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**"PUBLIC ACTORS AND THE MECHANISMS OF  
TRANSFRONTIER COOPERATION"**

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**Transborder Cooperation: How to Bridge Across  
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# **Public actors and the mechanisms of transfrontier cooperation in Europe**

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Transfrontier cooperation is nowadays understood as covering the relations existing between public bodies (local and regional authorities) located on different sides of an international border. Even though formally part of international relations - as could also be considered international relations between private actors - transfrontier cooperation differs from "classical" international relations studies mostly by the fact that its main actors have no access to the mechanisms of international law, and a very restricted access to those of private international law<sup>1</sup>. Therefore the field of international relations could be divided in three parts of unequal importance.

- 1 - Classical international relations, which are mostly concerned by relations between States regulated by international law;
- 2 - Private international relations, which are concerned by the relations between private actors, whether human persons or legal creatures (such as companies), and which are mostly regulated by private international law;
- 3 - Transfrontier relations which deal with the relations across international borders by public actors who do not have access to international law; these are mostly local or regional authorities, but many other forms of legal structure under public law - or para-public bodies - would also be concerned with this field. Since public international law is out of reach for these actors, and their access to private international law is limited - because the

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<sup>1</sup> We shall come back on this specific legal complication of transfrontier cooperation in paragraph I.3. The first article that seriously dealt with the matter was published by Pierre-Marie DUPUY in 1977 in the *Annuaire français de droit international*, 1977, pp. 837-860. Even though it correctly identifies the legal issues at stakes, the solution proposed by DUPUY's solution over-simplify the limitations linked to the recourse to private international law solutions.

State they belong to have as part of their public law control procedures over the activities of their infra-State entities and recourse to the mechanisms of private international law would often be in contradiction with these existing control procedure - new legal mechanisms have to be conceived, which will allow public bodies to develop transfrontier relations under a common law.

These three dimensions of international relations are naturally not hermetically closed to each other. One can find private actors doing business with States - this is the fairly important domain of transnational contracts which exist for example in relation to the exploitation of natural resources (mining, petrol, ...) by foreign companies. There also are some cases where sub-national public entities have the capacity to enter agreements under international law - these cases are for example expressly spelled out by article 32 par. 3 of the German Constitution as regards the *Länder*, or articles 9 and 10 of the Swiss Federal Constitution as regard the *Cantons*. Other is the case of human rights, also implying relations between individuals and States which are to a large extent governed by international law. Numerous other examples could be found which mix the actors and the rules of these three fields of international relations; not underestimating this cross-breeding between fields and norms, this paper will nevertheless focus on the third dimension of international relations, transfrontier cooperation. In this field, new mechanisms are currently being developed by European institutions and we shall review them in this paper. I have in other publications proposed to group these legal mechanisms under the appellation of "**public transnational law**"<sup>2</sup>, and we will try to show in which measure the phenomenon of transfrontier cooperation compels us to depart slightly from the principles of transnational law as they have been spelled out by Professor Jessup in his famous 1956 Yale lectures<sup>3</sup>.

As mentioned above, the legal problems existing for private economic actors working together across international borders, even though not always easy to solve, are not as acute as those met by infra-State public authorities. The mechanisms of private international law allow the partners to choose a single common law applicable to their relation. Furthermore the efforts made in Europe to create a single market have aggravated this discrepancy, and the successful establishment of the single market further eliminates the differences between the legal situation of private economic actors located in different EU Member States. These facts create an unbalanced situation in which public local or regional authorities located near international borders are very strictly limited in their capacity to answer properly to demands by local

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<sup>2</sup> See mainly Nicolas LEVRAT, *Le droit aux accords de coopération transfrontière entre collectivités publiques infra-étatiques*, Paris, PUF, 1994, pp. 339-346.

<sup>3</sup> Philip C. JESSUP: *Transnational Law*, New Haven, Yale University Press, 1956, 113p.

economic actors, and therefore risk delegitimation. At the same time, transfrontier issues which may be of great local importance, do not constitute situations of sufficient interest for national State to deal adequately with through their international policy - in other word through the diplomatic channels of their respective national Foreign Affairs Ministries. Conscious of this fact and pressed by the political demand from local and regional elected representatives, States have within European institutions developed legal tools on the one side, incentive policies on the other to counterbalance this trend and to allow local and regional public authorities to play an active and appropriate role in the construction of Europe.

In this paper, we shall therefore examine how and why the phenomenon of transfrontier cooperation has developed to such a scale in the second half of the twentieth century in Europe (I), before analyzing the adaptations that are currently being proposed by European institutions to allow further improvement of these relations, in view of developing new dimensions on the European territory (II).

## **I. The emergence of transfrontier cooperation in Europe**

Some authors<sup>4</sup> consider that modern transfrontier cooperation was born in 1956 along the Rhine River, through an informal agreement between the Alsacian "region"<sup>5</sup> located around Strasbourg and the *Breisgau Kreis* in Germany which started an informal cooperation of which written record can be found. Others<sup>6</sup> do not consider this as the true start of transfrontier cooperation since the formal registration of the aforementioned cooperation at the administrative Court of Strasbourg, as a private law association under Alsacian local law, only took place in 1965, whereas the *Regio Basiliensis* was created as a Swiss private law association in 1963, with the aim of developing transfrontier contacts around the town of Basel in Switzerland, which present the specificity of being located at the junction of three international borders.

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<sup>4</sup> For example DUPUY, quoted above, or WOEHLING in a 1977 paper entitled "Legal Problems of Transfrontier Cooperation at Local or Regional Level", submitted to OECD in 1977 (*Doc. OECD, ENV/TPF/77.10*, 1977, 27p.)

<sup>5</sup> This "region" was called "*Communauté d'Intérêt de la Moyenne Alsace*" and is much smaller than the actual Alsacian Region under French Law. It covers an area centered on Strasbourg and had no political structure (i.e. elected representatives) of its own.

<sup>6</sup> See for example BRINER, "La Regio Basiliensis an V", in *Les Régions d'Europe*, No II, Geneva, IUEE, 1970, pp. 72-77.

From the recollection of these two experiences, many interesting elements regarding transfrontier cooperation can be drawn.

First the fact that they are both very recent<sup>7</sup>, which should not come as a surprise, since they are both taking place nearby the Rhine River which, for a century, had been the frontier on which a military confrontation of a major scale between France and Germany was taking place. The fact that the Rhine River appears at time in European history as a line for building up national rivalries, and at other times as favoring peaceful relations between local populations throw in itself an interesting light on the changing role of European borders, and we shall come back on it in the second half of this paper. What is of interest to us at the present stage is to underline the novelty of this type of relations in the existing market of international relations, and the consequent difficulty it implies for these new relations to find a proper space among the already dense network of established relations.

Second, the underlined diverging opinions relating to the first appearance of transfrontier cooperation is linked to the formal and legal aspects of these relations. There is no doubt that, international frontier or not, relations between human groups sharing a common territory had to exist, one way or another, at all time. But in the current construction of a unified and pacified Europe, the degree of formalization that such relations should have has become an issue as such. And from this will to formalize these relations arise the legal difficulties of qualifying such relations and of fitting them in the sphere of international relations, somewhere below public international law, next to private international law and without contradicting public national legislations. Regarding this issue, one has to note that the easiest solution in both cases at that time, was the recourse to a single private national law, whether French law - and even more specifically Alsacian local law - or Swiss law.

This reference to private law leads to the third interesting aspect of these first relations; they were largely prompted by the actions and requests of private actors operating in the border area. This appears particularly clearly in the case of the *Regio Baisliensis* in which within the founding members of the association figure Swiss public entities, namely the *Cantons* of *Basel-Stadt* and *Basel-Land*, along side with Chambers of Commerce which are associations of private business interests, and private companies operating on either sides of the borders, that is in France, Germany and Switzerland. This mixture of public and private actors is characteristic of one early trend of transfrontier cooperation. Soon afterward and

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<sup>7</sup> It has been argued, mostly on the basis of the mention of existing traditional agreements between local community located in the area of the Pyrénée Mountains in a 1659 Treaty signed between France and Spain, that transfrontier cooperation could be traced to this time (BERNAD ALVAREZ DE EULATE, *Annuaire Français de Droit International*, 1984, pp. 537-546). It seems however hard to consider this example as relevant, since international borders between Nation-States did not exist at that time between France and Spain.

independently, another trend appeared, characterized by the wish of national governments to associate regional or local authorities to the implementation of international agreements concluded by States; this was for example done in 1973 between France and Switzerland around the town of Geneva.

These hybrid solutions have serious shortcomings in terms of democratic legitimacy, even though one of the main reason for allowing local or regional elected representative to take part into transfrontier relations does arise from the principle of subsidiarity, which implies government closer to the citizens. In the example just mentioned of the cooperation around Geneva, if Swiss Regional authorities could be properly associated to the implementation of the agreement, in France, it was only the territorial representative of the State - the French *Préfet* - which was representing French local interests, and not the local elected representatives. This feature points out to two important difficulties linked to transfrontier cooperation. One is that, even though we showed that transfrontier cooperation is by nature part of international relations, the capacity of local or regional public actors to take part to such relations depends more on their own national laws, regulations and political will than on the transfrontier factors. The other difficulty which has not to this day been solved regarding transfrontier cooperation, is that the relatively complicated legal solutions that have to be devised to allow such cooperation to develop, place the mechanisms of transfrontier cooperation away from political control. Subtle legal or techno-administrative solutions, are out of reach of the citizens and taxpayers. Therefore one of the main incentive for the development of genuine transfrontier cooperation, that is that local or regional matters should be dealt with at local or regional level<sup>8</sup>, notwithstanding the existence of an international border, is in practice contradicted by the fact that the solutions chosen lack transparency and very often reduce democratic control over these matters, either because genuine local or regional authorities are simply not allowed to participate, or because it is mostly the members of the local and regional administrations which are cooperating, out of sight of elected representatives.

These four issues, present from the origin of the phenomenon have prompted all the successive developments and have not to this day received a fully satisfactory answer. We shall now examine more concretely the actual development of these relations along European borders (1), looking first at the factors which prompted the apparition and the development of transfrontier cooperation (a), before having a look at those impeding the development of these relations (b). We shall then examine the answers proposed by European Institutions to foster

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<sup>8</sup> Among those who developed this argument the more forcefully, see BILDER, in the *American Journal of International Law*, 1989, pp. 821-831; CONDORELLI and SALERNO, in *Rivista trimestriale di diritto pubblico*, 1986, pp. 381-423; LAFORE, in *Revue de Droit Public*, 1988, pp. 763-811, and WOEHLING, quoted above.

the development of this type of relations, mostly by devising specific instruments tailored to meet the needs of local and regional public actors engaging in these transborder relations (2). This will allow us to realize that different approaches have been adopted by the Council of Europe (a) and the European Community (b).

## **1. Transfrontier realities**

Even though the main emphasis of this paper is to look at the institutional difficulties linked with the development of transfrontier cooperation mechanisms between public actors, one cannot ignore the material ground on which transfrontier cooperation is build, that is the transfrontier - regional or local - realities.

### ***a) Factors prompting transfrontier cooperation***

As a general rule, transfrontier cooperation projects are more likely to arise in areas densely populated which are split by an international border than in scarcely populated areas. The most obvious cases are when an international frontiers run through a single village - this for example more or less happens at the other end of the beautiful lake of Geneva, where the village of St. Gingolph is split between France and Switzerland. Such cases are more numerous in Europe than one would imagine. Even more frequent is the situation where a border town is stretching in all possible directions, including across the border. The urban development does not strictly take into account the existence of the international border, and event though living in different Countries, the inhabitant live in the same agglomeration. This cases are numerous in Europe and to quote only a few, you may consider Basel, Geneva, Strasbourg, Trieste, or Vienna as relevant examples. In such cases, transfrontier cooperation becomes a necessity for running the urban public services such as public transportation, sanitation, water management, ... These are beyond doubt local services that should be entrusted to local authorities, and not international matters that should be dealt with in Ministries of Foreign Affairs.

To be complete, one must underline that in some cases, transfrontier cooperation has been developed on the contrary because of very scarcely populated area. This has mostly happened in the Nordic Countries where one can find in the Northern part of their teeritories very large local authorities, with a few human settlement spread on different parts of the local authority. This geographical situation means that some of these settlements are located much closer from a larger village on the other side of the border than from the main village on their side; therefore it appeared sensible in cases of emergency, such as fire, or medical emergency, to have recourse to the services located nearby, even though that meant going through an



international border rather than calling on the closest services from your own State, which due to the distance would be of little or no help.

Transfrontier cooperation issues around an international frontier will developed only if this frontier is not to tightly closed. One of the most striking example is the situation around Vienna where the nearby border with Czechoslovakia was at the same time a frontier between Eastern and Western Europe, also known as the iron curtain. Therefore, even though Vienna and Bratislava are two large towns only some 60 kilometers apart from each other, no type of local or regional transfrontier cooperation was developed. But since the fall of the iron curtain in 1989, this frontier has become more open and in 1994, there were around 60'000 workers coming daily from Slovakia to work in Austria, and returning in the evening. Such local flux imply a demand for appropriate answers to several problems it induces, and therefore the change in the political nature of the frontier clearly shows its effect on the intensity of transfrontier cooperation that could be possibly developed. The fact that today on most part of Europe, international borders are not the site for adverse military buildup is therefore certainly one of the major factors for the development of transfrontier cooperation to such a scale in contemporary Europe.

Another factor which plays a role in the recent development of transfrontier cooperation is the very large number of tasks, and their diversity, that have to be fulfilled by public authorities. The move from the simpler police State to the welfare State has tremendously increased the functions to be filled by public authorities, and it has become impossible to deal with them all in a centralistic manner. Therefore States had to decentralize their competencies by giving more power to local or regional authorities. For those located nearby international borders, properly exercising these tasks endowed to them very often meant, for reasons of economy of scale, or simply for maintaining good neighborhood relationships, to cooperate with adjacent local authorities, whether located in the same Country or on the other side of the international border.

The two next factors are those which probably played the greater role in prompting the development of modern transfrontier cooperation. The first one is the increased workers' mobility, which allows workers, either through public transportation system or by individual transportation means, to live in an area located at some distance from their working place. This fact is naturally not specific to transfrontier situations, but it clearly creates specific and much more acute difficulties when the workers work in a country and live in another. Apart from the daily problems caused by the flux going in one direction in the morning and the other in the evening, serious issues were raised about tax collection and redistribution in the concerned areas. In other words it became urgent to find a way for the public services to be provided

either around their working place or in their living area to be properly financed. Same is true for the social security issues, and the financing of hospital infrastructure. Even though in these two fields do exist international agreement between most European States, these do not provide adequate solutions for such situations - where people are daily commuting between the two countries - since these agreements are rather aiming at the situation of people who successively live in one State, and then the other. The issues raised by transfrontier workers, and this can in some areas be no small matter - for example there are more 60'000 transfrontier workers around Vienna, some 40'000 around Basel, and around 35'000 around Geneva<sup>9</sup> - called for transfrontier solutions, at the level where the issue existed, that is at local or regional level.

The second phenomenon that played a catalyst role in the development of transfrontier cooperation at local or regional level is the ever increasing level of polluting activities within the industrial societies. Air and water pollution is not influenced by the existence or inexistence of an international border, and therefore, specially in densely populated areas, polluting activities may - and in fact very often do and it is not only by chance<sup>10</sup> - produce their effects on either side of the border. Aware of this fact, OECD has in the seventies undertaken several studies and encouraged members States to consider the possibility for the local or regional authorities located on either side of an international frontier to have access to appropriate cooperation tools in order to deal efficiently with transfrontier pollution issues<sup>11</sup>.

This brief examination of a series of factors shows that, in the second half of the XXth century, transfrontier cooperation appears as an answer to strong local demands in many borders areas of Europe; demands by socio-economic actors to have proper solutions to their needs, and demand by local or regional authorities to have the appropriate tools to cooperate over the border, in order to be able to bring appropriate answers to this social demand.

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<sup>9</sup> In a Council of Europe Seminar organised in Vienna in March 1993, Professor LASZLO proposed to evaluate the intensity of transfrontier worker flux, to take a single parameter, the difference between the average income on both side of the international border. The larger the difference, the more transfrontier workers one is likely to find. (See the Council of Europe publication: *Territorial planing and Transfrontier cooperation*, Strasbourg, 1993). In the three mentioned cases, this parameter is undoubtedly at work.

<sup>10</sup> One interesting exercise in this respect is to take a map of Europe and locate on it nuclear power plants, which may be considered as being a potentially serious environmental hazard. These are mostly located away from the center of the Country, as close as possible to the borders...

<sup>11</sup> See *OECD and the Environment*, OECD Publication, Paris, 1986. Several Resolutions were adopted by the OECD Council on this matter between 1974 and 1978.

### ***b) Factors impeding the development of transfrontier cooperation***

Naturally, the inexistence or the low relevance of the above-mentioned factors shall minimize the necessity for transfrontier cooperation to develop in some areas. Furthermore however are also other factors which can impede the development of transfrontier cooperation. A brief examination will show that they are all, to a large extent, linked to the institutional and legal national systems.

First, in order for proper transfrontier cooperation to exist, public authorities which main interest and duty is to care about local or regional interest have to exist. This is best achieved through authorities which have a local or regional democratic legitimacy, that mean which are accountable to local or regional population and should act to the satisfaction of their demands, in order to have a chance to be reelected. Other solutions, such as local or regional authority representing at the same time State interests and local interests - technically called deconcentrated administration - showed very poor results, mostly due to the fact that in weighting in relation to a local issue, national interest to international relations against local or regional interests to transfrontier arrangement, the former will of the time be considered more important. The most striking example of this fact is France where without significant political change in the regime<sup>12</sup>, the 1982 legislation creating an effective regional power, has prompted the development of numerous transfrontier cooperation activities by the French Regions<sup>13</sup>.

Second is the difficulty for proper transfrontier cooperation to exist when local or regional authorities' structures on either side of the border are very different. Such is the case when the size of the local or regional authorities is very different, or when their respective competencies do not match with each other, or when the resources they can mobilize and affect to transfrontier cooperation are far apart. None of these factors taken individually creates an impossibility to develop transfrontier cooperation - even though the absence of matching competencies is a serious shortcoming - but their combination may make it practically impossible to work out transfrontier solutions at local or regional level. One of the difficulty often encountered in the early stage of transfrontier relations is the ignorance on both side of the border of the exact structures and functioning rules of their potential partners on the other side. Due to European integration and the existence of specific legal instruments - mostly the

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<sup>12</sup> Another example in that respect could be Spain, but the creation of regions in Spain did go along with the end of the franquist regime and the quick moves towards european integration, making it hard to clearly identify the role played by each parameter.

<sup>13</sup> See for example the *Recueil des Conventions conclues par les Régions françaises avec des collectivités publiques étrangères*, published by the CNRS, Lille, 1991.

*European Charter on local self-government* (see below) - this limitation is of diminishing importance.

One serious limitation, to which local or regional authorities willing to develop transfrontier activities have often been confronted, is the refusal by the national State to allow local or regional authorities to engage in transfrontier cooperation activities. The arguments put forward were of three types; first, the principle of State sovereignty implies that State appears in relation to other States as a single entity, and letting local or regional authorities each conduct its own "foreign affairs" would lead to a cacophony on the international stage. Against this argument, it had to be shown that the transfrontier relations were not encroaching on State sovereignty because, even though taking place across the international borders of the State, they were not relations with foreign sovereign States, but in between local or regional authorities themselves; therefore one has to distinguish between a sphere of international relations between States, governed by the principles of international law and diplomatic practice, and next to it - or below - would be the sphere of transfrontier relations, outside the realm of State sovereignty. This is the solution that was presented at the beginning of this paper, but it took a long time to be accepted as such by European Nation-States<sup>14</sup>.

The second type of arguments advanced by States to deny the rights to their local or regional authorities to enter into transfrontier relations with partners in another Country was the possibility for the national State to find itself responsible for non fulfillment of these obligations - on which it had no part in contracting - according to the rule of State responsibility under international law. These rules are, one must admit, quite tight, but they only apply to obligations contracted under international law, and since local or regional authorities cannot enter into agreement under international law, the argument makes no sense whatsoever<sup>15</sup>.

Finally Governments argued that international relations are reserved to the central States organs according to their own national Constitution. Even though this is the case in most national legislation, scholars again managed to show by a close examination of texts and their

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<sup>14</sup> It is mostly the work of scholars that allowed to show the existence of a difference between transfrontier relations and international relations, and that is now being admitted by most European States - with the noticeable exception of Italy in which the Constitutional Court regularly considers unconstitutional agreements passed by Italian regions with foreign partners. To have a detailed view at the legal reasoning that led to this admittance, see BEYERLIN, *Rechtsprobleme des Lokales Grenzüberschreitenden Zusammenarbeit*, Berlin 1988, BILDER (quoted above), CONDORELLI AND SALERNO (quoted above), LAFORE (quoted above) and LEVRAT (quoted above).

<sup>15</sup> Even though this may seem evident, it took a long time for scholars to point out that fact. See on that issue BEYERLIN (quoted above), CONDORELLI, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", in *Recueil des Cours de l'Académie de Droit International*, La Haye, 1988, and LEVRAT (quoted above).

context<sup>16</sup>, that this exclusive competence for international relations that was attributed to central State organs was solely relevant for relations under international law, and not to all other form of relations that may include a non-national component.

The second serious difficulty for local and regional authorities wishing to engage in transfrontier cooperation activities, is the lack of an existing legal solution for doing so. If it has been shown that local or regional public authorities do not have the capacity - with a few exceptions for Austrian *Länder*, German *Länder* and Swiss *Cantons* - to engage themselves under international law, they furthermore had difficulties to find a common law to regulate their relations. Three paths have been proved possible<sup>17</sup>; one is to place the whole relationship outside of any legal framework, so as to avoid any interdiction; this is a possible solution, but it allows only very simple, punctual and limited cooperation activities. Another is to have recourse to the mechanisms of private international law, which allow for parties located in different countries to choose a common law for their relations. Technically, this solution allows for finding the proper law to govern such relations, but unfortunately there are many activities which, due to their public character, cannot be conducted under the rules of private law; and the mechanisms of private international cannot apply as such to a choice between public laws. The third solution is to place these relations under the umbrella of a framework agreement between the concerned States (concluded according to international law), which defines the rules under which direct relations between the local or regional public authorities can take place. This is on this third path that European institutions, mostly the Council of Europe and the European Union, have played an important role to encourage the development of transfrontier relations between infra-States public entities.

## **2. The role of European Organizations in the development of transfrontier cooperation**

Within the many European organizations, two have played a major role in developing specific tools to encourage the development of transfrontier cooperation activities; the Council of Europe (a) and the European Union (b). Both find grounds for such work in their constitutive Charters, which prompt them to work for a closer union between their member States. If this can be done by putting together representatives of the national governments, it also appeared that it had to be done where the Countries of Europe meet, that is at their common borders.

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<sup>16</sup> On this issue (which is an argument that was mostly put forward by French national authorities) see principally LAFORE (quoted above) and LEVRAT (quoted above).

<sup>17</sup> For a detailed examination of all the possible legal solutions and their consequences, see LEVRAT (quoted), pp. 259-337.

One main distinction between the tools developed by the two organizations is the discrepancy existing on the type of mechanisms under which they operate. The Council of Europe is a classical cooperation organization, which works under the rules of international law and can produce texts that will exist and are regulated by the rules of international law, whereas within the European Union, Community law has its own rules of creation, implementation and control. This difference has to be kept in mind while analyzing the product of each organization's efforts.

#### *a) The Council of Europe*

The Council of Europe incorporates within its structure since 1957 a body in which local and regional authorities of Europe are represented. These used this forum (the *Standing Conference of Local and Regional Authorities of Europe* from 1957 to 1994, which became the *Congress of Local and Regional Authorities of Europe* in 1994, both designated by the acronym CLRAE) to put on the European stage their common problems and interests; transfrontier cooperation issues were high on their list of priorities and their permanent request for solution to these matters pushed the Council of Europe to very early deal with this matter.

Thus was adopted in 1980 an *European Outline-Convention on Transfrontier co-operation between territorial authorities*. This text, adopted very reluctantly by States under the combined pressure of the CLRAE and the Parliamentary Assembly of the Council of Europe<sup>18</sup>, was to recognize at the European level the right of local or regional authorities to engage in transfrontier cooperation on the one hand, and to set-up the basic rules under which this transfrontier cooperation could be developed on the other. Unfortunately, and again due to State resistance - mostly France and Italy - it fell short of these two goals. Therefore the legal value of this international Convention is almost inexistent. Answering to a survey conducted by the Council of Europe Secretary General in 1992, the 15 States that had by then ratified this Convention admitted that in practice it was never used in the existing transfrontier relations. On the other hand, the political significance of this international Convention should in no case be underestimated. It represents the recognition by national States that transfrontier cooperation is an existing fact of European relations, and even though the text does not offer applicable legal rules to this type of relations, its mere existence justify the fact that local or regional elected representative undertake actions to deal at their own level with transfrontier issues.

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<sup>18</sup> For a detailed analysis of this Convention and on the difficult conditions of its adoption, see DECAUX, in *Revue Générale de Droit International Public*, 1984, pp. 538-620.

The next step in favor of transfrontier cooperation reached within the framework of the Council of Europe is the 1985 *European Charter of Local Self-government*. This convention sets out in 10 articles, the basic principles that should be the minimal standard for European countries to have a genuine local democracy. It has been shown above that one of the difficulties for developing proper transfrontier relations was the existing discrepancy between local authorities on either side of an international border. Without aiming at uniformizing the forms of local government, this Convention favors the development of more coherent structures in different European Countries<sup>19</sup>, and therefore facilitate relations between these different local authorities. Even more important however, is the mention in this Convention of the right of local authorities to undertake transfrontier cooperation with partners located across the border<sup>20</sup>. Thus this Convention reaches one of the major aim that the Outline-Convention on Transfrontier Co-operation had failed to meet.

For the other aim, that is providing basic legal rules under which transfrontier cooperation could operate, another ten years will have to pass before seeing a European solution being devised. It is only in November 1995 that an *Additional Protocol to the Outline-Convention on Transfrontier Co-operation* has been open for the signature of member States of the Council of Europe. Due to its very recent coming into existence, this additional Protocol is not yet into force. It includes however interesting legal solutions that should allow serious development in the institutionalization of transfrontier relations in the coming years. Without entering into the subtleties and the details of the legal solution, let's note that apart from formally recognizing the right of local or regional authorities to enter into transfrontier cooperation agreement (which was already achieved by the 1985 Charter examined above) it allows local or regional authorities to create permanent structures of cooperation under the form of "joint body", a unique structure that would have a dual legal existence within the legal system of each of the concerned State. Even if this solution may seem complicated in practice, it is legally an acceptable solution and should allow to solve many problems currently encountered by local or regional authorities engaged in regular transfrontier cooperation activities.

This solution is not entirely new, since it is based on existing regional Convention which have

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<sup>19</sup> That has been particularly evident since 1989 where the European Charter on Local Self-Government has been widely used in Countries of Central and Eastern Europe to build-up local government structures. See on this issue, LEVRAT, *The importance of the European Charter of Local and Regional Self-government in Countries from Central and Eastern Europe where it has not been ratified*, Paper presented at the Ministerial Conference for the 10th anniversary of the signing of the European Charter of Local Self-government, held in Copenhagen on 16-17 April 1996 (text to be shortly published at the Council of Europe edition, Strasbourg).

<sup>20</sup> Article 10 § 3 of this Charter reads as follows: "Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States."

been concluded on the matter of transfrontier cooperation; in 1986 between the 3 Benelux Countries<sup>21</sup> and in 1993 between Germany and the Netherlands<sup>22</sup>. These regional Conventions were only made possible by the existence of the Outline-Convention of the Council of Europe; that fact again underlines the political importance of this document. Such Conventions between a limited number of States are very useful, because they allow much more detailed and precise solutions, taking into account the institutional realities of the contracting States with much more accuracy than Conventions at the European level, which have to propose only general solutions acceptable to all States. It is therefore likely that such Conventions will continue to be signed by neighboring States in Europe<sup>23</sup>.

Further to these existing instruments, other Conventional texts are being prepared within the framework of the Council of Europe. These include a *Draft Convention on Inter-territorial cooperation*, aiming at regulating the relations between local or regional authorities which are not in neighborhood relations, but into "long-distance" relations. This text was adopted in 1992 by the CLRAE, but so far the member States of the Council of Europe have refused to turn it into a proper Convention. Another project is a *Draft European Charter on Regional Self-government*, whose first version has been adopted by CLRAE in early July 1996; this text includes 3 articles relating to the matter; one on transfrontier relations and transfrontier organs (article 10); another on inter-regional relations (article 9); and one on the rights of regions to have permanent representations abroad (article 11).

From all these different legal instruments, it can be seen that the Council of Europe has played a leading role in the development of transfrontier cooperation in Europe, by providing it with a political legitimacy at a first stage (1980), and today with legal tools for its future development (from 1995 onwards). However, the Council of Europe, apart from clarifying the legal framework for transfrontier cooperation, has not developed any incitative for local or regional authorities to engage into transfrontier cooperation. That has been done by the European Community.

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<sup>21</sup> *Benelux Convention on Transfrontier Cooperation* signed in September 1986 in Brussels between Belgium, Luxembourg and The Netherlands. However this Convention entered into force only in April 1991.

<sup>22</sup> *Convention on Transfrontier Cooperation between local authorities and other public bodies*, concluded in May 1993 between The Federal Republic of Germany, The *Länder* of Lower-Saxony and Rhine-Westphalia on the one hand, The Kingdom of the Netherlands on the other. As regard the proposed legal solutions, this Convention is the one which offers the most interesting mechanisms of all the existing Conventions to this day.

<sup>23</sup> For example was concluded in April 1996 in Karlsruhe a Convention for Transfrontier-Cooperation between France, Germany, Luxembourg and Switzerland.



## *b) The European Community*

Local and Regional authorities having missed a direct representation within the European Community structures until 1994<sup>24</sup>, this institutions has been less encouraged to tackle the issue of transfrontier cooperation and has devised specific instruments at a much later stage. However, some tools have been developed recently. They have to be separated in two distinct categories. The first concerns programs of financial incentives for local or regional authorities engaging in transfrontier cooperation activities (i) and the second some legal instrument of Community law that can be used by local or regional authorities to develop their transfrontier relations (ii).

### *i) Incentive policies*

The European Community has since 1975 developed a specific regional policy. This policy was however mostly based on national definitions of regional policies, being additionally subsidized from Brussels through European funding. A *European Fund for Regional Development* was the main tool for this regional policy. Under Article 10 of the Regulation of this European Fund, the European Commission could reserve a very small proportion of the funding (no more than 1%) to innovative regional projects, which did not necessarily entered into national regional policies. This has been used at homeopathic dose by the European Commission to promote a few pilot projects of transfrontier cooperation. From these disparate examples however, one could not conclude that existed a European policy to promote transfrontier cooperation. It has to be underlined however that the structural funding of the European Union is undergoing major changes, and that since 1999, its attribution will be negotiated on a partnership basis between the Commission, Members States and Local and Regional Representatives. This may allow for substantial contribution to transfrontier regional policies, if the partners so wish (the regional policy of the European Union makes use of about 1/3 of the global European budget, that represents for example in the 1994-1999 period an amount of more than 150 billions EMU).

The other very important initiative launched by the Commission to specifically support transfrontier projects at regional level along the borders or Europe, is the INTERREG

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<sup>24</sup> The *Treaty on European Union* (usually Known as the *Maastricht Treaty*) which entered into force in 1993 provides for the creation of a *Committee of the Regions* (articles 4 and 198 A,B,C); time to set up the structure and agreeing on the designation procedure of the representatives - which contrary to what the name of the Institution may lead to believe include a large representation of local elected representatives - led to this Committe being operationnal in 1994 only.

Program. Created by a Council Regulation of 1988<sup>25</sup>, this program is aiming at supporting genuine transfrontier cooperation activities. For this reason, money would not be channelled through national administration, nor to each regional structure on either side of the border, but to real transfrontier structures. The noble aim of this program unfortunately does not take into consideration the existing legal difficulties which make it impossible for such "pure" transfrontier structure to have a legal existence, and therefore to apply validly to receive the Commission funding. In order not to waste the reserved sums of money attributed to this program, some flexibility has been accepted in the attribution of grants, eventually leading to the conclusion of the 1995 Report of the Court of Auditors of the European Union that no part of the money from the INTERREG Program has been attributed according to the specified regulation creating the INTERREG Program<sup>26</sup>. For the very simple reason that no legal structure meeting the criteria set by the Council Regulation can be created, nobody really knowing how to find a proper legal solution. Even the latest progress regarding applicable law within the framework of the Council of Europe that we have seen above still fall short of the aim of the INTERREG Program. This shows the extent of the legal difficulties still laying ahead.

Apart from this formal problem - even though one must admit it is a very serious one - the INTERREG Program is a success in fostering development of new transfrontier projects, and it has been reconducted for the 1994-1999 period (as INTERREG II) with increased funding and with specific possibilities for regional authorities of Countries which are not EU Members, to participate in the program, provided appropriate funding come from their side<sup>27</sup>. This shows that whatever the size of the formal and legal difficulties encountered by the setting-up of appropriate mechanisms to regulate transfrontier cooperation, initiatives by regional (or local) partners located on both side of an international border can succeed, and even receive support - and therefore approval - from European Institutions and their Member States.

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<sup>25</sup> Council Regulation No 2052/88 of 24 June 1988, *Official Journal*, No 185/9, 15. 7. 88.

<sup>26</sup> *Le Soir*, (Brussels) 5 November 1995, p. 1.

<sup>27</sup> For the Countries of Central Europe, it has been foreseen that the PHARE Programme of the EU can finance transfrontier projects on the side of the Central European Country, on pair with the financing of the Region of the EU Member State under the INTERREG programme. In Switzerland, the Swiss Parliament has voted a grant that available as a matching grant for Swiss cantons that would enter into a transfrontier cooperation project with the EU partners being financed under the INTERREG Programme.

## ii) Legal solutions

Community law is a very special legal animal, not answering to the rules of international law - even though many aspects and some bits of it are regulated by international law - nor by these of a national law, since Europe is not a Nation State. In theory - and hopefully one day in practice - it is the ideal level to develop rules applicable to transfrontier cooperation. There could be rules that are not strictly speaking part of international law - otherwise as has been shown above, Nation-State fear a loss of Sovereignty and that their international responsibility may be engaged on the one side, and local or regional authorities cannot access it on the other - but which would be a common law for all the local or regional public actors involved. It would furthermore be neutral, since it would not be the national law of either of the parties to the transfrontier relation.

Contrary to the Council of Europe approach, the European Commission - which is the only organ of the European Community structure allowed to propose new projects for Community legislation - has never tried to develop specific rules for dealing with transfrontier cooperation. Two Community legal instruments developed for other purpose may nevertheless be used by local or regional authorities to give a legal framework to their transfrontier cooperation activities.

The first one is the *European Grouping of Economic Interests*, which is a mechanisms that allows economic actors working in similar fields in different European countries to join part of their activities under a single European structure, this GEIE (the acronym comes from the French abbreviation). The conditions for creating such a structure are fairly simple, the only major limitation being that the economic interests put together by the partners should not represent the main economic activity of the partners, but only side activities. This solution, if it allows to give a legal framework to some cooperation projects presents nevertheless two serious shortcomings. First, being an instrument of private law, there are many activities in which local or regional authorities would like to cooperate that can simply not be dealt with under private law. Such is for example the case of all activities linked to territorial planning. The second limitation is that the local authorities have, in order to use such a mechanism, to be considered solely as economic entities, which is a serious reduction compare to their real nature. We have seen that one of the reason for developing transfrontier cooperation is linked to the subsidiarity principle, considering that local matters are better dealt with by local authorities located as close as possible from the citizens and taxpayers. Reducing local or regional authorities to economic actors deprives them of their political significance. Therefore this solution, even though technically suitable in a limited number of cases, is not a sufficient legal framework for allowing a serious development of transfrontier activities by public

authorities.

More recently, a regulation concerning *European Grouping of Public Interests* has been adopted. It mostly aims at allowing large public firms to answer jointly to tenders related to public work on a basis of equal competition at the European level. Again, the mechanism can be used by local or regional authorities for their joint transfrontier projects, and one of the above mentioned limitation can be avoided, since this regulation specifically considers matters of public interest. However to fit in its mold, local and regional elected representatives still have to consider themselves as economic actors exclusively, and not as representatives of the interests of the people that elected them.

As we have suggested at the beginning of this paragraph, European law would still be the ideal place to develop a European regulation for transfrontier cooperation. Without entering into the complex details that would have to be worked out, it should be possible:

- to define the type of actors that are allowed to enter into transfrontier cooperation agreements;
- the rules for entering validly into a transfrontier agreement;
- the rules according to which such agreements should be implemented;
- the rules regarding responsibility of the parties in case of non-compliance with the agreement;
- the legal remedies available in case of a dispute.

The author is not aware of any project of such regulation being worked upon at the European level at the present time, but such a Regulation would be very sensible and one can believe it is only a matter of time until such a regulation will appear.

## **II. Scope for future development of Transfrontier cooperation**

We have seen in the first part of this paper that transfrontier cooperation has evolved in some 30 years from a marginal phenomenon at the periphery of European States, to an issue of European concern. This however represents only a modest part of the full potential of this phenomenon. It could become a major development of the European integration process and participate in the reshaping of the European territory by allowing local and regional authorities to directly work together all through Europe, giving truly new dimensions to the European continent. We shall briefly examine these potentiality and their meaning in the second part of this paper.

## 1. On the significance of frontiers in Europe

More than any other continent on the globe, Europe wears the scars of history along the numerous lines running on its political maps. Borders are the results of centuries of fighting, rearrangement of alliances, exchanges of territories, political compromises and other human inventions, rather than the product of natural or logical causes. They are therefore less absolute than one may think and many European territories have throughout the course of history been considered, as a single entity at one time, split by a frontier at others<sup>28</sup>. Links developed at one period in a territory politically, economically and legally homogeneous may find themselves part of a transfrontier relation some years later<sup>29</sup>. European frontiers thus appear as divisions of the continent that do not necessarily match other important demarcation such as linguistic frontiers, belonging to a common river basin, common cultural heritage, religious appartenance or traditional economic links between towns and their *hinterland*. The same natural frontiers can at different period be considered as clear landmarks separating distinct territories, or as common characteristic of a region which is articulated around this same "natural frontier". Thus the Rhine River has at time symbolized the frontier between European Countries where military confrontation was building up. At other time, the economic link it could create between populations located on both sides or on its upper and lower course was stressed, allowing easy transportation of goods. The same is interestingly true for mountain chains, and many of the transfrontier projects have developed along mountainous area<sup>30</sup>. Therefore, many traditional links between population groups are not being altered at the same pace as the

<sup>28</sup> REISMAN and SUZUKI wrote in 1981: "If one indicated in heavy lines on a Mercator's projection the political boundaries of states, stacked these maps at ten years interval, and then flipped through them quickly, the cinematographic effect would produce lines of almost erotic sensuality." in *International Law Essays: A Supplement to International Law in Contemporary Perspective*, New-York, The Foundations Press Inc., p. 464.

<sup>29</sup> Recently in Europe, new frontiers have been created; thus relations between Baltic towns that were before all included within the Soviet Union now are transfrontier relations; this is equally true for relations between Czech and Slovak local economic partners whose relations have very often been maintained, even though now in a transnational framework. Within former Yugoslavia also existed networks of partner towns or common economic projects for regions that are now split among different countries. More ancient is the situation along the Rhine River, where the effects of the facts that territories have been moved from one sovereignty to the other between France and Germany can still be felt.

<sup>30</sup> Transfrontier institutions exist along the Alps (such as COTRAO, *working Community of Western Alps*, encompassing two French regions, Three Swiss cantons and two Italian regions; ARGE-ALP *Working Community of the Central Alpine Region* encompassing one German Land, 4 Swiss canton and 2 Italian regions, ALP-ADRIA, encompassing one German Land, 1 Swiss canton, 2 Austrian Länder, 2 Italian regions and two regions of former Yugoslavia (Slovenia and Croatia) - which even though they have become States recognized under international law and could therefore enter into proper international agreements, are still interested to work within this mechanism -), the Pyrénées (*Working Community of the Pyrénées*, encompassing 3 Spanish regions, 2 French Regions and Andorre (a State under international law)), the Jura Mountains (*Working Community of the Jura*, regrouping 2 French Regions and 5 Swiss Cantons), the Carpathian Mountains (*Carpathian Euroregion*, encompassing "regions" - even though sometimes regions in the political sense do not exist in these countries from Hungary, Poland, Slovakia and Ukraine).

political frontiers move, creating or maintaining a multiplicity of transfrontier situations.

A second characteristic feature of Europe in this matter is the great number of international borders existing compared to the size of the territory. The density of frontiers in Europe is unequaled. Furthermore the density of population is important, making it very difficult to draw frontiers in non- or scarcely populated areas. Populations bordering international frontiers not only do suffer from a frontier effect, but are often far from the economic and political center of the Nation-State they are attached to; therefore direct links with partners located across the border - and in a same relation with their distant national center - can prove much more fruitful and interesting.

The significance of international borders is also rapidly evolving in Europe, mostly due to two important political developments. One is the building of a single market within the European Union, generating two types of international borders; the internal frontiers - frontiers between Members States of the European Union - and external frontiers - borders between a member State of EU and one non-Member State. The lowering of the significance of international borders has opened many more concrete possibilities of transfrontier activities for private economic actors than for public authorities, thus creating an unbalanced situation between these two sectors. The economic borders have almost vanished inside the single market - due to the four liberties, free circulation of goods, people (=workers), services and capital - while borders remain significant between legal and political systems. If public authorities want to still have a say in the conduct of matters in Europe, it is important that this gap between the possibilities of private and public actors be reduced. The other alternative would be a single powerful government in Brussels, concentrating the representation of all the public interest in Europe. Either of these solution seems frightful, and this is one of the main reason why transfrontier cooperation is today an issue with high political stakes.

The second significant development as regard borders in Europe is the disappearance of a single frontier that was cutting Europe in two pieces, that is "the fall of the iron curtain". It makes European territory of a much greater dimension and, if not *per se* changing the significance of other frontiers in Europe, it renders the potentiality of a European single market event more interesting for private economic actors. In this context the two trends we have just described above - public authorities without any real power compared to private economic actors, or a strong centralized government in Brussels - appears as even less palatable.

Nationalists throughout Europe may also seem to have such discourse, refusing more European Integration in order to preserve national interests, Nation-States; all this with all the dangerous consequences that the last two centuries of European history have shown to be

attached to nationalism. Transfrontier cooperation however also seems very distant from strong nationalism, since it pleads for the opening of borders, through direct cooperation between public actors at lower level. Therefore the development of transfrontier cooperation projects may be an important feature of the furthering of European integration, while keeping a measure of balance between seemingly contradictory interests of different sectors of the European society.

## **2. Seeking new dimensions in Europe**

Europe is not a static situation. It has for now almost fifty years been a project, which has allowed amazing results in terms of economic growth and political imagination. To continue to exist, it needs to move forward, and one of the topical issue in this matter is whether to strengthen and deepen the existing results of European integration, or to enlarge the European Union geographically, to new members States, more specifically in Central and Eastern Europe. The latter choice seems to carry along such a burden of economic constraints to new an present members of such an enlarged European Union that they would probably impeach for a long time any further strengthening of the integration process, or even force European integration process to make some steps backward.

The present paper will unfortunately not propose solutions to this dilemma, but I would like to suggest that there are also other dimensions of the European integration process that are worth considering in the coming years. The integration process has been focusing on economic targets, and the creation of the single Market is a major achievement; the acceptance of a single currency in all European countries will complete the process of economic integration. Naturally, all the problems linked with the single currency are far from being solved and I shall not try to read the future, but one has to admit that all the conceptual tools do exist for the realization of this full economic integration. On the other hand as regard political building-up of Europe, things have been lagging behind. As is pointed out above, the full economic integration should be accompanied by a large measure of political innovation, in order to allow public authorities to be able to deal efficiently with the social demand linked to the existence of an economically integrated Europe.

This political integration process has naturally started, but it is having difficult time. One of the obvious finding made during the ratification process of the Maastricht treaty; during which some countries consulted their citizens, is that citizens feel that the building of Europe suffers from a lack of democracy. The saying is that the European bureaucracy in Brussels is too far from the citizens, and operates a sort of a huge "kafkaian" structure in which absurd but all

powerful decisions are taken very far from the citizens, according to a logic not very well understood. The reality is in fact quite far from this perception. The administration in Brussels is rather sleek compared to its tasks and for example national administrations are of much larger size. Furthermore the real power is not in the hand of this administration, but still to a large extent concentrated in the hand of the Governments of the Nation States. The European Parliament does not seem, at least at the present stage, as a democratic institution close from the European citizens, and the hope some have put in the Committee of Regions to reduce the democratic deficit also seems exaggerated.

From a purely logical point of view, one may wonder if it is really in Brussels that it is proper to look for finding a solution to this democratic problem of the actual European structure of power. Maybe it would make sense to show disillusioned citizens that the political benefit of European integration also exist much closer from where they live, and that the strengthening of European political integration could be done, not by adding new institutions in Brussels, but by giving the power to public authorities located close to the citizens, as the principle of subsidiarity proposes<sup>31</sup>, to be part of the political integration of Europe. And in that respect, transfrontier cooperation appears as a powerful and far reaching field to develop such a new form of European integration.

As a young student, I was once amazed at the idea put forward by a physic professor that, at least in theory, when you have a line drawn on paper, you could go as far towards infinity by expanding this line at either end - or at both at the same time - (and provided your "piece of paper" has no physical limit), as you could by splitting the line in two, and always keeping splitting all the pieces you have - provided you have the technical tools to split extremely small bits. This would mean than when you look for extending what you have, you do not always need to look outside; the field for potential extension may be within what you already have.

In the particular case of European integration, this may mean that furthering the integration process may be done not only by extending the geographic limits of the European Union or by transferring more power to Brussels institutions, but maybe also by making full use of the new significance of borders in contemporary Europe. In other words to give the means to those democratically elected representatives located as close as possible from the citizens to enjoy all

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<sup>31</sup> There are presently two mentions of the subsidiarity principles in European instruments. One is the much discussed reference to this principle in Article 3 of the Maastricht Treaty; the principle is however not defined in this case and, according to the wording of this article, would only apply in relations between the European Community and its Member States. The other mention is less famous, but it proposes a definition of subsidiarity which reads as follows: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy. " This is the text of Article 4 § 3 of the *European Charter of Local Self-government*.



the potentialities of a greater European integration. Developing transfrontier cooperation in this respect may lead to discover new dimensions in Europe.

One may probably think reading these last paragraphs that this is only a scholar dream or, depending of one's own vision of Europe, even a scholar nightmare. It must however be noted that the Committee of the Region in his opinion concerning the current revision process of the Maastricht Treaty proposes, that *"to reinforce social and economic cohesion, the Treaty should promote transfrontier and inter-territorial cooperation and [The Committee of the Regions] suggest to add at the second paragraph of the EC Treaty the following sentence: "and to encourage, through its [it refers to the European Union] activities, transfrontier and inter-territorial cooperation of local and regional authorities."*<sup>32</sup>

If this was to be accepted, that would make transfrontier cooperation one of the fundamental aim of the European Union. It would make sense.

Nicolas LEVRAT/13-7-96.

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<sup>32</sup> Opinion 136/95 of the Committee of the Region, paragraph 11.