THE CONGRESS
OF LOCAL AND REGIONAL AUTHORITIES

Opinion 24 (2004)[1] on the draft outlook report of the Committee of the Regions on a new legal instrument for cross-border co-operation

The Congress,

1. Having regard to the draft outlook report entitled "a new legal instrument for cross-border co-operation", presented to the Commission for Territorial Cohesion Policy (COTER) by Mr Niessl, *Landeshauptmann* of Burgenland, with a view to its adoption by the Committee of the Regions of the European Union (EU);

2. Having regard to the invitation and the request for an opinion addressed to the President of the Congress by the president of the COTER;

3. Taking into account the opinion of the Committee of the Regions of 13 March 2002, entitled: "Strategies for promoting cross-border and inter-regional co-operation in an enlarged EU – a basic document setting out guidelines for the future";

4. Having taken note of the European Commission's third report on economic and social cohesion, entitled "A new partnership for cohesion: convergence, competitiveness, co-operation", the conclusions of which refer to the Commission's intention to propose a new legal instrument in the form of a European co-operation structure, in order to allow member states, regions and local authorities to implement cross-border co-operation activities;

5. Mindful of the recommendations and resolutions it has itself adopted on cross-border co-operation,

6. Recalls the Council of Europe's contribution to the development of the legal framework for cross-border co-operation between regional or local authorities:

a. the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 106), hereinafter the "Outline Convention" or the "Madrid Outline Convention", which was opened for signature by the Council of Europe's member states in Madrid on 21 May 1980 and provides a basis for the development of transfrontier co-operation between territorial communities or authorities, in spite of the heterogeneous nature of these authorities in the different states;

b. additional Protocol No. 1 of 9 November 1995 (ETS No. 159), concerning the legal effects of acts performed by territorial communities or authorities within the framework of transfrontier co-operation and the legal status of transfrontier co-operation bodies;

c. additional Protocol No. 2 (ETS No. 169), under the terms of which the provisions of the Outline Convention and the first additional Protocol apply mutatis mutandis to interterritorial co-operation;

7. Recalls the action taken by the Council of Europe and the Congress to foster transfrontier co-operation, which is so essential to democratic stability in Europe;

8. Appreciates the work done in the field at intergovernmental level by the select committee of experts and the role played by its Committee of Advisers in promoting transfrontier co-operation in central and eastern Europe;

9. Welcomes the fruitful co-operation established with the Committee of the Regions and the development of joint activities to improve the conditions for trans-European co-operation between territorial communities or authorities;

10. Recalls that the Committee of the Regions and the Congress have given their joint support to the European Commission's proposal to create a Community legal instrument on transfrontier, transnational and interregional co-operation, under two conditions:

a. that it is compatible with the European Outline Convention;

b. that it preserves the progress already made in co-operation between member and non-member countries of the European Union (letter from the Presidents of the Congress and the Committee of the Regions to Commissioner Barnier, 9 December 2002);

11. Fully agrees with the following points made in the draft outlook report:

a. the added value of transfrontier co-operation (paragraph 1.5);

b. the distinction between trans-European co-operation at the strategic level (programme implementation and management) and trans-European co-operation to implement specific projects (paragraph 1.6);

c. the regrettable continued existence of legal obstacles or restrictions to the development of trans-European co-operation between regional and local authorities (paragraph 1.7);

d. the need to treat the various forms and degrees of co-operation between regional and local authorities in the same way, irrespective of whether they are financially supported by EU Structural Funds (paragraph 2.5);

12. Wishes to make the following comments on the recommendations contained in the draft outlook report:

Concerning the terminology used

13. It would be preferable to harmonise the terminology used by the Council of Europe, the European Commission and the Committee of the Regions in the field of

trans-European co-operation between regional and local authorities, especially the terms "transnational", "transfrontier (cross-border)", "interterritorial" and "interregional" co-operation.

14. For the Council of Europe, "transfrontier" or "cross-border" co-operation is co-operation between territorial communities or authorities in an area straddling a common border. It concerns border areas between countries. "Interterritorial" co-operation, on the other hand, means relations between non-contiguous territorial communities or authorities in different countries. It should be added that the European Outline Convention and its protocols reserve the terms "transfrontier co-operation" and "interterritorial co-operation" for external relations between local or regional authorities that do not fall within the scope of international law and are not directly subject to the rules thereof. While states may conclude agreements that concern modes of cross-border co-operation between their territorial authorities, the Outline Convention provides for "arrangements" concluded between local authorities themselves. These arrangements are thus not subject to international public law. If agreements between states exist, they lay down the conditions of the co-operation and the forms it may take, but without making it the object of public law.

15. The terminology of the Committee of the Regions is, in principle, identical. In its Opinion 181/2000 of 13 March 2000 entitled "on Strategies for promoting cross-border and inter-regional co-operation in an enlarged EU – a basic document setting out guidelines for the future", the Committee proposed the following definitions:

a. "cross-border co-operation" implies bi-, tri- or multilateral co-operation between local and regional authorities (semi-public and private players may also be involved in this context) operating in geographically contiguous areas. This applies also in the case of areas separated by sea;

b. "interterritorial co-operation" implies bi-, tri- or multilateral co-operation between local and regional authorities (semi-public and private players may also be involved in this context) operating in non-contiguous areas. It should be noted, however, that the Committee of the Regions frequently uses the term "interregional co-operation" in the place of "interterritorial co-operation". The Committee also distinguishes a third form of trans-European co-operation – transnational co-operation – that differs from interterritorial co-operation only in so far as national government authorities are involved in it;

c. "transnational co-operation" is co-operation between national, regional and local authorities in respect of programmes or projects. This form of co-operation covers larger contiguous areas and involves players from at least two EU member states and/or non-EU states.

16. This triptych is partly inspired by the European Commission's 28 April 2000 guidelines for the Community initiative Interreg III, which is currently in progress and is made up of three strands:

a. "cross-border co-operation" between neighbouring authorities, intended to promote integrated regional development between border regions, including external borders and certain maritime borders (strand A);

b. "transnational" co-operation between national, regional and local authorities, to promote a higher degree of territorial integration in the Community across large groupings of European regions (strand B);

c. "interregional" co-operation, to improve regional development and cohesion policies and techniques through networking and exchanges of experience (strand C).

The terms used to define strand C are not very felicitous. In the legal literature interregional co-operation, strictly speaking, refers only to co-operation between regional authorities. Accordingly, the Congress proposes following the terminology used in the opinion given by the Committee of the Regions in March 2002, it being understood that the notion of transnational co-operation has a special meaning in the opinion.[2]

17. Furthermore, the draft outlook report frequently uses the expression "decentralised co-operation" (for example in paragraphs 1.6, 1.9 and 2.3) in reference to the various forms of trans-European co-operation between territorial communities or authorities in different countries. The Congress believes that this term should be avoided in this context as it refers only to the activities of "decentralised" authorities, that is public authorities with no legislative power, whereas all infra-state public authorities – with or without legislative or international powers – also develop cross-border or interterritorial co-operation outside the realm of international public law.

Concerning the legal nature of the proposed instrument

18. The draft outlook report suggests introducing a pan-European public law instrument (paragraphs 1.6 and 2.6). The Congress notes that there are numerous examples of erosion of the respective legal specificities of the private and public spheres; furthermore, the Council of Europe's conventions and many other treaties regulate the creation of transfrontier bodies under private and public law. The Congress is convinced that the focus should be more on the legal possibility of participation by public partners than on the public law nature of the arrangements introduced by the Community instrument;

19. Like the COTER, the Congress considers that the appropriate instrument at the present time is a Community regulation (paragraph 2.8), all sections of which are binding and directly applicable in any European Union member state (paragraph 2.2), affording uniform solutions for trans-European co-operation between territorial communities or authorities.

Concerning the compatibility of the proposed instrument with the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities

20. The Congress attaches the utmost importance to the compatibility of the future Community instrument with the

European Outline Convention and its additional protocols. It would therefore like the Council of Europe to participate in the preparation of the draft instrument, in order to harmonise its content with the additional protocols to the Outline Convention. It invites the Commission to keep the Council of Europe regularly informed and possibly to involve it, within the appropriate bodies, in the preparation of the draft regulation, to ensure its compatibility with the two protocols to the Madrid Outline Convention and, if necessary, any other protocol the Council of Europe may consider it necessary to produce.

Concerning the possible application of the proposed instrument to co-operation with regional or local authorities in non-EU states

21. The Congress draws attention to the need to respect the freedom of choice of local and regional authorities in non-member states of the European Union. It feels it is neither desirable nor possible to impose the use of the new Community legal instrument on these authorities (paragraph 2.3) but requests that the need to arrive at a harmonised legal framework between the European Union and neighbouring non-member countries be borne in mind, for example by introducing a Community regulation and a Council of Europe Convention open to European Union accession.

Concerning the optional nature of the proposed instrument and the powers of the public partners

22. Like the COTER, the Congress considers that use of the forms of co-operation introduced by the Community legal instrument should remain optional (paragraph 2.9), and that regional and local authorities should be free to use other existing forms of co-operation. It stresses the need for a clear distinction to be made between the legal system applicable to co-operation between territorial communities or authorities in different states and the powers of these authorities in the field of international co-operation. Only domestic legislation regulates the powers of territorial authorities and defines their competences in respect of cross-border co-operation. Community law must not bestow any additional powers or competences whatsoever on infra-state public authorities, but merely provide them with new co-operation methods.

Concerning the co-operation structure proposed

23. The name: the structure proposed by the draft outlook report is a cross-border, interterritorial or "transnational" co-operation body called the "European Co-operation Authority" (ECA) (paragraph 2.7). In so far as this type of body is founded by several public authorities, partners in co-operation, who contribute to its organisation and operation, it would perhaps be advisable to specify that it is a grouping of regional or local authorities and call it, for example a "public trans-European co-operation grouping";

24. Legal personality: like the COTER, the Congress considers that the proposed co-operation structure should be able to have a legal personality (paragraph 2.11). The resulting autonomy would enable the structure, for example, to recruit and employ staff, and to qualify for the European co-financing granted to cross-border, interterritorial or "transnational" programmes. However, the flexibility of such a trans-European co-operation instrument would be substantially enhanced if the partners also had the option of setting up bodies with no legal personality or budgetary autonomy;

25. Flexibility: the draft outlook report rightly insists that the Community trans-European co-operation instrument be flexible (paragraph 2.10) in terms of both the arrangements and its adaptability in time. The Congress shares this view and considers that setting up trans-European co-operation bodies with or without legal personality is in itself a very flexible solution to the types of problems encountered;

26. The public-law status of the structure: we have already pointed out a marked tendency for the legal systems governing public and private law bodies to become increasingly alike. The proposal contained in the draft outlook report presented to the COTER indubitably contributes to this trend, as the trans-European co-operation structure would be rooted in public law but would have no unilateral power of command ("imposing obligations on third parties") by statutory means or by individual administrative decision (paragraph 2.11);

27. The Congress believes that the co-operation structure should not necessarily be a public law body (paragraphs 2.11 and 2.12). All that matters is that territorial communities or authorities are able to use their competences to good effect at the cross-border, interterritorial or "transnational" level;

28. The Congress further points out that, under the Additional Protocol to the European Outline Convention, transfrontier co-operation bodies are not "empowered to take measures which apply generally or which might affect the rights and freedoms of individuals" (Article 4.2.b; see also Article 5.2);

29. Concerning the law applicable to the structure: the law applicable to the trans-European co-operation body having legal personality (paragraph 2.15) could, by analogy with the relevant provisions of EC regulations No. 2157/2001 of 8 October 2001 and No. 1435/2003 of 22 July 2003 concerning statutes for European companies and European co-operative societies respectively, be determined as follows: "the trans-European public co-operation grouping shall be governed:

a. by this regulation;

b. where expressly authorised by this regulation, by the provisions of the grouping's statutes;

c. in the case of matters not regulated by this regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

i. the laws adopted by member states in implementation of Community measures relating specifically to public cross-border or interterritorial co-operation groupings;

ii. the laws of member states that would apply to a cross-border or interterritorial co-operation body constituted in

accordance with the law of the member state in which the grouping has its registered office;

iii. the provisions of the grouping's statutes, in the same way as for a cross-border or interterritorial co-operation body constituted in accordance with the law of the member state in which the grouping has its registered office";

30. If the domestic legislation lays down specific rules and/or restrictions related to the nature of the activities carried out by a public cross-border or interterritorial co-operation grouping or provides for a form of control exercised by a supervisory authority, that legislation shall fully apply to the grouping;

31. Concerning liability and dispute settlement: paragraph 2.13 of the draft outlook report raises the question of final liability and individual responsibility of the co-operation partners for the implementation and management of programmes co-financed by the European Union. This should be extended to the activities of trans-European co-operation bodies which, without EU co-financing, are instrumental in implementing programmes or carrying out actual projects;

32. The Congress draws the COTER's attention to the need to include in the future Community regulation provisions concerning the procedure for establishing the liability of the grouping and its members vis-à-vis third parties and determining which courts have jurisdiction in the event of a dispute;

33. Concerning financial management and control: the Congress considers that the main rules governing the financial management and control of the co-operation body's activities (paragraph 2.14) should appear not only in the co-operation body's statute but also in the regulation itself.

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1. Debated and adopted by the Standing Committee on 27 May 2004 (see Document CG (11) 16, draft opinion presented by F. Dohnal (Czech Republic, R, EPP/CD) on behalf of H. van Staa (Austria, R, EPP/CD), rapporteur).
2. In the broad sense of the term, "transnational" relations are all external relations of public authorities – central or territorial – which do not fall within the direct scope of international public law.

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