

Working Group on Innovative Solutions to Cross Border obstacles

July 2016 – July 2017

BACKGROUND REPORT



LE GOUVERNEMENT
DU GRAND-DUCHÉ DE LUXEMBOURG
Ministère du Développement durable
et des Infrastructures

Département de l'aménagement
du territoire



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INTRODUCTION

Following the Luxembourg Presidency of the Council of the EU (2nd half of 2015) and its proposal to create a new legal tool for cross-border cooperation, the Working Group on Innovative Solutions to Cross-Border Obstacles has been established by Luxembourg and France.

Under the Dutch Presidency (1st half of 2016), the Working Group was presented to the Directors-General in charge of Territorial Cohesion and of Urban Matters on 11th and 12th May 2016. At this occasion, it received a mandate to further investigate innovative solutions to overcome cross-border obstacles, with a particular focus on the added value, feasibility and design of the tool presented under the Luxembourg Presidency. The first meeting of the Working Group was held in Vienna on 5th July 2016.

Conceived as an intergovernmental platform in a structured dialogue with the EU institutions, the Group included representatives from 12 Member States, 1 Partner State and 2 stakeholders in 5 meetings to work on the identification of obstacles to cross-border cooperation and innovative solutions to overcome them. Representatives of the European institutions – the European Commission, the European Parliament, the Committee of the Regions, the European Investment Bank – were invited to present their work on solving cross-border obstacles and discuss with the members of the Working Group how to tackle these challenges together. The detailed reports of each meeting are available on [MOT website](#).

Today, the Working Group presents a report on its activities, including recommendations on the European Cross-Border Convention (ECBC) procedure and tool, and a European multilevel platform to exchange problem-solving methods from different parts of Europe and foster the exchange of experiences and best practices.

1. Achievements and challenges of cross-border cooperation

For many years, European countries have cooperated on a political basis, carried out activities across borders and implemented cross-border cooperation projects. Interreg and now European Territorial Cooperation programmes have existed since 1990 at the EU level. Considering the results and achievements of all cross-border-projects, it can be said that a lot of progress was made towards the objective of overcoming borders¹. The possibility to create adequate institutional structures at the EU level, such as the EGTC for the public sector and the EEIG for the private sector, means that solutions to support projects are available.

However, it appears that while there is still a big potential to go further in the integration process across borders and the activation of cross-border development potentials, multi-dimensional support is needed. Citizens living in border regions face difficulties in their daily lives that are linked to the presence of the border, whether it is in the context of finding a job, accessing healthcare, travelling on holiday, commuting to work, or solving administrative problems.² Obstacles are more apparent when, for instance, the number of cross-border commuters increases and when cross-border integration reaches higher levels, as in the case of public transport, spatial planning, waste management, or a cross-border hospital. However, those sectors are precisely the type of cross-border public services that can bring immense benefits to communities in border regions. To overcome these difficulties, identifying obstacles to cooperation – and finding solutions – is one of the major challenges.

In accordance with the EU objectives of **creating a European Single Market and achieving territorial cohesion**, such obstacles should not exist within the EU. Overcoming these obstacles, therefore, appears to be more important than ever to unleash unused cross-border development potentials, and thereby contributes to the Union's objective of creating jobs and growth, improves the quality of life of citizens living in border areas, and contributes to the objective of achieving territorial cohesion. Cross-border cooperation serving European integration and territorial cohesion should thus be at the heart of EU priorities.

Many obstacles can be solved within existing legal frameworks by cross-border arrangements between actors; other obstacles require changes in national legislation or in the EU legal framework, or they require harmonisation efforts at the EU level. Some obstacles, however, could be solved through the unilateral recognition of certain rules and provisions (including technical standards and norms) of one country by another country. But in many cases, these arrangements suffer from a lack of legal certainty and are thus not viable in the long term.

Although cross-border regions are acknowledged as laboratories under the objective of territorial cohesion (included in the EU Treaty since 2009), this type of region cannot benefit from specific provisions allowing for legal “experimentation” or “innovation” under laboratory conditions.

The European political context is favourable to work on obstacles to cross-border cooperation and to develop a multi-level approach. Several processes have been initiated, giving a perspective to the work carried out on each border.

- **At the EU level, the “Cross-border Review:** In autumn 2015, the European Commission launched an initiative named “[Cross-border Review](#)”, addressing obstacles to cross-border cooperation, with a structure of 3 pillars: a study, a public consultation, and workshops with

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http://ec.europa.eu/regional_policy/en/projects/ALL?search=1&keywords=&countryCode=ALL®ionId=ALL&themeld=97&typeId=ALL&periodId=2&dateFrom=

²http://ec.europa.eu/regional_policy/en/policy/cooperation/european-territorial/cross-border/#5

stakeholders. Its progress can be viewed on the website of the European Commission³. On this basis, the EC intends to publish a communication in 2017 proposing new policy developments and directions.

- **At the intergovernmental level, the work of the Luxembourg Presidency of the Council of the EU:** The Trio Presidency of Italy-Latvia-Luxembourg 2014-2015 had placed its programme in the fields of Territorial Cohesion and Urban Policy under the general theme of making the objective of territorial cohesion, as well as the Territorial Agenda 2020, more operational. Over the course of its presidency of the Council of the European Union (2nd semester 2015), the Grand Duchy of Luxembourg put an emphasis on the issues at stake in cross-border cooperation, and the need to overcome obstacles to cooperation. This issue was debated during the General Affairs Council meeting of 17 November 2015, and the Informal Ministerial meeting on Territorial Cohesion of 26 November 2015, on the basis of a study – for which the Mission opérationnelle transfrontalière (MOT) was commissioned by Luxembourg – on legal solutions for overcoming obstacles to cross-border cooperation, investigating the need for changes to the legal framework and envisaging a new legal tool.

As a consequence, the **Working Group on Innovative Solutions to Cross-Border Obstacles** was created in order to develop the proposal of the Luxembourg Presidency on this instrument. The Working Group was proposed jointly by France and Luxembourg at the meeting of Directors-General responsible for Territorial Cohesion on 11 May 2016 under the Dutch Presidency, which gave a mandate to the group. This intergovernmental platform brings together interested States, different stakeholders and experts of cross-border cooperation in a structured dialogue with the EU institutions⁴.

The WG aims to build on the results of the European Commission's Cross-Border Review and on similar exercises at the national and cross-border level, while avoiding duplication. It also intends to identify innovative solutions to cross-border obstacles, with a focus on obstacles related to diverging standards and norms. Stakeholders were invited to demonstrate either the difficulties faced on the ground (e.g. Hospital of Cerdanya), or the ongoing processes to solve cross border obstacles (e.g. Nordic Council or Task Force Grenzgänger). In that context, the objective is to develop both a tool and an overarching methodology by addressing the open questions, including the tool's legal feasibility and its added value. The WG is implementing a structured dialogue and exchange with the EU institutions.

2. Mapping obstacles:

2.1 Some pioneer processes

Many obstacles have been solved by local actors with the help of upper levels, notably the EU level, through specific legislation and Interreg support. However, many obstacles do remain, in particular legal and administrative ones, and evidence on this state of affairs has been recently developed with the help of the Council of Europe, the Luxembourg Presidency of the Council of the EU and the European Commission. Significant cross-border activities or projects, funded or not by Interreg, face different sorts of obstacles, and thus a systemic approach is required in order to solve them.

Obstacles identified by the Council of Europe: The Council of Europe has been a pioneer in promoting cross-border cooperation back in the 1980s. Proof can be found not only in the first European Framework Agreement facilitating *Transfrontier Co-operation between Territorial Communities or Authorities*⁵ (see 3.2.b), but also in the EDEN database of obstacles and solutions collected by the

³ http://ec.europa.eu/regional_policy/en/policy/cooperation/european-territorial/cross-border/review/

⁴ <http://www.espaces-transfrontaliers.org/en/activites-ue/obstacles-intergovernmental-group/>

⁵ *European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities*, Madrid, 21/05/1980

Council of Europe and ISIG (Istituto di Sociologia Internazionale di Gorizia)⁶. The Congress of Local and Regional Authorities has, for its part, expressed strong statements on these issues⁷, stating the need to establish a pool of expertise on transfrontier co-operation issues; coordinate research in this area, including data collection and the development of indicators; and develop capacity-building and training programmes.

Obstacles identified under the EU Luxembourg Presidency: As part of the preparation for its presidency of the Council of the EU (second half of 2015), on 19 May 2015 the Grand Duchy of Luxembourg held a seminar devoted to the obstacles to cross-border cooperation as well as the tools and policies available to overcome these obstacles. The MOT, commissioned by the Grand Duchy to provide support, produced and sent out a survey to cross-border cooperation stakeholders, in order to gather up-to-date knowledge on obstacles. Based upon the results of the survey, the MOT analysis⁸ concentrates on obstacles of a legal nature that could be overcome with a new EU legal tool.⁹

Cross Border Review: Conclusion that administrative and legal obstacles are the most significant issue. The European Commission launched the Cross-Border Review in the context of 25 years of INTERREG in 2015. The review has 3 separate pillars: The first one is the online public consultation¹⁰, which took place during 3 months in 2015, in all EU languages, with over 600 replies. The second pillar is the study on border obstacles¹¹: 240 obstacles¹² have been documented and potential solutions have been outlined. The third pillar consists of workshops with stakeholders.

Example: The systemic nature of CB obstacles: Case study on the Hospital of Cerdanya¹:

The Working Group has considered the EGTC Hospital of Cerdanya as an example in terms of the challenges faced by cross-border projects. The hospital, whose construction was partly funded by the Interreg POCTEFA programme and whose governance is supported by an EGTC, has been operational since 2014. Many obstacles have been solved; some of them within a very long period of time; and some obstacles, mainly of an administrative or legal nature, have not yet been solved. When the EGTC hires staff, a significant part of the staff is not hired on a permanent contract because these agents come from other health structures either in France (hospital of Perpignan) or Spain. This cooperation pattern (in the sense that a service is not delivered through a single entity, but through a network of actors on both sides of the border) is common in CB contexts. The EGTC is a tool that is able to structure this kind of cooperation, but it does not solve nor prevent all obstacles, particularly those linked to the technical competences that are exercised in common while still depending on national frameworks and requiring a propensity to cooperate from each national component.

There is a convergence of evidence provided by the three pillars of the CB Review. The main lessons are that administrative and legal obstacles are the most significant issue; the second issue is language

⁶ (<http://cbc.isig.it/about/>): a database for the institutional actors facing obstacles arisen during the implementation of a CBC activity. It collects, through a questionnaire sent to the CBC offices of more than 20 European Countries, similar issues, obstacles and solutions found by institutions.

⁷<https://wcd.coe.int/ViewDoc.jsp?p=&id=2121969&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=CACC9A&BackColorLogged=EFEA9C&direct=true>
[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CG\(25\)9FINAL&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=CACC9A&BackColorLogged=EFEA9C&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CG(25)9FINAL&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=CACC9A&BackColorLogged=EFEA9C&direct=true)

⁸<http://www.espaces-transfrontaliers.org/actualites/news/news/show/les-conclusions-de-la-presidence-luxembourgeoise-en-matiere-de-cooperation-transfrontaliere/>

⁹http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/Documents_MOT/Etudes_Publications_MOT/2015_09_Legal_provisions_Obstacles_to_CBC.pdf

¹⁰ http://ec.europa.eu/regional_policy/fr/policy/cooperation/european-territorial/cross-border/review/#1

¹¹ http://ec.europa.eu/regional_policy/fr/policy/cooperation/european-territorial/cross-border/review/#3

¹² 5 policy areas were selected for the case studies: labour market, vocational training, recognition of diplomas, and access to employment; social security benefits and coverage, and access to healthcare; transport; business-related issues such as taxation, certification, and standards; as well as joint planning and services of general interest (mostly in relation to infrastructure).

and interculturality; the third issue is linked to accessibility, etc. Obstacles are often systemic (several categories of obstacles are mixed); the more integrated the border area is, the more obstacles become visible.

Moreover, they require tools of different categories: technical design (the project); funding (ESI funds, including Interreg, etc.); political and institutional governance (EGTC); legal provisions. Actions have to be taken at different levels (administrative coordination, bilateral agreements between countries, etc.). Some legal issues may hide political blockages. The legal tool proposed by Luxembourg during its presidency – a tool that would address administrative and legal obstacles by allowing local/regional authorities to initiate a procedure and encouraging the competent authority to address these obstacles – would considerably facilitate the development of cross-border cooperation projects, such as the hospital of Cerdanya.

2.2 The nature of cross-border obstacles: towards a European matrix

Different typologies have been built by various actors working on obstacle-identification and problem-solving processes, contributing to a better understanding of these obstacles and the creation of the right conditions for their removal:

- The ISIG firstly established a typology¹³ to categorize obstacles and solutions on the EDEN database built for the Council of Europe: specific operational areas, factors contributing to the obstacle persistence, and the need for finding the appropriate institutional level to address the obstacle were emphasized.
- Within the Cross-Border Review Study, categories like the “geographical scope” allow to analyse whether the obstacle is located on a small segment of an EU internal border or with neighbouring non-EU countries (i.e. NO, CH, LI and AD), along the entire length of specific EU land borders or with neighbouring non-EU countries, or along all internal EU land borders or with neighbouring non-EU countries. The typology also helps to visualise the policy context of an obstacle and the impact of an obstacle on the policy, on cross-border integration and in economic, social and environmental terms.
- The CGET explored the French answers to the EU consultation (see 3.3.b)¹⁴ and inquired about the link with the Interreg programmes, the competent authority for the obstacle and the perimeter of action on the obstacle (whether the solution has to be implemented unilaterally by one actor or found in a bilateral/multilateral process).
- Other actors like the [CESCI](#), [Nordic Council](#), and [ITEM](#) built their own typologies.

All of these typologies and processes demonstrate the need for a better identification of obstacles and possible solutions. In order to bring obstacles from the bottom up to find solutions at the national or EU level and exchange good practices all over Europe, the procedures need to converge, to speak the same language. That is why the MOT has developed for its online forum (see 3.3.b) a typology inspired by all of these analyses.

Taking into account all of the proposed categories listed above, a European matrix may look as follows:

¹³ <http://isig.it/en/manual-on-removing-obstacles-to-cbc-2014/>

¹⁴ http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/WG_Innovative_Solutions/WG_14_12_16_Pres_CGET.pdf

European Matrix for the description of cross-border obstacles

Border(s) concerned: E.g. *Austria-Hungary*

European programmes (mainly Interreg) concerned:

E.g. *Interreg VA Euregio Maas-Rhine*

Type of geographic area:

1. Urban area
2. Urban-rural area
3. Rural and natural areas
4. Maritime border
5. Euroregion
6. Macroregion

Nature of the obstacle¹⁵

1. Administrative and technical factors
2. Legal and institutional factors
3. Economic factor
4. Cultural factor
5. Lack of knowledge
6. Lack of propensity to cooperate

Level of the solution

1. Local/regional level
2. National level
3. European level

Perimeter of action

1. Unilateral
2. Bilateral
3. Multilateral

Topic(s):

1. Civil society
2. Climate change, risk prevention and management
3. Cohesion policy
4. Cross-border conurbation
5. Cross-border governance
6. Culture
7. Economic development
8. Education, training, languages
9. Employment
10. Energy
11. Environment, resources, waste
12. Health
13. Legal tools
14. Maritime cooperation
15. Observation
16. Planning and cross-border equipment
17. Public services
18. Research and innovation
19. Rivers
20. Rural and natural areas
21. Security, police
22. Social inclusion
23. Sport
24. ICT, communication and postal services
25. Tourism
26. Transports
27. Urbanism, housing and real estate

¹⁵ Based on the ISIG study; Jean PEYRONY, Integration of cross border regions; obstacles and solutions, in Wassenberg Birte (ed.), *Castle talks on Cross Border Cooperation, Fear of Integration? The Pertinence of the Border*, Steiner-Verlag, Stuttgart, 2017

3. Mapping the cross-border toolbox: financial and institutional tools do not solve legal and administrative obstacles

In principle, a solution can be found for many identifiable obstacles deriving from a cross-border situation. However, in practice, the costs (time and money) of finding a solution, the so-called transaction costs, are often too high, mostly due to the non-existence of a procedure or the complexity of using the existing procedure. Consequently, many obstacles cannot be overcome and persist, affecting the daily life of Europeans, as students, workers, scholars or entrepreneurs.

Therefore, to solve obstacles, a **toolbox** is needed that covers different types of obstacles and consists of different components. This includes tools for financial support (Interreg) to bridge a lack of finance specifically due to the cross-border situation; tools for institutional solutions to create legal bodies, which are set up by legal actors from different sides of borders (e.g. EGTC); and tools for a method/procedure to overcome administrative and legal differences on both sides of the border.

The toolbox already consists of a number of tools (EU tools, bilateral/multilateral tools, and national tools). However, regarding legal aspects, the existing tools often face limits and, therefore, the toolbox needs to be complemented.

3.1. Tools providing financial support

a) At the EU level

- *Interreg*

Under the umbrella of Cohesion Policy, Interreg Programmes have been operating for more than 25 years. In 1990, the initial paradigm was that the Single Market (envisaged in the perspective of the Maastricht Treaty of 1992) would favour the integration of cross-border regions. Interreg was supposed to give an initial incentive to cross-border cooperation, for regions that were still peripheral in their respective countries, and would progressively catch up and be able to tap into the cross-border potential linked with free movement.

When Interreg was mainstreamed as a full objective of Cohesion Policy, ETC programmes were submitted to the same injunction as others, namely to contribute to overall EU objectives such as the Lisbon Strategy, but sometimes lost their focus on the specific objective of CB integration¹⁶.

A first warning came from the stakeholders of macro-regions such as the Baltic area or Danube basin, whose statement was that, contrary to the initial paradigm, the combination of the Single Market and the impulse given by Interreg programmes was not sufficient to meet legal and financial challenges. Even if a growing part of national legislation is derived from EU legislation, Member States often transpose directives without taking the interoperability across borders fully into account. And the amount of Interreg funding is not sufficient to cover the costs of significant cross-border infrastructure. This has led to the acknowledgement that, even if Interreg can act as a catalyst and is of high importance for border regions and territorial cohesion, it is also necessary to align European, national and regional legislation, strategies and funding across borders. Cross-border stakeholders confirmed this for cross-border regions¹⁷.

¹⁶ See Ex post Evaluation of Interreg 2007/2013, p20: http://ec.europa.eu/regional_policy/fr/policy/evaluations/ec/2007-2013/#11

¹⁷ See inter alia Methodological guidebook: Articulate cohesion policy, governance structures and cross border territorial approaches, MOT, 2012 <http://www.espaces-transfrontaliers.org/en/european-activities/the-mots-european-projects/project-articulate-cohesion-policy-governance-structures-and-cross-border-territorial-approaches/>

- ***EIB loans and advisory hub***¹⁸

The cross-border context generates important externalities, which make CB investments less attractive and appropriate for mainstream financial solutions as well as not directly suitable for small-size projects that are not immediately or easily bankable. Grants often remain the most adapted financing solution. Such complex projects require specific expertise that goes beyond technical aspects to legal or financing issues.

The EIB offers standard loans but also more risky lending solutions which combine EIB finance with EU Budget (blending); Via this various set of financial products, the EIB has so far financed 100 CB projects, most of them TEN-T projects or energy networks.

The recently created Advisory Hub (EIAH) is an instrument to assess and address unmet needs for advisory support, and a cooperation platform to foster exchanges of know-how, coordinate technical support, and ensure appropriate delivery.

In the context of the EFSI regulation, the EIB now has a political mandate to make cross-border investments a priority. Therefore, EIB Advisory Services and the EIAH may offer expertise in this field, in complement to the skills of project promoters.

A stronger political support or concrete mandate (that the Hub may acquire with EFSI 2.0) will be important for the possible setting up/design of dedicated CB investment platforms. Such platforms may offer a flexible geographic scope (state, region, group of regions, macro-region); co-financing agreements enabling to share the risk between different investors (EFSI, ESIF, EIB, national promotional banks and institutions), in which EGTCs may act as platform managers.

b) At bi/multilateral and national level

Some financial tools are bi/ multilateral; there are, for instance, the Cooperation Euroregion mutual Funds Aquitaine-Euskadi and Aquitaine-Navarre, which are interregional funds supported by regional governments, intended to finance bilateral projects of CBC between Aquitaine and one of the Spanish autonomous communities. More generally, major CB investments, such as the tramway between Strasbourg (FR) and Kehl (DE), are mainly funded by national contributions combined across the border, with a limited contribution from Interreg.

c) Where are the limits of these tools?

The example of the Hospital of Cerdanya shows that – even with Interreg and national sources funding the construction, an EGTC to structure the governance, and actors with a strong will to cooperate, some obstacles remain unsolved, solutions that were implemented are not legally secure, or the transaction cost for finding the solution was very high.

The Cross-Border Review confirms the persistence of obstacles linked with legislation, language and culture, or accessibility. Specific financial instruments for cooperation cannot solve such obstacles alone; they appear as tools within a toolbox. This means that they have to be combined with other financial instruments, such as regional programmes, and with tools that support institutionalization and governance, and more generally tools providing legal, administrative, and technical solutions¹⁹.

¹⁸ René-Laurent BALLAGUY (EIB) presentation on 14th December 2016 : http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/WG_Innovative_Solutions/WG_14_12_16_Pres_BE1.pdf

¹⁹ See for instance Jean PEYRONY, New spaces for action: cross border territories for EU spatial development, in Farinos, Dasi, J. (ed.y coord.), 2016, Achieving territory becomes matter of state importance, Essentials for coordination of spatial planning policies, Valencia, Ed Tirat Lo Blanch.

3.2. Tools providing institutional solutions

a) At the EU level

The **European Grouping of Territorial Cooperation (EGTC)**²⁰ is an EU legal instrument establishing a public body for facilitating and promoting territorial cooperation (cross-border, transnational or interregional) with the aim of strengthening economic, social and territorial cohesion of the European territory. It is a body with legal personality and financial autonomy linking public entities (States, regional and local authorities, etc.). There is a great variety of EGTCs; thus, it can provide governance of the cooperation undertaken by the members concerned, or run projects on their behalf that lie within their joint sphere of competence, with or without financial participation from the EU²¹.

The **European Economic Interest Grouping (EEIG)**²² focusing on the private sector is designed to minimize the legal and fiscal difficulties that EU companies, firms and other legal entities governed by public or private law, as well as individuals carrying out an industrial, commercial, craft or agricultural activity or providing professional or other services in the EU, face in cooperating across borders. The purpose of the grouping is to facilitate or develop the economic activities of its members by a pooling of resources, activities or skills. This is intended to produce better results than if the members are acting alone.

Each Member State needs to apply the European Regulation in accordance with its internal legal order, namely by adopting domestic implementation measures.

b) At the bi/multilateral and national level

The Madrid Outline Convention of 21 May 1980 and its protocols were signed to encourage and facilitate the conclusion of cross-border agreements between local and regional authorities within the scope of their respective powers. The Convention, and its Additional Protocols No 1 and 3 (1998 and 2009) aimed at creating an adequate legal framework for decentralized cross-border co-operation, which may include the setting up of transfrontier associations, consortia of local authorities as well as the establishment of Local Groupings of Cross-border Cooperation (LGCC) or Euroregional Co-operation Groupings (ECGs)²³.

Model agreements enable competent authorities to go for a transfrontier cooperation set-up in the context best suited to their needs. Under the Convention, parties have concluded such bilateral and multilateral agreements empowering local authorities to undertake actions of eliminating obstacles to transfrontier co-operation on various borders²⁴.

Among these agreements, the BENELUX Convention of 20 February 2014²⁵ created the BENELUX Grouping of Territorial Cooperation. It still has to be ratified by the three countries; it is important to notice that it is the first tool allowing for the transfer of Member State competencies to the body (contrary to an EGTC).

²⁰ Introduced by the Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006, amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013

²¹ To go further: *Territorial Cooperation in Europe, a Historical Perspective*, EU, 2015, in particular p.61, http://ec.europa.eu/regional_policy/sources/information/pdf/brochures/interreg_25years_en.pdf

²² Introduced by the Council Regulation (EEC) No 2137/85 of 25 July 1985

²³ A cooperation structure set up under the 3th Additional Protocol of the Madrid Outline Convention of 21 May 1980

²⁴ e.g. the 1986 BENELUX Convention between the Netherlands, Belgium and Luxembourg amended and strengthened on 20 February 2014; the 1996 Karlsruhe Agreement between France, Luxembourg, Germany and Switzerland; the 2002 Brussels Agreement between France and Belgium; the 1995 Bayonne Treaty between France and Spain; the 1993 Rome Agreement between France and Italy; the 2002 Valencia Agreement between Spain and Portugal; and the 1991 Isselburg-Anholt Agreement between Germany and the Netherlands, etc.

²⁵ Signed by Belgium, the Netherlands and Luxembourg, the Convention remains open to the neighbouring States

c) Where are the limits of these tools?

These tools have demonstrated their added value in facilitating the governance of cross-border services (CB Hospital of Cerdanya with its EGTC; local transport in Greater Geneva through a LGCC) or of cross-border territories (Franco-Belgian or Franco-Spanish EGTCs, EGTCs of the Greater Region, Franco-German Eurodistricts, EGTCs around Hungary, etc.). They allow the hiring of a permanent cross-border technical team (able to carry forward the knowledge and vision of the CB project or territory, and to coordinate technical networks on both sides of the border), and articulate a CB political leadership. The EGTC, the EEIG or the ECG are some of the tools that can be used by actors. The approach is not about “the best” tool in general but about the most appropriate one for a particular cross-border project.

According to the Committee of the Regions²⁶, limitations arise in national registration and third-country participation. The CoR plans to write a white paper to provide guidance on the registration of EGTCs in the Member States in order to facilitate the process of registration (contacts) and the participation of third countries in EGTCs.

But examples such as the Hospital of Cerdanya show that while the EGTC and similar structures provide stakeholders with a legal framework for their working process, they do not and cannot provide substantial content and cannot solve administrative and legal obstacles as this is not their objective. According to the European Parliament^{27 28}, they do not resolve the questions of content: with certain policy areas requiring specific regulation (on environmental questions for example), it is necessary to determine which standards will be applied. This requires that the toolbox is complemented.

3.3. Tools/strategies providing legal and administrative solutions

There are good practices of obstacle-solving processes at different levels: EU level, bilateral/multilateral and national levels.

a) At the EU level

A first obvious statement is that EU legislation is globally favourable to free movement across borders²⁹, and thus to cross-border integration; the recent example of roaming is clear in this regard. In the EU legislative process, progress can be expected from ex ante impact assessments better taking into account territorial specificities, such as in the case of cross-border regions. The Committee of the Regions has developed a methodology to measure the potential territorial impact of regulations or directives, and intends to develop a specific approach for cross-border regions. The ITEM institute, acting in the context of the Euregio Maas Rhine, has also developed a process in this regard (see 3.3. b).

Some limitations come, however, from the fact that not the entire legislation pertinent in cross-border projects is European, and from problems with the implementation of EU legislation (for instance, non-interoperable transposition of directives).

Beyond legislation, the European Commission has developed other tools that can contribute to the solution of cross-border obstacles, even if they concern the Single Market in general and are not focused

²⁶ *Annual monitoring report on EGTCs*, Slaven KLOBUCAR, Presentation on 14th December 2016

²⁷ *EGTC, Promoting and improving territorial cooperation*, Diana HAASE (EP) Presentation on 14th December, Brussels http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/WG_Innovative_Solutions/WG_14_12_16_Pres_PE.pdf

²⁸ Study on the EGTCs: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563384/IPOL_STU\(2015\)563384_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563384/IPOL_STU(2015)563384_EN.pdf)

²⁹ In the context of the Internal Market (articles 4.2 a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union) EU institutions already implement actions to improve the overall efficiency of the EU through, in particular, the principles of harmonisation or mutual recognition

on the specific case of cross-border regions. For example, the portal “Your Europe³⁰” can contribute to general information, but there is a need for information specifically dedicated to obstacles. By establishing a difference between the perception of citizens and reality, the CB Review proved that there is a deep need for information that is easy to find and accessible for actors on the ground.

The REFIT³¹ Platform brings together the European Commission, national authorities and other stakeholders in a dialogue process aimed at improving existing EU legislation. On the Platform, the members can review suggestions and make recommendations to the Commission. However, the needs of border regions might be specific and this platform does not leave room to create a dialogue with the aim of solving obstacles. Finally, the Single Digital Gateway³² gives a strategy for the Digital Single Market in Europe.

The European Parliament, beyond the progress that may be achieved through new EU legislation in sectorial fields, has developed some initiatives with the objective of making MEPs more aware of the CB context, as e.g. the REGI Committee and the Working Group on Cross-Border Cooperation³³.

The Committee of the Regions (EGTC platform) – in its annual monitoring report on EGTCs – takes stock of the implementation of the EGTC Regulation and national provisions. The interregional group on cross-border cooperation inside the Committee of Regions is a place for raising awareness of CB issues³⁴.

b) At the bi/multilateral and national level

For many obstacles to cross-border cooperation, the source lies at the **national level** (either in national legislation or in the lack of inter-operability of this legislation with that of the neighbouring country), and could be avoided: by better taking into account cross-border concerns in the context of national policies; through more concertation with the local level and/or neighbouring countries; and through a greater flexibility and adaptation to the specific cross-border context. Some Member States have already implemented promising approaches, either coordinated in a bilateral/multilateral context, or based on purely national approaches.

Within the first category, **coordinated approaches between a group of countries, we can find the following examples:**

- The **Nordic Council**, which – from a European perspective – represents a kind of meso-regional approach, works to overcome obstacles to free movement through the action of the Freedom of Movement Council³⁵.

The Nordic Council manages to solve about 5-10 barriers per year through agreements or changes in the national legislations. A case is identified at the local level and prioritised by Member States; the relevant Ministers of the Nordic Council (Health and Social affairs, etc.) work on amending the Nordic convention applying to the topic; and lastly the Member States conclude bilateral agreements in accordance with this convention to find bilateral solutions. These solutions are valid for all cases involving these countries and not only for a specific cross-border region. If it is not possible to solve the obstacle at the national level, a regional solution can be found and lead to a new bilateral agreement.

³⁰ <http://europa.eu/youreurope/>

³¹ https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-burdens-and-simplifying-law/refit-platform_en

³² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0192&from=EN>

³³ <http://www.espaces-transfrontaliers.org/en/news/news/news/show/lever-les-obstacles-a-lemploi-transfrontalier/>

³⁴ <http://www.espaces-transfrontaliers.org/en/news/news/news/show/reunion-du-groupe-transfrontalier-du-comite-des-regions/>

³⁵ http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/WG_Innovative_Solutions/WG_CB_obstacles_Brux_28_09_16_PPT_Nordic_Council.pdf

There is extensive cooperation with regional information services and committees, national stakeholders, and the various formations of the Nordic Council of Ministers, enabling this institution to solve a high number of obstacles in a structured process.

- The **BENELUX Union**, set up under an intergovernmental cooperation agreement³⁶, is a framework for multilateral cooperation between Belgium, the Netherlands and Luxembourg. One of the objectives is to promote cross-border cooperation to help find solutions for common problems and if possible to act as a precursor for Europe. Next to the classical economic cooperation (Internal market and economic union), the BENELUX is also active in the field of security, sustainable development, justice and home affairs.

Coordinated approaches at the border level to identify obstacles to cooperation – and work towards their removal – have been undertaken on some borders:

- **Estonian-Latvian Intergovernmental Commission for Cross-Border Cooperation (IGC)** was established in 2004 by an Intergovernmental Agreement and is fully operational from 2010 onwards by organising annual meetings and joint discussion rounds regarding common challenges and a joint development vision/joint operations in the Estonian-Latvian border regions.

The cooperation process is organized in accordance with an Annual Work Plan and ensured within thematic Working Groups solving jointly identified obstacles to cross-border cooperation. The IG is coordinated by the Estonian Ministry of Finance and the Latvian Ministry of Environmental Protection and Regional Development, but includes representatives of line ministries, relevant regional agencies and relevant municipalities from both sides.

Results of this IG approach include amendments in national legislation (e.g. for firefighting and rescue operations in border areas) and bilateral cooperation agreements (on student mobility in border regions, on emergency medical assistance in border regions). Issues addressed but still on-going are related to the taxation system for cross-border commuters, the delivery of cross-border services, as well as the common planning/revitalization of the joint historical centre in the twin cities of Valka-Valga, etc.

- In 2007, the state of cooperation on the **Franco-Belgian border** was investigated by a group of 12 Parliamentarians from France and Belgium. The group worked on the different topics of cooperation identified (land use; transport and communications, employment, taxes, vocational training, economic development; environment; health; education; internal security), including political and technical actors from all levels of government and both sides of the border, to produce an inventory of cross-border obstacles and develop concertation practices. The final report³⁷ has mapped obstacles to Franco-Belgian cross-border cooperation and proposed solutions for overcoming them, including not only the creation of the EGTC: Eurometropole Lille-Kortrijk-Tournai (which was the first EGTC) and the one of Flanders-Dunkerque-Côte d'Opale, but also the development of an action plan concerning the whole border.

In 2012, the Nord-Pas-de-Calais Region's Prefecture commissioned a diagnostic study³⁸ of persisting obstacles. A summary table was produced, giving an overview of obstacles solved or not since 2007, and set out possible solutions and the main actions envisaged. The study

³⁶ The Treaty currently in force was signed on 17 June 2008

³⁷ http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/Documents_Territoires/Rapport_Groupe_travail_FR_BE_Rapport.pdf

³⁸ <http://www.prefectures-regions.gouv.fr/hauts-de-france/Actualites/Rencontre-a-Bruxelles-avec-l-ambassadeur-de-France-en-Belgique>

The MOT worked on this study in the role of assistant to the main contractor.

proposes in its conclusions four types of solutions: developing knowledge around certain thematic areas and their implementation; developing practices of administrative coordination and avenues for concertation; bringing modifications to domestic law; entering into new intergovernmental agreements.

- **A Grensmakelaar** (Ombudsman for border issues) was set up in 2009 in the Netherlands, more specifically on the border with Germany (NL- Limbourg). Financial support from The Hague was terminated in 2011.
- **ITEM** (Institute for Transnational and Euregional Cross-Border Cooperation and Mobility in the **Euregio Maas-Rhine**³⁹) is active on the analysis of the territorial impacts of European integration (European citizenship, the four freedoms, the principle of non-discrimination, etc.) together with national policies on cross-border integration⁴⁰.
- **Task Force Grenzgänger der Großregion 2.0, (Task Force Cross-Border Commuters of the Greater Region)**, which was established as an Interreg project, is currently located within the Ministry of the Economy of the Saarland, which holds the role of employer and is responsible for the implementation of its work. This cross-border regional unit brings together seven partners: Saarland, German-speaking Community of Belgium, Luxembourg, German Land of Rhineland-Palatinate, Wallonia and Lorraine.
The Task Force is a framework that deals with issues of cross-border workers and companies employing cross-border commuters. Its mission is to develop proposals for legal and administrative solutions.
The Task Force links, on the regional level, the Greater Region labour-market players with national and European policy-makers. It also submits its proposals for the improvement of labour mobility in the Greater Region to policy-makers.

The Task Force aims at establishing a close cooperation and an interconnection with equivalent institutions. This is why they joined the *Grenznetz* cooperation, which already gathers four similar German cross-border institutions. The purpose is to intensively exchange information and experiences and possibly in the future to share tasks between various Task Forces.

At the national level:

- **France:** Following the online public consultation of the CB Review in 2015, the CGET⁴¹ (national administration in charge of territorial cohesion) has developed a matrix to collect all obstacles that were identified on French borders. The CGET has also taken the initiative to set up an inter-ministerial working group on cross-border obstacles. It would allow a dialogue between ministries and local authorities on cross-border issues, in order to respond to the needs expressed by territories, contribute to establishing a general overview, and feed into the European process (intergovernmental coordination and follow-up of the CB Review), with the support of MOT.
The MOT (common tool of public authorities of different levels on both sides of French borders) supports the identification of obstacles and solutions at the local level. It is developing a new tool for this purpose: an online forum allowing the 70 members of its network at the French borders to bring an obstacle into a discussion, and to share experiences and good practices for solving obstacles. When obstacles need to be solved at the national or European level, these

³⁹ <http://www.euregio-mr.com/fr/>

⁴⁰ <https://www.maastrichtuniversity.nl/research/institutes/item/item-research>

⁴¹ http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/WG_Innovative_Solutions/WG_14_12_16_Pres_CGET.pdf

obstacles will be brought to the corresponding level, through the inter-ministerial process (see above).

- **Hungary:** The CESCO (Central European Service for Cross-border Initiatives) has completed a case study of a legal tool on the Hungarian borders⁴². The project, called “Legal Accessibility”, was carried out with the AEBR and was funded by the Hungarian Ministry of Justice. The aim of the project was to find solutions to identified obstacles on internal and external borders of the EU. The European background was explored: good practices, field experience and legal provisions. It was found that many obstacles come from a lack of information and are not of a legal nature.

The last step has consisted of a set of proposals concerning legal texts and policy recommendations, at national and supranational level (EU level), linked to four themes: mobility and public transport; labour market; healthcare services; trade of local products.

The project also recommends a tri-level mechanism for dealing with obstacles: neighbouring level (joint committees); government level (launching of inter-ministerial group); and meso-regional level (cf. Nordic Council).

- **Germany**⁴³ From a spatial planning point of view, Germany is a big country having borders with nine member states and one non-member state. Initiatives have been taken at the federal level to develop a cross-border perspective. German planning is based on polycentricity: a system of small, medium-sized and larger urban centres delivering services to hinterlands. Some centres are on the other side of the border, as is the case for Strasbourg or Basel. Some cities on the German-Polish border are divided by the border, which follows the river. For example, a citizen of Frankfurt (Oder) goes rather shopping on the Polish side in Słubice than in Berlin.

This requires the identification of where centres and communications are located, taking into account that this could be on the other side of the border. In Germany, there is now a legal obligation to gather data on border regions, according to the Federal Spatial Planning Law. One of the priorities of the corresponding MORO project consists in gathering data on border regions in connection with the other side of the border. For instance, some people commute on a daily basis across the borders, but relevant data is missing; the definition of a daily commuter even differs between countries.

A spatial development concept is also being developed on the German/Polish border.

c) Where are the limits of these tools?

Firstly, it needs to be acknowledged that the Nordic Council provides a very advanced approach on treating cross-border obstacles of an administrative and legal nature. However, as an EU-wide approach, this might go too far and be too demanding, as this means that cross-border solutions would need to be dealt with at the level of the General Affairs Council. However, the approach of the Nordic Council is only adequate and proportional for a limited number of countries with a high level of interaction, such as the Nordic countries.

Taking the EU perspective, the Single Market is supposed to ensure free movement across borders; but this is not sufficient because EU legislation does not cover all issues that are relevant in cross-border cooperation and because the transposition of EU legislation by Member States is not always interoperable.

⁴²http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/WG_Innovative_Solutions/WG_14_12_16_Pres_CESCOI.pdf

⁴³ Presentation by Katharina Erdmenger on 14/12/2016

Financial support, institutional solutions and national or regional mechanisms to solve obstacles already exist. However, **where are the limits of these tools and why does the toolbox need to be complemented?**

- Local actors who actually “experience” and have to deal with the aforementioned obstacles are not systematically involved in those procedures;
- Financial instruments and tools have reached the point where legal or administrative obstacles are hampering the realisation of projects;
- Institutional tools such as the EGTC focus on the institutional set-up across borders and cannot address legal or administrative obstacles related to the implementation of projects;
- Undeniably there are, in some cases, solutions to legal and administrative obstacles, but in practice this is mostly the result of a “muddling through” approach by highly motivated actors and it is dependent on a number of “coincidental” positive constellations;
- Generally, the transaction costs and the time spent for finding a solution are too high. The probability to get stuck somewhere in the process without a real result (which can be *yes* or *no*) is high and thus imposes a high risk for any project.

4. Finding innovative solutions to cross-border obstacles

4.1 Completing the toolbox: Proposal for the European Cross-Border Convention (ECBC) procedure and tool

In view of the coexistence of different legal frameworks in cross-border areas, the Working Group on Innovative Solutions to Cross-Border Obstacles, chaired by Luxembourg and France, proposes the **European Cross-Border Convention (ECBC) as a systematic bottom-up procedure and tool** allowing the local/regional authorities and stakeholders of one Member State – in the context of an obstacle to a cross-border activity (or project) or to a service of general interest – to **apply the administrative or legal rules and provisions that are applicable in the neighbouring Member State in a geographically defined area of application along the border**. In comparison to the existing approach, the proposed procedure and tool offer a **fast-track process** to overcome cross-border obstacles by **checking whether solutions already exist and – if not – offering a new solution**. The obligation for competent authorities would be to **support the actors in finding a solution or at least state why no solution could be found** within a certain period of time.

i) Rationale: what is the objective?

Improving cross-border cooperation will facilitate economic, social and territorial cohesion in functional areas. The objective of a new EU regulation will be to provide a procedure and tool allowing the actors concerned to overcome existing administrative and legal obstacles and thus implement cross-border activities, including operational projects, more quickly and efficiently.

The ECBC procedure would be initiated either by local/regional authorities to achieve a cross-border cooperation activity or project, or by stakeholders to overcome a administrative or legal obstacle that concerns a service of general interest. The objective is to enable those actors who are experiencing obstacles to cross-border cooperation on the ground to find a quick solution that provides legal certainty – subject to the validation by the competent authority at the appropriate level.

Thus, a European regulation that allows Member States to agree upon a common legal framework applicable to either a specific cross-border activity (or project) or a service of general interest would be a great possibility to strengthen the potential for cooperation and the territorial cohesion of cross-border areas.

ii) Principles

The procedure would be bottom-up as the initiative would come from the authorities or stakeholders at the local/regional level. It would also allow actors to find tailor-made solutions that are both border-specific and issue-specific. While the solution of the ECBC as offered by the tool would be a stopgap solution, the ECBC would nonetheless provide legal certainty to the actors and allow them, due to a fixed and reasonable timeframe, to gain time in comparison with finding an individual solution (“muddling through”).

While the procedure commits the competent authority to deal with the obstacle and accept or not the proposed solution (in the form of the ECBC proposal), the use of the tool would preserve the autonomy of the competent authority and safeguard its capacity to choose the appropriate mechanism and control the outcome.

The proposed ECBC procedure is flexible, as it does not automatically lead to a predetermined outcome and does not prescribe the use of the tool of the ECBC. For instance, the competent authority could decide that an existing instrument or method is more appropriate for overcoming the obstacle than the ECBC tool.

Moreover, the application of the specific provisions of the ECBC would be limited to a defined area for either as long as the objective of the cross-border cooperation activity or project exists, or as long as the specific state of affairs (in relation to a service of general interest) that is aggrieving the stakeholders persists, or generally as long as no permanent intergovernmental or European solution is found. In this sense, the solution of the ECBC as offered by the tool is not meant to create new regulation that circumvents the ordinary regulatory/legislative procedure. It could be seen as a way to experiment with new solutions before taking long-lasting solutions.

The proposed procedure would also **limit the administrative burden to the Member States** by facilitating the integration of and creating synergies with existing instruments or solutions, in particular when it comes to identifying obstacles and addressing the competent authorities. **These existing mechanisms, structures and institutions could be used at every step of the procedure to facilitate the process of finding a solution.**

Lastly, the proposed ECBC procedure and tool are meant to complement existing instruments and solutions like the EGTC. As such, the ECBC procedure and tool are a new element in the general 'toolkit' or 'toolbox' designed for improving cross-border cooperation. While the EGTC is a tool that creates a legal entity for delivering a service, the ECBC offers a procedure for finding a solution to overcome an obstacle. In fact, an EGTC could use the ECBC procedure. What the ECBC would have in common with an EGTC is that, once established by a Regulation, the ECBC tool would offer solutions to issues of cross-border cooperation without requiring a prior international agreement to be signed and ratified by national parliaments (while keeping in mind that the application of the specific provisions of the ECBC would be subject to the validation by the competent authority at the appropriate level and potentially an implementation measure). There would also be a similarity in the content of an EGTC and that of an ECBC:

EGTC	ECBC
<i>Name</i>	<i>Name</i>
<i>List of members</i>	<i>List of signatories</i>
<i>Area of application</i>	<i>Area of application</i>
<i>Objective</i>	<i>Objective</i>
To institute a cooperation instrument invested in a legal personality to carry out actions of territorial cooperation. It shall have the most extensive legal capacity accorded to legal persons under that Member state's national law. Preamble (8) and Art. 1 Reg. 1082/2006 Art. 1)	The objective is to enable those actors who are experiencing obstacles to cross-border cooperation on the ground to find a quick solution that provides legal certainty on administrative and legal certainty related to cross-border cooperation activity or project subject to the validation by the competent authority at the appropriate level.
<i>Mission:</i>	<i>Specific provisions</i>
The capacity should be given to act on behalf of its members, and notably the regional and local authorities of which it is composed. Tasks and competencies are to be set out in the (EGTC –) convention. Furthermore, It should be specified that the powers exercised by regional and local authorities as public authorities notably policy and regulatory powers cannot be subject of a convention (Preamble (9, 10, and 13) aforementioned regulation.	The tool would be either used by local/regional authorities to implement a cross-border cooperation activity or project, or by stakeholders to overcome a legal/administrative obstacle that concerns a service of general interest. Validated by the competent authority, the convention could potentially affect the way that policy and regulatory powers are exercised by regional and local authorities as public authorities.

iii) Terminology

The initiators (actor):

There are two categories of initiators:

- one or several local/regional authorities on one side of the border → *first possibility*
- one or several stakeholders, i.e. any institution, organisation or group of actors with legal personality → *second possibility*

The initiators identify a legal obstacle and prepare an ECBC proposal.

National and/or regional ECBC coordination points (actor): Every Member State would designate an ECBC coordination point, at the appropriate level (which could be national or in some cases regional), that would maintain an ECBC database and liaise with the ECBC platform at the EU level. It could also be foreseen that a network of regional ECBC coordination points supports a national ECBC coordination point. An ECBC coordination point could also support the initiators, where requested by them, in identifying the competent authority. Upon request by the competent authority, an ECBC coordination point could perform a preliminary evaluation of the ECBC proposal and monitor the application of the ECBC.

Competent authority (actor): The competent authority of each Member State, at the adequate level, should be determined on a case-by-case basis in accordance with the objective and specific provisions of the proposed ECBC. Each competent authority shall analyse the ECBC proposal, take a go/no-go decision, decide on the technical admissibility of and adopt the ECBC proposal, and work on as well as approve the final content of the specific provisions of the ECBC.

ECBC platform at the EU level (actor): The ECBC platform at the EU level will maintain a European database on all ECBCs across Europe. The ECBC platform could also assess whether a permanent European solution (in the case of multilateral issues that concern multiple borders or even all Member States) could be found.

Regulation: The EU level would set up a “Regulation on a European Cross-Border Convention (ECBC)”, as regards the establishment and functioning of the ECBC procedure and tool. The Regulation itself would not include any ECBC proposal or specific provisions. The latter would be defined in the ECBC proposal of the initiators. The approach would be similar to that of the EGTC Regulation.

ECBC proposal: The initiators prepare an ECBC proposal that includes a description of the administrative or legal obstacle and the wider context, a rationale for solving the obstacle through an ECBC, a draft of the specific provisions, and a justification for the proposed delimitation of the area of application as well as the foreseeable duration. The original proposal is submitted to the competent authority, while a copy is submitted to the national ECBC coordination point.

Specific provisions: The specific provisions under an ECBC:

- i. specify the recognition of one country’s legal provisions and rules (including technical standards and norms) by another. This means that country A recognises the rules of country B as a part of its national applicable law.
- ii. could, depending on the activity and the related legal norm, specify a mutual recognition of legal provisions and rules (including technical standards and norms) in the cross-border area.

- iii. specify that country A commits itself to adapt its legal framework within a given timeframe.
- iv. define a fourth solution.

In all cases, the specific provisions, firstly, determine the derogation from certain domestic legal provisions and rules if existing and, secondly, determine the application and implementation of certain foreign legal provisions and rules in a defined area of application (following a functional approach). The duration of the application would be linked either to, in the first case, the existence of the objective of the cross-border cooperation activity (or project) or, in the second case, the existence of the specific state of affairs (in relation to a service of general interest) that is aggrieving the stakeholders.

Lastly, the specific provisions specify the absorption of the costs linked to the application of the ECBC.

Process of the ECBC procedure and tool:

The systematic bottom-up procedure for addressing administrative and legal obstacles and for using the tool to establish an ECBC would consist of a five-step process:

1. Identifying the obstacle and preparing an ECBC proposal
2. a) Analysing the ECBC proposal and deciding on go/no-go; b) Finding an existing solution or adopting the ECBC proposal
3. Approving the ECBC
4. Applying the ECBC
5. Following up

iv) Process of the ECBC procedure and tool⁴⁴

Step 1: Identifying the obstacle and preparing an ECBC proposal

As there are two different kinds of initiators, there are also two different processes to launch an ECBC procedure.

In the first case, the local/regional authorities on both sides of the border or equivalent structures identify a legal/administrative obstacle to the implementation of their cross-border cooperation activity (or project) or the provision of a service of general interest. This legal/administrative obstacle could stem, for example, from diverging legal frameworks or a mismatch of standards, but there are other potential cases. The local/regional authority initiates the ECBC procedure by preparing an ECBC proposal and submitting it to the competent authority. The initiator is also obliged to inform the national ECBC coordination point and submit a copy of the ECBC proposal to it. If requested by the initiator, the national ECBC coordination point could also support the aforementioned in identifying the competent authority. This part of the process could be optional.

In the second case, a stakeholder identifies a legal/administrative obstacle to the implementation of a cross-border cooperation activity (or project) or the provision of a service of general interest. This legal/administrative obstacle could stem, for example, from conflicting legal frameworks or legal uncertainty, but there are other potential cases. The stakeholder initiates the ECBC procedure by preparing an ECBC proposal and submitting it to the competent authority. The initiator is also obliged to inform the national ECBC coordination point and submit a copy of the ECBC proposal to it. If requested

⁴⁴ See the diagram in the annex.

by the initiator, the national ECBC coordination point could also support the aforementioned in identifying the competent authority.

Step 2a: Analysing the ECBC proposal and deciding on go/no-go

Upon receiving the ECBC proposal, the competent authority would assess whether the ‘perceived’ obstacle is a ‘real’ obstacle or simply based on a misunderstanding, a misinterpretation of the relevant legislation, or simply a lack of information.

If the analysis of the competent authority concludes that the ‘perceived’ obstacle is indeed a ‘real’ obstacle, the competent authority takes a “go” decision and commits itself to proceed in finding a solution, including the ECBC, to overcome the obstacle.

If the analysis of the competent authority concludes that the ‘perceived’ obstacle is simply based on a misunderstanding or misinterpretation of the relevant legislation, the competent authority takes a “no-go” decision and the procedure ends.

In order to expedite the process of finding a solution to the obstacle experienced by the initiators, the Working Group would advise to limit the timeframe of step 2a to eight months in total. This means that the competent authority would have to take the “go/no-go” decision within eight months of receiving the ECBC proposal.

Step 2b: Finding an existing solution or adopting the ECBC proposal

After the submission of the ECBC proposal to the competent authority and a “go” decision from the latter, the ECBC coordination point could, where requested by the competent authority, perform a preliminary evaluation of the ECBC proposal at hand. This preliminary evaluation would primarily check whether a similar ECBC exists in the national context (either on a different border or on the same border) or in the European context (on a different border across Europe). For this reason, the ECBC coordination point could contact the regional ECBC coordination points, where existing, and the ECBC platform at the EU level. This preliminary evaluation is optional and there could be different national approaches to it. At this stage, the competent authority would also consult – where possible – the competent authority on the other side of the border.

Following the consultation, the competent authority would have to find an answer to the following question:

- Could an existing instrument or solution be used to solve the obstacle?

If an existing instrument or solution could be used to solve the obstacle, the competent authority would give preference to this instrument or solution and the ECBC procedure would end and the ECBC tool would not be used. If it is not feasible or expedient to use an existing instrument or solution to solve the obstacle, the competent authority would further analyse the ECBC proposal and answer the following two questions:

- Is the proposed ECBC legally implementable in the sense that the national or regional level has the required policy-making competences in the relevant policy area?
- Is the proposed delimitation of the area of application justified?

If the answer to both questions is ‘yes’, then the ECBC proposal is admissible and the next step of the procedure would be triggered. If the answer to at least one of the questions is ‘no’, then the ECBC proposal is not admissible. In this case, the competent authority has two choices: It could either work together with the initiators and the competent authority on the other side of the border to amend the proposal or it could offer the initiators to apply a different instrument or solution to achieve the same outcome within a reasonable timeframe.

Step 3: Approving the ECBC

If the competent authority has decided that the ECBC proposal is admissible, it shall endeavour, where possible, to work together with the initiators, the competent authority on the other side of the border and potentially the national ECBC coordination point on the final version of the ECBC with the specific provisions.

There are several possibilities for the approval process of an ECBC. In general terms, the ECBC would be signed by the competent authority and potentially, if it deems this expedient or necessary due to the nature of the solution, also by the initiator. It would be up to the competent authority to decide who the relevant parties are. In the first case, the signatories could be the competent authority plus the local/regional authority as initiator. In the second case, the signatories could be the competent authority plus the stakeholder(s). For some cases where EU law is concerned, it could be considered to propose to the European Commission to join the ECBC as a signatory.

Step 4: Applying the ECBC

Once the ECBC is signed by the relevant parties, the ideal solution would be for the ECBC to be directly applicable. This provision, to be specified in the Regulation, would result in the timely application of the ECBC. In this case, the competent authority and the initiators would apply the ECBC, i.e. implement the activity (or project) or deliver the service of general interest in accordance with the rules and provisions set out in the ECBC.

Step 5: Following up

In relation to record-keeping, the national ECBC coordination point includes the new ECBC in a national database and then submits it to the ECBC platform at the EU level to be included in a European ECBC database, operated by the European Commission.

In terms of monitoring, either the competent authority or the national ECBC coordination point, upon request by the competent authority, could monitor the application of the ECBC.

In relation to a political follow-up, it could be envisaged that once an ECBC is applied, a mechanism would be triggered that obliges the competent authority to assess whether a permanent intergovernmental solution (in the case of bilateral issues that only concern a specific border) could be found. Simultaneously, a mechanism could be triggered that obliges the ECBC platform at the EU level, with the support of the European multilevel platform (see 4.2), to assess whether a permanent European solution (in the case of multilateral issues that concern multiple borders or even all Member States) could be found.

v) Added value of the tool

There are solutions for many cross-border obstacles, but the new ECBC procedure and tool are meant to decrease the transaction costs and time needed for finding solutions to these obstacles. In practical terms, this means two things:

- In the case where a solution was found, this could have been done in a more efficient and structured way in terms of time and resources with the tool.
- In the case where no solution was found, the procedure would have offered a structured process and the tool would have offered a potential solution to overcome the obstacle (yet without a guarantee concerning the outcome).

vi) Elements to be defined: duration/territorial/thematic reach of the tool

- What is the appropriate timeframe for establishing an ECBC (for the decision “go/ no-go”, for the admissibility, and for the solution)? Is it sufficient to oblige the competent authority to take a decision on “go/no-go” within a fixed and reasonable timeframe (our suggestion: eight months)?
- What about meso-regional solutions and existing procedures/approaches?
- What about an ECBC on a border with a third country? A distinction has to be made between members of the European Economic Area, candidate countries, and other third countries.
- What about law suits in relation to the specific provisions of an ECBC? Some legal systems allow citizens or local/sub-national authorities to take "the State" to court, even for omission, but this kind of procedure is not possible everywhere. A Regulation may impose the obligation of the Member States to define one or more (per border) legal redress system(s) together with the neighbouring Member State(s). What about judicial and/or extrajudicial dispute resolution mechanisms?

vii) Possible concerns regarding such a regulation:

- It might be felt that it may have an impact on sovereignty, which, in fact, is not the case as it implies voluntary decision-making.
- It might be seen as a bureaucratic burden, which is not the case as the bureaucracy, in fact, often inhibits solutions for borders.
- Nordic Countries may claim they have already a mechanism for their internal borders.
- Countries with less integrated borders may claim that there is no need for such an instrument for their countries.
- National courts may need to apply foreign law, however, this in fact already the case in other fields of activity

viii) Possible way out of a blockage to move towards such regulation:

In case of fundamental differences in the perception of the need for such a regulation, is there a case for enhanced cooperation of a limited number of countries in the EU?

4.2 Completing the toolbox: The need for a multilevel process for dealing with cross-border obstacles and proposal for a European multilevel platform

i) The need for a multilevel process for identifying and solving cross-border obstacles

The different approaches mentioned above form a template for a potential coordinated process across the different levels of government with the dual objectives of identifying and solving cross-border obstacles.

At the national level, it is important to ensure **inter-ministerial coordination and steering of cross-border cooperation** in order to implement, if necessary, **regulatory or legislative modifications** or conduct the **negotiation of inter-state agreements**.

At the level of a particular cross-border area, numerous obstacles – notably those of an administrative or legal nature or resulting from a lack of knowledge, concertation, or coordination – can,

in principle, be overcome in that particular cross-border area without finding a solution applicable to the whole of Europe. This can be achieved by fostering the cooperation between local/regional actors (local/regional authorities, decentralised government departments, etc.) on either side of the border.

However, the removal of an obstacle can require changes in the law of one or both (or more) of the countries concerned, or even an intergovernmental agreement; in this case, the authorities at the central level (national or federated state government) concerned will need to be involved.

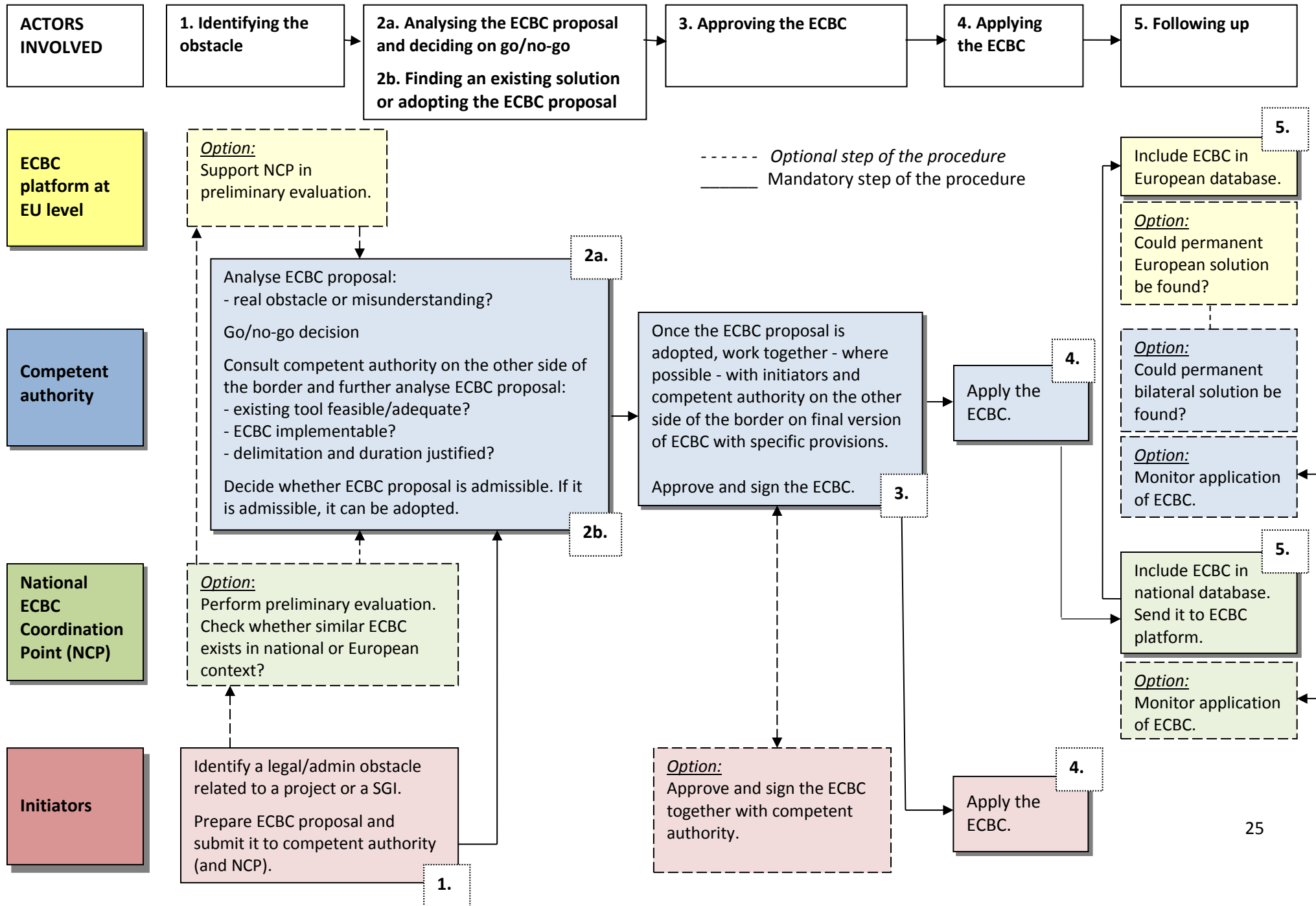
Taking the starting point of one particular cross-border project or cross-border area, it is important to take into account the specific context of each border. This will enable actors to deal with what they can at the local level while bringing the remaining obstacles to the attention of the higher levels of government.

Certain obstacles can be overcome through an intervention at **the European level**. The removal of obstacles to cooperation can involve: changes in EU legislation (for example, the abolition of roaming charges from June 2017); the creation of specific tools, such as the EGTC or the one proposed by the Working Group on Innovative Solutions to Cross-Border Obstacles; awareness-raising of the needs of cross-border areas through a targeted territorial impact assessment involving all the EU institutions; Cohesion policy, with the European Territorial Cooperation programmes and their multilevel governance (expression of problems from the bottom up, strategic guidance from the top down, and sharing of good practices).

ii) Proposal for a European multilevel platform to foster the exchange of experiences and good practices

Different organizations from all over Europe (MOT at French borders, CESCO at the Hungarian borders, Nordic Council in Northern Europe; Greater Region; Euregio Maas Rhine; Institutes or Universities such as ITEM or Euro-institutes; AEBR at the European level) pursue different approaches in the context of dealing with cross-border obstacles. There is a lot of potential for coordination and exchange with each other. These approaches could be made inter-operable at the European level, in complementarity with the ECBC procedure and tool proposed above, in the form of a European multilevel platform of cross-border cooperation for stakeholders. This would allow to:

- **take action at each border** in support of local/regional players (as in the Franco-Belgian process), in synergy with ESI funds programmes.
- **exchange experiences and best practices concerning** the removal of obstacles on different borders; MOT's forum could be extended to other borders.
- **raise awareness of the remaining obstacles at higher levels of government**; support the national level (national ECBC coordination points) in the removal of obstacles; facilitate concertation between neighbouring countries.
- **support the intergovernmental process**: follow up of the Working Group on Innovative Solutions to Cross-border Obstacles.
- **support the European level**: manage an EU database of obstacles and solutions, fed by the network of organizations quoted above, supporting the EU ECBC platform.



All the information and documents of the Working Group can be found on the Mission Opérationnelle Transfrontalière (MOT)'s website:

<http://www.espaces-transfrontaliers.org/en/european-activities/working-group-on-innovative-solutions-to-cross-border-obstacles/>



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Ministère du Développement durable
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