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Cross-border cooperation: Right or privilege?, by Loth Van der Auwermeulen

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Introduction

The phenomenon of cross-border cooperation is today a regularly described and studied topic within the broad field of humanities. Within the legal sciences, this form of cooperation also receives due attention. The study of this topic is far from over. Cooperation across national borders, both in theory and in practice, does not appear to be a simple exercise. One of the reasons for this is that today there is still a lot of uncertainty about the possibilities that cross-border cooperation creates. For example, during the COVID-19 pandemic, it became clear that there was a lot of ambiguity about cross-border cooperation, leaving its potential largely underused. (GONTARIUK, KRAFFT, REHBOCK, TOWNED, VAN DER AUWERMEULEN, & PILOT). For now, cross-border cooperation is a legal jungle and an administrative quagmire, as a practitioner aptly expressed his experience of cross-border cooperation exercises. This contribution briefly discusses the right of local actors to enter into such cross-border partnerships.

Cross-Border Cooperation: A Tool That Comes In Various Forms

Before analysing the right to cross-border cooperation, a brief explanation of the broad concept of cross-border cooperation is useful.

The social challenges faced by local actors today are big. The presence or proximity of a border often poses an additional challenge. Moreover, local challenges do not stop at the border. In the context of an increase in societal challenges that are often compounded by the proximity of a border, numerous cross-

extending across one or more national borders, located close to a national border or just further away from the border, or between local cooperation partners of the same or different levels of competence. Because of this diversity, there is no single comprehensive definition of what cross-border cooperation is.

Cross-Border Cooperation: A Multi-Layered Modular Regulatory Framework

Although cross-border cooperation has been established in practice for a long time, their regulation is a rather recent phenomenon. Starting from the observation that existing cooperation was in a situation of legal uncertainty, the Council of Europe took the regulatory lead concerning cross-border cooperation. After a long and difficult negotiation phase, the European Outline Convention of Madrid was signed on 21 May 1980. This Outline Convention was the first component of the current regulatory framework on cross-border cooperation. Since it entered into force on 22 December 1981, the regulatory framework on cross-border cooperation has expanded considerably at various levels of competence, resulting in a multi-layered regulatory framework. A feature of this multi-layered regulatory framework is its modular nature. Each of the regulatory instruments leave open the possibility of regulating cross-border cooperation at a different level of competence. The Outline Convention of Madrid provides in this regard that *"[…] shall not prevent the Contracting Parties from having recourse, by common consent, to other forms of transfrontier cooperation. Similarly, the provisions of this Convention should not be interpreted as invalidating existing agreements on cooperation.*" (art. 3.3 Madrid Outline Convention). In 2006, the European Union exploited this opportunity. The regulatory framework emanating from the European Union, consisting of the EGTC (European Grouping of Territorial Cooperation) Regulation, builds on the European Outline Convention of Madrid and is without prejudice to its application. *"The Council of Europe acquis provides different opportunities and frameworks within which regional and local authorities can cooperate across borders. This instrument is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community.*" With this Regulation, the European Union provides a legal framework for cross-border cooperation based on one of its specific objectives, namely economic, social, and territorial cohesion (Art. 175 TFEU). Both the European Outline Convention of Madrid and the EGTC Regulation assume a level of competence with a broad territorial scope. 38 of the 46 Member States of the Council of Europe ratified the initial text of the European Outline Convention of Madrid and the European Union, through the EGTC Regulation, directly addresses the legal order of its 27 Member States. As mentioned, these instruments leave room for additional 'regulatory modules' of a more limited scope. Local actors can thus opt for the regulatory instrument best suited to their specific cooperation needs. The scope of *ratione personae* constitutes a preliminary restriction on this local freedom of choice. For example, Flemish local governments can also apply the Benelux Treaty on cross-border and inter-territorial cooperation.

Because of the wide scope *ratione loci* of the European Outline Convention of Madrid and the EGTC Regulation, this contribution mainly focuses on these instruments and does not consider the instruments initiated at a smaller scale, or a bilateral or multilateral level.

As mentioned, the Council of Europe wanted to remedy the legally uncertain situation in which cross-border alliances might find themselves in the absence of a regulatory framework. The EGTC Regulation equally starts from the premise of remedying the legal uncertainty under existing cooperative arrangements. It is striking that neither the Council of Europe nor the European Union, question the legal validity of cooperative arrangements organised outside a specific legal framework on cross-border cooperation. Indeed, they leave open the possibility of organising cooperative arrangements outside the regulatory framework. In other words, they both start from the assumption that cross-border cooperation is a right. The Council of Europe again explicitly confirmed this right in the Convention on Local Self-Government, which states that *"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."* (Art. 10, 3 European Charter of Local Self-Government)

The 'Right' To Cross-Border Cooperation

The recognition of the right to cross-border cooperation is therefore in line with the principle of local autonomy, which the Council of Europe has conceived as the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their responsibility and in the interests of the local population (Art. 3, 1 Charter of Local Self-government). Moreover, the assumption of a right to cross-border cooperation may also be in line with national legal bases for cooperation across local borders. These too may be grafted on the idea of local autonomy. Concerning the Flemish local governments, for example, the right to interlocal cooperation is a constitutionally safeguarded right on which only relative limitations, considering local autonomy, are possible. Similarly, the Dutch system of interlocal cooperation starts from the autonomy of the cooperating actors.

However, an analysis of both the European Outline Convention of Madrid and the EGTC Regulation quickly shows that these regulatory instruments significantly restrict local autonomy. Both instruments put forward Member States/central governments as key players in the creation of cross-border cooperation. The Framework Agreement does this by placing responsibility for defining the possibility of cross-border cooperation in central hands. This responsibility is by no means a commitment to results. "*Each Contracting Party shall endeavour to resolve any legal, administrative or technical difficulties liable to hamper the development and smooth running of transfrontier co-operation and shall consult with the other Contracting Party or Parties concerned to the extent required.*" (Art. 4 European Outline Convention Madrid). The power of appreciation on behalf of the states here is unlimited. In other words, it lacks direct effect in this area. Thus, although the Madrid Outline Convention has been a major step in the regulatory process on cross-border cooperation and has put the possibility of imposing interlocal cooperation even across national borders on the radar of many central governments, it does not create an effective right to cross-border cooperation.

effective right to cross-border cooperation. As regards the cooperation agreements between the actors

involved, the EGTC Regulation contains the resolutive condition of approval by the central authorities under whose authority the cooperating actors fall. Although implicit approval occurs after three months in the absence of explicit approval, it is difficult to speak of a right to cross-border cooperation under the EGTC Regulation as well. Indeed, central authorities again have a wide appreciation margin when assessing a bottom-up application for cross-border cooperation: they can refuse such applications *"taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State"* (Art. 4.3 EGTC Regulation). The EGTC Regulation thus recognises a right to initiate cross-border cooperation but by no means an effective right to cross-border cooperation.

These two legal instruments both claim the right to cross-border cooperation as their *ratio legis*. Yet a cursory analysis reveals that both the Council of Europe and the European Union have installed only a privilege to cross-border cooperation for the time being. Cross-border cooperation is possible for local actors to whom this not generally applicable 'right' is granted by the central government. Indeed, both the European Outline Convention of Madrid and the EGTC Regulation push the central government forward as key players in the establishment of cross-border cooperation. As a result, they rather create a privilege for cross-border cooperation.

From Intended Right To Actual Privilege

Why a discrepancy between the *ratio legis* and the effective effect? Why is the intended right essentially a privilege? It is difficult to answer this with certainty. However, from the perspective of administrative law, which applies to the formation of cross-border cooperation, it is possible to attempt to identify some reasons. Administrative law, despite the evolution it is undergoing today, is a legal discipline that is strongly modelled on national traditions and, according to many, even intertwined with the state. The so-called territoriality principle means that providing a supranational regulatory framework within the context of administrative law is usually accompanied by a thorough protection of national tradition and interests regarding the concerned matter.

The more traditions that need to be united at the drawing board of regulatory instruments, the greater the likelihood of cross-border cooperation being considered a privilege. The presence of many administrative law traditions makes it more difficult to identify common grounds for cooperation across national borders. From a legal perspective, the creation of a right to cross-border cooperation is certainly possible. The principle of local autonomy, guaranteed by the Charter of Local Self-Government, is the primary legal basis for this. However, this principle does not, for the time being, appear to have penetrated sufficiently into the national legal orders that contributed to setting the course of the European Outline Convention of Madrid and the EGTC Regulation. Nevertheless, an effective right to cross-border cooperation could

The 'right' to cross-border cooperation does not seem to be on the agenda for tomorrow, but it is conceivable in the future. After all, even within administrative law, there is a growing awareness that sticking to national traditions is not always the best oil for the regulatory engine at the supranational level.

Cross-Border Cooperation: Multilateral Living Labs As A Possible Incentive For An Extension?

Where states can find each other based on common ground within their administrative law traditions, a right to cross-border cooperation needs no longer be a legal fiction. One example is the aforementioned Benelux Treaty Concerning Cross-border and Interlocal Cooperation. Within the more territorially limited scale of the Benelux, a right to cross-border cooperation was installed through this treaty. This treaty does not include the need for prior approval of the central government.

In other words, the issue of the right to cross-border cooperation, once again, makes it clear that the legal formation of administrative law at the supranational level is a story of politics, policy, and especially of national administrative law traditions. A story of legal possibility and political desirability, a story of rights and privileges.

Posted by Loth Van der Auwermeulen, Hasselt University

Loth Van der Auwermeulen is a PhD researcher in the field of administrative law. Her research concerns cross-border cooperation by local actors. More specifically, she focuses on the interaction between international, transnational, national and subnational law when it comes to regulating cross-border cooperation. Flemish local governments are the starting point of her research.

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