

**DR. ILDIKÓ ERNSZT<sup>288</sup> - DR. ZOLTÁN BIRKNER<sup>289</sup> - NÓRA BERKES<sup>290</sup>. Some Legal Aspects of Cross-border Cooperation**

“Start by doing what’s necessary, then do what’s possible, and suddenly you are doing the impossible.”  
(Francis of Assisi)

## 1. The basis and history of legal framework

Cross-border cooperations started parallel with European integration. Nevertheless, it was not a simple process. The difference between legal systems and administrative systems meant the biggest challenge: the possibilities for cooperation had to be found in this colorful environment. At first in the 1950’s cross-border cooperations were spontaneous, bottom-up joint actions without formalities. In these cases communities recognized the power of collaborations at places where the border lines did not coincide with the ethnical, language communities’ borders. The establishment of the organization of this cooperation was inevitable, though it took decades. Of course it also affected the treasured sovereignty of states what they guarded so jealously. [Fejes, 2010, p. 57.]

Border regions have a certain economic-social compensating role. Because of this characteristic these regions build economic and social cohesion – it is a common European integration interest. [Keller et al., 2014]

As at the beginning the common legal framework was missing, cross-border cooperations could flourish where sub-national levels, entities, regional, local authorities were empowered with the right to conclude international agreements. These cooperations were extremely diverse. Meanwhile international organizations<sup>291</sup> took the phenomenon on their agendas and international rules were created. This move was strengthened by the regional policies of the European Union with the INTERREG program which aided internal and external border cooperations. [Soós- Fejes, 2008, p. 123.]

In this progress the real earthquake-like change was the financial framework 2007-2013 of the EU. The Regulation (EC) No 1082/2006 substantiates the legal framework for the establishment of a common institutional entity: the European grouping of territorial cooperation. (EGTC)<sup>292</sup>

### 1.1. International regulations

Because of the different solutions of states’ domestic regulations cross-border cooperations were concluded first with the means of International Law. Multilateral and bilateral international agreements were made in this field. However, they had a big disadvantage: the real actors of these cooperations have only derived rights, they are not legal persons, they are

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<sup>292</sup> Regulation (EC) No 1082\_2006 of the European Parliament and of the Council of 5 July 2006.

It was amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

not independent entities, which limits their lives, and they function under the rule of domestic legal rules.

## 2.1. The Council of Europe – as a main engine of CBC

The Council of Europe played a crucial role in tearing down the barriers of cross-border cooperations at a European level.

In its structure it is the Congress of Local and Regional Authorities<sup>293</sup> which started to visualize and promote local and regional democracy quite early. In its activities the CLRAE conducts regular visits to the member states to monitor the compliance with European Charter of Local Self-Government and the Madrid Framework Convention. After the visits it makes recommendations for governments, which creates a framework for political dialogue and with this it can foster states to take into account the regional interests, too. The CLRAE is also an observer of local and regional elections; it creates international conventions and charters in this field, encourages the establishment of Local Democracy Agencies and national associations of regional, local authorities and sets up a new type of Euroregion which embrace EU and non EU countries. [http://www.coe.int.]

## 2.2. The European Outline Convention on Transfrontier Co-operation Between Territorial Communities or Authorities

The Council of Europe created the first created international conventions in this field. The European Outline Convention on Transfrontier Co-operation Between Territorial Communities or Authorities was accepted in Madrid in 1980.<sup>294</sup> It was a fruit of a long preparatory work which started already in the 1960's. The Convention had a great task: it had to create the framework of bilateral and multilateral international agreements relating to cross-border co-operation of states which have extremely different background. Meanwhile it had to guarantee the treasured sovereignty of states. [Fejes, 2010, p. 70, Fehérvölgyi-Péter, 2010].

The solemn Preamble lists the aims of the Convention: „co-operation between territorial communities or authorities at frontiers in such fields as regional, urban and rural development, environmental protection, the improvement of public facilities and services and mutual assistance in emergencies”. Already the name of the agreement refers to the fact that it provides the legal framework; it is the state parties who have to fill it with real content. It is expressly stated in Article 1: the parties undertake the obligation to make efforts to support and assist making the necessary agreements having regard to the constitutional provisions of the parties. It was a novelty to give the definition of transfrontier co-operations, but the precise geographical scope was still not determined.<sup>295</sup> The definition of the subjects is referred back to domestic regulations, moreover, „each Contracting Party may, at the time of signing this Convention or by subsequent notification to the Secretary General of the Council of Europe, name the communities, authorities or bodies, subjects and forms to which it intends to confine the scope of the Convention or which it intends to exclude from its scope.” [Art. 2 (2) of the Madrid Convention.]

<sup>293</sup> Further: CLRAE. It is a pan-European political assembly which has 636 members representing more than 200,000 authorities from 47 European states. In: [http://www.coe.int/t/congress/presentation/default\\_en.asp?mytabsmenu=1](http://www.coe.int/t/congress/presentation/default_en.asp?mytabsmenu=1)

<sup>294</sup> Further: Madrid Convention

<sup>295</sup> „Transfrontier cooperation shall mean any concerted action designed to reinforce and foster neighbourly relations between territorial communities or authorities within the jurisdiction of two or more Contracting Parties and the conclusion of any agreement and arrangement necessary for this purpose.” Article 2 (1) of the Madrid Convention

Then in Article 3 the concrete forms of these cooperations are listed with the referral that they must be adjusted to the concrete situation. The convention offers model agreements in its appendix: it distinguishes between two main categories: the model inter-state agreements on transfrontier co-operation at local and regional level and outline agreements, contracts and statutes which provide a basis for transfrontier co-operation between territorial authorities or communities. With this differentiation it clearly stipulates the three layers of cross-border cooperation: the European Outline Convention, the bilateral and multilateral agreements between states concluded under the aegis of the convention and finally the outline agreements, statutes between local and regional authorities. [Fejes, 2010, p 72.]

However, it is expressis verbis underlined that the convention does not „have the intention” to prevent the contracting parties from entering into other forms of transfrontier co-operation. „Similarly, the provisions of this Convention should not be interpreted as invalidating existing agreements on co-operation.” [Art.3 (3).] The Convention constantly stresses the respect towards the sovereignty of its member states: the jurisdiction, the supervision and the control of the state should be taken into consideration. [Art.3 (4)]

The Convention strengthens the status and rights of local and regional authorities and makes it possible for them to build cross-border cooperations independently from states since without concluding international agreements local authorities can cooperate. On the other hand, there is a section which seems to deteriorate this achievement: „If the Contracting Parties deem it necessary to conclude inter-state agreements, these may inter alia establish the context, forms and limits within which territorial communities and authorities concerned with transfrontier co-operation may act. Each agreement may also stipulate the authorities or bodies to which it applies.” [Art. 3 (2)]

With this provision the Convention gives a strong weapon to the hands of states: if they consider it necessary to make international agreements in the field of regional cooperation, these contracts must be concluded. So in fact it is states that can decide on the „nature” of cross-border cooperations: if they allow it with or without state control, if they want to dictate and specify its form, limits, possible areas.<sup>296</sup> [Fejes, 2010, p 74.]

Further, the obligations of states are enumerated: they shall make attempts to solve any legal, administrative, technical difficulties which could hinder transfrontier cooperation; they shall consult with each other [Art. 4] and „supply to the fullest possible extent any information requested”. [Art. 7]

On the other hand, they are also obliged to give information for the concerned territorial communities and authorities of the possible means of action on the grounds of this convention. [Art. 7]

Hungary is also a party to the Madrid Convention; it signed the document in 1992, two years later it came into force. „Nevertheless, the actual creation and operation of cooperation systems largely depends on the political attitude and legal system of the neighbouring countries.” [Soós-Fejes, 2008, p. 125.]

The Convention’s novelty can not be disputed. However, as it is an international convention, it has its weaknesses arising from this fact: Only those states are bound which are parties to the convention and their sovereignty is also strictly protected by the whole concept of the agreement.

The First Additional Protocol to the Madrid Convention was accepted in Strasbourg in 1995.<sup>297</sup> It deals with transfrontier cooperations. The revolutionary „innovation” of the Protocol is that it endows the territorial communities and authorities with the right to conclude transfrontier co-operation agreements with other territorial communities or authorities from

<sup>296</sup> This section is also a good example of the Madrid Convention’s scrupulous care about states’ sovereignty.

<sup>297</sup> Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, Strasbourg, 9. XI. 1995

other States in equivalent fields of responsibility. [Art.1 (1) of the Additional Protocol] The only requirements are that they must respect the other party's international obligations, and these agreements are binding only on the territorial communities or authorities which have concluded them. [Art.1 (2)]

Decisions made on the basis of the before mentioned transfrontier co-operation agreements must be executed by territorial communities within their national legal system in compliance with their national law. These decisions must be regarded as measures taken by the communities under their national legal system in the sphere of implementation.

The communities or authorities are empowered to establish a transfrontier co-operation body, which may or may not have legal personality. Legal persons may be public or private law entities within the national legal systems of the concerned communities. [Art.2-3]

The transfrontier co-operation body must officiate in harmony with its purpose and with the national law which governs it. The protocol sums up these conditions in four points:

- the transfrontier co-operation body must operate by its statute and by the law of state where its headquarter is,
- it is not allowed to take measures which touch the rights and freedoms of persons.
- They are financed by the territorial communities or authorities from their budgets, they are not authorized to impose any charges of fiscal nature. However, they are empowered to accept revenues for services offered by them to other communities or third parties.
- They must have annual estimated budget and draw up a balance-account approved by independent auditors. [Art. 4]

If the contracting parties' domestic law allows it, they may decide that the transfrontier co-operation body should have public legal personality, so it should be a public legal entity. It means that its measures have the same legal effect as of territorial communities' which made the agreement. [Art. 5]

### 2.3. The Protocols

Protocol 2 to the Madrid Convention was accepted in 1998 and entered into force in 2001.<sup>298</sup> The protocol's preamble refers to the fact that territorial communities' cooperation does not only extend to transfrontier co-operation: cooperation only with neighboring authorities' of other states, but it also extends to interterritorial co-operation, which is cooperation with foreign non-neighbouring countries with joint concerns. It draws attention to that a lot of bilateral agreements function in this field. Furthermore, the protocol would like to create an international legal framework for interterritorial co-operation. According to Article 1 of the Protocol "interterritorial co-operation" shall mean any concerted action designed to establish relations between territorial communities or authorities of two or more Contracting Parties, other than relations of transfrontier co-operation of neighbouring authorities, including the conclusion of co-operation agreements with territorial communities or authorities of other States." . [Art. 1]

So while the Madrid Convention did not give a definition to cooperation between communities from different states, the first Protocol defined and regulated transfrontier cooperations, while interterritorial cooperations are controlled by Protocol 2.

After the definition the drafters of the Protocol pass over the detailed rules with a legal technique: they refer to the Outline Convention and to the first Protocol: „the Contracting Parties to this Protocol shall apply, *mutatis mutandis*, the Outline Convention to interterritori-

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<sup>298</sup> Protocol 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, Strasbourg, 5. V. 1998

al co-operation and the Additional Protocol.” [Art. 4.] In the next section it is explained what „mutatis mutandis” means in this case: „in the Outline Convention and the Additional Protocol the term “transfrontier co-operation” shall be read as “interterritorial co-operation”, and that the articles of the before mentioned international contracts must be applied unless otherwise provided by Protocol 2. ” [Art. 5.]

This regulation has the result that the same international framework is applied to trans-frontier and interterritorial cooperations as well.

The Council of Europe constantly prioritized the trans-frontier cooperation. Besides the Madrid Outline Convention and its Protocols several recommendations were accepted by the Committee of Ministers with special regard to the Recommendation 2005 (2) on good practices in and reducing obstacles to transfrontier and interterritorial cooperation between territorial communities.<sup>299</sup>

It became obvious that „a clear and effective legal framework for institutionalised co-operation” is needed.” [Explanatory Report to Protocol 3 to the European Outline Convention.] Finally a new Protocol<sup>300</sup> was born which made it possible to establish transfrontier co-operation bodies: the newly created Euroregional cooperation groupings.<sup>301</sup> It is an attempt for the standardization of the euroregions which are extremely heterogeneous and show a colorful picture. However, the already existing and working cooperations do not have to transform themselves into this new form. It is also stressed that the new Protocol does not want to challenge the EC Regulation either: entities may also set up European Groupings of Territorial Co-operation (under the provisions of Regulation (EC) 1082/2006) on grounds of their goals.

The ECGs are legal persons; it is an obligatory rule, not just a possibility - like it was in Protocol 2. They are ruled by the law of the state in which the ECG has its headquarters. „The ECG shall have the most extensive legal capacity” secured to legal persons under the State’s national law: it can conclude agreements, contracts, bring legal proceedings, acquire property, hire staff and can have an own budget. [Art. 2 of Protocol 3.]

The members of ECGs are territorial communities or authorities of a state party and member states of the Council of Europe. A state non-party to the Protocol can also be a member if it has common border with a state party where ECG has its headquarter. Private persons can not be members. [Art.3.] ECGs are to be established by a written agreement, its mandatory requirements are listed. Besides a statute shall also be set up as a part of the agreement. [Art.4-5.] ECGs fulfil the tasks which are determined in the agreement and in the statute by its members and are in harmony with the competences of the members.

Hungary did not join any of the two Protocols. According to Soós and Fejes this can be explained by the fact that in our country there are no strong bodies in an economical sense empowered by public legal authority that could maintain cooperation systems with legal enti-

<sup>299</sup> In this document it is recommended for the governments of states to set up a legal framework for these cooperations, to join the Madrid Convention and its Protocols, to take the „good practises” in the Appendix and involve territorial communities in implementing them. In the Appendix the „good practices” are listed and addressed to central authorities: concrete, practical measures are suggested concerning the legal framework for transfrontier and interterritorial co-operation, information, training and institutional dialogue and transfrontier development.

In: Council of Europe, Recommendation Rec(2005)2 of the Committee of Ministers to member states on good practices in and reducing obstacles to transfrontier and interterritorial cooperation between territorial communities or authorities (Adopted by the Committee of Ministers on 19 January 2005at the 912th meeting of the Ministers’ Deputies)

<sup>300</sup> Protocol 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs). It as accepted in 2009 in Utrecht.

<sup>301</sup> Further: ECG

ty. A regional reform would be needed to establish regional self-governments invested with real political power which could set up these cooperation systems. [Soós-Fejes, 2008, p. 127.]

For now more than 30 years have passed since the adoption of the Madrid Convention. Several agreements were accepted to fill this framework. However, this type of regulation could not live up to expectations: a unified system could not come into existence. Its fragility partly derives from its international legal nature. It is also a deficiency of the Protocol that private members, so the whole civil sphere is excluded from the circle of membership. It also causes problems that we face a doubled system: Besides ECGs the European Union created EGTs, the European Groupings of Territorial Co-operations.

## 2.4. The European Charter of Local Self-Government

The European Charter of Local Self-Government<sup>302</sup> was also accepted under the aegis of Council of Europe in 1985 in Strasbourg. It consists of three parts: the first part deals with the principles of local self-government: among others with the constitutional and legal foundation, the scope and concept of self-government. The second part consists of miscellaneous provisions about the undertakings of the parties. In Article 10 the local authorities' right to associate is guaranteed: „Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.” These possibilities are extended to international level as well: they can „belong to an international association of local authorities” and „co-operate with their counterparts in other States.” [Art.10.]

**Table 1: The entry into force of the documents of the Council of Europe in Hungary and in its neighboring countries**

Member States of Council of Europe	Madrid Outline Convention	Additional Protocol to the Madrid Convention	Protocol No. 2 to the Madrid Convention	Protocol No. 3 to the Madrid Convention	European Charter of Local Self-Government
<i>Hungary</i>	1994	-	-	-	1994
<i>Austria</i>	1983	2004	2006	-	1988
<i>Croatia</i>	2003	-	-	-	1998
<i>Romania</i>	2003	1998 (signed)	1998 (signed)	-	1998
<i>Serbia</i>	-	-	-	-	2008
<i>Slovakia</i>	2000	2000	2001	-	2000
<i>Slovenia</i>	2003	2003	2003	2013	1997
<i>Ukraine</i>	1993	2005	2005	2013	1998

Source: Council of Europe, <http://conventions.coe.int>, (Status as of 27/2/2015)

For the facilitation of cross-border cooperation bilateral and trilateral international agreements were also concluded. These agreements already appeared in the 1960s. Inter-state commissions are the engines of these cooperations. Regional development programmes, spatial planning, good neighbourhood were the main elements of these agreements. Several states have also made international contracts on the implementation of the Madrid Outline Convention. [Lezaic, 2010. p. 21.]

The multilateral international conventions and documents create only the legal basis, the framework for cross-border cooperation; they must be “transferred into” national law. As

<sup>302</sup> European Charter of Local Self Government, Strasbourg, 15. X. 1985

Russo states: “the new law of CBC epitomizes the integrated legal order of the 21st century: a multisource, multilevel, multi-actors, multidisciplinary and multinational legal system, yet a unitary phenomenon, where soft law and actual practices also play an essential role. The study of the law of CBC is key to understanding of the legal reality of the present and future.” . [Russo, 2012, p. 18.]

Unfortunately it is true that “the words “border” and “barrier” became interchangeable in most of the economic discourse on European integration”. [Van Houtum, 2002, p. 37.]

The task to improve border areas is urgent: it should be much more wide ranging and joint activities must be the key characteristics. To be effective, all areas of everyday life should be included: not just economy, but also the cultural, tourism-related, planning, labor aspects as well. Finally, it should be an everyday reality.

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