

Title: Harmonizing Trends vs Domestic Regulatory Frameworks: Looking for the European Law on Cross-border Cooperation

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Abstract:

The European law of cross-border cooperation is the legal product of the interplay of different legal orders, namely the international public legal order (Madrid Outline Convention, following Protocols and international agreements enforcing it), the European Union and the national one. To this extent, the European law of CBC is a dynamic process where each of the three components plays a role but none is prevailing from a normative point of view.

The paper examines the components of this European law of CBC by looking first at the way CBC is currently conceived by the supranational legal drivers (Council of Europe and EU). It emerges that CBC is not more a matter of dealing with the problems of proximity between communities and territories laying on either side of borders, but of putting together genuine projects for CBC area and implementing a real CBC policy. This implies some consequences. First, CBC as a policy tends to involve territorial units enjoying influential political capacity, such as: federal state, legislative regions or at least inter-municipal association. Even national state may have an interest in participating. The second feature is the institutionalization of CBC as a way to promote coordination of policies, even according to a multilevel governance concept, rather than as an instrument to solve specific cross-border problems.

However, this conception of CBC and its consequences must be put into relation with the attitude national states have showed towards CBC. By taking into consideration some factors – namely, the type of decentralization, the intergovernmental relations, the ethnic minorities presence, the influence exerted by supranational actors in countries of democratic transition – we will investigate the potential degree of the national states' acceptability of the common regulatory solution advanced at the supranational level. To this extent, some specific references will be made to the national enforcement process of the EGTC Regulation in order to enlighten and understand why the EGTC application across Europe is likely to vary.

ESSAY

HARMONIZING TRENDS VS DOMESTIC REGULATORY FRAMEWORKS: LOOKING FOR THE EUROPEAN LAW ON CROSS-BORDER COOPERATION

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1. Introduction

Currently, one of the most prominent features of the European legal landscape is the interaction between national, European Union and international-regional legal orders. While the interrelations between national and EU legal orders are a well-established phenomenon, the influence played by the Council of Europe legal interventions on both national and EU legal orders is becoming more and more relevant, mostly due to the

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European Convention for the Protection of Human Rights and Fundamental Freedoms and the increased judicial activity of the European Court of Human Rights.

Cross-border cooperation (CBC) ¹ is another field, certainly less sensitive than the protection of human rights, where a similar interaction between legal orders emerges in such a way that it is possible to speak of a European law of CBC.

To this extent, it is difficult to define what the European law of CBC is in positive legal terms since the notion aims more to highlight the idea of CBC as a dynamic process where all the three mentioned legal orders – namely the international, the EU and the national one – have a normative role but none of them is prevailing.

In fact, CBC is not international, in the sense it is not an exercise of the international treaty-making power² but certainly, it is a matter that has been developed and is increasingly being developed by international law instruments.³

¹ In this contribution, the term ‘crossborder cooperation’ will be used as an overarching concept referring to any concerted action conducted mainly by subnational authorities (and occasionally by national states with other subnational units) belonging to different countries, aimed at establishing or fostering their cooperation. The preference for the mentioned terms relies on the wishing to avoid the terminology in use in specific institutions, namely the CoE and the EU. According to the Council of Europe legal instruments, ‘transfrontier cooperation’ refers to cooperation between neighbouring territories. The signing and entry into force of Protocol No. 2 of the Madrid Outline Convention introduced the notion of ‘interterritorial’ cooperation, referring to cooperation among territorial authorities not sharing a common border. In the EU INTERREG framework, transborder and interterritorial types of cooperation were labelled respectively cross-border and interregional cooperation. A third concept was also developed within the EU: the ‘transnational cooperation’, referring to cooperation among national, regional and local units of at least two Member States. Starting with the 2007-2013 EU structural funds programming period, the three previous strands of INTERREG were renamed “territorial cooperation”. Thus, CBC, as it is used in this contribution, is comparable to the “territorial cooperation” notion, as it is currently applied in the EU framework. However, the EU territorial cooperation concept, by avoiding any reference to the extra-territorial effect (as all the previous terms did, by means of prefixes such as trans-, inter-, cross-), seems to convey the idea that cooperation between subnational units pertaining to different EU Member States is almost an internal form of cooperation within the EU territory. Because of that, it seems a notion deeply-rooted in the EU conceptual framework. Cross-border cooperation seems more neutral and it maintains the idea of a cooperation having an extra-territorial character.

In the literature, the cross-border cooperation notion has been used to define “a more or less institutionalised collaboration between contiguous subnational authorities across national borders” (see Markus Perkmann, ‘Cross-Border Regions in Europe – Significance and Drivers of Regional Cross-border Co-operation’, in (2003) *European Urban and Regional studies*, 10(2), 153-171, 156). According to the further criteria mentioned by the Author, in order to better define the use of the concept, CBC involves public actors and it lacks any international character due to the fact the players are not legal subjects for the international law. This notion is different to CBC as it is used in the present contribution, since it refers to contiguous subnational cooperation and it suggests that CBC always implies a certain territorial institutionalisation, which, according to us, is only a potential development of CBC.

² There is a general consensus that CBC has not any international law dimension. This opinion is generally based on the premise that CBC is conducted by territorial players which are not legal subjects according to the international law, although this finding might be questioned in the light of the provisions, set in the EGTC Regulation and Protocol No. 3, foreseeing the participation of the national states in the EGTC and ECG.

According to some international scholars, the fact the players of CBC are not legal subjects according to the international legal order is not a decisive argument, though it can be an indicator of the non international nature of the cross-border agreements along with the material content and the will of the parties concerned. See L. Mura, *Gli accordi delle regioni con soggetti esteri e il diritto internazionale*, (Giappichelli, Torino, 2007). In fact, it is argued that according to international law the state is to be

Nor is CBC a purely domestic legal issue. As a matter of fact, whereas in the past the legal capacity for the subnational units to perform CBC or to set a CBC body was dealt with by the national state, by means of domestic provisions or international agreements the state decided to agree upon, today the increasing regulatory role of the EU in the CBC field with the adoption of Regulation 1082/2006⁴ – which sets common provisions concerning the European Grouping of Territorial Cooperation (EGTC) – seems to undermine this finding. The EGTC Regulation has allowed subnational units to conclude a cross-border convention with homologous foreign counterparts for a CBC body establishment, no matter if such a possibility was previously granted according to the relevant domestic legal order. This is the case of Italy, where, until the EGTC Regulation adoption, the subnational units were not allowed to set a CBC body.⁵

Thus, the paper argues that the key factor for explaining the legal nature of the CBC “European law” is exactly the interaction amongst supranational and national legal orders, a feature that makes it particularly difficult to settle disputes when they arise before the judiciary.⁶

To this extent, it may be noted that although the CoE and the EU legal instruments concerning CBC are deeply different in their nature and function (with the CoE aimed

considered as an overall subject which can be represented internationally by any internal organ. This principle is today enshrined in art. 27 of the Vienna Convention on the Law of Treaties. The Vienna Convention itself has introduced a derogation to the principle. According to art. 46 (which at present can not be considered as a codification of a general customary international rule) a state may not invoke a violation of its internal law as a ground of illegitimacy of the Treaty “unless the violation was manifest and concerned a rule of its internal law of fundamental importance”. It should be also mentioned that in the light of art. 7 of the Vienna Convention – a provision which enumerates the conditions or the situations according to which a person is considered as representing the state for the purpose of adopting the text of a treaty – there seems to be a strong presumption against the fact a subnational units, when it concludes a CBC agreement, could be considered as representing the state for the purposing of adopting an international treaty. The situation would be different and it should be assessed case by case when the CBC players enjoy the treaty making power according to their domestic constitutional provisions. See Luigi Condorelli, Francesco Salerno, ‘Le relazioni transfrontaliere tra comunità locali in Europa nel diritto internazionale ed europeo’, (1986) 36(2) *Rivista Trimestrale Diritto Pubblico*, 381-423.

³ See P.M. Dupuy, “La coopération régionale transfrontalière et le droit international”, in (1977) *Annuaire Française de droit international*, 1977, 854 : « loin d’apparaître un obstacle, [le droit international public] serait alors au service de la coopération régionale transfrontalière ».

⁴ European Parliament and Council Regulation (EC) 1082/2006 of 5 July 2006 on a European Grouping of Territorial Cooperation [2006], OJ, L 210/19.

⁵ It must be noted, however, that, as we will point out later in the text, the national state still retain wide discretion in denying the setting of an EGTC. Nonetheless, this is not unrestrained since the state has to give a statement of its reason for the denial which can be judicially reviewed.

⁶ For an interesting example, see decision 258 of 22 July 2004 of the Italian constitutional court, where the constitutional judges rejected the thesis of the central government according to which the national law enforcing the Madrid convention on CBC – a statute requiring the subnational units to obtain the agreement with the government before concluding a CBC agreement – was applicable to a CBC convention concluded within the framework of an INTERREG program. According to the court, the above mentioned CBC convention has to be considered as EU law. Moreover, the court considered the creation of a CBC body legitimate, if occurred within the INTERREG program context. The reasoning followed by the court seems to suggest that CBC occurring and regulated according to EU law is inherently different from other forms of CBC, as those regulated by the EOC or bilateral international agreements, and because of that requires a more lenient scrutiny by the national authorities.

to provide a minimal common regulation, according to international law standards, and the EU aimed to provide substantial legal harmonisation of EU Member States legislations),⁷ they share nonetheless the common goal of harmonising European national legislation and they highlight common legal developments.⁸

The idea we will develop in the first part of the paper is that this common supranational trend is based on the favouring of CBC institutionalisation. CBC is no longer conceived in terms of focus-tailored transfrontier action but rather in terms of transfrontier policy. Within this context, CBC bodies are increasingly considered as policy coordination tools where large and influential subnational territorial players take part.

At the same time, however, it would be a mistake to overestimate the harmonising role played by the above-mentioned supranational forces. In fact, in both the EU and CoE legal instruments the references to the domestic legal orders are still important and meaningful. Despite the “common core” provisions on the setting of a CBC body, both the EGTC Regulation and the Protocol No. 3 of the European Outline Convention on Transfrontier Cooperation concerning Euroregional Co-operation Groupings remit to the domestic law where the CBC body has its headquarters as a subsidiary source to be applied in the case substantial rules are lacking.⁹

This is not the only case. Probably, the most important example of the still decisive role played by the national state as a regulator of the CBC is the fact that both the EGTC Regulation and the Protocol no. 3 grant national states wide power in deciding on the setting of a CBC body by referring to concepts such as national public interest or public policy.¹⁰

The enforcement of these notions mostly relies on political evaluations that are likely to be influenced by the approach the relevant state has progressively showed towards CBC. Because of that, in the second part the paper will draw attention to the different existing national attitudes in order to see how they can influence the acceptability, both at a formal and informal level, of the common regulatory solutions put forward by the international and the European legal orders.

⁷ For an useful comparison of the CoE and EU interventions in the field, see Alice Engl, ‘Future Perspectives on Territorial Cooperation in Europe: The EC Regulation on a European Grouping of Territorial Cooperation and the Planned Council of Europe Third Protocol to the Madrid Outline Convention concerning Euroregional Co-operation Groupings’, (2007) 3 *European Diversity and Autonomy Papers-EDAP*, at <www.eurac.edu/edap>.

⁸ On this issue, see the contributions edited by Henry Labayle (ed.), *Vers un droit commun de la coopération transfrontalière?* (Bruylant, Bruxelles, 2006).

⁹ See art. 2.1.c) of the Regulation 1082/2006; art. 2.2 e 2.3. Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings, signed in Utrecht on 16 November 2009. Text available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/206.htm>>.

¹⁰ See art. 4.3 of the Regulation 1082/2006; art. 4.5 Protocol No. 3 to the Madrid Outline Convention. It should be noted that these concepts, though remitting to the national legal orders and practices for their enforcement, for the very fact of being inserted respectively in an European Union and Coe legal document also become international and EU notions. Needless to say, in relation to the EU, that as a consequence it would be possible to refer the Court of justice for indirectly reviewing the domestic enforcement of the above-mentioned concepts when they should contradict the *effet utile* of the EGTC Regulation.

To this extent, the research assumes that CBC may take on different forms or be differently regulated according to some variables, such as the degree of regionalisation of the national legal order, the usual pattern of relations between the national state and the subnational territorial level, the relevant national constitutional case law, the existence of national minorities across the borders.

The paper is divided in two parts. The first will deal with the international and European harmonising trends we may currently find in Europe. The second will focus on exploring the above-mentioned factors influencing the national policies concerning CBC. Finally, some considerations will be made concerning the implications derived by this interplay between harmonising trends and national regulations. To that extent some references will be made with regard to the domestic enforcement process of the EGTC Regulation.

2. The Harmonizing Trends: Council of Europe and EU Involvement in CBC

The original idea of CBC, as it has been set out by the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities (EOC), provided that it was mainly directed at solving local tailored problems between homologous territorial units. The current trend emerging both at the CoE and at the EU levels is towards a more dynamic form of CBC.

The dynamic nature of the CBC has to be put into relation with the fact that CBC is not just a matter of dealing with the problems of proximity between communities and territories lying on either side of borders but of putting together genuine projects for CBC areas and implementing real CBC policy.¹¹

In this part of the paper we will single out this emerging new conception of CBC by referring to the supranational instruments currently influencing the European legal landscape, namely the *CoE acquis*, the bi- or plurilateral international agreements adopted to enforce the EOC, the EU legal framework.

The first element suggesting such an evolution is the trend favoring public nature CBC institutionalization by means of supranational document setting “hard core” rules.

The second element is the involvement of territorial players with the greatest “political capacity”, that is, with the ability to intervene in public matters and use their political

¹¹ See Henry Comte, ‘Les acteurs et la légitimité des projets stratégiques transfrontaliers’, in Henry Comte, Nicolas Levrat (ed.s), *Aux coutures de l’Europe – Défis et enjeux juridiques de la coopération transfrontalière*, (L’Harmattan, Paris, 2006), 185-208 ; at 185-186: “Il ne s’agit plus seulement de traiter des problèmes de proximités entre des communautés et des territoire séparés par une frontière mais bel et bien de fonder de véritables projets de territoires transfrontaliers.”

standing to change the results.¹² This means that CBC conceived as a policy demands the involvement both of sufficiently large territorial units and at the same time of the state, which is called to perform a more proactive role in CBC, not merely a regulatory one.¹³

2.1 The Council of Europe *Acquis* on CBC

Certainly, the first contribution to the so-called European law of CBC was given by the entry into force on 22 December 1981 of the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities (EOC), signed under the Umbrella of the Council of Europe.

It took quite a long time before the text of the EOC was agreed upon. This clearly reflects the still persisting suspicions of the Contracting Parties towards CBC, considered as an instrument potentially affecting state sovereignty. As a consequence, the EOC is deprived of any direct legal effect,¹⁴ and it does not confer to subnational units any power to conclude cross-border legal agreements. Such a power can be conferred provided that the Contracting Parties decide to do so, having regard for their different constitutional provisions. In any case, the states maintain a supervision power in order to ensure that the general policy or the international relations of the state as a whole might not be affected.¹⁵ Moreover, the EOC explicitly permits the Contracting Parties to subject CBC to the previous conclusion of international bilateral agreements between the Contracting Parties themselves, with the aim to set the context, forms and limits within which territorial communities and authorities may cooperate.¹⁶

Thus, it is difficult to say that the aim of the EOC was that of providing even a low degree of standardization concerning the regulation of CBC. In fact, the EOC merely places upon the Contracting Parties a duty “to facilitate and foster transfrontier cooperation between territorial communities or authorities within the jurisdiction of two or more Contracting Parties” (Art. 1), and it leaves the Contracting Parties the task of regulating CBC by means either of national legislation or international bilateral agreements.

¹² The concept of “political capacity” has been developed by Michael Keating, *The New Regionalism in Western Europe: Territorial Restructuring and Political Change*, (Cheltenham, Northampton Mass. Elgar, 1998) at 135.

¹³ On the role of the state in dealing with CBC, see the contributions edited by Carlos Fernandez de Casadevante Romani (ed.), *L'Etat et la coopération transfrontalière*, (Bruylant, Bruxelles, 2007).

¹⁴ See Emmanuel Decaux, ‘La convention-cadre sur la coopération transfrontalière des collectivités ou des autorités locales’, (1984) 88(3) *RGDIP*, 557-620, at 557; Manlio Frigo, ‘La cooperazione regionale nella convenzione del Consiglio d’Europa del 1980 e i limiti della sua attuazione in Italia’, in Angelo Mattioni, Giorgio Sacerdoti (eds.), *Regioni, costituzione e rapporti internazionali. Relazioni con la Comunità europea e cooperazione transfrontaliera* (Franco Angeli, Milano, 1995), 71-96; Nicolas Levrat, “L’émergence des instruments juridiques de la coopération transfrontalière au sein du Conseil de l’Europe”, in Yves Lejeune (ed.), *Le droit des relations transfrontalières entre autorités régionales ou locales relevant d’Etats distincts* (Bruylant, Bruxelles, 2005), 17-35.

¹⁵ See Articles 2 and 3.4 of the EOC. The EOC text is available at <<http://conventions.coe.int/treaty/en/Treaties/html/106.htm>>.

¹⁶ See Article 3.2 of the EOC. For a closer examination of the main interstate agreements concluded with the aim of enforcing the EOC, see the further paragraph in the text.

The strategic importance of the EOC does not rely on the practical and effective solutions it puts forward for enacting CBC. Rather, its relevance is due to the fact of transforming CBC “from an activity at best tolerated into an explicitly mentioned ‘legal’ activity, which the Contracting states have agreed to promote”.¹⁷ The EOC set out the idea that the cooperation between subnational units belonging to two different national jurisdictions does not involve any use of international law,¹⁸ but rather it is a way of exercising, according to an “external dimension”, the powers that a national legal order grants to the subnational units.

It is, nonetheless, particularly interesting to investigate the idea of CBC, which emerges in the EOC and to see how it has changed. With regard to this, some issues must be highlighted.

First, if we take into account Article 2 of the EOC,¹⁹ we note that the Contracting Parties adopted a narrow idea of transfrontier cooperation, essentially limited to “neighbourly relations”.²⁰

Moreover, it has been noted that the neighbourly agreements of subnational units usually present a common material object. They do not have great political importance, and they consist of the management of local public services on a transborder area, such as waste collecting, water canalization, firefighters, etc.²¹

Finally, it is worth considering that the EOC specifies that for its purposes the terms ‘territorial communities’ or ‘authorities’ “shall mean communities, authorities or bodies exercising *local* and *regional* functions”.²² According to the explanatory report, this wording was used as a general category, which could cover any form of existing subnational unit.²³ However, it could also suggest the idea that CBC and its legal regulation may vary depending on the scale—regional rather than local—of the

¹⁷ Francesco Palermo, Jens Woelk, ‘Cross-Border Cooperation as an Indicator for Institutional Evolution of Autonomy: The Case of Trentino-South Tyrol’, in Zelim A. Skurbaty, *Beyond a One-Dimensional State: an Emerging Right to Autonomy* (Martinus Nijhoff, Leiden-Boston, 2005), 277-304, at 283.

¹⁸ Explanatory report on the European Outline Convention on Transfrontier cooperation, available at <<http://conventions.coe.int/Treaty/en/Reports/html/106.htm>>, point 35: “In no event are the central government’s powers in general policy-making or the conduct of international relations affected by the Convention. The Convention does not have the effect of conferring an ‘international’ character on transfrontier relations”.

¹⁹ Article 2 of the EOC: “For the purpose of the Convention, transfrontier cooperation shall mean any concerted action designed to reinforce and foster neighbourly relation between territorial communities or authorities within the jurisdiction of other contracting parties”.

²⁰ See the explanatory report on the EOC, at 18, according to which ‘neighbourhood’ implies a certain proximity that should make possible, even in cases in which no territorial strip has been designated by the relevant State, the ruling out of unjustified requests.

²¹ See Nicolas Levrat, *Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatique* (PUF, Paris, 1994) at 54-55.

²² See Article 2.2 of the EOC.

²³ See the EOC explanatory report at point 24.

subnational units involved. The EOC, though, did not provide such a distinction, implicitly suggesting they are the same phenomenon.²⁴

Thus, in the light of these remarks, we may observe that the EOC text conceives CBC in a very limited way.

It is mainly seen as an instrument to solve technical or administrative problems of neighbouring local subnational units.²⁵ The EOC failure to empower the subnational units with the setting of a CBC body reveals that the transborder relations are considered inherently episodic and sectorial. Probably at that time, the CBC institutionalization was considered premature and potentially too dangerous in respect of the national general interest and of the national foreign policy. As a matter of fact, for a state, it is easier to scrutinize a single CBC agreement than the institutional activity of a CBC body, which is very often vaguely defined in the institutive documents.

The EOC was much criticized. At least three general problems have been identified with it: the lack of any real recognition of the right of territorial communities or authorities to conclude transfrontier cooperation agreements; the legal force of the acts taken in the context of transfrontier cooperation; and the setting of a transfrontier body.²⁶

It is in this scenario that an Additional Protocol to the EOC was elaborated. Signed in 1995 and entered into force in 1998, the Additional Protocol marks a meaningful step towards the strengthening of the CBC, by addressing the main shortcomings identified with the EOC.²⁷

First, it explicitly grants to territorial communities or authorities the right to conclude transfrontier-cooperation agreements.²⁸

Second, it also clarifies the problem concerning the legal nature of these agreements and their legal effect.²⁹

²⁴ As I will point out later in the text, I am persuaded that CBC must be distinguished by whether it is conducted by local subnational units or by regional units enjoying meaningful powers, such as the legislative ones. In his book, Nicolas Levrat (*Le droit applicable ... op. cit.*, note 21) notes that a differentiation between local and regional transfrontier cooperation was used in some CoE documents and by some legal scholarship (140) but he does not draw from this any consequences.. He argues that there does not exist a common notion of 'region' and that the CBC legal instruments are the same, independent by the territorial scale of the subnational units involved (144). Though many of these findings are true, I still believe important to take into account that the national regulatory framework of CBC is substantially influenced by the 'political' weight the subnational units enjoy according to their domestic legal systems. The more influential they are, the more the general interests, included those of foreign policy, of the states could be undermined.

²⁵ See Roberto Toniatti, 'La bozza di statuto della regione europea', in Peter Pernthaler and Sergio Ortino (eds.), *Europaregion Tirol, Euregio Tirolo. Rechtliche Voraussetzungen und Scharken der Institutionalisierung/Le basi giuridiche ed i limiti della sua istituzionalizzazione* (Autonome Region Trentino-Südtirol/Regione Autonoma Trentino-Alto Adige, Trento, 1997), 17-38, at 27.

²⁶ See the explanatory report on the Additional Protocol to the European Outline Convention on Transfrontiers Co-operation between Territorial communities or Authorities, point 5, at <<http://conventions.coe.int/Treaty/en/reports/html/159.htm>>.

²⁷ See Bernard Dolez, 'Le Protocole Additionnel à la Convention Cadre Européenne sur la coopération transfrontalière des collectivités ou autorités territoriales', (1996) 100(4) *RGDIP*, 1005-1022.

²⁸ See Article 1 of the Additional Protocol to the EOC.

A third issue addressed by the Protocol is the legal possibility of setting up a CBC body with legal capacity.³⁰

The Additional Protocol introduced many improvements in order to effectively develop CBC. However, it did not repeal an important restriction to CBC contained in the EOC, namely the limitation of it to neighbourly relations and the consequent idea of a CBC essentially limited to solve problems of bordering territories.

It was only with the signature and the entry into force of the Protocol No. 2 on inter-territorial cooperation that the legal instruments and the regulatory framework of the EOC and of the Additional Protocol have been extended to external cooperation not involving any neighbourly relations.³¹

Another problem with the Additional Protocol is that the provisions enabling the subnational units to set a cross-border body do not provide a common legal framework, rather they refer to the national domestic legal system. This has caused many problems in the effective implementation of CBC. In some cases, the conclusion of interstate agreements, providing a common regulatory framework for such a body, has proven to be a solution. Despite the need for a text establishing a clear and effective legal framework for institutionalised cooperation between territorial communities or authorities, it was only in 2009 that the CoE adopts Protocol No. 3 to the EOC concerning Euroregional Co-operation Groupings³², a text offering basic uniform rules for the setting of a cross-border body.

Thus, the CoE *acquis* on transfrontier cooperation seems at first a story of legal breaches and turning points, with the three Protocols progressively expanding CBC.

It should be noted, however, that it was the EOC itself that made CBC legal regulation an evolving issue. Article 8.2 of the EOC explicitly mentions the procedure the Contracting Parties should follow in order to add or extend the convention itself. This reflects the idea of the 'evolutive nature' of the EOC, in which it may be perfected and expanded in light of experience acquired when implementing the provisions of the convention.³³

²⁹ See Article 2 of the Additional Protocol to the EOC and the explanatory report on the Additional Protocol to the EOC, at points 16-18.

³⁰ Articles 3 to 5 of the Additional Protocol to the EOC. Further details are provided in footnote 53.

³¹ See Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial cooperation, Strasbourg, 5 May 1998. Text available at <<http://conventions.coe.int/Treaty/EN/Html/169.htm>>. Interterritorial cooperation is defined in Article 1 of Protocol No. 2 as "any concerted action designed to establish relations between territorial communities or authorities [...] other than relations on trans-frontier cooperation of neighbouring authorities".

³² See Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings, signed in Utrecht on 16 November 2009. Text available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/206.htm>>.

³³ See the explanatory report on the EOC text, at point 14.

Moreover, it should be noted that the EOC's drafters put the regulatory framework of the CBC in appended models and outline agreements, deprived of legal force, rather than in the text itself of the convention. According to the explanatory report this was due to a need for flexibility. The Contracting Parties and the territorial communities were therefore provided with a wide range of possible solutions to meet the various cooperation needs.³⁴

However, a different explanation may be suggested. Because, among the Contracting Parties there were different policies towards CBC, the EOC was meant to provide a minimal common legal framework. The diplomatic compromise reached or needed to agree with the EOC on did not allow the possible legal developments of CBC – already put in place in some Member States - to be included in the EOC text at the time of its signature.

According to this view, the attached models can be read as a possible prelude of the legal developments of CBC at the CoE level, once the Contracting Parties would have agreed to consider them as common legal solutions. Their analysis is important, then, to the extent it reveals an idea of CBC much more complex than that effectively delineated in the EOC text.

Among the interstate model agreements attached at the moment of the EOC signature, we want to focus on those listed as n 1.2 and 1.5, dealing with, respectively, a model of interstate agreement on *regional* transfrontier cooperation and a model of interstate agreement dealing with the setting of a transfrontier body.

Focusing on the first of them, it is interesting to note that although the EOC text treats regional and local CBC as the same phenomenon, the above-mentioned model of interstate agreement on *regional* transfrontier cooperation suggests a different conclusion. In fact, this model agreement recommends the establishment of both an intergovernmental commission—comprising national and regional delegates of both national contracting parties—and of regional committees—made up of representatives of regional and local authorities. The main task of the regional committee is to investigate, in different areas, with the aim to make proposals and recommendation to the intergovernmental commission. Thus, the role of the regions here is not operative. The regions, rather, are called upon to perform a coordinating role, bringing together the relevant territorial players, included the state itself and the local authorities.

As far as the second model, appended to the EOC, it deals with the possibility for State to regulate by international agreement the establishment of a CBC body. Thus, this reveals that the EOC drafters were aware of the need to provide a regulatory framework for CBC body, an issue formally addressed only at a later stage, with the Additional Protocol signature.

³⁴ See the explanatory report on the EOC text, at point 30.

2.2 Interstate international agreements on CBC in Europe

Several interstate agreements concerning CBC among subnational units have been signed in Europe, mainly for developing and regulating the principles contained in the EOC. The purpose of this section is to analyze them according to some common key points.³⁵

2.2.1 Why Concluding bi- or multilateral treaties on CBC?

A good starting point to deal with our issue is to wonder whether there is a need to sign interstates agreements regulating CBC among subnational units. To this extent, it is important to refer to Article 3.2 of the EOC. This provision gives the national Contracting Parties the option to subject the EOC application to the previous conclusion of an interstate agreement with the other Party concerned.

Article 3.2 can be considered a sign of the Contracting Parties' mistrust of CBC. The idea that every external relation should pertain to the central level was still dominant in the 1980s. Therefore, the previous conclusion of an international agreement, as a precondition to permit CBC to develop, meant that the power of subnational units to perform external actions could be neither implicitly derived from their internal competences nor from the EOC itself. The foreign-relations power was considered as a matter reserved for the national level. As such, the power of the subnational units to conduct foreign contacts or relations had to be explicitly recognized and it was in any case considered as a derogation to the general rule that foreign relations pertain in principle to the national state.

Moreover, the previous conclusion of an international agreement gave the national government a powerful instrument to control and limit the scope of transfrontier cooperation.

However, it should be noted that only a few Contracting Parties made use of the possibility created by Article 3.2. This is the case of Italy and Spain, whereas France, which originally made use of this declaration, withdrew it at a later stage.

This finding reveals that the interstate agreements in the field of subnational CBC are to be conceived only to a very limited extent as a means to legitimize and to put under strict control a practice very often developed beyond the law. Rather, they are very often instruments necessary to provide a clearer legal framework, permitting cross-

³⁵ For a general overview of the issue, see Carlos Fernández de Casadevante Romani, 'Les traites internationaux, outils indispensables de la coopération transfrontalière entre collectivités ou autorités territoriales', in Henry Labayle (ed.), *Vers un droit commun de la coopération transfrontalière?*, op. cit. note 8, 89-118. See also Carlos Fernández de Casadevante Romani, 'Le Traité de Bayonne et l'Accord de Bruxelles sur la coopération transfrontalière entre collectivités territoriales', in Yves Lejeune (ed.), *Les droits des relations transfrontalières entre autorités régionales ou locales relevant d'états distincts*, op. cit. note 14, 37-50.

border actors to solve the practical problems they encounter in cooperation among them. This is so especially considering that the EOC and its subsequent Additional Protocol failed to provide a common legal framework.

To this regard, the case of France is particularly interesting.³⁶ At the time of the signature of the EOC, France, as noted above, issued a declaration in pursuance of Article 3.2 of the EOC, thus limiting CBC subnational units to the previous conclusion of an international agreement. Later, the French government changed its policy towards CBC. In 1992, the French subnational units were granted general power to conclude administrative agreements with their foreign counterparts and to set public bodies for transborder cooperation.³⁷ In 1995 they were allowed to take part in CBC public bodies ruled by a foreign law.³⁸ As a consequence of this legislative and political evolution, the declaration to the EOC was withdrawn. However, even the most permissive national regulation towards transborder cooperation is useless if the other national counterparts do not provide a similar pattern. That may explain why France concluded international agreements with almost all of its neighbouring states. In some cases, such as the Bayonne³⁹ and the Rome⁴⁰ treaties, respectively, with Spain and Italy, the international agreements did not add anything to the legal possibilities already offered by the domestic legislation. However, these international agreements were nonetheless necessary for permitting transborder cooperation to develop along these borders. CBC is a mutual relation: lacking an EU harmonizing legislative intervention, an international agreement with the bordering national counterpart was the only way to provide the common legal framework necessary to deal with relations having a transnational character.

An international agreement on CBC may also have the goal of strengthening CBC, offering more instruments for its development. This is the case with various international treaties concluded with the aim of providing a legal regulation for public law-based CBC, in areas in which CBC practices, grounded in private law, were already well developed.⁴¹

³⁶ For a general overview of the French legal framework concerning CBC, see Christian Autexier, 'De la coopération décentralisée (commentaire du titre IV de la loi d'orientation du 6 février 1992, relative à l'administration de la République)', in (1993) 9 (3) *Revue Française de Droit Administratif*, 411-423; Conseil d'Etat (ed.), *Le Cadre juridique de l'action extérieure des collectivités locales* (La documentation française-Collection les études du Conseil d'Etat, Paris, 2006); Daniel Dürr, "La création des organismes de coopération transfrontalière", 235-249, and Patrick Janin, "Le statut et le régime juridique des organismes de coopération transfrontalière en droit français", 251-261, both in Comte and Levrat, *Aux coutures de l'Europe*, *op. cit.* note 11.

³⁷ See *Loi d'orientation relative à l'administration territoriale de la République*, No.92-125, 6 February 1992, in *Journal Officiel République Française (JORF)*, 8 February 1992, 2064-2083.

³⁸ See *Loi d'orientation pour l'aménagement et le développement*, No.95-115, 4 February 1995 in *JORF* 5 February 1995.

³⁹ The Bayonne Treaty was signed in 1995 and entered into force in 1997. The French text is available in *JORF* No. 59, 10 March 1995.

⁴⁰ The Rome Treaty was signed between France and Italy on 26 November 1993. The French text is published in *JORF* No. 5 of 6 January 1996.

⁴¹ See, for example, the preamble of the Benelux Convention on Transfrontier Cooperation between Territorial Communities or Authorities signed 1986 by Belgium, Luxembourg and the Netherlands in 1986. French version: "Constatant avec satisfaction que les collectivités ou autorités territoriales collaborent déjà souvent entre elles de part et d'autre des frontières intra-Benelux sur base du droit privé,

Thus, international agreements regulating CBC among local bodies can serve different goals: they may be a legitimizing source of a practice otherwise deemed illegitimate; they may be a necessary way to solve practical problems raised as a consequence of the transnational nature of the cross-border relations; and they may provide instruments to deepen transborder cooperation.

2.2.2 The Setting Up of a CBC Body: from Episodic to Systemic CBC

Many issues can be considered when assessing the goals pursued by a state in concluding an interstate international agreement on CBC among subnational units. However, one of the most important is certainly whether the treaty regulates or not, and to what extent and powers, a public body for CBC. In fact, a cross-border body permits the subnational units to develop with their homologous foreign counterparts more-systematic cooperation and to establish a permanent arena for discussion and policy-making coordination⁴². It is clear that a national legal order that grants such a legal possibility to its subnational units implicitly considers CBC an instrument of development, rather than as a threat to its general and foreign policy.

Keeping in mind these remarks, we can now class the relevant international agreements as follows:

A first group includes the international agreements signed by Italy with France, Austria and Switzerland. The agreements all reveal a suspicious attitude towards CBC. In fact, they permit the subnational units to conclude agreements with their foreign counterparts, but they do not allow the establishment of cross-border bodies. Moreover, the material scope of the cooperation agreements is limited to those matters specifically listed in each treaty. The reason for that is clear: by allowing territorial communities to conclude only specific agreements on previously established matters, the supervision power of the national state is more effective and the risk for the coherence of the national foreign policy is reduced.

Souhaitant créer pour celle-ci la possibilité de coopérer également sur la base de droit public.” The French text of the treaty is available in (247) *Moniteur Belge* (1991). See also the Isselburg-Anholt Agreement on transfrontier cooperation among territorial units, signed in 1991 between Germany, Rhine-Westphalia, Lower Saxony, and the Netherlands, published in *BGBI*, 1993, Teil II, 842. (French translation): “Souhaitant donner à ces collectivités ou autorités et à d’autres organismes publics la possibilité de coopérer sur la base du droit public.”

⁴² In general terms on the institutionalization of the CBC, see Noralv Veggeland, ‘Regional Governance, Euroregions, Flexibility, Power and Rights’, 46-52, Joseph Marko, ‘Beyond the Nation State: Problems of Regionalisation in Western and East Central Europe’, 65-77, and Thomas Christiansen, ‘Borders and territorial Governance in New Europe’, 78-106, all contributions in Renate Kicker, Joseph Marko, Michael Steiner (ed.s), *Changing Borders: Legal and Economic Aspects of European Enlargement* (Peter Lang, Frankfurt am Main, 1998); Markus Perkmann, Ngai-Ling Sum (eds.), *Globalization, Regionalization and Cross-Border Regions* (Macmillan, Palgrave, 2002); Markus Perkman, ‘Construction of New Territorial Scales: A Framework and Case Study of the EUREGIO Cross-border Region’, (2007) 41(2) *Regional Studies*, 253-266.

A second group regards those international treaties that empower subnational units to set up public cross-border bodies. However, the treaty itself does not provide a common legal regulation for it. Rather, it refers to already existing administrative institutions regulated by the relevant national legislations, usually for inter-municipal cooperation. Moreover, the task of the cross-border body is mainly that of providing transborder public services, rather than being a organisation for policy coordination. We may include in this second group the Bayonne Treaty, signed between France and Spain,⁴³ and the recent treaty signed between Spain and Portugal in Valencia.⁴⁴

A third group to be considered is represented by the Karlsruhe Accord.⁴⁵ Unlike the other above-mentioned international treaties, the Karlsruhe Accord provides substantial common rules for the setting up and functioning of a cross-border body, not merely a reference to the national inter-municipal legislations. The model is represented by the so-called *groupement local de coopération transfrontalière* (GLCT). This is a body whose legal regulation is to be found partly in the Karlsruhe Accord and partly in the constituting documents of the body itself that the parties have to adopt. For what is not explicitly regulated by the above-mentioned sources, the national law regulating inter-municipal associations of the state in which the organ has its headquarters applies.

The GLCT has been a legal model for following international treaties concerning CBC,⁴⁶ for national law dealing with transborder organs (the French *district européen*) and even for EGTC Regulation. The success the GLCT model has encountered may be explained when considering that the subnational units pertaining to different domestic legal orders prefer to adopt an instrument whose regulation is common to the parties, rather than being subject to the national law of one of them.

The fourth model of public cross-border bodies that we should consider is represented by the Benelux Convention, which is certainly the most sophisticated, although not necessarily the most effective one.

⁴³ See Article 5 of the Bayonne Treaty: “Les collectivités territoriales espagnoles et françaises peuvent créer conjointement, en France, des groupements d’intérêt public de coopération transfrontalière ou des sociétés mixte locale dont l’objet est d’exploiter les services publics d’intérêt commun et, en Espagne, des groupement ‘consorcios’.” On the Bayonne Treaty see, Carlos Fernandez de Casadevante Romani, ‘Le traité de Bayonne du 10 mars 1995 relatif à la coopération transfrontalière entre collectivités territoriales: un cadre juridique complet’, (1998) 102(2) *Revue générale de droit international public*, 306-325.

⁴⁴ The Valencia Treaty was signed between Portugal and Spain 3 October 2002, and it entered into force in 2004. See the Spanish text in *Boletín Oficial del Estado (BOE)* n. 219, 12 September 2003 The treaty enables the Portuguese and the Spanish subnational units to set a public crossborder body with a legal entity. This may take the form of *associações de direito publico* or *empresas municipais* if the Portuguese law applies or *consorcios* if Spanish law applies. However, some organizing rules are set in the treaty itself.

⁴⁵ On the Karlsruhe Agreement see Bernard Perrin, ‘Coopération transfrontalière des collectivités locales contenu et limites de l’Accord quadrilatéral de Karlsruhe’, (1996) 289 *Revue Administrative*, 81-89. This agreement, concluded among Luxembourg, Germany, France and Switzerland (the last acting on behalf of the Soleure, Bâle-Ville, Bâle-Campagne, Argovie and Jura cantons), was signed in 1996 and entered into force 1 September 1997. The French text is published in *JORF* of 29 August 1997. The Karlsruhe Agreement reproduces many aspect set in the German-Dutch agreement signed at Isselburg-Anholt, which also allows the subnational units to establish an *öffentlich-rechtlichen Zweckverband*, a public law association with legal personality which is entitled to act on behalf of its members.

⁴⁶ See especially the Bruxelles Agreement signed in 2002 and entered into force in 2004. It was concluded by France, Belgium, the Flemish Region, the Wallonia Region and the French-speaking community. French text available at the *Moniteur Belge*, 16 January 2004.

This public transfrontier institution may enact regulatory acts which are directly binding to member parties and third parties.⁴⁷ The acts passed by the body produce legal effects with no need for domestic implementation in all the territories pertaining to the constituent parties. This makes the organ a real cross-border territorial authority.

Because of the meaningful powers that the body may exert, the Benelux Convention provides that the institutive documents of the cross-border public body must not be in conflict with the national laws of each country involved.⁴⁸ Moreover, the decisions made must respect the national laws of the parties concerned, with it being otherwise possible for the national authority to suspend the act itself. A special commissioner position has been created whose task it is to solve the legal problems that may arise during the cooperation.⁴⁹ In case of the intervention's failure, the commissioner refers the case to a special intergovernmental commission.

The strong model of cross-border public bodies delineated by the Benelux Convention has not been followed by other national legal orders, even if territorially contiguous. This is especially the case of the German–Dutch agreement of May 1991 signed in Isselburg-Anholt. During the rounds of negotiations between, on the one hand, the Dutch government and, on the other hand, the German federal government, the Land of Lower Saxony and that of the North Rhine–Westphalia, the problem arose of the German constitution not permitting citizens to be directly bound by the decisions of a cross-border body.⁵⁰ This might explain why the agreement explicitly excludes the cross-border public body being able to enact administrative acts affecting third parties and why it states that decisions passed by the cross-border body need to be implemented by the parties concerned.⁵¹

The discussions raised during the negotiations of the Isselburg-Anholt agreement concerning the constitutional legitimacy for Länder to transfer sovereignty powers probably led to the addition in 1994 of a new paragraph to Article 24 of the German constitution. The new paragraph permits Länder to transfer sovereignty powers to transborder territorial organizations provided the federal government gives its assent.

However, when, in 1996, the Mainz agreement was signed between, on the one hand, the Land of North Rhine–Westphalia and the Land of Rhineland-Palatinate and, on the

⁴⁷ See Article 3.1 of the Benelux Convention: “Si les collectivités ou autorités territoriales [...] peuvent attribuer [au organisme public] des compétences de réglementation et d’administration”. It should be stressed this is only a possibility left to the subnational units.

⁴⁸ See Article 3.5 of the Benelux Convention.

⁴⁹ Articles 5 and 6 of the Benelux Convention.

⁵⁰ See, K.J. Kraan, ‘The Dutch-German Treaty on cross-border cooperation’, in Euregio Rhine-Waal (ed.), *Administrative Organisation of Cross-Border Cooperation* conference book (Euregio Rhein Waal, Kleve, 1994), at 25.

⁵¹ See Articles 5.1 and 5.2 of the Isselburg-Anholt Agreement (French translation): (1) “L’association intercommunale n’est pas autorisée à imposer des obligation à des tiers au moyen de règles de droit ou d’actes administratifs”, (2) “les membres de l’association intercommunale sont tenus de prendre à l’égard de l’association, dans le cadre des attributions conférées par le droit interne, les mesures nécessaire à l’exécution de ses taches”.

other hand, the Walloon Region, the German Länder did not make use of Article 24.1 of the German constitution.⁵²

Thus, the interstate treaties have progressively provided common substantial regulation of public cross-border bodies. However, with the exception of the Benelux Convention, they do not allow public cross-border bodies to make and pass general regulations directly applicable to the territorial parties involved. As the few applications of Article 5 of the Additional Protocol to the EOC reveal,⁵³ the trends are still in favour of a 'dualist' approach: the public body may make general decisions, but they have no legal effect unless the subnational units, parties to the cross-border body, enforce it autonomously in their legal system. To this extent, it may be noted that even the EGTC Regulation does not alter this scheme, because the EGTC is not empowered to make general decisions.⁵⁴ Most likely, the issuing of general binding acts by a cross-border public body is still considered a threat to the national sovereignty principle.

2.2.3 New actors for CBC?

A third issue that emerges from the examination of the interstate agreements concerning CBC regards the type of subnational actors involved in it. More precisely, we want to focus here, on the attitude that federate units of federal states have shown in relation to CBC.

Usually, these subnational units are vested, according to their domestic constitutional provisions, with treaty-making power, a fact that highlights their political relevance and their strong degree of autonomy. Precisely for that reason, they may feel uneasy with the idea of collaborating with foreign subnational units enjoying only limited powers. At the same time, however, it may be disadvantageous for them to not collaborate with their foreign counterparts even if they enjoy only limited powers.

This ambivalent attitude of the federate states clearly emerges in the text of some interstate agreements.

In the first wave of these international agreements, we may note that federate units are not listed among the subnational units to which the treaties' provisions apply. The

⁵² For the French text, see Decret 99-1051, 2 July 1998, 8 "portant assentiment à l'accord entre le Land de Rhénanie du Nord-Westphalie, le Land de Rhénanie-Palatinat, la Région Wallonne et la Communauté germanophone de Belgique sur la coopération transfrontalière entre les collectivités territoriales et d'autres instances publiques, signé à Mayence, 8 mars 1996", in *Moniteur Belge*, 13 April 1999.

⁵³ The Additional Protocol to the EOC provides, in Articles 4 and 5, two different concepts of the functioning of the cooperative body entrusted with legal personality. Article 4 follows, according to the Explanatory Report (at 23), a 'double' legal logic: if such a body wants to take measures which apply generally, it must adopt a decision, which in itself has no legal force, and then each party has to enforce it by transposing it in the national legal system to which the party belongs. Article 5.1 follows a different model, re-echoing the Benelux Convention. The public law transfrontier cooperation body may take action under public law. The act is directly applicable in all territorial communities party to the agreement. It should be noted that the Additional Protocol leaves for the national contracting parties the possibility of opting for applying Articles 4 or 5 or both.

⁵⁴ EGTC Regulation art. 7.4.

Benelux Convention (1986), the Isselburg-Anholt agreement (1991) and the Mainz agreement (1996) follow this scheme, although the latter two have also been signed by the relevant federate units in the exercise of their treaty-making power because of their power of regulating local territorial units.

The more recent wave of interstate international agreement (the Karlsruhe Accord, 1996, the Bruxelles Agreement, 2002) marks a rupture because the federate units, although being excluded from the territorial units to which the agreements formally apply, are nonetheless allowed to make use of the provisions contained in them.

The Karlsruhe Accord is a good example. It was signed by national states, although Switzerland acted on behalf of the relevant Swiss Cantons. Article 2 lists the subnational units to which the treaty applies. Neither the Swiss Cantons nor the German Länder are included in it. However, Article 2.3 provides the Länder and Cantons with the possibility of concluding agreements among themselves and with the other subnational local units.⁵⁵

The Bruxelles Agreement, signed between France, on the one hand, and the Belgian government, the Flemish and the Walloon Regions and the French-speaking community, on the other hand, is more contradictory. In fact, Article 2.5 explicitly excludes the signatory parties from being covered by the provisions of the agreement. However, Article 17 states that the agreement is also applicable to the accords concluded or participated in by the signatory parties, a wording that could even permit France and Belgium to participate in CBC projects.

The involvement in CBC of subnational units, enjoying legislative powers or even treaty-making power, can turn out to be a problem for those countries whose subnational units are merely entitled to administrative powers. In these cases, intervention at the national political level can become convenient, at least when the cooperation concerns matters beyond the competences conferred to the domestic subnational units⁵⁶. The “political backing-up” of the central government can also be necessary to avoid any potential infringements of the national foreign policy.⁵⁷ CBC

⁵⁵ Article 2.2 of the Karlsruhe Accord: “Les Länder [...] et les Cantons [...] peuvent aussi [...] conclure entre eux ainsi qu’avec les collectivités territoriales et organismes public locaux [...] des conventions dépourvues de caractère de droit international et relatives à des projets de coopération transfrontalière, dans la mesure où ces projets relèvent de leurs compétences selon le droit interne et où ils ne contreviennent pas à la politique étrangère et en particulier aux engagements internationaux.”

⁵⁶ See Henry Comte, “Les acteurs et la légitimité des projets stratégiques transfrontaliers”, in Comte, Levrat, *Aux coutures de l’Europe*, *op. cit.* note 11, at 186: “La reconnaissance du caractère stratégique de tels projets transfrontalières soulève, selon nous des questions spécifiques. [...] D’une part, les collectivités locales concernées ne peuvent prétendre accéder à un véritable capacité d’action stratégique transfrontalière que sur la base d’une action collective, d’autre part il paraît à tout le moins contre-productif de mésestimer la nécessaire implication d’Etats, à travers leurs instances locales ou centrales, dans la conception et la mise en œuvre de tels projets.”

⁵⁷ It is interesting to note the different wording used by the Karlsruhe Accord distinguishing by whether CBC is conducted by local units or by regional units. Article 1 of the Karlsruhe Accord empowers the local territorial units of the Contracting Parties to pursue transfrontier cooperation, provided they respect their internal competences and they do not impinge upon the international treaties of the Contracting Parties. Article 2.2 (see text at note 45), which deals specifically with Länder and Cantons,

may become a highly sensible political issue when it involves subnational units with significant economic resources and powers.

Again, the Karlsruhe Accord offers an important example. Article 2(3) gives the French prefects the duty of ensuring the cooperation between, on the one hand, German Länder and/or Swiss Cantons and, on the other hand, the French territorial communities whenever the effectiveness of the transfrontier projects might be undermined because of the different powers enjoyed by the parties.⁵⁸ An analogous provision is set out in the Bruxelles Agreement.⁵⁹

Finally, we may recall the Valencia Treaty between Portugal and Spain.⁶⁰ It permits Spanish and Portuguese subnational units to create cross-border bodies. It is interesting to note, however, that there is a clear division between cross-border bodies entrusted with public services which enjoy legal capacity, and those institutions deprived of legal capacity whose primary aim is the coordination of decision making.⁶¹

In relation to the latter type of cross-border body, the treaty enables the Spanish *Comunidades Autónomas* (CC.AA.) to establish such a body only with the Portuguese *Comissões de Coordenação Regionais*, which are decentralized organs of the state.⁶² This is remarkable. Since the Spanish CC.AA. enjoy meaningful powers with no correspondence in respect of the Portuguese subnational units, the only level of government that can effectively cooperate with the Spanish CC.AA. is the Portuguese state itself, even if by means of decentralized organs.

Thus, two concluding remarks can be made. At a certain point the federate units started to consider CBC not only as an instrument used by local bordering subnational units to solve their practical administrative problems, but also as an important instrument for their regional economic, social and territorial development. Moreover, they understand that CBC, instead of the treaty-making power which their constitutions grant to them, was an easier way to develop their external action policy.

The involvement of the federate units, enjoying powers, resources and political capacity, determined the tendency to develop more-strategic cross-border projects. However, this

refers more generally to the *politique étrangère*, a broader concept that, supposedly, only these territorial units can undermine.

⁵⁸ Article 2.3 of the Karlsruhe Accord: “Les représentants de l’Etat dans les départements et régions français sont habilités à étudier avec les autorités compétente des Länder et des Cantons concernés, sans porter atteinte au libre exercice de leurs compétences par les collectivités territoriales, les moyens de faciliter les initiatives entre les collectivités territoriales françaises d’une part et les Länder et les cantons d’autre part, lorsque les différence de droit interne entre les Etats concernés en compromettent l’efficacité.”

⁵⁹ Article 2.3 of the Bruxelles Agreement: “Les représentant de l’Etat dans les département et régions français et les autorités de l’Etat fédéral, des communautés et des Régions belges concernées suivent la mise en œuvre du présent Accord. Les représentant de l’Etat dans les départements et régions français peuvent également étudier avec ces mêmes autorités les questions de coopération transfrontalière qui relèvent en France de la compétence de l’Etat.”

⁶⁰ See Marta Sobrido Prieto, ‘El Tratado Hispano-Portugués sobre la cooperación transfronteriza territorial’, in (2004) 8 *Revista Electrónica de Estudios Internacionales*, at <<http://www.reei.org/reei8/reei8.htm>>.

⁶¹ See respectively art. 11 and 10.6 of the Valencia Treaty.

⁶² See Article 10.2 of the Valencia Treaty.

evolution towards a more strategic CBC can be hindered by the fact that the foreign counterparts did not enjoy similar powers. This in turn calls for a more active participation of the national state whenever their subnational units are too weak. The cases of France and, to a certain extent, Portugal are good examples.

2.3 The EU Role in CBC: from Financing to Legal Regulation

For a long time, the two driving European supranational forces concerning CBC, namely the CoE and the EU, had maintained distinct spheres of action. On the one hand, the CoE has been mainly called to set out the legal framework within which to develop CBC; on the other hand, the EU has leaned more towards the financing of it.⁶³

The EU intervention in the field dates back to 1990 with the adoption of the INTERREG programme. Since its inception, INTERREG was a community initiative (CI) programme. This meant the European Commission had more power to define the areas of intervention financed by the European Union and the procedural rules to apply. The fact that INTERREG was created as a CI programme is important because it highlights the political relevance that the European Commission meant to give to the development of CBC in Europe.

In general terms, the European cohesion policy has generally been seen as an instrument for strengthening the regional dimension of the EU Member States and as a way to enhance multilevel governance.⁶⁴

This general finding can certainly be applied to the case of INTERREG. Nonetheless, it must be pointed out that the national states have always been guaranteed a role in the INTERREG framework. To this extent, it may be recalled that according to the Commission guidelines for the implementation of the INTERREG programmes, the proposals, to be submitted to the Commission, had to be prepared by joint cross-border or transnational committees constituted by the relevant regional/local and *national* authorities and, where appropriate, by the relevant nongovernmental partners.⁶⁵

The national state task was mainly that of providing a coordinating framework⁶⁶, but its involvement in the procedural framework for the enactment of the INTERREG

⁶³ For this approach, see Nicolas Levrat, 'La coopération territoriale: adaptation de la coopération transfrontalière aux nouveaux territoires du projet européen' (2006), 3 *Revue des affaires européennes*, 495-509. For a general overview of the EU interventions in the field of CBC see: Michel Casteigts, 'Cadre juridique et enjeux politiques du financement de la coopération transfrontalière en Europe', in Yves Lejeune (ed.), *Le droit des relations transfrontalières*, op. cit. note 14, 165-181; Committee of the Regions, *Trans-European Cooperation between Territorial Authorities* (CoR Studies, 2/2002).

⁶⁴ On the EU cohesion policy and the role of the regions see L. Hooghe and G. Marks, *Multi-level governance and European Integration* (Rowman & Littlefield, Lanham, Maryland, 2001); S. Leclerc (ed.), *L'Europe et les régions: quinze ans de cohésion économique et sociale* (Bruylant, Bruxelles 2003);

⁶⁵ See Communication of the Commission on INTERREG III of 2 September 2004, laying down guidelines for a Community initiative concerning trans-European cooperation, INTERREG III, in *OJ*, 10 September 2004, C 226, 2 *et seq.* point 21.

⁶⁶ This applies even today in relation to the new objective 3 of the cohesion policy, named "territorial cooperation" (see further in this paragraph). See art. 32, c. 2 of the Regulation n. 1083/2006 laying down

programme can also be considered as a way to guarantee Member States a look at the external activities of their territorial communities, although conducted under the reassuring ‘umbrella’ of European Union law.

However, if we look more carefully at the INTERREG programme the impression is that the national state was called to play a more active role. With regard to this consideration, it should be noted that the INTERREG programme (at least the latest version of it in force during the 2000-2006 period) was structured in three strands: “cross border cooperation” between neighbouring authorities directed towards local authorities; “transnational cooperation” regarding “cooperation between national, regional and local authorities [aimed] to promote a higher degree of territorial integration across large groupings of European regions”; and interregional cooperation, intended to create networks for improving development and the cohesion of regions not geographically contiguous.⁶⁷

Whereas “cross-border cooperation” and “interregional cooperation” somehow reflected categories already elaborated within the CoE (respectively, transborder cooperation and inter-territorial cooperation), transnational cooperation was something new. In fact, this form of cooperation relied on an active involvement of both national states and subnational units.

Thus, it may be noted that the CBC promoted by the EU level was conceived differently in respect of CBC enhanced in the CoE framework. Whereas, in the latter, the role of state was conceived in term of exclusion⁶⁸ (since the non involvement of the national-level organs was considered a precondition in order to exclude CBC from the realm of international relations), in the EU context a logic of inclusion prevailed, with the national state actively involved in CBC projects. In fact, besides a local-tailored CBC (the cross-border cooperation strand of the INTERREG programme) the EU supported a more strategic CBC – namely the transnational cooperation strand of INTERREG – , to be enforced within a greater territorial scale and based on projects involving matters reserved for the national state or the regional units of highly decentralised states.

These short remarks about the INTERREG programme can help us to clarify better the new regulatory framework dealt with by the new European structural funds programmes covering the 2007 to 2013 period.

general provisions on the ERDF, ESF and cohesion funds, in O.J. L.210, 25, according to which the operational programme – the document setting out a development strategy to be carried out with the aid of a fund – is drawn up by the Member States, though in cooperation with, among others, the relevant subnational units.

⁶⁷ See Communication from the Commission to the Member States of 2 September 2004, laying down guidelines for a Community initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory, INTERREG III, in *OJ*, 10 September 2004, C 226, 2 *et seq.*

⁶⁸ It is interesting to note that the signature of Protocol No. 3 of the EOC, which expressly admits member states among the potential constituent members of the Euroregional Co-operation Groupings (see art. 3 of Protocol No. 3) has changed the original conception of CBC in the CoE context. To this extent, it is patent the influence played on this specific issue by the enactment of the EGTC EU Regulation.

The new programming period is aimed at the simplification and, at the same time, the concentration of financial resources as a consequence of the Central and Eastern Europe enlargement, which resulted in a substantial widening of the regional disparities, with the poorest parts concentrated in the new EU member states. This in turn led the Commission to reshape the structure of the structural funds and to abolish CI as the INTERREG programme was.

The interest of the European Union in CBC has not yet vanished. On the contrary, it gained strategic importance. In fact, the general EC Regulation on structural funds created three general objectives to be pursued. The third one—named European territorial cooperation—is the new label within which the three previous strands of the INTERREG programme—i.e. cross-border cooperation, transnational cooperation and interregional cooperation—are revived.

Terms are always important, especially in law. The new territorial cooperation objective reflects a new focus of the European cohesion policy. According to the new Article 3.3 and Article 174.1 of the Lisbon Treaty, the cohesion policy is no longer limited to the economic and social dimension; it also includes the ‘territorial’ one. This change reflects the findings of some research showing that the cohesion policy, even in those cases in which it has been successfully conducted, has led to an uneven development, with an increased growth of the central regions in detriment to the most peripheral ones. A more balanced and sustainable development is then suggested. This development should benefit the most peripheral regions, called to develop, with their analogous counterparts of neighbouring European member states, functional Euroregions, according to a multipolar scheme of development.⁶⁹

This is the background within which the enactment of EGTC Regulation 1082/2006 must be evaluated. This EGTC Regulation is a sort of break of the previously sketched out scheme concerning the respective CoE and EU tasks in CBC. In fact, with the adoption of the EGTC Regulation, the European Union played the role of legal regulator of CBC, a job that until recently was mainly for the CoE to carry out.

This change was mostly due to the ineffectiveness shown by the CoE’s instruments. The Additional Protocol of the Madrid Convention did in fact provide the territorial authorities with the legal possibility to create cross-border bodies. However, it failed to provide a common legal framework regulating the creation, since it referred to applicable national rules and procedures. The conclusion of bi- or multilateral international agreements has solved only part the problem.

The adoption of Regulation 1082/2006 was meant to fill this gap by providing a common European legal framework for the setting up of cooperative groupings – invested with legal personality – between territorial authorities located on the territory of at least two Member States (3.2). The EU intervention, however, has gone a little further since the EGTC functioning is not limited to the implementation of territorial cooperation projects financed by the European Union, but rather could carry out other

⁶⁹ See Study Group for European Policies (ed.), *Territorial Cohesion in Europe* (Committee of Regions, Office for official publications of European Commission, Luxembourg, 2003).

territorial initiatives not financed by it. This goal is framed by the Regulation itself in quite strict terms. To this extent it should be recalled that according to art. 7.3 the main objective of an EGTC is that of implementing territorial cooperation programmes, whereas the possibility to conduct *specific actions* – a wording suggesting a focus tailored activity – other than implementing territorial cooperation programmes is perceived as a secondary goal. Moreover, the requirement suggesting that the matters in relation to which an EGTC can take action should be common to all the parties can be read as an obstacle for developing coordinating CBC of different territorial levels⁷⁰.

A first survey of the EGTCs set until now in Europe reveals that only few of them manage territorial cooperation programmes or projects co-financed by Community funds; most of them carry out other territorial cooperation actions without a financial contribution from the EU.⁷¹ More precisely, by looking at the constitutive documents of many EGTCs set thus far, the impression is that the institution of a European grouping is a goal *per se*, as a means to permit future policy coordination, rather than being functional to develop a specific CBC project.⁷²

⁷⁰ Art 7.2. “An EGTC shall act within the confines of the tasks given to it which shall [...] be determined by its members on the basis that they all fall within the competence of every member under its national law”. The point is addressed by the study conducted by Nicolas Levrat financed by the Committee of the Regions (CoR), *The European grouping on territorial cooperation* (2008) at 88. The text is available at the CoR website.

⁷¹ See the own initiative opinion of the Committee of the regions on the new perspectives for the revision of the EGTC Regulation, CDR 100/2010 fin, p. 17718/19: «notes, however, that although the EGTC is an institution under Community law created for the express purpose of facilitating territorial cooperation within the Union, and it would appear a priori that the regulations governing the Community funds favour their use under the objective of European territorial cooperation, the actual facts are quite different to the logical and desirable expectations that prompted the Community legislator to take a step of such legal significance; confirms, following the wide-reaching prior consultations carried out with representatives of the European parliament, the Council and the Commission, and in meeting open not only to Committee members, but also to the different European regional organisations and specialists in the field, that only a small number of existing EGTCs manage territorial cooperation programmes or projects that are cofinanced by Community funds; avers that most of the existing EGTCs carry out other specific territorial cooperation actions without a financial contribution from the Union, in keeping with the second paragraph of art. 7(3) of Regulation 8EC) No 1082/2006». The document is available at <http://portal.cor.europa.eu/egtc/SiteCollectionDocuments/opinion%20nunez/cdr100-2010_fin_ac_en.pdf>.

⁷² See for example art. 3 of the West Vlaanderen/Fiandre-Dunkerque-Côte d’Opale EGTC convention according to which: «Le G.E.C.T. a pour mission principale de promouvoir et de soutenir une coopération transfrontalière efficace et cohérente au sein de son territoire et à ce titre exerce les missions suivantes: à l’intérieur du périmètre de référence : 1. assurer la coordination et favoriser la mise en réseau de tous les membres du GECT et, d’une manière générale, de tout organisme dont l’intervention est de nature à rendre pertinente, cohérente et efficace la coopération transfrontalière sur le périmètre du Gect ; 2. assurer la représentation et la concertation politique du territoire, 3. définir des stratégies et des programmes d’action communs pour répondre aux besoins des habitants du territoire, 4 définir et réaliser des projets communs ; 5. développer toutes formes d’actions qui concourent au développement de la coopération transfrontalière entre les acteurs de ce territoire, avec une attention particulière pour la coopération transfrontalière dans la région frontalière de proximité. A l’échelle régionale, nationale et européenne. 6. assurer la représentation du territoire vis-à-vis des instance tierces». Given the vague wording used and the mention, among the objectives, of the political coordination of the territorial units concerned it is not by chance that among the constitutive members there are also the national states.

See also the instituting convention of the Pyrénées-Méditerranée EGTC (made up of the Spanish CCAA of Balers islands and Catalonia, French region Midi Pyrénées and Languedoc Rossilon): «Le Gect “Pyrénées –Méditerranée a comme object d’assurer la realisation des projet de cooperation territoriale qui

In this context, where EGTCs are increasingly considered as policy-making institutions rather than (or at least less) operative instruments, it is not surprisingly that art. 3 of the EGTC Regulation includes Member States among the prospective members of an European grouping.

The involvement of the state, along with local and regional authorities, has been defined as a “Copernican revolution” in the field of CBC, since, as already noted, according to the CoE *acquis*, the state should have a role only as a regulator of CBC and not as an actor directly involved in it.⁷³

However in the light of the previous experiences of the INTERREG programme, it comes as no surprise to see that the national state can play an active role in territorial cooperation.

Nonetheless, it is undeniable that the involvement of the state as a potential actor in CBC is becoming increasingly relevant. It is seen as necessary for developing cross-border projects on a larger territorial scale and having their focus on very strategic matters, usually reserved for the state. This is the case of the creation of the European transport corridors (particularly the cross-border section), protection and management of river basins or coastal zones, public health services, the strengthening of polycentric development, etc.

This kind of CBC—which entails the involvement of territorial actors having a ‘strong’ political capacity (national state but also regions)—is likely to be the focus of the EU strategy on territorial cooperation. Because of the decreasing amount of available resources, it is mandatory to concentrate them in very specific and strategic projects.

There is important evidence of this trend: the recent EU strategy for the Baltic Sea Region, which was the first application of the “macroregion” concept. Following a request advanced at the European Council of 14 December 2007, the European Commission adopted a communication in which it calls for a coordinating action by Member States, regions, the European Union, financing institutions and nongovernmental bodies, finalized to promote a more balanced development of the Baltic Sea Region.⁷⁴ The Commission intends to have a role that goes beyond the monitoring of the implementation of the funding programmes. For the practical implementation of the strategy, the Commission explicitly calls for the concentration of all available structural funds—including those meant for territorial cooperation—in order to implement actions foreseen in the strategy.

seront approuvés par les membres de l'Euroregion. Le Gect a pour objectif de réaliser et de gérer, dans une perspective de développement durable, les projets et actions de coopération territoriale approuvés par ses membres agissant dans le cadre de leurs compétences»

⁷³ See Committee of the Regions (CoR), *The European grouping on territorial cooperation* (2008) study conducted by Nicolas Levrat et al, at 100.

⁷⁴ Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, concerning the European Strategy for the Baltic Sea Region, Brussels, 10 June 2009, COM (2009) 248 final.

The Baltic Sea Region is considered by the Commission as an example of a “macroregion”, i.e. “an area covering a number of administrative regions but with sufficient issues in common to justify a single strategy approach”.⁷⁵ The emergence of the macroregion concept in the EU territorial cooperation policy highlights the necessity to develop an institutional and political strategy with the objective to produce a framework permitting interaction and participation of promoting members state, of various regions, together with EU institutions. The recent emergence of an EU strategy for the Danube Region reveals that that macroregion is going to be crucial for the European cohesion policy.

Thus, CBC in the European context is likely to be less spontaneous than it was previously. The bottom-up pushes for external actions will probably be canalized in a common frame defined by vertical political actors, mainly the EU and the States. The role of regions and other territorial actors will be proportionate to their political capacity to be influential in this established framework.

3. The Role of the National State in the European Law of CBC

In the previous section, we take into account the two harmonizing dynamics present today in Europe in the field of CBC: the CoE and the European Union.

Although the trend towards the creation of an harmonised European law on CBC is incontestable, we cannot underestimate the still-relevant influence that national legal orders play in the issue. As mentioned in the introduction, both the EGTC Regulation and the Protocol No. 3 to the EOC emphasise the regulatory role of the national state not only by remitting to specific domestic legal provisions whenever common rules are lacking but also by granting national states wide discretionary power in relation to the setting of the EGTC and the ECG. They do so by mentioning concepts such as national public interest and public policy whose enforcement is almost entirely based on political evaluations which are in turn influenced by the general attitudes of the state towards CBC.

To this extent, the present and the next paragraphs are meant to provide an analysis of the different approaches national states have shown in regard to CBC.

The examination relies on the comparative method. The relevant national legal orders are not assessed case by case. Rather, it is preferred to enucleate some key points considered particularly influential in respect to the attitude a national state can assume towards CBC. These are: the type of decentralisation, the intergovernmental relation between the national state and the subnational territorial level, the presence of ethnic minorities along the borders, the “conditionality” in countries of transition and, where relevant, the judicial cases. On the basis of this analysis and relying on empirical experiences of some national states, taken as paradigmatic, the next paragraph will suggest a classification of the model of the national attitudes towards CBC.

⁷⁵ *Ibid.*, at 6.

3.1 Types of Decentralization

One issue to take into consideration concerns the question of whether there is a direct relation between the type of decentralization and the power of subnational units to act ‘externally’.⁷⁶ Because CBC is generally seen as a means of enhancing the self-government rights of the territorial units, one could assume that in those countries in which a ‘strong’ decentralization is enacted, with subnational units at the regional level enjoying legislative powers, the national state’s attitude towards CBC should be favorable and in principle more encouraging than in those countries that apply more-limited forms of decentralization (i.e. administrative types).

However, even a quick look at the relevant domestic legal systems seems to seriously make us question the grounds of the assumption.

If, on the one hand, we consider the case of France—a state well known for its centralistic distribution of territorial powers (although recently eased by the 2003 constitutional reform⁷⁷)—we would probably be surprised by the number of legislative acts passed with the aim of enhancing CBC⁷⁸. Furthermore, if we look at the countries of Central and Eastern Europe—where local democracy is recent and uneven—we quite surprisingly find that the constitutions of both Poland and Hungary confer their territorial communities “the right to join international association of local and regional communities as well as cooperate with local and regional communities of other states”.⁷⁹

On the other hand, we can mention the cases of both Italy and Spain, two states which present a strong degree of decentralization but for whom the acceptance as legitimate of ‘external’ actions conducted at the regional level has been difficult.⁸⁰

The case of Austria is also important. Despite the fact that Austria is usually classified as a federal system, it is often argued that it is structured as a strong regionalized system.⁸¹ This is well reflected in the legal and political ability of the Länder to act internationally. Unlike in other federal legal systems, which usually grant the federate states the treaty making power, the Austrian constitution did not originally provide the Länder with this power. Following the Länder’s push for a strengthening of their constitutional autonomy, a constitutional amendment was passed in 1988 that established their treaty-making power. Article 16 of the Austrian federal constitution establishes that the Länder, within their own sphere of competence, may conclude treaties with states or their constituent states bordering Austria. The provision,

⁷⁶ See Renaud Dehousse, *Fédéralisme et relations internationales* (Bruylant, 1991) at 116: “Dans une large mesure l’action internationale des régions sera fonction de la manière dont elles se définissent par rapport à l’Etat dans son ensemble et de leur perception des liens qui les unissent aux autorités nationales.”

⁷⁷ See Michael Vepeaux, *Les collectivités territoriales en France* (Dalloz, 2004); Olivier Gohin, ‘La nouvelle décentralisation et la réforme de l’Etat en France’, in (2003) 3 *Actualité Juridique de Droit Administratif*, 522-528.

⁷⁸ For more details on the French legal interventions on the matter see part II, lett. A, 1.

⁷⁹ See Article 171 of the Polish constitution and Article 44(a) of the Hungarian constitution.

⁸⁰ See later in the text.

⁸¹ Peter Perenthaler, Anna Gamper, ‘National federalism within the EU: the Austrian experience’, in Sergio Ortino, Mitja Žagar, Vojtech Mastny, *The Changing Faces of Federalism* (Manchester University Press, 2005), 132-155.

however, states that any agreement—including transfrontier cooperation agreements, according to the federal government⁸²—must have prior expressed approval by the federal government. In particular the federal government must be informed before negotiations begin, and the authorization must be signed by the President of the Republic, following a recommendation from the Land government, and countersigned by the president of the Land.⁸³

Until now, Article 16 of the Austrian constitution has never been enforced. This does not mean that the Austrian Länder have never been involved in CBC. When not based on the EC framework of INTERREG programmes, CBC has been developed by means of Article 17 of the Austrian constitution. This provision allows Länder to make use of all forms of private law, including financing projects, in all matters even of the national state, without being restricted by the distribution of competences. This constitutional provision—which serves as a safety valve against the severe centralization of competences in Austria⁸⁴—has been the instrument that allows the Länder to develop external relations, bypassing the strict procedural rules set in Article 16.⁸⁵ It is worth noting that even though a same provision was meant to deal with both treaty-making power and the other external relations of Länder (Art.16), the practice led to distinguishing the two categories, with CBC enacted by means of Article 17 of the constitution and with the treaty-making power not enforced by the Länder.

In the light of this scenario, shall we then assume that the type of decentralization is irrelevant when assessing the state's policy towards CBC? I do not believe so. The fact that CBC is being pursued by institutional subjects enjoying legislative powers, who are exercising influential political capacity with autonomous resources, creates a breach in respect to the traditional, locally tailored CBC. In fact, the external conduct of 'strong' regions may undermine the coherence of both the national general policy and the foreign policy. This may lead to a more cautious approach towards CBC from the national state.

To this extent, it is worth considering that in some countries in which the regional level enjoys legislative competences, the regional external action, including CBC, is very often treated (or has been originally treated) —by the constitution itself or by the interpretation currently given by the national-level administration—as if it were

⁸² See Council of Europe, Transfront (2005/2), Report on the current state of the administrative and legal framework of transfrontier cooperation in Europe (updated 15 March 2005), 22. "The law [Art. 16 Cost. N.A.] does, however, state that any agreement—including, therefore, transfrontier agreement—must have the prior express approval of the federal government [...] The Länder feel that such a complicated procedure somewhat limits their ability to enter into transfrontier cooperation agreements." The data concerning the Austrian case have been provided by the federal chancellery. The report is available at <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1324633&SecMode=1&DocId=1342918&Usage=2>>.

⁸³ See Wolfgang Burtscher, 'La acción exterior de los Länder austríacos y su participación en la celebración de tratados internacionales', in Manuel Perez Gonzales (ed.), *La acción exterior de los Länder, Regiones, Cantones y Comunidades Autonomas* (IVAP, 1994), 147-170.; Theo Öhlinger, 'Le competenze dei Länder e dei comuni austriaci in tema di attività internazionali', in Andrea de Guttry, Natalino Ronzitti, *I rapporti di vicinato tra Italia e Austria* (Giuffrè, 1987), 71-94.

⁸⁴ Pernthaler and Gamper, *National federalism*, *op. cit.* note 81, at 140.

⁸⁵ Peter Pernthaler, *Lo stato federale differenziato* (Il Mulino, 1998), 68 -73.

conduct comparable to the use of treaty-making power rather than as a way to promote their self-government rights, despite the fact that the Explanatory Report to the EOC (point 35a) excludes that CBC may entail any international liability of the state as a whole.

To give some examples, one can mention Article 117.9 of the Italian constitution, as amended in 2001, which grants the Regions the power to conclude, in the same provision, both international treaties and agreements with a foreign counterpart, though remitting to a statute that nonetheless regulates distinctively the two hypothesis.

In similar terms, according to the Austrian federal government interpretation and the current practice, Article 16 of the Constitution applies not only to international treaties, but even to transfrontier cooperation agreements signed by the Austrian Länder. Finally, even in Germany, at least until the decision of the German Constitutional Tribunal on the Kehl Port,⁸⁶ the federal government argued that Article 32 of the German Basic law (GG)—a provision expressly dealing with the Länder's treaty-making power—applied even to the Länder's CBC agreements.⁸⁷

A possible explanation for this is that any external relation of 'strong' subnational units, being it an exercise of their treaty making power or CBC agreements, may potentially undermine the consistency of the foreign policy and the general policy of the national state.

Thus, both in regional and federal states, the external conduct of the regional subnational units is enforced according to procedures that, formally or informally, grant the national authorities some discretionary evaluation over the respect of the national foreign policies and general interests. However, it should be noted that the extent and the nature of this control is also deeply influenced by the type of intergovernmental relations among territorial units and the national state.

⁸⁶ BVerfGE 2, 347 (374). In 1951, the Land Baden and the Strasbourg Port Authority signed an agreement concerning the joint administration of the Kehl Port. The German federal government gave its consent to the agreement, assuming that Article 32 of the German constitution (Grundgesetz GG) applied. However the national Parliament deemed the whole procedure void because, according to Article 59 of the GG, the signing of an international treaty is subject to the consent of both Bundestag and Bundesrat. The Constitutional Tribunal took a different view. The agreement was not an international agreement since it was concluded with a non state subject. Thus, Article 32 of GG did not apply. This meant that not only did the Parliament not have a say in the procedure, but also that the previous consent of the central government was not needed. Thus, when the Länder engage in agreements with foreign counterparts, they may freely act without even the previous consent of the central government, although the principle of federal loyal collaboration should be respected. The Decision of the German Constitutional Court is analysed by : Nicolas Schmitt, *L'émergence du régionalisme coopérative en Europe*, (edit. Universitaire Fribourg, 2002), at 172- 182.

⁸⁷ Article 32.3 of the German constitution: "In so far as the Lander have power to legislate, they may conclude treaties with foreign states, with the consent of the federal government".

3.2 Intergovernmental Relations

Another issue we should keep in mind when evaluating the national-level attitude towards CBC is the type of relations between the national state and the subnational units of regional level.

In a context in which intergovernmental relations are based on a cooperative scheme, it is likely that CBC will be assessed according to the same paradigm and thus progressively being considered as a way for subnational units to exercise their self-government rights. On the contrary, where the intergovernmental relations are based on more-competitive terms, the policy of the national state towards CBC might be more cautious, and therefore stricter forms of national supervision are likely to occur.

As an example of cooperative intergovernmental relations, we can consider the cases of Germany⁸⁸ and Switzerland.⁸⁹ Both countries are, as is well known, federal states whose constitutions grant to Länder and Cantons treaty-making power. However, in both cases, the federal state retains the power of supervision in order to avoid a possible conflict with national foreign policy.⁹⁰ The current practice shows that both the Länder and Cantons rarely use their treaty-making power. In fact, according to the usual pattern of cooperative federalism, both the Länder and Cantons have agreed to renounce their use of treaty-making power, in favour of the national state, in exchange for a political commitment of the national state itself to consult and to take in due account the interests of regional units when defining and conducting foreign policy.⁹¹ In Switzerland, the duty of involving the Cantons in the definition of the confederation's foreign policy was formalised in the 2000 constitutional text codifying a lasting and previous institutional practice.⁹²

⁸⁸ The concept of cooperative federalism is explored by Constance Grewe, *Le fédéralisme coopérative en République Fédérale d'Allemagne* (Economica, Paris, 1981); Raffaele Bifulco, *La cooperazione nello stato unitario composto* (Cedam, Padova, 1995).

⁸⁹ See René Rhinow, "Le fédéralisme Suisse: l'approche juridique", in René L. Frey, Georg Kreis, Gian Reto Plattner, René Rhinow (eds.), *Le fédéralisme suisse. La réforme engagée. Ce qui reste à faire* (Presses Politechniques et Universitaires, Lausanne, 2006), 64 *et seq.*

⁹⁰ See Article 32 of German Basic Law. As far as Switzerland is concerned, Article 56 of the Swiss constitution (2000) establishes that the Cantons can conclude treaties in areas falling under their jurisdiction, provided they are not in breach of federal law and of the interest of the confederation and of the rights of the other cantons. The Cantons are required to inform federal authorities before concluding international treaties. The federal government or another Canton may oppose this agreement. In such a case, it is up to the national parliament to decide. Finally, the Cantons can directly deal with lower-ranking foreign authorities, whereas it is up to the confederation to conduct relations with foreign states on behalf of the Cantons.

⁹¹ In Germany, the issue is still regulated by a gentlemen's agreement (so-called Lindau Agreement), which dates back to 1957, between the Länder and the federal government. In 1993, an attempt to formalize the agreement in the text of the federal constitution failed because of the Länder's disagreement. See Uwe Leonardy, 'Federation and Länder in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs', in *Foreign Relations and Federal States*, (Londres/New York 1993), 236.

⁹² Art 55 of the Constitution states: "Les Cantons sont associés à la préparation des décisions de politique extérieure affectant leurs compétences ou leurs intérêts essentiels. La Confédération informe les Cantons en temps utile et de manière détaillée et elle les consulte. L'avis des Cantons revêt un poids particulier

Thus, it is in a context highly characterised by a cooperative pattern that we should evaluate the policy of Switzerland⁹³ and Germany towards CBC.

The recognition of such power is based on Länder and Cantons' constitutional self-government rights. The ratification of the EOC and the subsequent Protocols gave it a further formal legal basis.⁹⁴ In both countries, there are no provisions concerning a supervision power of the central government in relation to CBC or other external relations not of an international nature conducted by the Länder and Cantons.⁹⁵ The external relations must, however, take place respecting the general principle of the loyal cooperation characterizing the intergovernmental relations between the central and the regional tier of government.

Thus, although at the beginning the CBC conducted by the Länder and Cantons were somehow assimilated to their international treaty making power, later on CBC was progressively considered more as an exercise of self-government rights - to be dealt with according to public internal law - rather than as an issue involving an international law dimension. In the case of Germany this evolution has certainly been favoured by the decision of the constitutional tribunal on the Kehl port.

However, the role of the two national states must not be underestimated. In fact, both states have always guaranteed their commitment to develop the CBC of their subnational units. This has been done especially by concluding international interstate

lorsque leurs compétences sont affectées. Dans ces cas, les Cantons sont associés de manière appropriée aux négociations internationales". See also *Loi fédérale du 22 décembre 1999 sur la participation des cantons à la politique extérieure de la Confédération*.

⁹³ To this regard, Yves Lejeune, 'La surveillance des relations internationales conventionnelles des collectivités fédérées (Les exemples de la Belgique et de la Suisse)', in Carlos Fernandez de Casadevante Romani (ed.), *L'Etat et la coopération transfrontalière*, *op. cit.* note 13, 105-129, at 121, notes : « l'assemblée fédérale n'a jamais eu à approuver un traité cantonal dont le conseil fédéral ne voulait pas. Eu égard à la grande courtoise dont sont empreintes les relations entre la Confédération et les Cantons, l'opinion di Conseil fédéral est toujours prise en considération ». On this issue see also Sergio Gerotto, 'Il potere estero dei cantoni svizzeri: un giusto equilibrio tra autonomia e partecipazione?' (2004) *Diritto pubblico comparato ed europeo*, 2, 701-716.

⁹⁴ It should be noted that in both Germany and Switzerland the regional levels have jurisdiction in dealing with municipalities. This means that forms and limits of municipal CBC are set in regional law. However, since both Switzerland and Germany signed the EOC and the following Protocols—and other relevant international treaties as well—the primacy of international law over domestic law means the municipalities could not be prevented from taking part in CBC.

⁹⁵ In Switzerland, however, according to the information provided by the Swiss Confederation, the conclusion of cantonal transfrontier agreements should follow the same procedure set in relation to the cantonal international treaties. This means the Cantons are required to inform federal authorities before concluding transfrontier agreements. In case the confederation or another canton disagree, the agreement is submitted to the national parliament. See Council of Europe, *Report on the current state of the administrative and legal framework of transfrontier cooperation*, *op. cit.* note 82, at 93. See also art. 61c and 62 of the "Loi sur l'organisation du gouvernement et de l'administration" as emended in 2005, according to which the procedure above described applies to the agreements concluded by Cantons "avec l'étranger", a wording broad enough to include CBC agreement. According to some scholars, however, the procedure—now set in Article 56 of the federal constitution—applies only to the international treaties concluded by the Cantons, and not to the transfrontier agreements with no international value. See Nicolas Michel, *La acción exterior de los Cantones suizos y su participación en la celebración de tratados internacionales*, in Perez Gonzales, *La acción exterior*, *op. cit.* note 83, at 201.

agreements favouring CBC or by establishing intergovernmental commissions which permitted the connection of both national and regional levels.⁹⁶

Let us now consider examples of highly decentralised states (both federal and regional) whose internal intergovernmental relations cannot be easily assessed according to the cooperative scheme characterising Germany and Switzerland.

The first case is Belgium. Here, treaty-making power for Regions and Communities was introduced in the 1980s, but it was formally enshrined in the constitution only in 1993.

The specificity of the Belgian case is shown by the fact that Belgian Regions and Communities tend to use the international-treaty instrument frequently. The reason for that is clear: they want to promote themselves as a quasi-formal state, somehow politically competing with the central government. The use of the foreign power by the Regions and Communities is often a way to highlight their political distinctiveness in respect to the federal state⁹⁷.

In this framework, some procedural mechanisms have been set to regulate the treaty-making power of the Regions and the Communities. However, the established procedural mechanism is more an instrument of loose coordination, rather than that of effective cooperation, between territorial levels. In fact, Article 81 of the Special Law of Institutional Reforms gives the federal government the power to prevent a Region or a Community from signing an international treaty. However, this may only occur after the failure of the attempt to reach a compromise and in very specific circumstances,⁹⁸ such as the breaching of previous international treaties which could expose Belgium to international liability or the signing of a treaty with a state not internationally recognised by Belgium or with whom the diplomatic relations are suspended. Thus, by specifically listing the narrow circumstances that allow the national state to intervene, it is clear the intention is to avoid the national authorities enjoying a too wide discretion in establishing the limits of the Belgian Regions' and Communities' foreign power.⁹⁹

⁹⁶ See paragraph IV for practical examples.

⁹⁷ A recent indicator of this trend is the Benelux Treaty of Economic Union signed in 2008. In 1958 a first treaty between the Benelux countries was signed, establishing a Benelux Economic Union for a 50-year period. In June 2008, a new Benelux treaty was signed, with the objective, *inter alia*, to strengthen CBC at any level. However, this reference has to be read as referring to local territorial authorities. In fact, all Belgian Regions and Communities are signatories parties of the new Benelux treaty, thus showing how Belgian Regions and Communities prefer to utilize international law instruments in order to cooperate with their neighbours.

⁹⁸ See Bart Kerremans, Jan Beyers, 'The Belgian sub-national entities in the European Union: second or third level players', *Regional and Federal Studies*, 6 (2), 41-55, at 43.

⁹⁹ See Yves Lejeune, 'La surveillance des relations internationales conventionnelles des collectivités fédérées (Les exemples de la Belgique et de la Suisse)', in C. de Casadevante Romani, *L'Etat et la coopération transfrontalière*, *op. cit.*, note 13, at 126-127, "La Belgique n'a pas instauré un contrôle central contraignant de l'opportunité de l'activité internationale de ses collectivités composantes. C'est d'ailleurs le seul Etat fédéral qui s'y soit refusé. Le conseil des ministres belge ne peut décider la suspension de la négociation ou de l'exécution d'un traité d'une Communauté ou d'une Région qu'en invoquant l'excès de pouvoir, c'est-à-dire la violations des règles fixant les conditions précises de constitutionnalité ou de légalité de pareil traité". The Author further remarks (126): "L'autonomie internationale des Communautés et des Régions belges apparaît beaucoup plus grande que celles des Cantons suisses. Elle résulte du système de gestion consensuelle de la politique extérieure sur un pied de stricte égalité entre l'Autorité fédérale et les autorités fédérées".

As far as CBC is concerned the basic idea is that it is part of the self-government rights pertaining to regional or local subnational units and because of that no national authorisation is required. For a long time, Regions and Communities have considered CBC as something reserved for local units. This is reflected by the international agreements concerning transfrontier cooperation signed by Belgium, which, as we have seen, does not apply to the Regions and Communities (Benelux Convention, Mainz Agreement). According to some scholars the increasing interest of the Regions and the Communities in CBC emerged when the EC started to fund the INTERREG programme.¹⁰⁰ In fact, the more recent Bruxelles Agreement reveals a change of attitude with Belgian Regions and Communities explicitly entitled to conclude CBC agreements.

Thus, in Belgium, due to the fragile institutional equilibrium existing among the constituent units of the state, a procedural framework is set to the limited extent of regulating the treaty-making power, whereas the other external conducts, as CBC, are not regulated at all since they are considered an exercise of the self-government rights of the subnational units. Moreover, the cases justifying a barring intervention of the federal state are narrowly construed and do not include clauses such as general interest or foreign policy.

The cases of Italy and Spain present a common pattern. In both Italy and Spain¹⁰¹ a highly formalized procedure applies in such a way that any external action is actually treated, from a substantial point of view, as if it were almost a use of the treaty-making power. The control exerted by the national state involves not only legal but political evaluation. The priority for the national state is to ensure that the national foreign policy and the national interest are not affected by the external conducts of the regional subnational units. This attitude has been certainly favored by the fact that, unlikely federal states, whose constitution usually recognize the treaty making power to federate units, these legal system¹⁰², though highly decentralized, do not, or at least did not originally, admit any rooms for the external action of the regional levels since the external relations were seen as an activity strictly pertaining to the national state.¹⁰³ In both states, however, the claims of the regional territorial level for the entitlement of such a power have been successfully conducted before Constitutional Courts which have nonetheless considered their power to act externally as a derogation to the otherwise national competence in foreign affairs, thus to be narrowly construed.¹⁰⁴

¹⁰⁰ Yves Lejeune, "L'action extérieure des régions et des communautés belges et leur participation à la conclusion de traités internationaux", in Perez Gonzales, *La acción exterior*, *op. cit.* note 83, at 514.

¹⁰¹ For a detailed analysis of the Spanish case concerning CBC, see Susana Beltrán García, *Los acuerdos exteriores de las comunidades autónomas españolas* (Universitat Autònoma de Barcelona, 2001) and Carlos Fernández de Casadevante Romani, *La acción exterior de las Comunidades Autónomas: Balance de una práctica consolidada* (editorial Dilex, 2001).

¹⁰² This is also the case of Austria that although usually considered as a federal state did not provide, until the Constitutional Amendment in 1988 which inserts art. 16, any international making power to the Austrian Länder.

¹⁰³ See Antonio La Pergola, "Regionalismo, federalismo e potere estero dello Stato. Il caso italiano e il diritto comparato", in Antonio La Pergola, *Tecniche costituzionali e problemi delle autonomie «garantite»* (Cedam, 1987), 91-93.

¹⁰⁴ When they first faced cases concerning the legitimacy of external conduct of the regional level, both constitutional courts adopted a strict scrutiny of review, in fact reaffirming the national state as the sole institution able to legitimately conduct international actions. However, the increasing spread of CBC

The competitive intergovernmental relations between national state and regional level,¹⁰⁵ the tendency of the regional level to put emphasis on CBC as a way to promote political distinctiveness, the burdensome procedures enforced by the national states in order to permit CBC of regional actors are all factors that have not favoured an easy recognition of CBC.

To this regard, a first important indicator is the enforcement of the CoE's *acquis*. Both countries ratified the EOC but not the Additional Protocol and Protocol No. 2. The failed ratification of the Additional Protocol, which deals with the creation of cross-border bodies, is meaningful because it shows the hostility of the two states to admitting a stable and lasting institutionalization of CBC.

Italy, when depositing the instruments of ratification of the EOC, issued two declarations revealing the severe policy of the national state in relation to CBC. First, the application of the EOC was subject to the conclusion of interstate agreements. Second, the Italian territorial authorities were empowered to conclude transfrontier agreements provided they were situated within 25 km of the border. Both these limitations are included in the national law enforcing the EOC, still in force.

practice, the signature of the EOC, and the quite ambiguous policy of the national states towards such regional conduct are all reasons I believe explain why the two constitutional courts applied, at a later stage, a more lenient standard of review.

To this regard, as far as the Spanish Constitutional Tribunal is concerned, decision 165/1994 was a turning point. Somehow overruling the already mentioned previous 137/1989 decision, the Spanish Constitutional Tribunal held that, in consideration of their constitutional autonomy, the CC.AA. are empowered to conduct external activities, provided these activities do not imply any exercise of an international *jus contrahendi*, nor that they determine immediately enforceable obligations towards foreign public powers, and nor do they breach central government foreign policy. This means that the external activities should take place according to a procedural regulatory framework permitting the national state to avoid possible clashes with the national foreign policy.

In Italy, the landmark decision is 189/1987. The constitutional court started its reasoning by affirming that in principle the national state has the exclusive power in relation to foreign policy. The legislator can provide exceptions to this general rule, which must be constructed narrowly. Among the activities having an external character a Region could perform, the constitutional court distinguished between, on the one hand, the transfrontier promotional activities (*attività promozionali*) and, on the other hand, a broader category called *attività di mero rilievo internazionale*. The first group includes activities aimed at the social, economic and cultural development of the Regions. According to the constitutional court the *attività promozionali*—which also includes the crossborder agreements concluded under the umbrella of the EOC—require the previous consent of the central government (and the consistency with national guidelines) because they are to be considered, in any case, as binding agreements supposedly affecting the international liability of the state as a whole. The other category, the so-called *attività di mero rilievo internazionale*, includes a plurality of activities characterized by the fact they do not create legally binding obligations, but merely political commitments, and, therefore, because they are not able to affect the international liability of the state, they are subject to a less formalized authorization regime.

¹⁰⁵ To this extent, it is worth noting that both Italy and Spain lack a legislative chamber in which regional interests are effectively represented, as usually happens in federal states. As far as Italy is concerned, this led to the creation, by statute, of the Conferenza Stato Regioni, a forum in which representatives of the central government and regions meet to even their relations. In Spain the need for cooperative relations led to the creation of intergovernmental commissions with a sector-tailored focus. However, the historical CC.AA. (Galicia, Catalonia, Pais Vascos) especially tend to favour direct relationships with the central government, rather than match up with the other CC.AA., in order to claim more powers and resources.

The case of Spain is slightly different. At the time of the signature of the EOC, Spain issued a declaration according to which the EOC application was subject to the previous conclusion of an interstate agreement. However, lacking this international agreement, subnational units could nonetheless conclude transfrontier agreements provided that the express consent of the governments of both national parties involved was given.

In 1995, the Treaty of Bayonne, concerning transfrontier cooperation, was signed between Spain and France. In 1997 a decree (n. 1137) dealing with the procedure to be followed for transfrontier agreements of subnational agreement was issued. The decree provides a different regulatory framework depending on the legal context within which the agreement is concluded. For those transfrontier agreements concluded under the umbrella of an international treaty (as was the case along the French–Spanish border but not along the Portuguese one), the express consent of the national state was replaced by a simple duty of communication in order to permit control of the legitimacy of the agreement with reference to both the EOC and the relevant bilateral treaty. The recent Treaty of Seville between Spain and Portugal has allowed for the extension of the above-mentioned procedure for transfrontier agreements concluded by Spanish and Portuguese subnational units, for which the express consent of the central government was previously required.

The Royal Decree, however, only applies to transfrontier cooperation.¹⁰⁶ No regulatory framework is set for the other external conduct of CC.AA., such as interregional agreements or the joining of European frontier-region associations. Nonetheless, these activities can be considered legitimate in the light of the tribunal constitutional's case law, which, however, requires a duty of loyal collaboration between the two territorial levels of government.

In Italy, following the constitutional reform in 2001, Article 117.9 of the constitution established that the Regions have the power to conclude international agreements (*accordi*) with a foreign state and understandings (*intese*) with constituent parts of a state. A statute (no. 131/2003) was passed to enforce the new constitutional provisions. The statute provides two different procedures for the conclusion respectively of the international agreements and of the understandings a Region can come down to with its territorial counterparts. As far as the latter, the procedure echoes a previous regulatory framework set in 1994.¹⁰⁷ These understandings, aimed at promoting the social,

¹⁰⁶ See Javier A. González Vega, 'El real decreto 1317/1997 de 1 de agosto sobre comunicación previa y publicación oficial de los convenios de cooperación transfronteriza. Via libre por fin a la cooperación transfronteriza?' (1997) *Revista Española Derecho Internacional* 49 (2), 349-355.

¹⁰⁷ This was set in Decreto Presidente della Repubblica (31 marzo 1994), which provided a different procedure to be followed depending on the nature of the regional external conduct. If the latter implied the conclusion of binding agreements (*attività promozionali*), the previous explicit consent of the national state was required, to permit control over the respect of the national foreign policy. For other less relevant external conduct (*attività di mero rilievo internazionale*), such as visits, meetings, conferences, participation in cultural social, and economic activities, a simple duty of informing the central government was required. Such an act was passed in order to enforce a decision of the Italian Constitution Court (see later in the text). For comments on the Regulation of the Italian regional external power before the constitution amendment in 2001, see Francesco Palermo, *Il potere estero delle regioni*, (Cedam, Padova, 1999), 170-188; Isabella Pasini, '«Potere estero» delle regioni: il consolidamento degli indirizzi

economic and cultural development of the Regions, require the previous communication to the national state, which may provide guidelines the Regions have to take into account. If the central government fails to communicate any observation within 30 days, the Region can act¹⁰⁸. It is still unclear whether the CBC agreements concluded within the context of the EOC are dealt with by the above mentioned procedure or rather by the stricter rules set in the national law enforcing the Madrid Convention. The above-described extremely detailed procedure reveals the central government's fear concerning the regional external conduct.

3.3 Ethnic Minorities

The possible link between CBC and the protection of ethnic minorities has emerged quite recently in the legal and scholarly debate. Clear evidence of that is Art. 18 of the Council of Europe's Framework Convention for the Protection of National Minorities (FCPNM).¹⁰⁹

At first, the connection between ethnic minorities protection and CBC can appear obvious. In fact, since the core of CBC is the very fact that populations and subnational units of two bordering national states cooperate jointly, "trans-border cooperation is *per se* a way to deal with ethnic diversity".¹¹⁰

However, ethnic diversity can actually be a problem for CBC. This may occur, as it has been convincingly pointed out, "when the cross-border activities affect a territory where the (majority of the) population is ethnically homogeneous with the (majority of the) population on the other side of the border and thus generally a minority in the state to which it belongs".¹¹¹ In such a situation, national governments can consider CBC as a potential threat to their national integrity. This fear can get even more accentuated when national minorities are concentrated in territorial areas enjoying special self-government rights.

This is the case of the Land Tyrol and of the two autonomous Italian Provinces of Trento and Bolzano.¹¹² In the latter is concentrated a German-speaking minority that is

giurisprudenziali e dottrinali nel D.P.R. 31 marzo 1994', (1995) *Rivista italiana diritto pubblico comunitario*, 981

¹⁰⁸ On the current regulatory framework see: Maria Romana Allegri, 'Dalla cooperazione transfrontaliera alla cooperazione territoriale: problemi di ordine costituzionale', in Antonio Papisca (ed.), *Il gruppo europeo di cooperazione territoriale* (Marsilio, 2009), 63-93; Adele Anzon Demming, *I poteri delle Regioni*, (Giappichelli, 2008), 171-185; Antonio Ruggeri, "Riforma del Titolo V e «potere estero delle Regioni (notazioni di ordine metodico-ricostruttivo)", (2002) at <www.giurcost.org/studi>.

¹⁰⁹ According to which "the contracting parties shall endeavor to conclude, where necessary, bilateral and multilateral agreements with other states, in particular neighboring states, in order to ensure the protection of persons belonging to the national minorities concerned. Where relevant, the parties shall take measures to encourage transfrontier cooperation".

¹¹⁰ See Francesco Palermo, 'Trans-border cooperation and ethnic diversity', in Jørgen Kühn, Marc Weller, *Minority Policy in Action: The Bonn-Copenhagen Declaration in a European Context 1955-2000* (European Centre for Minority Issues, Flensburg, and Institut for Graenseregionsforskning, Aabenraa, 2005), 161-185, at 161.

¹¹¹ *Ibid.*, at 162

¹¹² *Ibid.*, at 166.

actually the majority in the territory concerned. Following an international interstate agreement on CBC signed between Austria and Italy in January 1993, the three territorial units established a roundtable of experts in order to explore legal ways to allow a strong institutionalized form of CBC. The draft proposal envisaged a common permanent organization, to be called Euroregion Tyrol, which was empowered to make decisions with binding force. Both national governments reacted firmly to this political initiative. The Austrian government, in an internal expert opinion, noted it had not been informed about the beginning of negotiations, as Article 16 of the Austrian constitution requires, and it further objected that no public law entities were admissible under both Austrian and Italian law.¹¹³ A similar attitude was taken by the Italian government, whose Ministry of Interior defined the project as subversive. For a long time, the idea of a strong institutionalization of CBC in the Brenner area was put aside, although the recent approval of the EGTC Regulation reopened the political debate.

In some cases, the very fact that ethnic tensions are present in a given area is the main reason to develop CBC. However, CBC is driven by the national governments, and it becomes part of a larger strategy for pacification. This scheme has been followed in the Northern Ireland context.

Both Ireland and the United Kingdom do not provide any legal ground for transfrontier or interregional cooperation. Neither of them signed the Madrid Outline Convention, and limited interregional cooperation practices took place only in the context of the INTERREG programme (such as Transmanche and Rives-Manche between Kent and the French Region Nord-Pas-de-Calais¹¹⁴).

According to the Good Friday Agreement between Ireland and the United Kingdom in 1998, a North-South Ministerial Council (NSMC) was established, a body that brings together ministers of the Northern Ireland government and the government of the Republic of Ireland. The agreement also provides for several joint bodies, with a clear operational remit, to operate in the field of transport, agriculture, education, health care, the environment and tourism. All bodies are responsible to the NSMC, whose policies they must implement.¹¹⁵

The ethnic issue can also be problematic for the development of CBC in the case of multinational states. In a multinational state, there are no, properly speaking, 'national minorities' since it is the state itself that is made of several distinct national groups, representing the constitutive units of the state.¹¹⁶ This is reflected in the institutional

¹¹³ See the official comments of the Federal Chancellor's Office and of the Ministry of Foreign Affairs in documents in Pernthaler and Ortino, *La bozza di statuto*, *op. cit.* note 25, at 278-289.

¹¹⁴ See Andrew Church, Peter Reid, 'Cross-border Co-operation, Institutionalization and Political Space Across the English Channel', (1999) *Regional Studies* 33 (7), 643-655.

¹¹⁵ For further details about and criticisms of the proper functioning of this institutional framework, see Palermo, in Kühl, Weller, *Minority Policy Action*, *op. cit.* note at 165, see also Francesco Gilioli, 'Cross-border cooperation in Ireland, its legal framework and Europe: a third party view', 3 Queen's papers on Europeanisation (2005), at <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/Research/PaperSeries/EuropeanisationPapers/PublishedPapers/>, 13.

¹¹⁶ See Francesco Palermo and Jens Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze* (Cedam, 2008), at 53.

framework which not only grants a high degree of autonomy to those territories where the various national groups are mainly settled, but which also adopts a governmental framework in which the power is shared among the different national groups.¹¹⁷ Whereas in some cases, as in Switzerland, the multinational state is effectively cohesive, in others it is not, and the institutional equilibrium is more precarious. In this event, the territorial units often claim, or even act as if, they are quasi-autonomous states.

In this institutional pattern, the power to conduct external or foreign relations is seen as instrumental to claiming their political distinctiveness in respect to the state as a whole¹¹⁸. The already mentioned case of Belgium is eloquent to this regard but it could be applied to a certain extent to Spain as well.

In more recent years, there has been a resurgence of nationalistic parties in Catalonia, the Basque Country and Galicia claiming for more powers as a sign of their distinctiveness in respect to the other CCAA.¹¹⁹ In 2004, the Basque parliament approved a proposal for a new *Estatuto de autonomía*¹²⁰ (so called *Plan Ibarretxe*) according to which sovereignty would have been vested to the component nations, with Spain being reduced to a mere confederation. The plan was, however, rejected by the national parliament.¹²¹

The reforming procedure of the *Estatuto de Autonomía* took place in Catalonia as well, and it was approved by the national Parliament.¹²² However the *Partido Popular* – the political party at the opposition in the national Parliament at the moment of enacting the *Estatuto* – took action before the constitutional tribunal, claiming the unconstitutionality of numerous provisions. In June 2010, the constitutional tribunal estimated illegitimate some articles of it.¹²³

¹¹⁷ See Marc Weller, Stefan Wolff (eds.), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005).

¹¹⁸ See Thomas Wilson, 'Sovereignty, Identity and Borders. Political Anthropology and European Integration', in Liam O'Dowd, Thomas Wilson (ed.), *Borders, Nations and States*, (Aldershot, 1996), 199-221; Marc Abeles, Werner Rossade (ed.s), *Politiques symboliques en Europe*, (Duncker and Humblot, 1993).

¹¹⁹ See Eliseo Aja, *El Estado autonómico. Federalismo y hechos diferenciales*, (Alianza editorial, 2003); Roberto L. Blanco Valdes, *Nacionalidades históricas y regiones sin historia*, (Alianza editorial, 2005).

¹²⁰ The act containing the basic institutional norms, including the powers a CA is granted, is called *estatuto de autonomía*. The Assembly of the CCAA are called to propose a text of the *Estatuto* which, in order to become legal effective, must be approved by the National Parliament with a *ley organica*—a national statute whose legal rank is higher than ordinary statutes (Art. 147.3).

¹²¹ In relation to the Plan Ibarretxe, see José Manuel Castells Arreche (ed.), *Estudios sobre la propuesta política para la convivencia del lehendakari Ibarretxe* (IVAP, Oñate, 2003); Tomás Ramón Fernández Rodríguez, 'Sobre la viabilidad de la impugnación jurisdiccional de Plan Ibarretxe', (14) *Teoría y realidad constitucional* (2004), 117-132.

¹²² The literature concerning the reform of the Catalan *Estatuto* and of the others CCAA. *Estatutos de Autonomía* is extensive: see Enoch Albertí Rovira, 'El blindaje de las competencias y la reforma estatutaria', (2005) *Revista catalana de dret públic* (31), 109-136; G. Rico-Rico Ruiz (ed.), *La reforma de los Estatutos de Autonomía, Actas del IV Congreso Nacional de la Asociación de Constitucionales de España* (Tirant lo Blanch, 2006).

¹²³ See decision n. 31/2010, 28 June 2010.

Although the *Catalonia Estatuto* does not contain references to independence as the Basque plan did, it nonetheless puts a strong emphasis on the ‘distinctiveness’ of Catalonia in the context of Spain.

In this regard, one of the key issues is exactly the power to act externally¹²⁴. An entire chapter (Chapter 3) of the *Estatuto* is dedicated to the issue, with eight provisions specifically dealing with it. Although reaffirming the exclusive power of the national state to conduct foreign relations (in line with Art. 149.1.3 of the Spanish constitution), the *Estatuto* seems to formalize the previous case law of the constitutional tribunal in the field, in some cases going a little further.

Article 195 of the *Estatuto* establishes that Catalonia can conclude agreements within its powers for the promotion of the Catalonia general interests, somehow implicitly considering the power to act externally as a way to exercise internal powers. The provision does not say anything about the subjects—states or component units of a state—with whom to cooperate with.¹²⁵ Besides, it calls for the national state to provide support to the Catalonian power to act externally.

The following Article 196 of the *Estatuto* claims for an involvement of Catalonia whenever an international treaty, to be signed by the national state, impinges upon Catalonia’s reserved matters. Moreover, the following Article 197 explicitly mentions transfrontier and interregional cooperation as a way for Catalonia to pursue its external power.

It is difficult to say at the moment what the practical consequences that the enactment of this *Estatuto* will have on the Spanish national policy towards the external conduct of the CCAA. However, since these provisions have been substantially agreed upon by the national government, they probably have to be seen as a part of the new institutional equilibrium among national groups composing Spain. It is then likely this will lead to a more supportive attitude of the national state towards CBC of CCAA.

3.4 Supranational conditionality and CBC in countries in Transition: the Case of Central Eastern Europe

The title of this section may give rise to some criticisms. It considers under the category of “countries in transition” states that have experienced independence and democratic regimes for more than 20 years and that are now part of the EU, thus sharing the democratic values this institution underpins.

¹²⁴ On the regional external power as a symbolic way to highlights territorial identity of the Spanish CCAA: see Stéphane Pacquin, ‘La paradiplomatie identitaire et les relations Barcelone-Madrid’, (2002) *Études internationales* 1 (33), 57-90; Margarita Ledo Andion, Josep Maria Sole I Sabate, ‘Le droit à l’autodétermination. Un exemple des limites démocratiques de l’État espagnol à l’égard des nationalités’, in Marc Abeles, Werner Rossade, *op. cit.* note 117, 377-381.

¹²⁵ Precisely for that reason, art. 195 was among the provisions whose constitutionality has been challenged before the constitutional tribunal. The Court rejected the claim stating that the provision is to be considered legitimate, provided that it is applied within the limits established by the constitutional tribunal itself in its previous case-law. This means that no agreements with subject of the international legal order are allowed.

Moreover, it does not take into account that each of these countries presents a different legal regime concerning CBC. To this regard, we may note that there are national experiences, such as Poland and Hungary, that enshrined in their constitutions the power of subnational units to conclude cross-border agreements with foreign counterparts and the power to join associations of frontier European regions. In other cases, it is a statute (generally the law on municipality or, where relevant, on regions) that explicitly grants such a power.¹²⁶

There are also important differences concerning the procedure and the material scope of the central government's supervision power.

In the Czech Republic, the agreements concluded by municipalities with their foreign counterparts are not subject to specific forms of control, whereas regional agreements or those instituting cross-border bodies require the previous consent of the Ministry of Interior.

In Poland, the regional level (*voivodat*), which enjoys administrative powers in the field of economic and social programming, is granted remarkable external power. However, before concluding a cooperative agreement with a foreign regional counterpart, it must obtain the consent of the Foreign Affairs Minister.¹²⁷

In Romania, according to law 215/2001 on local public administration, before concluding any transfrontier agreement, the local government shall obtain advice from the Ministry of Foreign Affairs and inform the Ministry of the Public Administration.¹²⁸

In Slovakia, the development of cross-border bodies, taking the form of Euroregion based on private law, was problematic until the ratification of the EOC¹²⁹.

¹²⁶ See the Czech Republic law on the regions 131/2000 and the law on municipalities (number 128/2000); Slovak Republic law 302/2001 on local self-government in the autonomous regions and law 30272001 on municipalities as emended following ratification in 2000 of the Madrid Outline convention; Romania law 215/2001 on local public administration; and Bulgaria 1991 law on local autonomy. These data are based on the information collected by the Council of Europe in its report on the current state of cross-border cooperation, *op. cit.* note 82 at 93.

¹²⁷ Maja Kozłowska, 'Aspetti costituzionali ed amministrativi del decentramento dello stato unitario polacco', in *Istituto di studi sui Sistemi Regionali, federali e sulle Autonomie (ISSIRFA)*, at <<http://www.issirfa.cnr.it/4759,949.html>>.

¹²⁸ The case of Romania and Slovakia presents some inconsistencies. Although in both countries ordinary statutes appear to grant local and, in the case of Slovakia, regional units the general power to conclude CBC agreements, the Act of Ratification of the Madrid Outline Convention suggests a different conclusion. Both countries made a declaration according to which the enforcement of the Outline Convention is subject to the previous conclusion of an international agreement with the party concerned. Whereas in the case of Slovakia this is not any more of a limitation—since it has concluded international treaties with all border states—in the case of Romania, none of these international agreements have been concluded.

¹²⁹ For a very detailed analysis of the Slovak legal framework concerning CBC and of the main experiences concerning Euroregions set in Slovakia, see Ol'ga Marhul'ková, 'Institutional Aspects of Transfrontier Co-operation in the Slovak Republic', study conducted and published by Council of Europe, in *The role of Euroregions in transfrontier co-operation. Three cases studies: the Slovak Republic, Lithuania, South-Eastern Europe* (2006), at

Thus, the national CBC legal framework certainly varies from country to country, although there are some similarities. These are, for instance, the preference for the setting up of private law-based cross-border bodies (often lacking any legal capacity) and the application of specific forms of national state supervision whenever the external conduct of the territorial community is likely to have more political relevance, as is the case for the setting up of a cross-border body or for agreements concluded by the regional territorial level (see Czech Republic, Poland).

However, despite these national disparities, it is undoubted that there exists a common background concerning CBC. All CEE countries have been equally and deeply affected by both European and international trends. The relevance of external factors in favouring the CEE countries' transition towards the Western legal tradition has been stressed by several scholars who have pointed out how the accession to first the CoE and then the European Union have favoured, if not required, the previous acceptance of democratic values.¹³⁰ CBC was considered as part of this process, and that is why I deem it appropriate to stress in the title of this section the link between CBC and the democratic transition that has occurred in the CEE countries.

All CEE countries ratified the EOC, thus accepting the idea that CBC is a legitimate practice. To a certain extent, this may seem surprising. In newly freed or independent states, as the CEE countries were, the priority was building a nation and preserving the national sovereignty that had been only recently regained. In this framework CBC could be considered as a threat to their integrity. The picture was still further complicated by the interplay of other factors. Several state borders (Germany–Czech, Germany–Poland, Slovak–Hungary, Hungary–Romania) were and still are very sensitive from an ethnic point of view because of the ethnic cleansing that occurred during and immediately after World War II. Moreover, CEE countries had no previous history of truly democratic regional or local decentralization.¹³¹

Certainly, in some cases, these factors play a significant role in hindering the CBC, but in general terms it can be noted that the CEE countries took quite quickly a positive attitude towards CBC.

A primary important reason to explain this is certainly the commitment of the CEE states towards the protection of national minorities. This link between minority rights and CBC has been stressed in almost all bilateral treaties for the protection of national

<<https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1531231&SecMode=1&DocId=1343260&Usage=2>>.

¹³⁰ See Dimitry Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', (2004) 8(10) *EIOP*, at <<http://eiop.or.at/eiop/texte/2004-010a.htm>>.

¹³¹ All these factors are highlighted by Emil J. Kirchner, 'Transnational Border Cooperation between Germany and The Czech Republic: Implications for Decentralization and European Integration', European University Institute, RSC Working Paper No 98/50, December 1998, at <http://www.iue.it/RSCAS/WP-Texts/98_50t.html>.

minorities or on good neighbourly and friendly cooperation concluded by practically all CEE countries.¹³²

The second important factor has been the efforts for developing democratic and autonomous local territorial communities.¹³³ The CoE institutions have played a pivotal role, especially in sustaining the strong connection between the right to self-government of territorial communities and their entitlement to act 'externally'. To this regard it should be noted that the EOC has not been the only CoE international document relevant for the topic. A larger impact on the CEE countries local democratisation has been determined by the European Charter of Local Self-Government, whose Articles 10.2 and 10.3 explicitly entitle local authorities, respectively, to belong to an international association of local authorities and the power to cooperate with their foreign counterparts under such conditions as may be provided for by law.¹³⁴

The third important common driver, which may be the more influential one, has been the European Union and its PHARE Programme, which since 1994, has boosted in many cases the creation of Euroregions along the former EU border.¹³⁵

The CEE countries faced and still are facing common internal challenges. One of them is certainly the decentralization issue, which is important for our topic since successful CBC requires effective local self-government. The local institutions in the CEE countries seem weak, especially considering that the local government finance is still dependent on central funding.¹³⁶ Moreover, the decentralization is of the administrative

¹³² See Aree Bloed and Pieter van Dijk (eds.), *Protection of Minority Rights Through Bilateral Treaties—The case of Central and Eastern Europe* (Kluwer Law International, 1999). See also the special focus on CBC and minorities in Eastern Europe in 6 *European Yearbooks of Minority Issues* (2006/7), 137 *et seq.*, with the contributions of Katrin Böttger, 'Transnational and Trans-regional Cooperation and Effects on the Situation of Minorities: A Case Study of the Polish–Ukrainian Border Region'; Nataliya Belitser, 'A Case Study on Crossborder Cooperation in the Ukrainian–Moldovan Border Region and Its Effects on the Respective Minorities'; Martin Klatt and Jørgen Kühl, 'National Minorities and Crossborder Cooperation between Hungary and Croatia. A Case Study of Baranya, Hungary and Osiječ ko-baranjska County, Croatia'; Karina Zabielska, 'Crossborder Cooperation in Mid-Eastern Europe and Its Influence on Minorities: the Case of the Lithuanian Minority in Poland'; and Alice Engl and Jens Woelk, 'Crossborder Cooperation and Minorities in Eastern Europe: Still Waiting for a Chance? A Summary and Evaluation of the Four Case Studies'.

¹³³ See Andrew Coulson, Adrian Campbell (eds.), *Local Government in Central and Eastern Europe: The Rebirth of Local Democracy* (Routledge, 2006); Harald Baldersheim (ed.), *Local Democracy and the Processes of Transformation in East-Central Europe* (Westview Press, 1996).

¹³⁴ The European Charter of Local Self-Government was signed in Strasbourg on 15 October 1985. It entered into force 1 November 1988. Text available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/122.htm>>.

¹³⁵ See Grzegorz Gorzelak, 'Normalizing Polish–German Relations: Cross-border cooperation in Regional Development', 195–205, and Hans-Joachim Bürkner, 'Regional Development in Times of Economic Crisis and Population Loss: the Case of Germany's Eastern Border Regionalism', 207–215, both contributions in James Wesley Scott, *EU Enlargement, Region Building and Shifting Borders of Inclusion and Exclusion* (Ashgate, 2006); Zoltán Pogátsa, 'Regionalisation, the Powers of Subnational Entities in Hungary and the Central European Region', (2002) *Diritto Pubblico Comparato ed Europeo* (2), 782–793.

¹³⁶ For a general overview of the legislation on local government in some CEE member states, see Michaela Salamun, 'The Laws on the Organization of the Administration in the Czech Republic, Hungary, Poland and Slovakia: a Comparative Analysis in the Context of European Integration', (2007) *Review of Central and East European Law* (32), 267–301.

type. CEE countries have been reluctant to establish a powerful middle territorial level, either because of the countries' sizes or for fear that the creation of a regional power might compete with the central one. Where this institutional move has occurred (Poland, Czech Republic, Slovakia and, more recently, Slovenia), it was mainly in response to the requests of the European Commission for a more effective implementation of the EU structural funds.

The weak role of the intermediate level, which, even in those cases in which it has been settled, enjoys only administrative powers, can represent a serious obstacle in the development of a more strategic cross-border policy, according to the meaning I have outlined earlier in this chapter. The fact that the richest counterparts in the area are represented by 'strong' regions empowered with legislative competences (German and Austrian Länder) does not help too much. The risk is in fact that the CBC, or at least the more strategic cross-border projects, will be driven almost entirely by the central government, according to a top-down approach not sufficiently balanced by effective subnational-level participation.

4. An attempt of classification of the national practices by looking at empirical cases of CBC

Taking into account the different factors influencing the national policies towards CBC outlined above, the purpose of this paragraph will be to suggest a classification of the national policies towards CBC within three groups. References to some CBC national empirical cases, considered as paradigmatic, will back up our attempt at classification.

4.1 "Soft promotional" national states

The first model can be labeled as a "soft promotional" national state. This is especially the case for Germany and Switzerland. It should be noted that CBC in both countries have been developed mainly according to a bottom-up approach which has especially interested the local tier of territorial government, though the latter acts in form of inter-municipal association.¹³⁷ To this extent, the upper territorial levels – the national state but even the Länder (which enjoy power on matters related to local self-government) – have played a role in accompanying this development by enforcing instruments when proved useful. To this regard, the already mentioned Isselburg-Anholt, Mainz, Karlsruhe international treaties are good evidence of that.

The regional level has increasingly showed an interest in developing CBC as the Karlsruhe agreement reveals, with Länder being specifically empowered to make use of the legal instruments provided by it. The inherent cooperative nature of the intergovernmental relations can probably explain why in the area CBC, though mainly developed according to a bottom approach, has nonetheless benefited of the national state attention.

¹³⁷ See Markus Perkmann, 'Cross-border regions in Europe', *op. cit.* in note 1.

To this extent, the analysis of CBC practices in the upper Rhine area may support this view.¹³⁸ From a legal point of view, the CBC in the Upper-Rhine area is grounded on an international agreement signed in Bonn in 1975 among the Federal Republic of Germany, France and Switzerland. The agreement set an intergovernmental Commission with representatives of the three states charged with the promotion of transfrontier cooperation between the territories concerned. The Bonn agreement represented the legal ground for the establishment of the Upper Rhine Euroregion - the larger territorial CBC body within which CBC practices have developed in the area - made up of the Haut et Bas Rhin French departments, the Swiss Cantons of Bale Ville and Bale Campagne, the German Länder of Baden Wuttemberg and Rhineland-Palatinate. Although the CBC cooperation in the area started originally according to an up-down approach, later on a bottom up approach prevailed. In fact, the Bonn Treaty provided for an Upper Rhine conference made up of local territorial actors representatives, plus the involvement of the regional prefect for the French part. It was this institution that was (and still is) the real engine of the cooperation practices in the area.

A new agreement concluded in Basel in 2000 replaced the Bonn agreement. It recognized the important role the Upper Rhine conference had for the CBC. It is then up to this institution, which has a policy coordinating role, to smooth the cooperation and only in the case a solution cannot be found, it would refer to the intergovernmental commission.

Another reason of interest for the Upper-Rhine region is given by the fact that a sort of Russian doll structure has been put in place to institutionalize CBC, varying in scale depending on the level considered most appropriated to deal with each specific issue, thus applying a subsidiarity principle form to CBC.

Within the perimeter of the Euroregion of the Upper-Rhine conference, other three Euroregions have been established. They are Pamina, Centre-Harnolte and the TriRhena Region. Among the components of TriRhena, there is the *Regio Basiliensis*. This is an institutional actors and civil society association in the area of Bale which at the same time has been charged with the secretariat of the Swiss government delegation in the intergovernmental commission established by the Bonn treaty. Thus, the double role performed by the Region Basiliensis - both as a local player and as a permanent connector with the national state - has permitted this institution to play a decisive role.¹³⁹

¹³⁸ See, for further details, James Wesley Scott, 'Transborder Cooperation, Regional Initiatives, and Sovereignty Conflicts in Western Europe. The Case of the Upper Rhine Valley', (1989) *Publius: The Journal of Federalism* 19 (1), 139-156; Walter Ferrara, "La Regio Basiliensis e la cooperazione transfrontaliera nella regione del Reno superiore", in Walter Ferrara, Paolo Pasi, *Come funzionano le euroregioni. Esplorazione in sette casi* (Isig, 2000), 27-39; Jochen Sohnle, Françoise Schneider, "La coopération transfrontalière dans l'espace du Rhin supérieur et le cas particulier de l'agglomération trinationale de Bale", in Comte and Levrat, *Aux coutures de l'Europe, op. cit.* note 11, 35-59.

¹³⁹ See Alberto Gasparini, D. Del Bianco, *EUREGO Progetto di una Euroregione transfrontaliera*, (Isig, Gorizia, 2005), at 38 *seq.*

4.2 “Strongly promotional” national states

The second national attitude can be defined as “strongly promotional”. France is particularly indicative of this approach.¹⁴⁰ By means of its decentralized territorial organ (the Prefect), the national state has often taken part in CBC projects, especially when they have a strategic territorial relevance, going beyond the local dimension.

The prefect (usually at the regional level) has the task not only of ensuring the legitimacy of the CBC agreements but also of coordinating CBC and distributing national resources. This role has been defined by a governmental document (*circulaire*) significantly named “*Coopération décentralisée et rôle des services déconcentrés de l’Etat*”. After reminding the will of the national state to encourage CBC, the document states that it is up to the regional prefect to define a yearly program for CBC, in strict cooperation with territorial units, which have to nonetheless respect the geographical and thematic priorities established by the Foreign Affairs Minister.¹⁴¹

Another feature to be highlighted is that many national administrative structures have been created in order to provide legal support and national coordination of French CBC subnational units.¹⁴²

The involvement of the national state has almost transformed CBC from a practice functional to the development of self-government rights of local units to a sort of promotion of national interest, though applied locally. Another explanation for this move seems to rely on the fact that the bordering foreign counterparts of the French *collectivités* are usually strong subnational units enjoying economic resources and legislative powers. The role of the prefect may be that of supporting the project, both politically and legally, whenever the powers of the French regions are not enough when compared with their foreign counterparts.¹⁴³

¹⁴⁰ See the rapport edited by the Conseil d’Etat, *Le Cadre juridique de l’action extérieure des collectivités locales*, (La documentation française, Paris, 2006), at 32: «L’Etat conçoit son rôle comme celui d’intermédiaire encourageant et facilitant la mise en oeuvre d’actions des coopération décentralisée [...] Il lui appartient également de veiller à la mise en cohérence et à l’efficacité de l’aide apportée en fonction des besoins locaux».

¹⁴¹ Circulaire du Ministère des Affaires Etrangères, 26 February 2003, *Coopération décentralisée et rôle des services déconcentrés de l’Etat : cofinancements du Ministère des Affaires étrangères*, «Dans le cadre des enveloppes budgétaire annuelles qui sont notifiés aux préfets de région, et sur la base des dossiers établis par les collectivités territoriales, le Préfet de région proposera, après avis éventuels des préfets de départements et en concertation avec les autorités territoriales, un programme régional annuel de coopération décentralisée. Cette programmation devra veiller au maintien de l’équilibre entre les différents niveaux de collectivités territoriales (communes, départements, et régions) et leurs groupements dans le respect des priorités géographiques et thématiques communiquées par le ministère des Affaires étrangères ».

¹⁴² See, for example, the *Delegué pour l’action extérieure des collectivités locales*, which is nominated by the Foreign Affairs minister and which is called to support technically the regional prefects. In 1992 it was established the *Commission nationale de la coopération décentralisée*, made up of national and local representatives; more recently it has been set the *Mission Opérationnelle Transfrontalière*. For further details see the already mentioned rapport of the Conseil d’Etat, *op. cit.* at 36.

¹⁴³ See Alain Lamassoure, *Les relations transfrontalières des collectivités locales françaises*, rapport presented to the Foreign Affairs minister, (May 2005), available at <www.espaces-transfrontaliers.org/document/rapport_lamassoure.pdf>, p. 23: «La création d’une unité d’action [sur un territoire transfrontalier donné] nécessite aussi de repenser la place de l’Etat dans l’organisation politique

It is in the light of this scenario that we can consider some examples of CBC institutionalisation.

The first case we would like to consider is the CBC practices occurring along the French and Swiss borders surrounding Geneva.¹⁴⁴ From an historical point of view, it is important to recall that several CBC initiatives in the area – although favored by previous and lasting relations in the past – started with an international agreement signed between France and Switzerland, the latter acting on behalf of the Geneva Canton. With this agreement the Geneva Canton took the commitment to pay directly to the French bordering subnational units a part of the revenues paid by the French transfrontalier workers.

This top-down initiative led nonetheless to the setting of the *Comité Regional franco-genevois*, composed of representatives of the Swiss Cantons (Geneva and Vaud) and of French subnational units which effectively became the real CBC political engine in the area. It is important to note, however, that the prefect of the French Region Rhone-Alp is a constitutive party of the *Comité*, highlighting the role of the French state as an active CBC player.

The activist role in supporting CBC emerges more recently considering that France is a constitutive party of some of the first EGTCs set thus far in Europe.

To this extent, we may consider the case of the Eurométropole Lille–Kortrijk–Tournai.

Unlike the above mentioned CBC case in the area of Geneva, here CBC started according to a bottom-up approach. It was thanks to an initiative of the urban community of Lille and of two associations of Belgian local units that in 1991 the *Conférence Permanente intercommunale transfrontalière* (Copit) was set as a non formalized body for CBC. The initiative was meant to establish new development opportunities for the area which was experiencing an economic decline.¹⁴⁵

The CBC took a new emphasis at the end of '90, thanks to a project co-financed by INTERREG EU program. At the end of this experience, the political will for a more formalized form of cooperation which put together the major territorial actors, including the national states, emerged in order to develop a transborder governance for the economic and territorial development of the area. The Bruxelles international agreement was meant to provide the legal instruments to formalize this cooperation.

et, si besoin est, juridique de ces projets. La présence de l'Etat dans les structures de Gouvernance doit être organisée de telle sorte que son représentant soit en mesure de prendre des engagements, ou, à défaut, de transmettre les demandes aux autorités centrales en étant entendu. Dans le même temps, l'éventail des outils juridique doit être adapté pour permettre à l'Etat, là ou cela est souhaité, de participer aux structure juridiques qui se mettront en place».

¹⁴⁴ See Nicolas Wismer, Christine Ricci, 'L'agglomération franco-valdo-genevoise', in H. Comte, N. Levrat (ed.s), *Aux coutures ...*, *op. cit.* note 11, 139-176.

¹⁴⁵ See, for further details, Valérie Biot, Pierre Got, 'Une stratégie pour faire de l'aire métropolitaine franco-belge une métropole transfrontalière: le projet Grootstad', in H. Comte, N. Levrat (ed.s), *Aux coutures ...*, *op. cit.* note 11, 61-84.

However, the adoption of the EGTC Regulation pushed the institutional actors to pursue this route further on.

The Eurométropole Lille–Kortrijk–Tournai EGTC, constituted in January 2008, is made up of the two national state representatives, representatives at the regional level (Flemish Region, Walloon region and French speaking community and the Région Nord-Pas-de-Calais), representatives of the meso-territorial level (French Département du Nord and Provinces of Western Flanders and of Nainaut) and of local territorial units associations. The objectives of the EGTC are vaguely defined, confirming the nature of the EGTC as a policy coordination forum.¹⁴⁶

4.3 “Reluctant” national states

Finally a third model is represented by Italy which displays a “reluctant” attitude toward CBC. The reasons for this approach relied on the fact that CBC is mostly seen as a regional rather than a local issue. Often, the regional players used CBC as a way to promote their political distinctiveness rather than to pursue clear-cut objectives. The presence of ethnic minorities along the national borders which are the majority of the population in the relevant regions further complicates the issue.

The case concerning the Euroregione Alpi Mediterraneo setting is quite indicative of this approach.

In the attempt to urge the national authorities to transpose the EGTC European Regulation into the national legal order, in February 2009, the Region Liguria approved a statute stating that it shall participate in the so-called Euroregione Alpi-Mediterraneo, an EGTC the Liguria will constitute with other Italian and French regions. The regional statute, which enclosed the institutive acts of the above-mentioned EGTC, was sent to the national authorities two weeks before its enactment. Moreover, a provision specifies that the Liguria participation in the EGTC would be fully effective provided the consent of the Italian national state was given, in pursuance of the EC Regulation 1082/2006.

The reaction of the national state was sharp. The government itself took action before the constitutional court, claiming that by enacting the challenged statute before the national enforcement of Regulation 1082/2006, Liguria breached the constitutional principle of loyal collaboration. The national state went even further. It argued that the regional statute was also in breach of the EC Regulation—and, indirectly, of the Italian constitution. In fact, according to the government complaint, the EC Regulation limits

¹⁴⁶ According to art. 2 of the Constitutive convention of the Eurometropole Lille–Kortrijk–Tournai EGTC : “L’Eurométropole Lille–Kortrijk–Tournai a pour mission principale de promouvoir et de soutenir une coopération transfrontalière efficace et cohérente au sein du territoire concerné. En rassemblant l’ensemble des institutions compétentes, l’Eurométropole Lille–Kortrijk–Tournai est un lieu permettant : d’assurer la concertation, le dialogue et de favoriser le débat politique ; de produire de la cohérence transfrontalière à l’échelle de l’ensemble du territoire ; de faciliter, de porter et de réaliser des projets traduisant la stratégie de développement à élaborer en commun, de faciliter la vie quotidienne des habitants de la métropole franco-belge”.

the range of the activities an EGTC can carry out with regard to the strengthening of the economic and social cohesion of the parties involved. However, the Euroregione Alpi-Mediterraneo extended this material scope to political and cultural ties of the parties.¹⁴⁷ Following the reaction of the national authorities, Regione Liguria passed a new statute (n. 2, 15 February 2010), repealing the original reference to the strengthening of “political ties”, as one of the aims pursued by the Euroregione Alpi-Mediterraneo. The regional intervention smoothed the procedure for authorising the establishment of the mentioned EGTC. In March 2010, the Italian constitutional court (decision 112/2010) rejected the claim by the national authorities noting that the challenged statute of Regione Liguria was meant to be fully effective only after the enactment of national law enforcing EGTC Regulation. Furthermore, the constitutional court observed that the repealing of the words “political ties” was enough to conclude that the statutory aims of the Euroregione were in line with the EC Regulation.

A more favourable approach arose when the CBC project presented a more focus tailored objective, as has been the case for the Brenner Corridor Platform. This is a cooperative agreement among the representatives of the three national states (Germany, Austria and Italy), of the regions involved (Bavaria, the Land Tirolo, the autonomous provinces of Trento and Bolzano and the Verona province) and the railway companies¹⁴⁸ whose setting is mainly due to the initiative of the European Coordinator.¹⁴⁹ The main goal of the Platform is the construction of a tunnel in the Brenner area, linking the territory of Austria and Italy, as part of the European Priority project 1¹⁵⁰, concerning the construction of a rail connecting Berlin and Palermo.¹⁵¹

The case of the Brenner Corridor Platform is interesting for at least two reasons. Despite that, initially, the focus of the project was on the construction of the tunnel—a matter that involved only national competences—a different approach subsequently emerged. The construction of such a rail infrastructure has deep consequences for the economic development and the territorial planning of the territories concerned. Since these matters are reserved for the regional territorial level, there was an interest in setting up a coordination policy arena linking together national and regional territorial levels as well. Moreover, such a regional involvement took place in national contexts (Italy and Austria), which have shown restrictive attitudes towards CBC, especially when conducted by the Brenner area regional actors. Most likely, the fact of being involved in the same project and the fact that the latter has a specific and clear focus, with no claims on political integration, has favoured a change of attitude in the national states.

¹⁴⁷ See complaint No. 30 of 5 May 2009 in GU, 3-6-2009.

¹⁴⁸ See Karel Van Miert, Annual Report 2007, priority project 1, p. 10. The full text of the report is available at <http://ec.europa.eu/transport/infrastructure/european_coordinators/2007_en.htm>.

¹⁴⁹ The European coordinator was set in pursuance of European decision 884/2004/CE, Art. 17-bis in *O.J.* L167, 30 April 2004. He has the task of easing the enforcement of those European transport projects that have a transfrontier dimension and thus require coordination between member states.

¹⁵⁰ See Debra Johnson, Colin Turner, *The Political Economy of Integrating European Infrastructures* (Macmillan, Basingstoke, 1997); Jean Arnold Vinois, ‘Les réseaux transeuropéens: une nouvelle dimension donnée au Marché Unique’, (1993) *Revue du Marché Unique Européenne* (1), 95-125.

¹⁵¹ See Giulia Bertazzolo, ‘Il procedimento per l’individuazione dei progetti prioritari nel settore dei trasporti (art. 154-156 del Trattato): caratteri e limiti della pianificazione comunitaria’, (2008) *Rivista italiana diritto pubblico comunitario*, 792-834.

5. Concluding Remarks

In the first part of this contribution, we have underlined some common legal developments that the two supranational driving forces in the field of CBC, namely the *CoE acquis* and the EU, are displaying.

Firstly, we have highlighted the increasing attention towards legal instruments for institutionalising CBC. In the CoE context, this feature emerged at the time of the signature of the Additional Protocol to the EOC, although the model agreements listed to the text of the EOC reveal this was an issue already present at the time of the Madrid Convention.

Currently, a move forward can be noted. The original model – somehow suggested by the Additional Protocol and further enforced by some of the interstate agreements (see for example the Valencia Treaty) – was in fact based on the remitting to the national law where the CBC body was located for the regulation of membership, powers, operations and so on. This is being replaced by a different framework where a “common core” of harmonized rules for the establishment of a CBC body is provided, since the subnational units are unwilling to subject themselves to the national law of one of them. Earlier evidence of this new approach has been seen during the signing of the Karlsruhe agreement which regulates the *Groupement locale de collectivités territoriale* (GLCT). The GLCT has been a legal model for following international treaties concerning CBC¹⁵² and for the EU EGTC Regulation.

The second emerging feature of the CBC European is the increasing relevance of institutionalised CBC as a means of developing policy coordination of different territorial players other than operative instruments aimed at solving specific cross-border issues. The setting of a CBC body means to conceive CBC as a stable and lasting relation in order to permit the development of a true systematic cross-border policy concerning a larger territory and entailing the coordination of more territorial levels, according to the multilevel governance concept.¹⁵³ This marks a departure from the idea of CBC as related only to neighbourly relations and having only a technical content, as was originally suggested by the EOC.

This evolution could be hindered by some textual elements contained in the EU EGTC Regulation.¹⁵⁴ However, the enforcement of the EGTC Regulation conducted thus far

¹⁵² See especially the Bruxelles Agreement signed in 2002 and entered into force in 2004. It was concluded by France, Belgium, the Flemish Region, the Wallonia Region and the French-speaking community. French text available at the *Moniteur Belge*, 16 January 2004.

¹⁵³ See Nicolas Levrat, *L'Europe et ses collectivités territoriales – Réflexions sur l'organisation du pouvoir territorial dans un monde globalisé* (PIE-Peter Lang, 2005) 269-271.

¹⁵⁴ We are referring to the fact that the carrying out of tasks, other than those related to the implementation of the territorial cooperation programmes or projects within the structural funds, is construed in strict terms by art. 7. 3 of the EGTC Regulation. To this regard, it is also worth of mentioning the requirement, set by art. 7.2, according to which the EGTC could act only in common area of competences of the participating members. For further details see *supra* sect. 2.3 of the paper. This ambivalence also emerges by looking at the European Cooperation Grouping (ECG) legal framework as set in Protocol No. 3 to the EOC. On the one hand, art. 7 provides a great flexibility as regards the reasons why to conclude an ECG, thus admitting both operative and coordinating policies ECGs.

has showed that the potentiality of the EGTC to be used as a territorial multilevel forum has been generally accepted. Moreover, what according to the EGTC Regulation was conceived as an exception, (the carrying out of territorial cooperation tasks other than implementing EU financed territorial projects) is almost the rule.

There is however a strong argument favouring the hypothesis that the EU Regulation drafters (and now the CoE Protocol No. 3) had perfectly in mind that the EGTC could be developed according to a multi-territorial governance framework: the provision concerning the possibility for a Member State to participate in an EGTC.

In fact, CBC as a means of developing coordination policies determines consequences in relation both to the subjects and to the content of CBC.

As far as the first element is concerned, CBC conceived as a mechanism of coordination policy tends to involve territorial units enjoying influential political capacity, such as federate states or regions or inter-municipal associations since the larger territorial units are in a best position to perform programming tasks. Again, the mentioned interstate international agreements are important evidences to this regard (see the Karlsruhe Agreement or the Brussels agreement, both providing special provisions dealing with the CBC enacted by the components units of federal states) and the empirical cases of CBC at the German, French, Swiss borders support this view. At the same time, it may demand for the direct or indirect involvement of the national tier of government among the actors of the CBC. This is due to the fact that the CBC as a policy may encroach upon matters pertaining to different territorial levels, included the national one.

As far as the material content of CBC, since the main aim is on policy coordination, the attention is less on the matters of the cooperation and much more on the function of cooperating and coordinating. This can explain why the objectives of the EGTC thus far constituted are often expressed in vague terms, thus permitting to avoid strict control in the requirement of competences and their commonality among the EGTC participants.

This emerging strategic dimension of the CBC should nonetheless be put into relation with the national attitudes towards CBC, as outlined in the second part of the contribution, so as to understand to what extent the latter can influence and reshape domestically the “new” European CBC.

Although the measurability of this influence is certainly difficult to assess, two factors will be taken into account. The first consists in looking how Member States have enforced art. 4.3 and 13 of the EGTC Regulation. These provisions deal respectively with the decision of the Member State not to approve the prospective member's

Moreover, the explanatory report suggests that the very name of the ECG reflects the fact the ECG is meant “to create sustainable networks and not new territorial entities”, an idea that is strengthened by the possible participation of a national state in an ECG, provided that one or more of its territorial authorities or communities are members. On the other hand, this move towards multilevel governance is contradicted by the requirement (art. 1) that transfrontier or interregional cooperation, promoted by the ECG, must only concern common areas of competences of the participating members.

participation in case it considers such participation not justified for reasons of public interest or public policy (art. 4.3) and the possibility of a M. State authority to carry out specific control procedure in order to prohibit any activity of a EGTC in contravention of a Member State's provision on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State (art. 13).¹⁵⁵

Because of the inherent vagueness of the public interest/public policy notions, it is important to look at the way national states have enforced these clauses in order to establish whether a relation can be drawn between the national attitudes towards CBC and the national implementing measures of the EGTC Regulation.

If we consider the case of federal states as Germany and Belgium, there is no mention of possible barring intervention of the national state because of national interest interferences.

Such a broad limitation is also excluded in those national legal orders whose territorial units enjoy only administrative powers. For example, both the Portuguese and the French¹⁵⁶ national enforcement acts empower the national authorities to prohibit the participation of a Portuguese or a French subnational unit in an EGTC provided that it acts beyond its internal competences or against international agreements (not foreign policy) concluded by the national state.

In both Italian¹⁵⁷ and Spanish¹⁵⁸ acts of EGTC Regulation enforcement the national authorities are provided with a wide margins of discretion in denying the authorisation

¹⁵⁵ It should be noted that the two provisions are framed according to a different wordings. Art. 13 use the expression "may prohibit", thus making clear that it is a possibility not an obligation for M. States to prohibit EGTC activity in case this is in breach of public interest, public policy, etc. On the contrary, the wording of art. 4.3 ("M. State [...] shall approve") may suggest that the grounds for not approving members participation in an EGTC are required by the EGTC regulation itself and this applies even to public policy and public interest grounds, no matter if these conditions are explicitly mentioned by the national enforcement provisions. However, such a reading seems to contradict the *effet utile* of the EU law since it might impose a more burdensome procedure than that usually applied by the relevant M. State. Moreover the last indent of art. 4.3, by stating that in deciding on the perspective member's participation in the EGTC M. States may apply national rules, it seems to suggest M. States may choose to "soften" the legal requirements for issuing the authorisation, as listed in the EU Regulation, but they could not add new ones. To this extent, it may be assumed that when the national enforcement acts does not mention public policy or public interest as grounds for not issuing the authorisation, there is a presumption that these factors cannot be taken into consideration in the relevant domestic authorisation procedure.

¹⁵⁶ See Loi 2008-352, du 16 avril 2008, in J.O.R.F. du 17 avril 2008, qui a modifié l'art. 1115.4 du Code général des Collectivités territoriales : «les collectivités territoriales [...] peuvent, dans les limites de leurs compétences et dans le respect des engagements internationaux de la France, adhérer à [...] un groupement de collectivités territoriales d'un état membre de l'UE [...]».

¹⁵⁷ See Legge n. 88, 7 July 2009, (legge comunitaria 2008) in G.U. n. 161 of 14 July 2009, art. 46-47.

¹⁵⁸ See Real Decreto 37/2008, 18 January 2008, in B.O.E. n. 17, 19 January 2008, p. 4156, art. 6, c. 4. The relevant provisions state that the national authorities, in issuing the authorisation for the setting of an EGTC, should take into account the suitability of the EGTC objectives for the strengthening of the economic and social cohesion. The member of the prospective EGTC must also respect the division of the internal competences. This must be related with the preamble of the decree according to which «La regulación contenida en el presente decreto se justifica de modo prevalente en la competencia estatal en materia de relaciones internacionales, que habilita a las instituciones estatales – en este caso al gobierno de España – para ordenar y coordinar las actividades con relevancia externa de las Comunidades Autónomas – así como de las restantes entidades territoriales – de forma que no condicionen o perjudiquen la

for a prospective EGTC. A burdensome procedure is required in order to verify that the establishment of the EGTC does not produce any interference with the public national interest or foreign policy.

These findings seem to fit with the general remarks concerning the national attitudes towards CBC previously outlined.

In national legal orders based on administrative decentralisation, the external conducts of local units are considered *per se* as unsuitable to affect the general foreign policy or the general public interest of the state and thus they are not grounds to be scrutinised, at least not prior to the establishment of the EGTC.¹⁵⁹

On the contrary, in those legal orders structured on a strong degree of decentralization, whose intergovernmental relations are based on a competitive scheme and ethnic minorities are present along the national borders, a more cautious approach towards CBC institutionalisation arises and as we have seen the control is more on discretionary grounds. The same does not occur in those federal legal orders where more cooperative intergovernmental relations apply.¹⁶⁰

A second issue to explore concerns the involvement of the State in the EGTCs. As we have noted, although the involvement of the state is not *per se* a true novelty, it seems to be a crucial element in strengthening the idea of a strategic and political CBC.

dirección de la política exterior, de competencia exclusiva del Estado, de acuerdo con lo establecido por la jurisprudencia constitucional» (italics added by the author).

¹⁵⁹ Both Portuguese, Romanian and British national provisions provide the national authorities with the possibility to prohibit the activity of an EGTC established in the relevant state or to demand that its participating subnational entities withdraw from the EGTC whenever the activity conducted is in breach of national public policy or public interest. [Data provided by the Committee of Regions, *The European grouping of territorial cooperation: state of play and prospects*, (author: METIS GmbH), 2009 Luxembourg]. It should be noted that this possibility is framed by the EGTC Regulation according to a proportional and incremental framework, since before the prohibition is issued, the EGTC shall have the possibility to voluntarily cease the relevant activity. Moreover, the prohibition according to art. 13 occurs after the EGTC is established and in relation to a concrete hypothesis of breach on national interest or national policy. To this extent, art. 13 enforcement is less decisive than art. 3.4, in relation to which evaluations on the breaching of public policy or public interest by the national public authorities precede the establishment of the EGTC and they are not based on definite and concrete activities conducted by the EGTC.

¹⁶⁰ It is also interesting to consider what territorial level – national or regional – has been called to enforce domestically the EGTC Regulation. To this extent, we should recall that in those legal systems whose territorial units enjoy legislative competences the transposition of EU law can be a matter for both national and regional territorial levels, according to the division of powers dealt with by the Constitution. To this extent, it may be noted that whereas Germany and Belgium did not enact any national provisions for the enforcement of the EGTC Regulation, leaving the regional level the task of setting the relevant regulatory framework, both Italy and Spain have retained the power to enact the enforcement measures of the EGTC Regulation. The reason for that has been that in both countries the enforcement of the EU Regulation has been considered as falling under the foreign relation national competence, whereas both in Belgium and in Germany the EGTC Regulation has been considered as a matter related with the self-government principle of the regional level and/or with the competence the regional level enjoy in order to regulate local units. The consequences of this different legal qualification are indeed important: whereas in Belgium and Germany there is no need for previous national authorisation for establishing a EGTC made up of regional authorities, in Italy and Spain such authorisation is required, in line with the idea that CBC of regional level can potentially undermine the national foreign policy.

By looking at the EGTCs thus far constituted, it can be noted that the national states which are, directly or by means of their decentralised organs, amongst the constitutive members of an EGTC are generally unitary states with a decentralisation of administrative type. This is the case of the Lille-Kortrijk-Tournai and West Vlaanderen/Flandre-Dunkerque-Côte d'Opale where France (and Belgium)¹⁶¹ are amongst the constitutive members; the Greater Region constituted amongst the others by France and Luxembourg, the Hospital de Cerdanya EGTC (France), the EGTC Galicia-Norte de Portugal (keeping in mind that the *Comissão de coordenação e Desenvolvimento regional do Norte* is a decentralised organ of Portugal).

Among the above-mentioned EGTCs, the Hospital de Cerdanya EGTC has the most focus tailored objective: to create a cross-border organisation for the constitution and subsequent management of an acute-care hospital for all patients in Cerdanya and Capcir areas. The specific task of this ETGC is further highlighted by the limited number of participants (the French government and the Generalitat of Catalonia) and by the definite duration.

The other EGTCs are generally structures for integrating stakeholders from different territorial tiers of governments¹⁶² and they are primarily aimed at being coordination policy instruments.¹⁶³

We can infer that the direct involvement of the state in the EGTC structure is favoured when the relevant state is a unitary state with an administrative type of decentralisation, which has displayed in the past increasing attention towards CBC

¹⁶¹ Obviously, the case of Belgium is different. Its participation in the two mentioned EGTC may be due as a consequence of the France participation, as a way to guarantee a sort of institutional equilibrium in the EGTCs themselves.

¹⁶² The West Vlaanderen/Flandre-Dunkerque-Côte d'Opale EGTC is made up of national states (France and Belgium), the Flemish Region and the French Région Nord-Pas-de-Calais; French and Belgian meso-territorial units (French department and Western Flemish province) and inter-municipal association; the EGTC Eurométropole – Lille – Kortrijk – Tournai, constituted in January 2008, is made up of representatives of the two national states, of representatives of the regional level (Flemish Region, Walloon region and French speaking community and the Région Nord-Pas-de-Calais), representatives of the meso-territorial level (French Département du Nord and Provinces of Western Flanders and of Nainaut) and of associations of local territorial units; the EGTC –Interreg “Programme Grande Région” is made up with national states (Luxembourg, France – by means of the Préfet de la Région Lorraine), regional units enjoying legislative powers (the German Länder of the Sarre and Rhenanie Palatinat, the Belgian French and German speaking communities and the Walloon region), regional units enjoying administrative powers (the French Région Lorraine) and French meso-territorial units (Départements de la Meuse et de la Moselle). A different framework composition characterises the Galicia – Norte de Portugal EGTC which is a tightly-focused geographical cooperation with only two partner regions (C.A. de Galicia and Comissão de coordenação e Desenvolvimento regional do Norte). All data are available at the website of the Committee of Regions: <http://portal.cor.europa.eu>.

¹⁶³ The “Interreg Programme Grande Région” EGTC has been constituted with the sole aim of being the managing body of the Interreg IV A 2007-2013. Thus, its objective seems to be quite focus-tailored. However, in consideration of the long-established history of CBC in the region, according to a study conducted by the CoR, the EGTC “is above all considered as an instrument for the further institutionalisation of the cross-border cooperation of the members. The establishment of the EGTC of the Greater region is perceived as a step towards the macrorregion’s integration. The Greater Region has managed to successfully apply for EU funds, so the EGTC is expected to exert a stronger influence on the members themselves than on the third parties”. See Committee of Regions, *The European grouping of territorial cooperation: state of play and prospects*, (author: METIS GmbH), 2009 Luxembourg, 100.

conducted by its territorial units. The national state assumes the role of political coordinator by means of its decentralised territorial organs. It participates in the EGTC when the latter has strategic importance both for the territorial scale concerned or the project itself.¹⁶⁴ An explanation for this may also rely on the fact that the bordering foreign counterparts are usually ‘strong’ subnational units, enjoying legislative powers and economic resources, and because of that they are likely to acquire a leading and influential position in the cooperation that needs to be counterbalanced.

Thus, the interplay between the supranational (notably EU) legal forces and the national regulatory dimension can lead to an uneven development of the CBC European law. In fact, the strategic political dimension of CBC – entailing multilevel territorial participation, CBC institutionalisation of unlimited duration, made up of large territorial units enjoying strong powers and which pursues general coordinating aims – is more likely to occur in those countries, where regional level play influential roles and the intergovernmental relations are framed according to cooperative scheme. Because of that, the bordering countries which are based on decentralisation of administrative type (France, relevant CEE countries) will probably play a more activist role by participating directly in the EGTC.

The case is different in those countries where vertical relations are more competitive based and the presence of ethnic minorities located along the borders may render CBC an issue of national concern (Spain, Italy, Austria – in this case as an indirect consequence of the German speaking minority set in Italy along the border with Austria). In such a situation, it is likely that a more suspicious attitude of the national state towards regional CBC and its institutionalisation will emerge. From a normative point of view this means the authorisation procedures will be based on political evaluations of concepts such as public policy or public interest and the requirements concerning the competences can be more strictly scrutinised in order to avoid the risk of a too political form of CBC institutionalisation (the case of Euroregione Alpi Mediterraneo well illustrates the case). At the same time, in these contexts the direct involvement of the state in an EGTC is more difficult to put in place: such a move might be seen as a threat to the regional self-government rights. A third approach is likely to emerge: it consists in favouring CBC institutionalization when this is functional to pursue clear objectives rather than being conceived as a too vague form of political cooperation. The mentioned cases of the Hospital de Cerdanya and of the Brenner Corridor Platform seem to support the view.

¹⁶⁴ See Laurent Malo, ‘Le contrôle administratif de la coopération transfrontalière’, in Carlos Fernandez de Casadevante Romani (ed.), *L’État et la coopération transfrontalière* (Bruylant, 2007), 131-168, at 136: “D’une logique de méfiance, caractérisée par des contrôles visant à empêcher, les autorités étatiques sont aujourd’hui passées à une logique d’encadrement, dans le bus de garantir la cohérence et la sécurité juridiques de l’action extérieure nationale, qu’elle soit le fait de l’Etat ou des collectivités territoriales”.