

Daniel Hegedűs

Critical Analysis of the EGTC Regulation's European and Hungarian Supervision from the point of view of the Implementation's Experiences.

Will the European Border Regions have an effective MLG-platform for territorial cooperation?

The European Grouping of Territorial Cooperation (EGTC) established by the Community Regulation 1082/2006/EC is the first comprehensive, intentionally uniform legal platform for territorial cooperation in the European Union. During the last years several deep analysis was born about this legal institution, mainly with descriptive¹, but fortunately sometime with analytical and critical character². This not really academic, even more policy oriented paper would like to analyse and present the Community and Hungarian experiences gathered with the implementation of EGTC Regulation during the past years. It would like to identify the most important biases which caused that this cooperation form could not be such successful as many European and regional actors hoped it. And it confronts these experiences with the main points of the EGTC supervision process, led by the European Commission in 2011 and with the previous modification of the Hungarian and Bulgarian national provisions. The paper formulates three hypotheses concerning the biases undermining mostly the success of this community legal tool. Firstly (1), that the existing incompatibilities among the national implementation provisions and the diverse implementation of the regulation by the competent national authorities create non neglectable obstacles for EGTCs' establishment and functioning. Secondly (2), that albeit EGTC could be used as Multi-Level Governance platform for managing cross-border cooperation or other policy programs, this possibility is in most of the cases practically not utilised. And thirdly (3), the amendments of national provisions often target the creation of state authorities' stronger control on EGTC activities, and not the supporting of a more effective functioning.

The European and national experiences with EGTC platform

Breaking with the euphoric discourse used until now containing that thanks for its legal personality, uniform implementation and MLG capabilities EGTC is the best suited institutional model for managing territorial cooperation and contributing to the horizontal Europeanisation in border regions, the Committee of Regions established in January 2011 an EGTC Platform to provide the evaluation of this legal tool and its implementation with special regard on the ongoing Commission revision process in 2011. In its Opinion³, which is until now the single published Union document of the EGTC supervision, CoR identified several handicaps, which can be summarised in the following points:

- only few cooperation platforms were established during the last nearly four years.⁴ EGTC has not become a widespread used legal tool for territorial cooperation;

¹ Janssen 2006, INTERACT 2008.

² Maier 2008

³ COTER-V-004. Own-initiative Opinion of the Committee of Regions on New Perspectives for the Revision of the EGTC Regulation

⁴ On the 13th of May 2011 16 EGTCs are registered in CoR's database and 23 are mentioned as "being under preparation". These figures are relatively low to the number of other existing territorial cooperation platforms (Euroregions, Working Communities) in Europe. The EGTC creation boost, hoped and augured by so many scholars and policy actors, failed.

- just a small number of existing EGTC manage territorial cooperation projects co-financed by Community funds;
- there are huge biases on the field of the Regulation's uniform implementation by the Member States and the non-sufficient coordination of national legislations leads to incompatibilities among the national implementation provisions.
- EGTCs are often discriminated by national authorities in project and program calls and often do not have access to community funds because of procedural reasons.

Perhaps from some point of view these diagnoses of CoR EGTC Platform can be surprising, but they are highly correlating with the outcomes of earlier researches about the Hungarian experiences with EGTC implementation.⁵ In a former research paper on the comparative analysis of EGTC national provisions I argued for the need of enhancing general legal and procedural certainty in the national implementation regulations and procedures, because the content of these laws at one hand, and inductive experiences gathered with the strategy of the Romanian national authority by the establishment of some East-Central-European EGTCs on the other hand showed us that the most important motivation of Member States is the establishment of a strong administrative and political control over EGTCs.⁶ Parallel with that Member States try to expand their jurisdiction to all possible EGTC in which entities of the State are participating and try to avoid the use of "foreign law" and foreign jurisdiction that leads to a competition, which national law should govern the EGTC.⁷ It was also revealed, that the exclusive regulation of liability form (limited or unlimited) can make the establishment of common EGTCs practically very hard or impossible, which underlines the strong need for EU supervision on the field of national implementation provisions' compatibility.

But the main drawbacks setting EGTCs back in East-Central-Europe are not only related to the different legal regulations and their deficiencies but to some general institutional and political cultural remarks of Cross-border Cooperations in this corner of the continent. Based on previous researches, qualitative interviews and practical field experiences we can summarise the main remarks of East-Central-European CBC in the following points.⁸

Territorial Cooperations are mostly resource and not need or problem oriented. CBC projects are influenced mostly by the calls and by the available financial contributions. It can be hard to find any CBC project in border-regions around Hungary financed by the own resources of the participants without remarkable external contribution or in PPP form. It reflects on the problem, how financially weak local communities and partners in East-Central-Europe are, but also on another one, which can partially question the efficiency of European Territorial Cooperation resources. Namely that the main motivation for application on calls are not the policy challenges, which could be solved with external resources, but the resources itself, independently from the fact, how really do the participants need the project aim. Practically we can see this phenomenon in the flowering of eco-tourism and bike road projects in border-regions meanwhile the basic traffic infrastructure is also often missing, which would influence much more the competitiveness of the region and the living quality of its inhabitants. This point is just at first sight in contradiction with CoR's observation about the lack of community resources in cross-border programs managed by EGTCs. The activity of the most EGTCs in the Carpathian Basin is generally weak (as exception could be Ister-Granum mentioned) similarly to the most other institutional platforms, e.g. euroregions

□ Hegedűs 2009a

⁶ This opinion is also shared by Maier 2008.

⁷ Maier 2008.

⁸ Hegedűs 2009a, Hegedűs 2010a, Hegedűs 2010b

(exceptions could be again WesPa, DKMT, etc.). The reason in both cases is the same, namely that the calls of European Territorial Cooperation Programs are not really harmonised with EGTCs or other institutional platforms and they often can not apply. It has the consequence, that the most cooperation platforms (incl. EGTC-s) do not manage any transfrontier projects with or without European financial contribution, because the calls still target nearly exclusively the local or civil partners, not the institutional platforms or EGTCs, which do not fit legally in the programs. Albeit the resource and challenge oriented application behaviour is an East-Central-European phenomenon, the need for the harmonisation of project founding and CBC institutional structures is a general European one, emphasised also by CoR's opinion.⁹

A second characteristic of CBC in East-Central-Europe is that *institutional cooperation platforms were organised nearly exclusively by the logic of administrative structures and levels and not along administrative and policy competencies*. Euroregions, Working Communities, EGTCs were established by entities on the same level in the administrative structure of the neighbouring countries, e.g. municipalities with municipalities, or second level administrative structures with each other. The practical disadvantage of this nearly self-evident behaviour is, that administrative and policy competencies are delegated to quiet different levels in the given national administrative systems. The Slovak municipalities have much lesser competencies than e.g. Hungarians have, albeit euroregions and EGTC along the Slovak-Hungarian borders are consisted exclusively by municipalities. The situation is again nearly the same, when Hungarian counties, lacking competencies and financial power, cooperate with Austrian federal states (Länder). In all of these cases cooperation is just in the common segment of competencies possible. This limitation of cooperation fields could be avoided if cooperation platforms (EGTCs) were established as Multi-level Governance (MLG) platforms. It would mean that either all relevant policy-makers should participate in the given geographical area (border region) or those ones, which dispose of the needed competencies on both sides of the border, independently from the fact, where are they situated in the administrative structure.

As third point we could emphasis that characteristic, which is perhaps the major grassroots obstacle of MLG-platforms' establishment. Namely the *lack of territory based regional concept* in the head of local policymakers and *the interest conflicts and manifestation of immanent mistrust between the representatives of different administrative levels*. By the establishment of many EGTCs in Hungary could be experienced after 2007 that local municipalities are often not open to participate in multi-level cooperation structures in which also NUTS III level entities (counties) or important development poles, cities in central position would be involved.¹⁰ On the other hand counties and development poles do not "waste time" for cooperation structures in which they should bargain and reconcile with dozens of small municipalities about common policy programs, even if these municipalities create the small-regional neighbourhood of the pole. An empirical evidence supporting this statement is, that among all EGTCs established with the participation of Hungarian members¹¹ it can not be found anyone which would have multi-level character. In contrary to that, all were founded exclusively by local municipalities. In the case of Banat-Triplex-Confinium Szeged and Makó clearly rejected the possibility of the participation and the same happened with Győr in the Csallóköz-Szigetköz EGTC project. Albeit on the other hand the

⁹ COTER-V-004 – Cdr 100/2010 fin

¹⁰ Empiric experience gathered through the establishment process of Banat-Triplex-Confinium and Tündérvölgy Csallóköz-Szigetköz EGTCs.

¹¹ State of 13th May 2011. Abaúj.Abaújban, Ister-Granum, Ung-Tisza-Túr-Sajó (UTTS), Banat-Triplex-Confinium, Karszt-Bódva and Pons-Danubii.

invitation was also not really warm, the smaller towns opposed since the very beginning the integration of higher administrative units or great cities in the work of the EGTCs. The first EGTC with multi-level character will be perhaps the Ung-Tisza-Túr-Bodrog, initiated this year by Oszkár Seszták, Head of the Assembly of Szabolcs-Szatmár-Bereg county in which beside the municipal level also Szabolcs-Szatmár-Bereg and Kosice counties are planned to participate.

Forth, we can not deny that *the characteristics of the national legal systems and their CBC related regulations at one hand, and the implementation culture and the level of rule of law on the other hand influence fundamentally the quality of territorial cooperation.*¹² As it was mentioned, nation states compete to expand their national law – and through that their sovereignty – on the possible greatest number of cooperation platforms, especially in the case of EGTCs.¹³ A parallel phenomenon, that albeit the number of border functions¹⁴ decreases within the European Union, *the vindication of state sovereignty is still vivid on the field of cross-border cooperation.* The political control of central state authorities over cooperation platforms could be mentioned here, especially concerning EGTCs again. The state authorisation, control and dissolution regulations are the most detailed parts of nearly all national implementations provisions. And in some countries the special status of the border line can also pull back CBC investment programs – as it is the case in Hungary – because to all activities in the border line area intergovernmental agreement is needed, representing the governmental responsibility over borders and state sovereignty.¹⁵

Last but not least we can not leave it out from consideration that till today significant ethnopolitical motivations are vivid on the field of territorial cooperation from governmental sides in East-Central-Europe.¹⁶

As it can be seen, most of the drawbacks belong to the political cultural environment and can be hardly eliminated by the modification of the community legal frames. On the other hand the enhancing of legal certainty and the limitations of arbitrary actions by the nation state could contribute to the more effective use of EGTC platforms and could remove some obstacles from the way of territorial cooperation in East-Central-Europe.

The focal point of EGTC supervision on European level

In this part of the paper the analysis would like to reflex on the question whether the main points of EGTC community supervision reflex on the above mentioned special problems of the East-central-European region and how far could they contribute to the more effective functioning of EGTC in the territorial cooperation.

In its opinion¹⁷ the Committee of Regions identified three segments of difficulties regarding the establishment and functioning of EGTCs. They are mainly legal-substantial, legal-procedural and economic-financial causes and CoR identified the legal-procedural segment as the most determining source of problems for EGTCs and concentrated its recommendations to that dimension.

The single legal-substantial remark in the document is, that the unclear legal status of the EGTC form, whether it is public or private law entity, undermines in some respect the

¹² Hooghe – Marks 2003

¹³ Maier 2008

¹⁴ To border functions see Ricq 2006

¹⁵ Hegedüs 2009a and 2010a

¹⁶ To the ethnopolitically motivated restrictions in the EGTC implementation provision see Hegedüs 2009.

¹⁷ COTER-V-004 – Cdr 100/2010 fin

legal certainty of the implementation and through that the trust of the relevant partners.¹⁸ The conflict in my point of view is not between the facts, that public law entities (with public procurement obligation) establish an EGTC, which is mostly anchored in the national legal systems following the model of private law entities. The problem is that community law prescribes public law quality that makes the cooperation with private law actors (either from business or from NGO sector) very hard and complicated for EGTCs and aggravates through that the contribution to the EGTC's original goals.

Among the legal-procedural recommendations CoR emphasizes the general requirement of possibly unified national implementation and the need for a legally not binding outline containing its corner points. Beside such a guiding tool CoR also expressed the wish for a joint forum and continuous dialogue with the involvement of all relevant European and national authorities and different promoters. That would really enhance the transparency of national authorities' decision and would make politically motivated restrictive steps more difficult. Together with the proposed network of legal help and technical assistance these new measures could really enforce more legal certainty and neutrality towards EGTC in different stages of establishment or functioning from the side of the national authorities. On the other hand, the earlier Hungarian proposal¹⁹ to create a European appeal forum against the decisions of the national authorities were not overtaken, CoR chose a milder, not legal procedural tool to enhance a more uniform implementation culture.

CoR also proposed steps for enhancing legal certainty and partners trust from a different angle, namely taking the obligation for publishing EGTC fundamental documents in the Official Journal more seriously. Cases, when the registration and through that the legal fact of the establishment could be questioned, happened throughout of Europe, but also in Hungary. The Ung-Tisza-Túr-Sajó EGTC (UTTS), which by the way abused the name of an other cooperation platform that time under establishment (Ung-Tisza-Túr EGTC – UTT) and caused not neglectable confusion in the Committee of Regions, did not publish its agreement and statute according to Article 5 (2) of Regulation 1082/2006.

At the beginning of 2010 the Hungarian Ministry of Self-Governments in cooperation with INTERACT collected the national experiences and recommendations and composed a catalogue of them for the forthcoming EGTC supervision.²⁰ In this catalogue a useful tool was drafted – based on the negative experiences gathered with UTTS – for the solution of this above mentioned problem of publishing the founding documents in the Official Journal. It was recommended that this part of the founding procedure should be integrated into the national registration procedure or more concrete the registration authority should send the accepted agreement and statute for the national publishing source and for the Official Journal. Unfortunately CoR's opinion contains much more only comprehensive identification of some problematic points in the EGTC legislation and rarely concrete solution proposals. It can be just hoped that during a later stage of the EGTC revision the European Commission will use also the more detailed recommendations and proposals of INTERACT.

Beside the legal-procedural suggestions the Committee of Regions also opened three contentual questions which could give new inputs and new horizons for the territorial cooperations under the revised EGTC regulation in the future.

First one, the question of private law entities' participation in EGTCs' activity was affected. As it was mentioned above, private law business and civil entities could contribute a lot to the efficiency and quality of territorial cooperation and EGTCs' work. Without that

¹⁸ To the link between legal personality and partners' trust see Maier 2008.

¹⁹ <http://www.otm.gov.hu/web/egtc.nsf/html/munkacsopot.html>

²⁰ <http://www.otm.gov.hu/web/egtc.nsf/html/munkacsopot.html>

EGTC can not become such a multi-level governance platform which is characterised by Liesbet Hooghe and Gery Marks as “task-specific governance”:²¹ flexible structure of a network with multi-level and cross-cutting membership aiming the delivering of specific public-goods for the society. CoR’s opinion emphasises first at all the importance of PPP and other concession structures. But the final regulation of this question will determine largely the future of territorial cooperation in Europe, because it can be also understood as a choice between the categories of public legal entities oriented, rigid and hierarchical “general-purpose jurisdiction” and the flexible “task-specific governance” with mixed membership according to the theoretical framework of Hooghe and Marks.²²

A second contentual question is the participation of third state entities. Paragraph (16) of Regulation No. 1082/2006’s preamble governs contemporarily this issue on the following way. Third states can not be members in EGTCs, but subnational entities of third countries – if the national law or the international legal obligations make it possible – can participate in it. But different national provisions stretched this regulation, the French²³ and Bulgarian²⁴ implementation norms for example liberalised third parties’ participation.²⁵ The extension of possible EGTC membership to non EU Member State entities could contribute a lot to the quality and intensity of cross-border cooperation in the Eastern Partnership dimension of NPI and to the legal frames of contacts maintained with Switzerland, which influenced the French national legislation on a non-neglectable way.

Accepting the question’s importance, formally this kind of cooperation was already possible. During the supervision the concrete, unified rules and forms should be adopted and should be determined the circle and content of that national and international legislation, which can work compatible with the EGTC regulation. From the side of the international law it could mean the adoption of optional protocols No.1. and No.3. of the Council of Europe’s Madrid Outline Convention with the recognition of self-governments legal capabilities to make legally binding international agreements²⁶ and the cooperation platforms’ legal personality.²⁷ From the side of national law, the implementation provisions should regulate the question of authorisation procedure and the designation of the notification authority in conformity with the EU regulation. But beside that all it is questionable, how could the Commission and CoR manage parallelly the projects of more uniform implementation of the EGTC regulation among EU Member States and the establishment of a common supervising network at one hand and the more comprehensive involvement of third country entities on the other hand.

And last but not least CoR emphasised the importance of the link between the cohesion projects and the introduction of EGTC’s institution. Based on the current experiences, now EGTCs are often excluded from project calls because of their unique legal form. The harmonisation is self-evidently required, if EGTC would like to fulfil its task in the improvement of territorial cooperation, but it depends mainly from the managing authorities of the ETC operative programs.

²¹ Hooghe – Marks 2003

²² Hooghe – Marks 2003

²³ Code général des collectivités territoriales

²⁴ Governmental regulation No. 199/2007

²⁵ Hegedüs 2009a

²⁶ Which does not mean that they become subjects of international law, as it is often misinterpreted.

²⁷ To the system of the Madrid Outline Convention and its compatibility with the EGTC regulation see Orova 2006, Hegedüs 2006, Hegedüs 2007, Hegedüs 2008.

National supervisions between 2007 and 2011

It has taken long time – nearly three and half years – until Malta as last Member State adopted its national implementation provision on 12th January 2011. But this part of the paper will not concentrate on the prolonged national legislations, in connection which we have unfortunately few information about the know-how transfer and information exchange among the legislators and implementation authorities.²⁸ It will focus on the supervised and amended national norms, in connection which the gathered national experiences could have led to the modification of the EGTC rules. Two of such kind amendments can be mentioned. The amendment of the Bulgarian governmental regulation²⁹ in 2008³⁰ and the modification of the Hungarian EGTC act³¹ in 2010.³²

In the Bulgarian case the amendment made the political control over EGTCs more rigid in manifold ways. In contrary to the earlier regulation, in which the Ministry for Regional Development and Public Work was the only competent implementation authority, after 2008 the participation of higher-level territorial units should be approved by the government itself. No procedural deadlines are bounding the competent authorities, which jeopardizes legal certainty in connection with EGTC's establishment. And on the other hand the Bulgarian legislator give the right not only to competent authorities, as it is regulated in article 14 of the EGTC regulation, but for every citizen to initiate *actio popularis* the EGTC platform's dissolution, if it acts against public order, public security, public health or public moral according to their opinion. Between 2007 and 2008 no EGTCs were founded with Bulgarian participation, so it can be stated that the amendment does not aimed the improvement of the regulation based on former experiences, just the extending of state control further than the first legislation made it possible.

The Hungarian regulation before 2010 could be mentioned from some aspects as best practice in Europe. The high level norm in the hierarchy of legal sources accepted by the legislative branch (Parliament) and the Metropolitan Court of Budapest as competent authority, part of the independent judicative branch secured the immunity of EGTCs' activity from all negative political influence of the executive and granted a high level of legal certainty.³³ The Hungarian national provision was the one single within the EU, which empowered an organ of the judicative and not of the executive branch for implementation authority. Unfortunately, albeit this model could be shared as best practice, the Metropolitan Court of Budapest could not became acclimatized with its own role and has done comprehensive lobby to modify the national legislation and can unload this competence. The lobby was successful, but the legislative outcome became a bit confuse and suboptimal. Now the Ministry for Public Administration and Justice is the approving authority, but the Metropolitan Court of Budapest became the registering one. It means, that there could not be attained any real goals, meanwhile a lots of negative effects were created. The workload of the Metropolitan Court of Budapest became not really fewer. The procedure on the other hand became much more complicated, because concerning the two steps contained by the EU regulation two different state organs are authorised to act, which decrease transparency and

²⁸ During 2007 intensive coordination and negotiations have taken place among Romanian and Hungarian experts concerning the forthcoming adoption of the Romanian implementation norm, but the results of the information exchange can be adjudged as very suboptimal, the Romanian and Hungarian rules became the less compatible EGTC implementation norms in the European Union. Hegedűs 2009a

²⁹ Regulation No. 199/2007

³⁰ By regulation No. 250/2008

³¹ Act No. XCIX/2007

³² By act No. CXXVI/2010

³³ Hegedűs 2009a

legal certainty. And last but not least, the best practice model excluding the negative political influence of the executive power belongs to the past. The contentual decision about the approval of the entities' participation in the EGTC is made by a ministry.

Albeit beside France the most experience with EGTCs' establishment could be gathered in Hungary, the amendment of the Hungarian act was also not motivated by the utilisation of these experiences, but by the negative lobby of an affected policy actor, the Metropolitan Court of Budapest. Even out of the own recommendations formulated together with INTERACT³⁴ the Hungarian legislator has not overtake a single one, albeit the possibility existed for contentual improvement. The amendment remained "slim shaped" and aimed just the change of the approving authority.

But the whole climate of EGTC policy can be adjudged rather positive after the amendment too. Now the approving authority, the Ministry for Public Administration and Justice is very committed for the support of EGTCs.³⁵ In its regulation No. 15/2011 the Ministry established a fund exclusively for the financial support of EGTCs' creation and activity. With that tool it reacted on earlier Hungarian feedbacks and experiences, but in conformity with CoR's opinion about the harmonisation of EGTC legislation and the founding of territorial cooperation programs. Until it can happen on the level of European Territorial Cooperation operative programs, this ministerial fund can serve well as provisional transitory measure.

Conclusion

Albeit the Committee of Regions step over on the until now unanimous uncritical approach toward the legal institution of European Grouping of Territorial Cooperation, as it could be seen, just some fundamental problems could be identified and both Committee of Regions and the European Commission are in dept with the concrete policy answers. But it is questionable, how effective can be the supervision process, if CoR concentrates first of all on legal-procedural issues, how can be more EGTCs established, and not on contentual ones, how could EGTCs contribute more effectively to horizontal Europeanisation and to the management of territorial cooperations.

The amendments accepted by the national legislations in the period between 2006 and 2011 do not aimed again the improvement of the legal tools' efficiency. The changes affected mostly the competent national authorities and resulted the enhancing of state control and political influence over territorial cooperation. The Hungarian regulation on the ministerial fund for the financial support of EGTCs can be mentioned as a unique positive example.

But all in all, it should be underlined, that the most shackling obstacles of this legal institutions' effective use lay in the political and cultural environment and not in the regulation itself. It should be emphasised, that EGTC is not a magic tool. But if it will be used as a competency based MLG-platform for the management of challenge and problem oriented cooperation programs, it could contribute a lot to the quality of territorial cooperation in Europe. But if we are not able to see the need for qualitative change, how territorial cooperation should be organised, EGTCs can be also not much more, just v2.0 euroregions with legal personality, an institutional framework with often paralised units.

³⁴ <http://www.otm.gov.hu/web/egtc.nsf/html/munkacsopot.html>

³⁵ Albeit this political attitude is not always shared by many governmental actors. To this question see Hegedüs 2008.

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