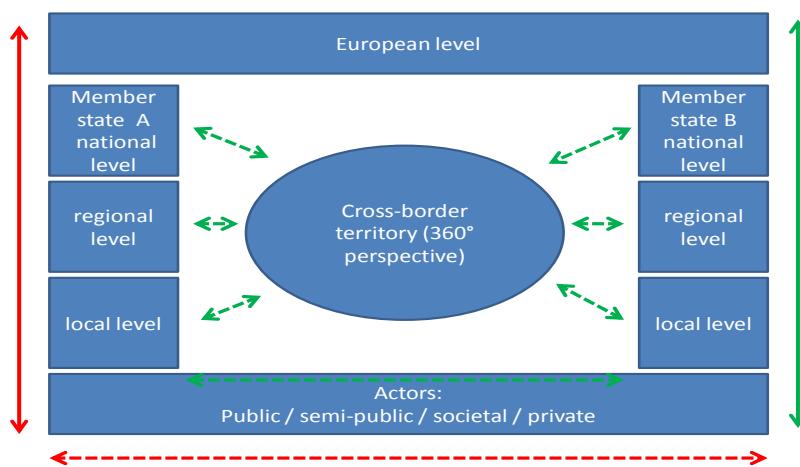
30. The local and regional actors on the other hand would have to develop shared transfrontier services and transfer domestic local/regional competencies to joint transfrontier bodies with real administrative competencies for concrete missions within relevant transfrontier fields. Instead of building or maintaining relatively expensive public infrastructures separately on both sides of the border, in service areas such as health, leisure, schools, nurseries, fairs and libraries as well as transport operators, hospitals, fire department and civil protection, local and regional actors would develop complementary fields of specialisation and share their infrastructures with local and regional actors from the neighbouring state. This could give transfrontier co-operation a completely new dimension, allowing not only saving scarce resources but also symbolising both the permeability and the added value of the ‘joint’ transfrontier territory from the point of view of the ordinary citizen.

31. Subsidiarity within the transfrontier territory: In an area such as this, where there is freedom to undertake transfrontier action strengthened by horizontal subsidiarity, two additional subsidiary perspectives must be taken into account. On the one hand, a vertical subsidiarity should be established within the transfrontier areas of responsibility across the total spatial level (eg. the total territory of the Danube macro-region, the total territory of the Lake Constance Conference, the total territory of the tri-national metropolitan region of the Upper Rhine) which would only become operative when the smaller transfrontier entities (inter-municipal co-operation, Eurodistricts, EUREGIOs) receive excessive demands on their pragmatic, territorial expertise. Thus, distributions of functional and specific assignments on the proficiency scale could be developed in the transfrontier area which would be likely to reduce any duplication of work which has been observed, and which is still widespread today, between the different actors, institutions and territorial levels of transfrontier co-operation.

32. On the other hand, the prospects of intersectoral subsidiarity should also be greatly strengthened. While today, in most transfrontier territories in Europe, transfrontier issues are primarily the responsibility of political and administrative actors (the current configuration of European aid programmes sustains this trend), subsidiary transfrontier co-operation should support more strongly sectoral ownership of transfrontier systems in economy, science and research, and civil society. Public action contributions would therefore be in these sectors that, in future, would need to better arrange transfrontier action amongst themselves, either in a catalytic (for example to simulate project initiatives) or complementary way (such as in the form of financial assistance to initiatives coming from these very sectors), while not replacing them.

33. The conceptual foundation of the interlink between the subsidiarity and the governance dimension on the one hand and the vertical and horizontal differentiation of both principles on the other are illustrated, for the case of transfrontier policy making, in the following graph.

The vertical and horizontal dimensions of multi-level governance and subsidiarity in cross-border cooperation



Practical implications and recommendations

3.2.1 Developing the legal provisions in order to make horizontal subsidiarity work

34. The legal preconditions for transfrontier co-operation in Europe are characterised by the fact that most legal areas which are relevant to horizontal exchanges, taking place within the context of transfrontier territories, are not yet (and probably will not be in the nearer future) harmonised at the European level. Areas such as fiscal law, labour law, social law, administrative law, economic law remain within the competence of the member states (both of the European Union and of the Council of Europe). And even in such areas, where a legal competence has been transferred to the European level, the implementation of European law by the member states often even fosters national differences regarding technical and legal standards on both sides of the border due to the applications of given administrative standards, systems and cultures.

35. For practical transfrontier policy making this regularly leads to massive obstacles which go far beyond the question of what kind of legal form the transfrontier co-operation can take. On the one hand, the shaping of the socio-economic transfrontier phenomenon within the border-crossing territorial context is perceived by the local and regional actors on site as important (high numbers of transfrontier commuters, consumers, increasing numbers of patients, SMEs, traffic and leisure time activities) and asks for flexible solutions which allow for the joint development of the intra-territorial potentials or the common reduction of negative spill-over effects. But on the other hand, the border-crossing phenomenon is not important enough, from the point of view of the national legislators, to justify a general change of the national legal provisions in the respective policy fields. In addition, the constitutional point of view also creates an important limit: any exception that may be allowed for the transfrontier territory may lead to constitutional conflicts for citizens, enterprises, administrations, etc. who are located outside the transfrontier context and who may appeal to the constitutional principle of equal treatment.

36. In a situation like this it seems necessary to better analyse and understand the possibilities and limits of developing special thematic legal provisions for transfrontier territories. This question goes de facto far beyond the current legal provisions which are already provided by the Madrid Outline Convention and its different protocols (although it must be stressed, that the ECG provides essential preconditions for going further in this direction). The challenge here is not to develop new legal instruments and forms for the transfrontier co-operation itself (which of course is a necessity and challenge within itself (see below Point 3.2.5) but rather to develop an adequate thematic and administrative legal framework, allowing for a smooth functioning of the principle of horizontal subsidiarity in relevant functional policy areas without challenging the legislative and legal competence of the participating states.

37. No research and only very few practical surveys have been carried out on this until now. However, many practical and political questions arise: what is the appropriate legal level (thematic law, administrative law, regulations, recommendations etc.)? What are the appropriate forms (solutions within existing legal provisions, specific transfrontier co-operation provisions)? What are the appropriate instruments (bi-national framework agreements, thematic agreements, opening clauses in thematic law, thematic provisions inspired by the idea of generalised transfrontier *de minimis* rules etc.)? It is suggested that these questions, which represent a central pre-condition for any intensification of transfrontier co-operation in the future, be taken up by the Council of Europe.

3.2.2 Informed 360° transfrontier co-operation strategies with qualified targets and indicators

38. Beside the lack of appropriate thematic legal provisions, transfrontier co-operation is often also limited by the lack of sound information and data upon the potentialities and challenges of the given cross-border territory. It is astonishing that even in transfrontier territories that do have a long existing transfrontier policy making frame already in place (institutions, organisations, committees, programmes and projects.) detailed information for informed transfrontier development strategies are often still missing. This is due to the difficulties of different national statistical systems working together, often characterised by their own traditions and methods. Even the European statistical services have not yet developed a data frame that provides the necessary basis for informed transfrontier policy making. Although some pilot projects do exist (such as under the ESPON-programme, supported by DG REGIO) the overall situation is less than satisfying in this regard.

39. On the other hand, transfrontier policy making in the past has very often been predominated by a simple project based approach, which was only indirectly linked to the 360° perspective of an integrated territorial development approach. SWOT-analysis for Interreg-programmes, for instance, have been used for an ex ante planning of a new operational programme but have hardly served later on as a reference basis for an informed project selection once the programme started its implementation. The same can be observed at the level of objectives which are in many cases rather of qualitative than of quantitative nature, with the difficulty of capturing and measuring their real achievement later on.

40. The generation of a solid transfrontier co-operation database is also a necessary prerequisite to inform the thematic legal approach outlined under point 3.2.1 – it could, for instance, quantify a respective reflection on *de minimis* levels (e.g. only 3% of the entire active population of the transfrontier co-operation territory are commuters, only 2% of patients demand transfrontier health-services) or – the other way round – could quantify a transfrontier potential, which would inform the application of the principle of horizontal subsidiarity in areas where there is a real need for a specific integrated transfrontier approach, likely to create a higher added value than actions undertaken by the domestic jurisdictions themselves (e.g. 15% of the population would use transfrontier services in the sports and leisure time area, 20% share of transfrontier

transport, 8,000 small and medium-sized enterprises (SMEs) would develop transfrontier activities, 20% of the population has moved over the border, 30% of researchers would work on transfrontier co-operation research projects, 25% of associations search for partnerships in the neighbour state, x square kilometres are of very sensitive nature, 30% of the elderly population will require new care services etc.).

41. An additional challenge can be seen in the fact that the design of the new cohesion policy of the European Commission will ask much more for evidence-based policy making in the future. Not only will the preparation of new operational programmes have to be better informed, but also the development of individual projects and their link to defined territorial development strategies. For the time being, only a few transfrontier territories have already anticipated this new demand, and many transfrontier territories will have problems in the coming years to meet these new programme standards. It is therefore recommended to support this informed strategy building and to build up the necessary cross-border data-basis in the near future.

3.2.3 Increased result-orientation via integrated development contracts

42. Based on the propositions, described under 3.2.1. and 3.2.2, a further field of prospective action could consist of increasing the result-orientation of transfrontier co-operation. The challenge here is to overcome the fragmentation of a multi single-project approach by applying the principle of multi-level governance via a concrete instrument which is the transfrontier development contract. Initially discussed by the European Commission during its "Green book on territorial cohesion" exercise, this idea was not developed much further, as some member states did not want to see direct contracts between transfrontier co-operation territories and the European Commission to be developed on a bilateral basis. However, beyond this understandable position, other diverse approaches of mutual territorial contracting can be imagined. Today transfrontier contracting is either limited to projects which are funded by European programmes or to transfrontier bodies, which are financially supported by different partners.

43. The idea suggested here goes beyond this approach by establishing integrated territorial development contracts between all sectorial and horizontal (public and private, governmental and non-governmental) partners within a given transfrontier territory, to be signed on the basis of agreed and commonly shared territorial development plans. The roles, actions and financial contributions of the different partners but also the outputs, results and impacts to be achieved are fixed in a transparent way. The process of establishing and implementing such an integrated territorial development contract would concretise the notion of transfrontier multi-level governance. It would also increase the transparency and the result-orientation of future transfrontier action by strengthening the perception of the territorial 360° thinking amongst actors. This is of specific relevance with respect to domestic sectorial policy approaches (transport, environmental, labour market, infrastructure, energy, research, education etc.) which very often are not only developed externally (eg. outside the transfrontier co-operation territory via ministries of the domestic jurisdictions) but which are afterwards often also implemented as external contributions in a sometimes unco-ordinated manner within the transfrontier territory.

44. An integrated transfrontier development plan and its implementation based on concrete performance contracts between the different partners involved could be a powerful instrument, not only for horizontal and vertical co-ordination, but also for the illustration of areas which should be subject to horizontal subsidiarity. Complementary to the EU-Commission's new cohesion policy, the topic could be taken up by the Council of Europe in order to strengthen transfrontier co-operation between its members.

3.2.4 Training and capacity building of relevant actors

45. A key bottleneck preventing the deepening of transfrontier co-operation in Europe is the lack of knowledge and understanding of the political and administrative systems of the neighbouring countries. Successful transfrontier co-operation needs qualified actors who are able to close the gap between the subsystem and its specific functional characteristics and the functional preconditions provided by the different domestic jurisdictions involved. Transfrontier training should be structured according to the needs identified by the actors involved in transfrontier co-operation. It is essential in this respect, to provide a bi-national and bi-cultural orientation. Based on the Euro-Institute's experience, training in a transfrontier context, as part of an overall capacity building approach, should develop at least three levels of personal skills:

- basic training on cross-sectoral competences: development of the cross-sectoral skills and competences (institutional and legal knowledge about the politico-administrative system of the neighbouring states and about the system of transfrontier co-operation itself, instrumental,

- methodological and linguistic skills, sensitising future actors about the importance of the intercultural factor and providing them with the necessary tools and methods of intercultural management, providing participants with the specifics of managing transfrontier projects in terms of planning, financing, organisation of meetings, and monitoring and evaluation);
- specialised training: specialised training oriented towards representatives from the different administrative sectors in the neighbouring states, selected policy-oriented topics within transfrontier co-operation, providing a neutral platform for exchanges between specialists from the different countries so that they can better understand the specific sectoral competences and organisational structures in the other countries, and identify differences and similarities with their own – or just allow them to get current information and analysis on policy developments and good practice in the neighbouring state;
 - developing competences on European affairs for local and regional authorities: to enhance the capacities of national public administrations with regards to European integration, how to access EU financial support programmes like INTERREG, how can local and regional authorities participate in inter-territorial or even trans-national projects, and develop partnerships with other European regions, learn of good practice in international network management, how to build and maintain a solid international partnership; how to prepare and manage international meetings; how local and regional authorities being affected by European legislation, can become more actively involved in the preparation of this law and how to better represent local and territorial interests in its formulation.

46. The recently created Transfrontier Euro Institut Network (TEIN)⁷ aims at building up training capacity on transfrontier questions on a EU-wide level. Twelve partner-institutions coming from 9 different transfrontier contexts all over Europe decided to propose a co-ordinated answer to the increasing need for knowledge, competences, tools and support on transfrontier affairs. TEIN gathers training organisations and universities on a non-profit basis and aims to facilitate transfrontier co-operation by giving concrete answers on how to professionalise actors on transfrontier issues. Partnership agreements have been signed with the Association of European Border Regions (AEBR) and the Mission Opérationnelle Transfrontalière (MOT). It is planned to widen the membership of TEIN in the coming years.

3.2.5 Transfer of operational competences and resources to transfrontier co-operation bodies

47. A further field for prospective development of transfrontier co-operation in Europe is the challenge of transferring real functional competences to transfrontier bodies and institutions. In recent years, most transfrontier territories have developed specific institutional frameworks in order to co-ordinate and/or promote transfrontier co-operation. However, a critical look at this institutional landscape highlights the very low competence profile of these institutions. Even in the case of bodies equipped with a proper legal personality (eg. the EGCT) and/or budget we can hardly find any competences for handling transfrontier policies or issues beyond the softer dimension of informing, synchronising or at least co-ordinating the transfrontier actors involved. Today real material and thematic competencies remain largely with the institutional partners of the respective domestic context.

48. It is evident that the application of existing legal transfrontier instruments only makes sense if the bodies created also receive the necessary legitimisation and thematic competence to act – otherwise they remain (or become) mere symbols for the co-operation but not real actors themselves. With the specific legal provisions outlined under 3.2.1 it should be possible in the future to transfer and/or develop new functional competences for transfrontier institutions.

49. A necessary precondition for this can be seen in the identification of such policy areas where a transfrontier co-operation approach clearly leads to an added value compared to the co-ordination of individual approaches led by the national partners involved. Policy fields where core competences could be transferred to transfrontier co-operation bodies are for instance spatial planning, transfrontier labour market issues, economic promotion and tourism, public transfrontier transport, health-infrastructure planning, etc. In this regard, it seems of special importance to consider both the principle of horizontal subsidiarity in relation to the domestic partners involved but also the principle of vertical subsidiarity with regards to a functional complementarity of the different co-operation levels within the transfrontier territory itself. This could lead to a functional division of labour between transfrontier bodies which are competent for the entire transfrontier territory (with usually more regional, sub-national and national counterparts) and those, working on a smaller territorial perimeter, like inter-local or inter-county bodies.

⁷ For more details: www.transfrontier.eu.

50. In the field of transfrontier health, for instance, the territorial level would focus on the development and implementation of an integrated hospital planning whereas the inter-local level would jointly build the hospital infrastructure, exchange the personnel and manage the transfrontier mobility of patients according to the fields of specialisation of different hospitals.

51. Further action is required to stimulate the reflection on possibilities of such a transfer of core transfrontier competencies towards transfrontier bodies and to develop a new perspective for the territorial co-operation approach that goes beyond the closer focus of the European Commission and its financial programmes (the INTERREG-world). This would also allow for a better promotion of the opportunities which are provided by the ECG with regards to developing and implementing new approaches of integrated transfrontier policy making in such areas, where a better operational/institutional co-ordination could stimulate appropriate and innovative answers to transfrontier territorial challenges.

3.2.6 Shared services as new perspective for the future

52. Closely linked with proposal 3.2.5 is an additional idea that future transfrontier co-operation should go beyond the typical thematic project approach, often provided and funded by European programmes such as INTERREG. The conceptual approach here is to apply the principle of shared services on a transfrontier level. In many transfrontier territories we can identify infrastructural settings and public services which fully ignore the fact that similar counterparts with similar missions and/or functions do exist just across the border. A neutral analytical look can quickly come to the conclusion that both the administrative and infrastructural facilities are often de-connected from the integrated needs of the transfrontier territories. This situation creates on the one hand administrative and functional barriers to mobility and, on the other hand, does not exploit the potentials which could be developed by a shared services approach.

53. Such an approach could provide transfrontier co-operation of the future with a completely new foundation: a base where it is no longer only a question of how to do good projects together periodically but a question of how to better mutually share the increasingly scarce resources and optimise the service delivery for target groups could lead the transfrontier initiatives of the actors involved. The notion of shared services in a transfrontier perspective has a practical implication for both local and regional/de-concentrated state services. Areas like housing, social services, leisure time infrastructure, economic promotion, fairs, public libraries, public transport, water supply and waste disposal, school building but also public procurement provide large fields where transfrontier shared services could be developed in the future. Until recently, this was not the primary occupation of local and regional actors and the argument was often developed, that the still rather low level of transfrontier mobility would not justify the building of core services in this field. With the consequences of the financial crises, however, the need to fundamentally reform and reorganise public services will be on the agenda with an even higher priority than was already the case in the past. An administrative reform approach in transfrontier territories could therefore promote the development of shared services in a transfrontier perspective on a far bigger scale in the future.

3.2.7 Monitoring and active dissemination of good transfrontier co-operation practice

54. The transfrontier co-operation monitoring of the Council of Europe is for the moment strongly concentrated on the implementation of the Madrid Convention and its respective protocols. The role of the Council of Europe in stimulating transfrontier co-operation between member states should go beyond this. It is recommended to develop a broader approach in the future, which includes not only monitoring of the implementation of the legal provision developed by the Council of Europe (and its member states) but which aims at actively identifying and promoting good practice examples of transfrontier co-operation all over Europe. Although there are already some actors working in this field (eg. Association of European Border Regions, Mission Opérationnelle Transfrontalière, TEIN, Committee of Regions) the level of exchange on operational good practice examples is still rather low. There is a real need to improve the exchange between 'old' transfrontier regions and 'new' ones, in order to compare the most recent approaches in enhancing the existing transfrontier governance settings and to exchange with 'emerging' transfrontier regions, especially in Eastern and South-East Europe. Here the Council of Europe could play a much more pro-active role as a platform for the exchange and dissemination of good practices but also for the preparation of new transfrontier co-operation initiatives.

3.2.8 Interdisciplinary research

55. Until now, the theme of transfrontier co-operation has not been a significant source of study in scientific literature and research in Europe. Although there are a large number of publications in Europe dealing with this subject from different angles, it is still not possible to speak of a true object of scientific research in this regard. Nevertheless, various scientific disciplines have theories, methods and empirical studies, which can be used to prospectively study the phenomenology of transfrontier co-operation. The analysis of references shows that there are already many uni-disciplinary reflections on the phenomenon of the border in general and transfrontier co-operation in particular. However, no integrated vision, that is to say, interdisciplinary, has been developed until now. This is particularly true for the area of applied sciences, which is surprising since transfrontier co-operation is a policy field that very much depends on pragmatic solutions to be developed for concrete challenges.

56. In this regard, the outstanding feature of the research cycle of transfrontier co-operation, carried out between 2008 and 2012 by the University of Strasbourg and the Euro-Institute, was that for the first time, on an object of study with relatively little attention in the scientific literature, different disciplines have worked together and the link was made with the practice. De facto, it was not and is not an easy task, since not only were different disciplines engaged at the same time but also a new dimension that is characteristic of transfrontier co-operation itself: beyond the comparative perspective in the analysis of actual transfrontier regions, it was important to achieve a mutual understanding between different national scientific cultures too.

57. While this cycle has not yet developed an integrative theoretical reflection on the transfrontier phenomenon in Europe, but it has nonetheless laid the groundwork for a better understanding – including theoretical and conceptual – of transfrontier co-operation as an object of scientific research.

58. At this stage of research, it is not possible to yet speak of the emergence of a theory of transfrontier co-operation in the strict sense of the term and it may even be questioned if such a theoretical approach would be feasible or even desirable. However, the challenges described under point 2 and the fields of actions suggested under point 3.2 of this report may be concrete areas for further research, allowing for the foundations of an epistemological view on the phenomenology of transfrontier co-operation. However, for the formation of such a ‘middle-range’ theory that goes at least beyond very knowledgeable and territorially nuanced empiricism and that can generate prescriptive knowledge for future capacity building, a more systematic and interdisciplinary approach is needed which will find its programmatic foundations in the reference model of applied sciences.

59. The Congress has already been an active partner in the design and implementation of the joint research programme of the University of Strasbourg and the Euro-Institute. A structured scientific accompaniment of further research on the activities suggested above would certainly contribute to their implementation and create the necessary sustainability.

4. Conclusion

60. The eight proposals outlined above represent a holistic approach that could prepare for a new standard of European transfrontier policy making in the future. In order to make it work, however, the individual components will have to be reflected according to two dimensions.

61. On the one hand, it will be crucial to differentiate the degrees and forms of implementation of these recommendations according to the specific situation and needs of the various types of transfrontier territories in Europe. A pragmatic approach in this regard could be to distinguish between a support for the ‘re-inventing’ the initiatives of older (Euro-regional) transfrontier co-operatives in Western Europe, the contribution to the consolidation of younger co-operation approaches (between ‘newer members’ of the Council of Europe and/or their neighbours), the further facilitation of relatively new co-operation areas such as the Black Sea and the Adriatic area and, finally, a better stimulation/information of new approaches such as the co-operation for instance between Caucasian states or between Tajikistan and its neighbours.

62. The second differentiation relates to the forms and degrees of the involvement of the Congress itself and its future relations with possible partners during the implementation process. A co-operative implementation approach could both strengthen the role and the visibility of the Congress and the dissemination of the opportunities that are offered by the 3rd protocol to the Madrid Outline Convention. It could also promote the necessary sustainability during the implementation process via a catalyst function that enables and motivates partners to become multipliers within their respective territorial and institutional context.