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Towards a new European Convention on Groupings of Territorial Co-operation

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Introduction

The Council of Europe is the oldest and largest European political organisation whose aim is to promote “greater union” among its member states. It comprises today 46 member states – soon to become 47, if the application by the Republic of Montenegro,

currently being examined by the Committee of Ministers, is accepted. The Council of Europe's remit covers all spheres of states' action, with the only exception of defence and security. Its working method is intergovernmental co-operation, i.e., the action by governments themselves with a view to identifying common challenges, best practice and suitable solutions that are adopted in the form of guidelines, recommendations and conventions.

Two political bodies, the Parliamentary Assembly and the Congress of Local and Regional Authorities, provide additional impetus to the intergovernmental work. They stimulate the action by the Committee of Ministers, by addressing to it their recommendations, and keep a watchful eye on the implementation by member states of their commitment, through separate but complementary monitoring procedures. The Assembly follows the implementation of member states' commitments entered into at the time of accession, while the Congress measures on a regular basis the progress made by member states in meeting the goals of the European Charter of Local Self-government, a convention adopted in 1985 now binding upon 41 member states.

It is also worth recalling the role of the conferences of specialised ministers. The Council of Europe's decision-making body is the Committee of Ministers whose members, according to the Statute, are the Foreign ministers. They are also responsible for co-operation in "technical" fields, i.e. those fields where intergovernmental co-operation takes place, as legal issues, education, culture, social affairs, and health. However, technical expertise and political clout also lie in the ministries primarily responsible for these areas of policy action at domestic level. For this reason the practice has spread over the years to convene within the Council of Europe regular conferences of "specialised ministers". In the field of local and regional democracy, this conference brings together, at two/three

years' interval, the ministers in charge of local and regional government.

It was at their latest session, in February 2005 in Budapest, that the European ministers responsible for local and regional government adopted an Agenda for delivering good local and regional governance which includes, among its objectives, the “establishment of a clear and effective legal framework for institutionalised co-operation between territorial communities or authorities”. To this effect, the Ministers agreed “to continue the work engaged in the Council of Europe with a view to adopting a Third Protocol to the Madrid Outline Convention, regulating the Euroregional Co-operation Groupings”. The implementation of the Budapest Agenda will be reviewed at the next ministerial session, to be held in Valencia, Spain in October 2007.

The Madrid Convention, its two protocols and states involved

Working on a Third Protocol to the Madrid Outline Convention presupposes that there are already two protocols and a convention. What is this convention about? The Madrid Outline Convention was adopted in the Spanish capital on 21 May 1980. It now binds 34 member states while 3 other have signed but not ratified yet. Its purpose is “to facilitate and foster transfrontier co-operation between territorial communities or authorities within its jurisdiction and territorial communities or authorities within the jurisdiction of other Contracting Parties”. Each Contracting Party “shall endeavour to promote the conclusion of any agreements and arrangements that may prove necessary for this purpose with due regard to the different constitutional provisions of each Party”.

The adjective “Outline” has no particular meaning in legal terms. If one looks at the contents of the Convention, one realizes that the obligations it contains are of a relatively general nature. To “facilitate

and foster” may indeed look as a relatively minimalist undertaking. However, the implications may be significant for the States concerned.

First of all, the Convention does not establish a right, for territorial authorities and communities, to engage in transfrontier co-operation. It places the burden on the Contracting parties whose undertaking is precisely to “facilitate and foster” such co-operation. Secondly, this co-operation shall take place “in the framework of territorial communities' or authorities' powers as defined in domestic law. The scope and nature of such powers shall not be altered by this Convention”. Thirdly, the Contracting Parties have the possibility, under the Convention, to subject the effective transfrontier co-operation by their territorial communities to the previous conclusion of interstate agreements between neighbouring countries with a view to defining the scope of such co-operation or specifying which territorial authorities can engage in such a co-operation.

On the other hand, “facilitating and fostering” cross-border co-operation means not a passive attitude by the Contracting Parties but a rather active one. Existing obstacles have to be removed, excessive controls lifted and positive action, if necessary, has to be taken. The Committee of Ministers of the Council of Europe adopted as recently as January 2005 a Recommendation on good practices in, and reducing obstacles to transfrontier co-operation that defines in a rather comprehensive way the type of obstacles to be removed and the positive actions that could be envisaged by member states in order to give substance to their endeavour to “facilitate and foster” cross-border co-operation.

The Madrid Convention has been supplemented by two protocols. The second protocol, the “easiest” one, of 5 May 1998, adds the so called “interterritorial” co-operation to the existing “transfrontier co-operation”. Interterritorial means co-operation between non adjacent

authorities. In this way, the principles of the Madrid Convention are also applicable to the co-operation between territories that are not contiguous in physical terms.

The Additional Protocol is more complex. It was adopted in 1995 and is ratified to-date by 17 states, plus 8 signatures. It contains an important adjunct to the Madrid Convention, i.e. the recognition, by the Contracting Parties, of “the right of territorial communities or authorities under [their] jurisdiction and referred to in Articles 1 and 2 of the Outline Convention to conclude transfrontier co-operation agreements with territorial communities or authorities of other States in equivalent fields of responsibility, in accordance with the procedures laid down in their statutes, in conformity with national law and in so far as such agreements are in keeping with the Party's international commitments”. Furthermore, the decisions “taken jointly under a transfrontier co-operation agreement shall be implemented by territorial communities or authorities within their national legal system, in conformity with their national law”. And finally, a transfrontier co-operation agreement “may set up a transfrontier co-operation body, which may or may not have legal personality”.

In this way, the system established by the Madrid Convention becomes more articulate. It comprises transfrontier co-operation between neighbouring territorial authorities and also between non contiguous authorities. It enables territorial authorities to conclude agreements for the purpose of taking concerted action, allows for the adoption of decisions within the framework of these agreements and grants legal effectiveness to such decisions. Through such agreements, territorial authorities may establish “transfrontier co-operation bodies”, something often referred to as “Euroregions”.

***How has transfrontier cooperation proceeded in 25 years
(positive and negative experience)***

What is the effectiveness of this “system”? One crude method of assessing effectiveness is to look at the number of ratifications: the Madrid Convention has attracted 34, the Additional Protocol 17 and the Second Protocol 15. These are relatively high figures, which confirm the “popularity” of these instruments. Are they also effective? One can also consider that for a number of countries, namely those seeking accession to the Council of Europe after 1989, the ratification of the Madrid Convention was one of the commitments they entered into, especially at the request of the Parliamentary Assembly. The Convention is part of the Council of Europe’s *acquis* and therefore “has” to be ratified. But are then ratifications followed by a genuine improvement of the situation?

Here the measurement is more difficult. The fact that the Recommendation on good practice and reducing obstacles was adopted in 2005 may signal that difficulties emerged lately in the actual implementation of the commitments enshrined in the convention. For European states that only recently acquired or developed a comprehensive system of local self-government, it is quite understandable that cross-border co-operation by their local authorities could create a problem: in which areas could this co-operation take place? With which neighbours? With what consequences? Would inter-state agreements be necessary or at least helpful in order to clarify the framework for such a co-operation? What kind of assistance if any should be provided to local authorities? And what about financial encouragement or support to actual cross-border projects?

The enquiries done at the Council of Europe showed that while the legal framework was slowly put into practice – with legislation being amended or adopted with a view to making cross-border and

interterritorial co-operation “legal” – the other “accompanying” measures take more time to be adopted. These may include the provision of technical assistance by a central state apparatus, the access to funds especially targeted to cross-border co-operation projects, the adoption of interstate agreements or an effective co-ordination between interstate committees, where they exist, and the initiatives taken at local level.

One useful indicator of effectiveness may therefore be the number of cross-border co-operation bodies established by the territorial authorities of member states, not only those that have ratified the Madrid Convention. Studies recently published on the “euroregions” created in such countries as Lithuania (and its neighbours), Slovakia (and its neighbours) and South Eastern Europe in general, show how popular “Euroregions” have become in a relatively short period of time. There are approximately 90 Euroregions in Europe today – at least, Euroregions whose existence is known to the Council of Europe or to the Association of European Border Regions – and probably more if one takes into account those whose creation is not officially communicated to the Council of Europe – even if this communication has no legal consequences.

These euroregions have very different aims, management bodies, and working methods. However, their existence shows a clear trend towards the institutionalisation of cross-border co-operation and the need to provide a clear answer to the following questions: what can euroregions do and what cannot they do? What are their responsibilities and rights? What decisions can they take and with what consequences?

Is time suitable to step further? The objective of the new Convention and its optional character

To these questions, the Additional Protocol provides answers that are not easy to make use of. In the case of a co-operation body, the law applicable to its establishment is that of the country of the seat. But for decisions taken jointly, each territorial authority shall implement it according to the law applicable to it, i.e. its own domestic law. The body may have or not legal personality, by decision of its members, but the establishment of a “public law “entity depends on a separate decision by the Contracting Parties, which may also restrict the scope of such a public law entity.

In practice, if the countries to which the territorial authorities concerned belong are not all Parties to the Additional Protocol, the establishment of such bodies may be seriously impaired. And even if they are Parties to the protocol, they may have chosen different options, for instance not letting the body being a public law entity. Furthermore, the law applicable being that of the state of headquarters, it may appear that domestic legislation is insufficient, or unclear. Don't forget that in many European countries, legislation applicable to territorial authorities takes years to develop, and that provisions on associations, accounting, civil liability, administrative controls, may have to be found on a number of laws that also require years to take shape.

This is to say that to the very simple question: “what do we have to do in order for our “euroregion” to be established in accordance with European law” there is no simple answer or indeed no answer at all.

And this is the main reason why the Council of Europe started, two years ago, its work on a Third Protocol to the Madrid Convention that would try to provide a satisfactory solution to the problems encountered by member states and territorial authorities in

establishing, managing and making effective use of their “euroregions”.

In approaching this question, we at the Council of Europe, and more specifically in the Committee of Experts on Transfrontier Co-operation which was entrusted with this work, followed some guiding principles:

- The Third Protocol should respond to the need of the member states and be fully compatible with the fundamental principles of legislation prevailing in them;
- The Third Protocol should facilitate the establishment of “euroregional” co-operation bodies;
- The Third Protocol should not require existing cross border co-operation bodies to transform themselves into the “new” type of euroregions nor indeed introduce a single, “one size fits all” type of euroregions.

In respect of the first principle, the committee’s position was: the Third Protocol should be acceptable to all member states, including those that – because of their legislation or of the treaties to which they are already Parties – do not “need” so to speak, a new set of rules for their “euroregions”. As it happens for all international treaties, some of the latter prescriptions may be different from what at a given moment prevails in a given country, but this discrepancy must remain within the limits of what is compatible with the fundamental principles of the domestic constitutional order. The necessity for some domestic legislation to be brought into line with the provisions of the protocol cannot therefore be ruled out.

To the second principle, the committee’s original reply was that the set of rules applicable to “euroregions” should be as uniform as

possible. Here the crucial issue was the existence of very differing national legislations which could be applicable – in accordance with the prevailing principle of the law of the seat – to the functioning of the euroregions. This could lead to unwanted distortions, in the choice of this seat for example. But also as regards the law applicable, for instance, to liability issues. Therefore the option was that the protocol should contain a uniform law, to be adopted and introduced as such in the domestic legal order of the contracting parties. The possibility for Contracting Parties of adopting national variables would have remained limited.

On the third point, the position was equally clear: new-type euroregions would only be one more option available to territorial authorities, in addition to the possibilities already offered by domestic and international law. Future euroregions would have the possibility of establishing themselves in accordance with any legal provisions open to them, that offered by the Third Protocol being perhaps more sophisticated and all-embracing than the others, but not exclusive. And of course, existing euroregions would remain free to opt for the new statute, it suits them, or remain as they are.

Variety of opinions of European countries on adoption of the Convention into the national legislation

The work progressed on this basis and indeed, by last spring, the committee was able to produce a draft convention – the option of the Third Protocol having been set aside – for consideration by the Steering Committee on Local and Regional Democracy (CDLR) that supervises our work.

The Steering Committee (CDLR) considered that the work done was of high quality. Some countries, however, raised two types of objections. The first objection concerned the possibility of attributing to the groupings of territorial co-operation tasks whose

implementation touches upon rights guaranteed to citizens by national constitutions. This would concern the case of citizens of country A claiming rights or services to be provided by a grouping established in country B, possibly under different conditions. A technical solution could be found, yet the objection remained. The second objection was raised by federal states and addressed the very idea of uniform law, easy to implement in a unitary – i.e. a centrally organised – state but more difficult to implement in a federal state where each entity – Land, canton, region – would have to legislate in order to include the uniform provisions in its own legal order. Here again solutions could be found whereby the State complies with the obligation to implement the uniform law in its domestic legal order if a majority of *Länder*, or cantons, adopt the uniform law, or if this is done first by the *Länder* or cantons or regions with legislative powers at the border of the State, and then by the others. But again, the objection remained.

The third major concern had to do with the existence of EGTC Regulation – i.e. the EC Regulation 1082 of 5 July 2006 on a European Grouping of Territorial Cooperation – whose draft had been under discussion for almost two years too. The LR-CT committee had taken care to ensure compatibility between the provision of the Uniform law and other conventional provisions with the draft regulation as it gradually emerged from the discussions in the Council of the European Union. But only the text as finally adopted would enable a comparison and indeed the identification of precise obligations or optional choices for EU member states. To what extent would a Council of Europe convention then complement the Regulation, making it possible for the two texts to coexist harmoniously?

Compatibility of the EC Regulation and the Convention/Third Protocol

It is important to discuss briefly at this point the issue of compatibility between the two texts. It goes without saying that in our work we understood the need for the convention not to encroach upon EU law. A specific provision was drafted to that effect and care was taken not to introduce directly applicable provisions that would have conflicted with equally directly applicable provisions of the regulation. However, the regulation has gradually emerged as a text that refers to a large extent to the domestic order of the member states, with relatively few directly applicable provisions. Therefore, our role was to provide so to speak “the” domestic legislation applicable in the form of the uniform set of rules that would if not supersede at least indirectly set aside the existing domestic legislation in a number of EU member states. On the one hand, we at the Council of Europe had – and still have – to accommodate the needs of a greater number of states than the EU, the half of which (almost) are not members of the latter. In some of these states the domestic law applicable – let me refer again to the case of the Additional Protocol – is limited or non-existent. In case of cross border co-operation involving EU and non EU member states, the Regulation would raise questions as to applicability. And in cross border co-operation between non EU member states, only the Council of Europe convention would be applicable.

This is not to say that EU member states would be content with the Regulation and that the non EU member states should either follow, suit or adopt a distinct instrument only applicable to them. Both options are politically unacceptable and technically difficult to implement. But the need to ensure a clearer connectivity between the two instruments was forcefully stressed in the framework of our Steering Committee (CDLR), which oversees the work of our committee.

This means the work done had to be reviewed in order to more accurately reflect the position arrived at by a significant number of member states in the framework of the European Union, and also the positions that emerged from other corners.

Where are we now? Technical discussions will resume in February on the basis of a revised draft which is not yet final. Therefore, the information that I can convey to you is certainly limited and probably unsatisfactory. But I can be precise on a number of points.

The choice of the “uniform law” is probably no longer at the core of the project. The draft convention is likely to resemble again a Third Protocol to the Madrid Convention, with a number of substantive provisions applicable to all contracting parties and maybe an additional appendix containing the detailed provisions that only those states that need them would accept.

The substantive provisions would be more precise than those of the existing Additional Protocol as regards the legal capacity, scope, management bodies, liability and budgets of the euroregions. These provisions would fill the gaps in the EU regulation in a way that makes it easier for EU member states to implement the latter while providing non EU member states with rules precise enough for euroregions to be established effectively. Contracting parties will not dispense with the need to have domestic legislation of some sorts in force, but their task will be made easier, given the completeness of the Third Protocol on a number of points.

Being more general, the provisions of the Third Protocol will make easier for euroregions to be established with a uniform legal status while allowing for variations depending on the objectives to be pursued by each of them.

The previous “uniform law” approach implied for the provisions to be detailed and cover a great deal of aspects, some of which would have been unnecessary in euroregions not established for the purpose of managing grants or providing services to the public. One could draw a distinction between euroregions as loose framework for dialogue, joint discussion of issues of common interest and cooperation – which do not require complex regulations as to their functioning – and euroregions as almost operational companies, managing an utility, providing services to the citizens, benefiting from grants or implementing projects for which they can obtain EU, state and other public funds. The latter have to conform to precise rules about accountability, transparency and liability that would be to a large extent inappropriate to the former.

The Third Protocol will be applicable to all member states of the Council of Europe. It will therefore be necessary to maintain the provisions relating to the possibility of admitting as a member of a euroregion a territorial authority of a member state that has not ratified the Third Protocol, or an authority belonging to a non member state of the Council of Europe. The current text already provides for these options, with clauses protecting the interests of the Contracting Parties, of course.

On two aspects the EU regulation and the draft convention differed clearly: the first was the possibility for private law entities to be members of the euroregions according to the Council of Europe draft but not according to the Regulation. The second was the possibility for a State to object to the establishment of a grouping, a possibility that the EU regulation admits on grounds that look *prima facie* broader and looser than the grounds envisaged in the draft convention. The Third Protocol will no doubt address these issues again.

And finally, the main difference is of course that the Regulation is part of EU legislation and therefore obligatory in all its parts – even if the eventual establishment of the EGTCs is not an obligation – while the Third Protocol will be entirely optional. Member states that do not wish to be bound by its provisions are free not to sign nor ratify and in case of ratification, are free to denounce it, in accordance with the stipulation of the protocol.

Ladies and Gentlemen

Let me sum up the content of my presentation

As regards cross-border co-operation, the Council of Europe has produced a number of legal instruments that have shaped the way in which this cooperation has evolved in Europe over the last thirty years. If local authorities engage in cross-border co-operation, if the states recognise this right as a normal way for these authorities to implement their functions, if euroregions have so quickly spread over the territory of this continent it is to a large extent thank to the Council of Europe and its conventions in the field of cross-border co-operation.

In doing so, the Council of Europe has responded to the perceived needs of its member states and their territorial authorities, and provided the necessary and indeed loose legal framework for this to happen.

But the Council of Europe is also the forum in which new needs are identified and solutions discussed. The draft convention – with all the changes in format and content, from uniform law to a Third Protocol, with or without appendices – is the result of this attempt at providing member states, and through them territorial authorities as well as the citizen with adequate legal responses.

The Third Protocol and the EC regulation will be fully complementary and our ongoing work – to be hopefully completed by the time the Valencia Conference meets in October 2007 – will aim at precisely that.

But we are also committed to producing a text which has a significant content and “added value” in comparison to the Additional Protocol. In doing so we do not aim at satisfying simultaneously the needs and expectations of all member states but at providing the member states with a useful and effective set of rules whose implementation would be in the interest of their territorial communities and in line with the political goals of the member states.

Let’s us recall the conclusions of the Warsaw Summit. Our Heads of State and Government declared themselves “convinced that effective democracy and good governance at all levels are essential for preventing conflicts, promoting stability, facilitating economic and social progress, and hence for creating sustainable communities where people want to live and work, now and in the future.” Cross-border co-operation between territorial authorities is indeed a significant tool in the pursuit of this objective.

I hope that this meeting, and the exchanges of views that it will enable, will help all of us to achieve this shared goal.