

5. Capacity development, horizontal subsidiarity and mutual recognition as basic operating principles

5.1 *The practical challenges of cross-border governance – a need for capacity building*

The horizontal analysis of the contributions of a joint research project with the title "Living and Researching Crossborder-Cooperation", carried out by the Euro-Institute and the University of Strasbourg with more than 100 contributions coming from both the academic field and from practitioners of cross-border cooperation²³¹ allowed to identify two generalized patterns of cross-border-policy-making in Europe. One first conclusion that we were able to formulate on this basis²³² is the hypothesis of a certain *convergence* with regards to the practical functioning of cross-border cooperation in Europe. This convergence is mainly caused by the procedural logic of the financial promotion programmes of the European Commission with regards to the ETC objective ("Interreg") leading to more or less unified practices regarding the implementation of elements like the partnership-principle, the principle of additionality, multi-annual programming based on SWOT-analysis, project-based policy-making, project-calls, financial control etc. As a consequence we can observe, during the last two decades , a general pattern of CBC policy-making that is characterized by a shift from informal exchanges to more concrete projects, from general planning to attempts for a more concrete policy- implementation, from rather symbolic to real world action, from closed informal networks to more transparent and official institutions.

In addition the role and the perception of the very concept of the border has changed considerably: the separating function is less important today but more and more replaced by an integrated 360° perception of the cross-border territory and its unused potentials. At this level it is not so much the impact of the European programmes and their sometimes a bit too ambitious objectives as such, but rather the change in the perception of the local and regional actors themselves, which after years of

231 Wassenberg 2010; Wassenberg/Beck 2011a, 2011b, 2011c; Beck/Wassenberg 2012a, 2012b

232 Beck 2012a

sometimes frustrating experiences, leads to a certain positive pragmatism when it comes to cross-border issues: it becomes more and more evident that cross-border institutions today are more platforms than real administrative units, allowing for the very pragmatic search for joint solutions to common local problems resulting from the increasing border-crossing socioeconomic dynamics²³³, in areas such as transportation, spatial planning, environmental protection, risk prevention, citizens advice and health cooperation, etc. rather than for the definition and implementation of big strategic ambitions.

The research project has on the other hand allowed to identify a second general pattern, which is represented by *seven central challenges* of *CBC policy-making*, determining and often still hindering – however with differences regarding their intensity and combination – the horizontal interaction in cross-border territories everywhere in Europe²³⁴:

- Developing functional equivalences between different politico-administrative systems: How to develop functional interfaces that allow for successful cooperation between partners coming from different institutional domestic backgrounds with regards to distribution of power and resources, professional profiles and sometimes even the scope and the legitimacy for transnational action as such²³⁵?
- Creating effective knowledge-management for the cross-border territory: How to generate and use valid information about the characteristics, the real world problems, but also the potentialities of a cross-border territory in a 360° perspective, how to base future action on a sound and integrated empirical basis and thus avoiding a negative "garbage can model"²³⁶ practice of cross-border policy making (ad hoc solutions developed by individual actors, based on individual preferences in search for an ex post justification and a real world problem).
- Transferring competencies from principals to agents: How to reduce the dependency of cross-border actors and policy-making on the respective domestic context by identifying fields of cross-border action that best can be implemented by a transfer of real administrative and functional competence from the national jurisdictions towards cross-border

233 Beck/Thevenet/Wetzel 2009

234 Beck 2014; Casteigts 2010; Chilla 2015; De Sousa 2012; Harguindéguy/Sánchez-Sánchez 2017

235 Beck 2008

236 Cohen/March/Olsen 1972

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bodies with sufficient administrative, financial personnel capacity and how to design decision-processes in this regard²³⁷?

- Optimizing the interaction between actors: How to turn the confrontation of different cultures, attitudes, expectations, assumptions, values, interests etc into a productive working context, which allows for the avoidance of mutual blockages and the development of innovation and real added-values instead²³⁸; how to integrate actors representing different sectors (public, private, societal) and cultures into existing patterns and structures of cooperation, how to create and manage inter-sectoral synergies in a cross-border perspective²³⁹?
- Finding the right level of organisation and legal structure: How to find the right degree of institutionalization and the right legal form for different cross-border tasks by developing a good balance between open network and classical organizational approaches when structuring the cross-border working context; how to avoid both the case of institutional sclerosis and informal/individual arbitrariness²⁴⁰?
- Capturing and measuring the value added and the territorial impacts: How to pre-assess cross-border impacts of different policy-options before taking action on the preferred one; how to develop and inform specific indicators allowing for a better demonstration of the specific value added of the integrated cross-border action compared to an action taken by the neighbouring jurisdictions separately²⁴¹?
- Increasing the sustainability beyond a simple multi-project approach: How to avoid the case of multiple uncoordinated sectoral projects which creates fragmented cross-border activity for a certain time (funding) period only, by strengthening the target-orientation and selectiveness of cross-border policy-development based on integrated (eg. inter-sectoral) territorial development strategies²⁴².

It is evident, that the seven challenges cited above are at the same time the central fields for any capacity-building approach responding to the needs of a future multi-level-governance perspective of cross-border cooperation²⁴³. This includes not only the question of how individual actors or

237 Benz/Scharpf/Zintl 1992

238 Demorgan 2005; Eisenberg 2007; Euro-Institut 2007

239 Beck/Pradier 2011

240 Beck 1997

241 Tailon/Beck/Rihm 2011

242 Casteigts 2010

243 Scharpf 1994; Beck/Pradier 2011; Jansen/Schubert 1995; Nagelschmidt 2005; Beck/Wassenberg 2011

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members of institutions can be better trained in order to cope with these challenges. Rather the overall systemic question is on the agenda, e.g. how the entire cross-border cooperation-system can be improved and professionalized in order to reach a new level of quality which allows for a better development of the endogenous potentials of this type of territory within the context of the overall objective of territorial cohesion in Europe²⁴⁴.

It is amazing to see, how the well known and very basic definition of the concept of "capacity-building", developed by the UNDP within a rather different context, can inspire such a reflexion on the future of cross-border policy-making in Europe. According to UNDP (2006), capacity-building or capacity-development "...encompasses ... human, scientific, technological, organizational, institutional and resource capabilities. A fundamental goal of capacity-building is to enhance the ability to evaluate and address the crucial questions related to policy choices and modes of implementation among development options, based on an understanding of environment potentials and limits and of needs perceived by the people of the country concerned "²⁴⁵. Accordingly, capacity-building has to cover three levels : a.) the creation of an enabling environment with appropriate policy and legal frameworks, b.) institutional development, including community participation and c.) human resources development and strengthening of managerial systems.

As these three elements refer directly to the seven challenges of cross-border cooperation identified above it seems promising to better exploit the concept of capacity-building within the context of cross-border cooperation in Europe.

5.2 Training and facilitation as basis of capacity building in a cross-border context – The Euro-Institut approach

Border regions everywhere have specific characteristics. A wide range of social and economic phenomena have a 'border crossing' dimension, in areas as different as transport, labour markets, service delivery, consumption patterns, migration, criminality, pollution, commuter movements, tourism and leisure time activities. All of these require close cross-border cooperation between neighbouring states. However unlike in the national context, where regional cooperation takes place within a uniform legal, institution-

244 Frey 2003

245 UNDP 2006: 7

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al and financial framework, cross-border cooperation faces the challenge of managing different politico-administrative systems which have a distinctive legal basis and are usually characterised by different degrees of vertical differentiation in terms of structures, resources and autonomy of action²⁴⁶.

After a long post-war experience, where cross-border-cooperation was mainly marked by its reconciliation function²⁴⁷ we are now in Europe on the threshold of cross-border cooperation of a completely new quality²⁴⁸. With the new cohesion policy of the European Union, attaching much greater importance to territorial cohesion and the extent of real impacts of cross-border actions²⁴⁹, but also thanks to a new generation of actors²⁵⁰, who are more interested in results than procedures, many border territories are currently redesigning and trying to strengthen their given pattern of cooperation²⁵¹. At the same time, cross-border cooperation should continue to be developed and enhanced by a capacity building structurally and functionally, so that it is up to the real importance of border territories for the future European integration process²⁵². Two practical fields seem of particular importance in this respect : strengthening training/facilitation and further developing the institutional capacity of cross-border cooperation.

One of the key bottlenecks preventing the deepening of cross-border cooperation in Europe is the lack of knowledge and understanding of the political and administrative systems of the neighbouring countries. A successful cross-border cooperation needs qualified actors who are able to close the gap between the subsystem and its specific functional characteristics and the functional preconditions provided by the different domestic jurisdictions involved²⁵³. One approach, which has been very successful for more than 25 years now, is the creation of a specific institution, which exclusively works on CBC training – the Euro-Institute Kehl/Strasbourg²⁵⁴. This bi-national institution contributes to the improvement of cross-border cooperation by continuing education and training and provides practical advice and coaching to practitioners in the cross-border field. In this

246 Casteigts 2010; Beck 1997; Lang 2010

247 Boehm/Drápella 2017

248 Beck 2011

249 Tailon/Beck/Rihm 2011

250 Botthegi 2014

251 Casteigts 2010

252 Jakob/Friescke/Beck/Bonafous 2011

253 Jann 2002; Beck/The dieck 2008

254 Beck 2008b

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way, the Institute has become a facilitator for successful cross-border cooperation in the Upper Rhine region and in Europe with regard to public policies, and contributes actively to the resolution of problems resulting from different legal and administrative systems.

The Euro Institute's training product is structured according to the needs identified by the actors involved in cross-border cooperation. The main characteristic of this product is its bi-national and bicultural orientation, and the main target groups are the employees of the state and local administrations in Germany, France and increasingly Switzerland. Its training courses are also open to participants from the private sector, and from research institutions, universities, civil society associations and other groups.

Based on the Euro-Institute's experience, training in a cross-border context as part of an overall capacity-building approach should develop at least three levels of personal skills:

Basic training on cross-sectoral competences

The basic component of such a training approach is the development of the cross-sectoral skills and competences necessary for any cross-border and/or inter-regional cooperation. The main objective here is to provide those involved with the necessary institutional and legal knowledge about the politico-administrative system of the neighbouring states and about the system of cross-border cooperation itself. In addition, the relevant instrumental, methodological and linguistic skills must be trained in order to prepare and structure the proposed cross-border activity in advance. It is very important to sensitise the future actors about the importance of the intercultural factor and to provide them with the necessary tools and methods of intercultural management. Courses should also provide participants with the specifics of managing cross-border projects in terms of planning, financing, organisation of meetings, and monitoring and evaluation.

The courses and qualifications provided under this first level meet an increasing demand at our Institute. The more cross-border cooperation becomes an everyday reality, the more new actors face the challenge of becoming better trained and qualified in terms of the skills the course covers. Nearly all public institutions in the Upper Rhine valley are now seeking well qualified people who can represent them in both formal and informal cross-border cooperation situations.

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Specialised training

A cross-border training programme should then also provide specialised training courses which are more oriented towards representatives from the different administrative sectors in the neighbouring states. The content of these courses consists of selected policy-oriented topics within cross-border cooperation. The aim is to provide a neutral platform for exchanges between specialists from the different countries so that they can better understand the specific sectoral competences and organisational structures in the other countries, and identify differences and similarities with their own – or just allow them to get current information and analysis on policy developments and good practice in the neighbouring state. At the Euro-Institute, this training mainly consists of two day seminars, including informal exchanges during an evening event on the first day. As most cross-border problems have a sectoral or thematic component, and thus require cooperation between the relevant sectoral services, these specialist seminars are very often the starting point for future joint projects, and sometimes even lead to the establishment of bilateral or trilateral standing working groups.

A specific programme deals for instance with cooperation between the French and German police, justice and gendarmerie services in the context of the Schengen treaty. This programme, which consists of five annual seminars, was established in 2004. It is accompanied by a steering committee of high-level representatives from the participating administrations which select the topics and annually evaluate the course, which has been developed by the Euro Institute.

Developing competences on European affairs for local and regional authorities

At a third level, it seems necessary to enhance the capacities of national public administrations with regards to European integration. Most local and regional administrations take a very pragmatic view and see Europe mainly as an opportunity to access EU financial support programmes like INTERREG. This is a legitimate position which raises numerous practical questions: how to find the right partner across the border; how to fill in the application form; how to set up a project's organisation; how to manage a cross-border budget; how to justify expenses; how to define good progress and impact indicators, and how to make a project-oriented

monitoring and evaluation system work. Although the INTERREG secretariats of the relevant Operational Programmes usually do a very good job, practical experience shows that local and regional partners are very often overloaded by the complexity of the reporting and accounting demands, imposed on them by the funder. In addition, project partners coming from different jurisdictions often have different perceptions of these demands, and have to deal in the day-to-day running of a cross-border project with national administrations with quite different administrative cultures. This is why the Euro Institute, using its own extensive experience of such projects, provides adaptable practical coaching to both the individual project leader and the bi- or tri-national project teams as an intercultural group. This contributes to the smooth functioning of the project teams, helps to avoid blockages, and thus facilitates both project and programme implementation.

Under the EU-objective of territorial cohesion, more and more local and regional authorities want to participate in inter-regional or even trans-national projects, and are developing partnerships with other European regions. In this context the question of good practice in international network management arises: how to build and maintain a solid international partnership; what is the relative position of the actors in the network; how to prepare and manage international meetings and so on. Here the Euro Institute also provides practical assistance.

Last but not least, the local and regional authorities are increasingly realising to what extent they are affected by European legislation. The fact that at the sub-national level 70 % of all local and regional administrative action is more or less determined by EU law, raises the question of how to become more actively involved in the preparation of this law and how to better represent local and regional interests in its formulation. Based on the wide practical experience of its former Director, who has since 2004 been an accredited trainer on Impact Assessment for the European Commission's Secretariat General, the Institute helps local and regional actors to become more familiar with the relevant procedures at EU-level and teaches them how to contribute actively to stakeholder consultations and *ex ante* impact assessments, which increasingly have to consider regional and/or trans-regional dimensions.

A thorough knowledge of the politico-administrative system of the neighbouring country is a prerequisite for any efficient cross-border co-operation. The main difference of the Euro Institute's training courses compared with those of a national training organisation is therefore a real concentration on themes arising out of the needs of the cross-border pro-

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fessionals within the various sectors. Also, the fact that the training courses are always inter-service, bi-national and bilingual in nature has contributed to their high acceptance among participants. We have found that partnerships between the relevant administrations are best developed when the courses are prepared by an *ad hoc* group of different national specialists. Such preparation requires a lot of time and investment by the partners – but it is a necessary precondition for any effective bi-national training product, which not only considers the intercultural dimension but actively uses it in terms of content, methodology and participation. For successful cooperation with no 'mental frontier', trainers too must understand that they have to reconsider their whole way of thinking, recognising that constructive cooperation is not possible without knowing and respecting the structures, working methods and ethos of the neighbouring country's system – as well as fully understanding one's own!

The contribution of the Euro Institute in making this partnership principle really work is twofold: providing a neutral platform, and facilitating intercultural and inter-service exchange. Most important in this respect is a strategic positioning which is able to respond quickly to the real needs of the participants. Sometimes this means to be modest in one's aims and to provide only technical and logistical support. However, the provision of methodological and linguistic competence along with solid experience of good practice in intercultural management²⁵⁵ are the hallmarks of the Euro Institute²⁵⁶.

The success of this Euro-Institute approach has ultimately lead to the creation of a new European actor: the transfrontier Euro-Institut-network (www.transfrontier.eu) aiming to built up training capacity on cross-border questions at an EU-wide level. 12 partner-institutions coming from 9 different cross-border contexts all over Europe decided to propose a coordinated answer to the increasing need for knowledge, competences, tools and support on cross-border affairs. Regarding the rising awareness of the importance of cohesion policy in Europe, the idea of the Network is to build capacities in cross-border and transfrontier contexts and this way strengthening the European integration. In order to achieve this goal and to have an extensive overall view of the territorial specificities in Europe, the project coordinator has been careful to invite partners from different parts of Europe to participate in the project. Hence, the partners involved in this project come from "maritime borders", "old European borders",

255 Hall 1984; Hartmann 1997

256 Euro-Institut 2007

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"new eastern borders", "peace keeping borders", "external borders", as well as "overseas borders between outermost regions". As such, the partnership will be able to gain a comprehensive overview of the need for the professionalization of actors in cross-border cooperation and also gain insight into the current situation regarding transfrontier cooperation.

TEIN gathers training organizations and universities and aims at facilitating cross-border cooperation and at giving concrete answers to the need of Europe for professionalizing actors on transfrontier issues. The "identity and reference grids" of all the partners testify from the quality and the great experience of each partner. The partners of TEIN exchange best practices, analyse the specificity of training and research on cross border issues/in cross border contexts, capitalize on and draw synergies from the different local initiatives, work on new products like transferable training modules (training for cross-border project managers, etc.), methods (need-analysis methods in cross-border regions, etc.), tools (impact assessment toolkit, etc.), produce valuable research in this field and assure that newest research results within this field are disseminated to actors involved in transfrontier cooperation. TEIN will develop a joint certification system for cross-border training in Europe and will also enable bilateral projects in fields of common interest (exchange of learning units, of lecturers, common research programme, involvement in conferences, etc.) and an increased knowledge and awareness of cross border issues (at local, regional, national and European level) by producing higher quality work in this field.

5.3 Horizontal subsidiarity : setting the frame for a systemic capacity building

In addition to training/facilitation, which has been outlined in more detail above, three further and more fundamental components of a systemic cross-border capacity-building seem to be of particular strategic interest:

Strengthening the evidence base of cross-border policy-making: One central weakness of most cross-border policy-making consists in the lack of tangible base-line information regarding both the real world strengths/weaknesses and the potentials of the cross-border territory in question. The national and regional statistics often suffer from a lack of comparability and specific analysis on the characteristics and the magnitude of the socio-economic cross-border phenomenon (be it mobility of citizens, economic exchanges and relations, transport and traffic movements, exchanges between universities, students, associations etc) which results in a

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challenge of both quantification and qualification. In addition, the results of the SWOT-analysis carried out at the beginning of a new INTERREG programming period, are often not really binding later on, when the selection of project applications actually takes place. In turn, both the programme and the project level have difficulties to describe and capture the specific cross-border added-value of the actions that were funded – mostly due to the absence of credible impact-indicators and a meaningful data generation that requires both specific qualitative and quantitative methods.

Under the new generation of the cohesion policy, the idea of evidence based policy-making has a prominent place. Cross-border territories will have to strengthen their efforts to creating and proceeding tangible impact information in the near future. This is also a prerequisite for any cross-border policy-approach that wants to become more strategic in the sense of a more focused and concentrated pattern that concentrates on the integrated development of territorial potentials (360° perspective) instead of multiplying disconnected sectorial projects.

With the Impact Assessment toolkit for cross-border cooperation, the Centre for Cross Border Studies in Ireland and the Euro-Institute have developed an instrument that can be very significant in this regard, allowing for a much more evidence based policy- and project development in the future²⁵⁷.

Promoting CBC at EU-level: From the perspective of cross-border territorial cohesion the frequently different implementations of EU law by the neighbouring countries regularly leads to technical and political asymmetries, which often even reinforce structural differences rather than leveling them. It must be worrying that the comprehensive annual work output of the European Commission (on average, these are several thousand proposals for directives, policies, regulations, decisions, communications and reports, green papers, infringement procedures per year) does not explicitly consider possible impacts on the European cross-border territories so far – although it is evident how strongly they are affected by it. It therefore seems necessary that cross-border territories become more visible with regards to their specific implementation role and thus get more explicitly considered by the European policy-maker when developing strategic key-initiatives. In the European Commission's impact assessment system²⁵⁸ a specific cross-border impact category is currently still lacking. However,

257 Tailon/Beck/Rihm 2010

258 European Commission 2017

cross-border territories could become ideal test-spaces for the ex-ante evaluation of future EU policies. On the other hand this would require a real awareness of cross-border territories to also actively engage in this in a coordinated manner, and – for instance – present joint opinions and impact analysis throughout official thematic consultations, launched by the European Commission. It is evident, that also a joint and coordinated thematic lobbying and advocacy activity of cross-border territories should be strengthened in this regard. The European macro-regions have shown how the interests of specific types of cross-border areas may well find their way into European strategies.

Developing a multi-level-governance based on "horizontal subsidiarity": In the perspective of a systemic capacity-building approach it seems desirable to strengthen and enlarge the scope of action of the sub-system of cross-border-cooperation in Europe. Overcoming the seven challenges cited above would require multi-level governance that leads both to a much closer and more integrated cooperation and a much clearer functional division of labour between the different levels of cooperation. In such a perspective the EU-level would anticipate impacts of future EU-initiatives on the cross-border territories at an early stage and would allow for a better inter-sectoral coordination between the different thematic policy-areas and institutional competences which have a logical border crossing dimension. Integrated policy-making would require, for instance, standing inter-service groups on cross-border cooperation, which are themselves interlinked with relevant groups of the Committee of the Regions and the European Council and Parliament.

The member states (and their territorial subdivisions) would on the other hand support cross-border cooperation actively and would allow for flexible solutions to be developed on the borders. This would lead to a new operating principle, which I recently described as *horizontal subsidiarity*²⁵⁹ : Whenever a policy-field that is relevant for horizontal exchange, cannot be harmonised at the European level, member states should then at least try to set the frame via direct coordination with their neighbouring states. The term "horizontal subsidiarity" means in this respect, that with regards to cross-border policy-issues the "smaller" cross-border unit should have the possibility to solve a problem or handle a question prior to the intervention of the "bigger" national jurisdiction. This would then require that the smaller unit will become enabled by the provision of the necessary legal flexibility: experimental and opening clauses in thematic regulations and

259 Beck 2012b

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exemptions based on de minimis rules, allowing for diverging solutions to be developed „bottom-up“ in the border area compared to the national context (whenever a cross-border phenomenon does not exceed a certain level of magnitude – e.g. 5 % of the population being commuters, 3 % of the students studying at the neighbouring university, 2 % of patients asking for medical treatment with a doctor beyond the border – an execution to the national rules will be allowed). It is promising to see, that these ideas have ultimately been taken up by the national legislators in France and Germany within the socalled „Aachen Treaty“ from 2019²⁶⁰. The proposal of the European Commission to establish a socalled „European cross-border mechanism (ECBM)“²⁶¹ goes into the same direction (see also chapter 8).

The local and regional actors on the other hand would have to develop shared cross-border services²⁶² and transfer domestic local/regional competencies to joint cross-border bodies with real administrative competencies for concrete implementing missions within relevant cross-border fields. Instead of building or maintaining relatively expensive public infrastructures separately on both sides of the border in service areas such as health, leisure time, schools, kindergarten, fairs, libraries but also transport operators, hospitals, fire department or civil protection etc., local and regional actors would develop complementary fields of specialization and share their infrastructures with local and regional actors from the neighbouring state. This could give cross-border cooperation a completely new finality, allowing not only to save scarce resources but also to symbolize both the permeability and the added-value of the "joint" cross-border territory from the point of view of the ordinary citizen.

The conceptual foundation of the interlink between the subsidiarity and the governance dimension on the one hand and the vertical and horizontal differentiation of both principles on the other are illustrated – for the case of cross-border-policy making – in the following graph:

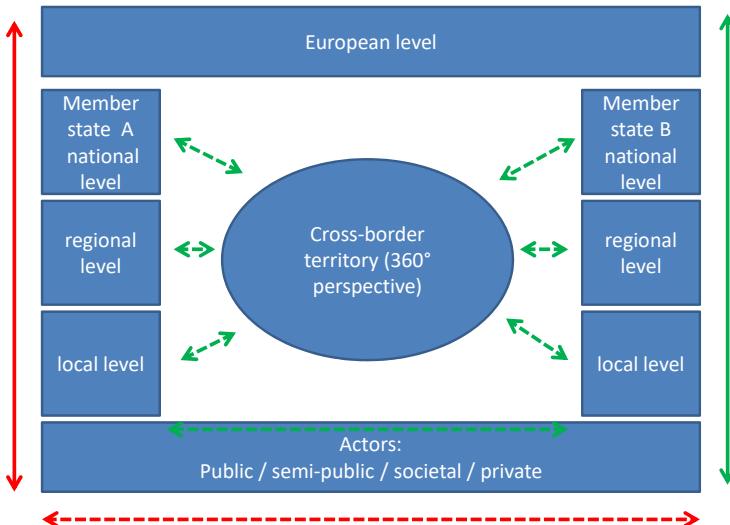
260 Beck 2019

261 Proposal for a "mechanism to resolve legal and administrative obstacles in a cross-border context" COM(2018)373

262 Tomkinson 2007; AT Kaerny 2005

Figure 13: Horizontal Subsidiarity within cross-border cooperation

The vertical and horizontal dimensions of multi-level governance and subsidiarity in cross-border cooperation



In the perspective of European integration, a great deal has already been discussed and written about the principle of subsidiarity. With the reform of the Treaty of Lisbon, this was enshrined in Art. 5 (3) and, in particular, two important instruments were made available to the national parliaments in the form of the early warning system and the subsidiarity complaint. In the academic and practical debate on integration, however, it is noticeable that the concept of subsidiarity, and thus subsidiarity as a normative concept, is used almost exclusively in a vertical perspective: An upper (in this case European) state level may only take action if a lower level (in this case a national or sub-national level) cannot fulfil a certain task better or would be overburdened with the fulfilment.

In terms of the history of ideas, however, the concept of subsidiarity has its origins in a more horizontal perspective: namely as a general maxim according to which the individual responsibility of a smaller unit (individual, private, small groups) should have priority over that of larger units (groups, collectives, higher forms of organisation such as the state); the public sector should therefore only become active if the individual, a social organisation or association, the economy, etc. cannot fulfil a task equally or better.

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Subsidiarity can be regarded today as a general principle of social organisation, whereby in the state-theoretical perception the primacy of action of the more efficient smaller unit is accompanied by a duty of support by the larger unit if it is overtaxed, which has led to the development of two alternative concepts with regard to the "burden of proof" (defensive = view of the smaller level vs. complementary = view of the larger unit).

If one considers the cross-border areas of Europe and the cooperation taking place in them as a specific, horizontal form of European integration, it is obvious to (re)interpret the principle of subsidiarity in this sense as well: Subsidiarity in cross-border cooperation then refers to the horizontal relationship between a cross-border area and the institutional or individual stakeholders acting in it, and which are thus forming a subsystem of decentral transnational cooperation (= the smaller unit) and their national political, legal and administrative domestic („mother“) systems, by which they are functionally supported and on which they are dependent (= the larger units). Accordingly, the smaller unit would always be given priority over the larger units if a task related to the cross-border area (development or problem-solving task) can be better fulfilled horizontally-decentrally. Conversely, the larger units should only be responsible if the smaller unit cannot perform the cross-border task better.

The conceptual justification of such a horizontal subsidiarity thinking follows a rather simple consideration: If cross-border cooperation is depending on active contributions by actors coming from diverging political-administrative and legal systems, and if this divergence creates substantive legal and administrative obstacles, then a transnational cooperation system should be equipped with the necessary formal and functional implementation competences, that allow the stakeholders, acting on the transnational ground, to develop effective and efficient solutions jointly without being hindered by externally caused structural or functional restrictions.

A "horizontal" understanding of subsidiarity in cross-border cooperation interpreted in this way would mean consistently changing the de facto distribution of competences that exists today and thus also the "burden of proof" on the side of tasks and competences: It is not the member states and/or their territorial subdivisions that are primarily responsible for cross-border matters, but rather these are only responsible if cross-border (corporate) actors of the smaller unit cannot properly fulfil the integrated cross-border territorial responsibility. Conversely, this would of course first of all require that the smaller unit be put in a position institutionally, materially and functionally to the extent that an appropriate fulfilment of tasks for the cross-border area is possible at all. Through the necessary

development of a functionally appropriate cross-border administrative capacity – similar to comparable cross-border approaches to action in the national context, such as the city-regional associations or the metropolitan regions²⁶³ – the situation that still exists in many cases today could be overcome, whereby cross-border matters – at least from the point of view of the "home administrations" involved – are often still regarded as something "voluntary", selective, etc. and thus only as a "secondary" policy field.

Now it is obvious that in cross-border cooperation under the real-world conditions of "micro-diplomacy"²⁶⁴ such a principle of horizontal subsidiarity cannot mean that the larger units relinquish state sovereignty or the responsibilities for the fulfilment of tasks laid down in the national legal systems to the cross-border area in favour of the smaller units, i.e. that this area reconstitutes itself as its own autonomous cross-border state entity. This is a "conditio sine qua non" for the participation and support of the member states, especially in young or politically sensitive, but also in established European border regions. The principle of horizontal subsidiarity is not intended to strengthen the autonomy aspirations of minorities or separatists at the Community's borders. Rather, what is meant by this is a new division of labour between the cross-border areas and their national partners, which is necessary in the interest of efficient cross-border task fulfilment that is appropriate to the problems and potential. In this context, the smaller unit should be given as much leeway as possible in the development and implementation of tasks so that it can best solve its specific cross-border challenges itself through the decentralised development of its own, adapted and flexible procedures.

A pragmatic first step in this direction could be to create separate cross-border areas of competence for the joint implementation and execution of tasks with genuine cross-border relevance (e.g. cross-border local transport, education and training, supply and waste management, labour market and business promotion, environmental protection and hazard prevention, social security and health care, etc.). For the participating municipalities, this requires the willingness to horizontally transfer the implementation of tasks in relevant areas of responsibility to usually supra-municipal cross-border administrations²⁶⁵. For the participating member states and their sub-national administrative subdivisions, this means that in all those areas

263 BVBS 2011

264 Klatt/Wassenberg 2021

265 For example, in the Greater Geneva area, responsibility for the organisation and operation of cross-border public transport has been transferred to a newly creat-

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of responsibility or law, in which the European legislator has not yet taken harmonising action – mostly due to a self-interest of the member states – and where a transnational need of action is proved and can be justified, the issue in question would have to be horizontally bundled at least at the cross-border level and technically and inter-institutionally coordinated, i.e. carried out in an *integrative manner*.

To this end, of course, not all national specialised laws in mobility-relevant areas such as tax, labour, social or economic law can be adapted to all the different territorial specifics of the border areas (this would not work, if only because of the principle of equal treatment). However, it would be conceivable to insert at least at the ordinance level cross-border opening or experimentation clauses or – analogous to the so-called de minimis rule – at least certain exemption regulations for cross-border circumstances, which could allow for a more flexible adaptation to cross-border circumstances. The contours of a transnational administrative law would also have to be reflected for the future in order to provide resilient cross-border procedural regulations.

In addition, the role of the member states and their sub-national subdivisions should increasingly be to examine future initiatives of the European and national legislators from an ex-ante perspective (e.g. within the framework of the impact assessment procedures of the EU Commission or through national approaches to legislative impact assessment) to see whether they are also compatible with the cross-border conditions of the respective neighbouring states, so that – e.g. in the case of the "subsidiarity-friendly" directives – when European law is implemented by the member states, technical differences on both sides of the border are not established rather than harmonised. At the level of national legislators, a "border impact assessment" should be institutionalised analogously or within the existing systems of regulatory impact assessment, with which possible negative consequences of national law on neighbouring states can be recognised and taken into account at an early stage²⁶⁶.

Within such a cross-border area of action strengthened by horizontal subsidiarity, two subsidiary internal perspectives would have to be taken into account. On the one hand, vertical subsidiarity between the different

ed joint cross-border structure in which the two national municipal transport operators each hold a 50 % share.

266 A pioneering approach in this sense was realised in the German-Dutch border context through the establishment of the ITEM Institute at Maastricht University; cf. Unfried/Kortese 2019

spatial cross-border levels of action would have to be realised, in which the overall spatial level (e.g. the overall area of the Danube macro-region, the overall area of the Lake Constance Conference, the overall area of the Upper Rhine Trinational Metropolitan Region, etc.) would only become active within the cross-border task areas if smaller cross-border units (inter-communal cooperation, Eurodistricts, Euregios, etc.) are overburdened in their spatial and material competence. In this way, functional level-specific task divisions could develop in the cross-border area, which are suitable for reducing the duplication of work between different institutional actors and bodies of cross-border cooperation that can still be observed in many cases today. The prerequisite for such a perspective, however, would be the willingness of the actors acting at the decentralised level to actually transfer implementation and/or material design competences for the integrative cross-border performance of tasks to cross-border institutions within their nationally existing municipal fields of organisation – the exclusive creation of such institutions with legal personality seems to make little sense from a perspective without the second step of transferring material competences for action.

On the other hand, inter-sectoral subsidiarity should be strengthened much more. Whereas today in the vast majority of cross-border areas in Europe cross-border affairs are primarily a matter for the political-administrative actors (the EU funding programmes in their current form sustainably reinforce this tendency), subsidiary cross-border cooperation would have to emphasise much more strongly the self-responsibility of the cross-border subsystems of economy, science and research, civil society itself. Public contributions to action in these sectors, which would have to organise themselves much more strongly in the future, would therefore be either catalytic (e.g. to stimulate project initiatives) or complementary (e.g. in the form of financial participation in initiatives that come from these sectors themselves), but not primarily representative of them²⁶⁷. In addition to the cross-border public core tasks (infrastructure, provision of public services, hazard prevention, etc.), public actors in such a perspective could ultimately derive functional legitimacy to act in a subsidiary manner from the task of cross-border, future-oriented protection of the environment²⁶⁸, which would have to manifest itself in integrated approaches of a cross-border sustainability strategy.

267 See already Grabher 1994; Scharpf 2006

268 Cf. Böhret 1990, 1993; Dror 2002

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Such a perspective of differential cross-border action based on the principles of horizontal and vertical subsidiarity appears to be a necessary prerequisite for a future capacity-building-approach, allowing for the better deployment of the potential for innovation of cross-border territories and therefore of their specific function within the context of a new horizontal dimension of European integration and the emerging European Administrative Space²⁶⁹.

5.4 Cross-border territories and the principle of mutual recognition – towards a new quality of transnational administrative cooperation?

5.4.1 The principle of mutual recognition within the context of European construction

The elimination of technical obstacles to the free movement of goods is one of the main objectives of the internal market-policy of the European Union: Article 34 TFEU prohibits obstacles to free trade and Article 36 TFEU provides a closed list of justifications for such obstacles. One of the means of ensuring the free movement of goods within the internal market – besides the principle of non-discrimination (prohibition to maintain distinctive state measures hindering trade between Member States) and the principle of free access to national market (beyond discrimination, impossible to maintain state measures which substantially restrict the possibility to sell a product or a service on another market) – is the *principle of mutual recognition*. The principle derives from the case-law of the Court of Justice of the European Communities and applies to products which are not subject to Community harmonization legislation, or to aspects of products falling outside the scope of such legislation (so-called non-harmonized products). According to that principle, "a Member State may not prohibit the sale on its territory of products which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject".²⁷⁰ Only on the basis of overriding reasons of public

269 Siedentopf/Speer 2002; Beck 2017b

270 European Commission 2010; See Alinea 3, REGULATION (EC) No 764/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 July 2008; The principle originated in the famous Cassis de Dijon judgment of the Court of Justice of 20 February 1979 (Case 120/78 Rewe-Zentral [1979] ECR 649) and

interest and which are proportionate to the aim pursued, a Member State can refuse the free movement or justify a domestic regulation or technical specification going against this principle.

The principle usually applies, when actors such as companies or professionals offer non harmonized goods or services abroad. The area of free movement of non-harmonized goods is of great economic importance to the functioning of the internal market: approximately 21 % of industrial production or 7 % of the GDP inside the EU is covered by mutual recognition and about 28 % of intra-EU manufacturing trade. It is estimated that the failure to properly apply the principle of mutual recognition reduces trade in goods within the Internal Market by up to 10 % or €150 billion²⁷¹. Accordingly, the Commission has set up a proper policy for analysing and enforcing the application of this principle. On the grounds of evidence that the principle is not working smoothly (a supporting study of an Impact Assessment identified in 2007 around 11,000 technical exceptions at Member State level and a high number of technical, procedural and information related obstacles)²⁷² the European Union issued in 2008 a regulation laying down procedures and actions to enforce the functioning of the principle. The philosophy of the Regulation followed the twofold approach of "combining transparency and efficiency: transparency of information to be exchanged between enterprises and national authorities, efficiency by avoiding any duplication of checks and testing"²⁷³.

The importance of the principle of mutual recognition increased constantly during the last decades – leading even to popular concern when it was again enforced after the enlargement of the Union via the so-called "Bolkestein" directive²⁷⁴ – and at least in a normative perspective some academic observers even estimate, that the EU has de facto in the meanwhile

was the basis for a new development in the internal market for goods. While at the beginning not expressly mentioned in the case-law of the Court of Justice, it is now fully recognised (see, for example, Case C-110/05 Commission v Italy [2009] ECR I-519, paragraph 34)

271 See Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC, Impact assessment COM(2007) 36 FINAL, p. 42

272 DIE ZEIT, 18 October 2007, p. 32

273 European Commission 2012: 6

274 DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market

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become a "mutual recognition space"²⁷⁵. Beyond the single issue-orientation of allowing the free movement of goods and services in the non-harmonized area – what are the implications of mutual recognition from the broader point of European construction and the EAS?

Firstly it is evident that mutual recognition constitutes a very pragmatic alternative to harmonisation. With the Treaty of Lisbon the functional division of labour between the European and the national level with regards to policy-competences has been re-adjusted and many observers come to the conclusion that the degree of supra-nationalization that has been achieved by the Lisbon Treaty will be the working basis for the next decades or so. It is not very realistic to expect any significant efforts of further harmonisation at the EU-level going beyond approaches that aim at a level-playing field in very specific sectorial areas. A horizontal analysis of the Impact Assessments carried out by the Commission during recent years²⁷⁶ may demonstrate the efforts of the European law-maker to search for alternatives to classical regulatory approaches and rather implement a "soft-law" policy within the context of the "smart regulation" strategy²⁷⁷. In this context, Member States who do not want to delegate further competencies to or share domestic competencies with the European level may indeed consider mutual recognition as a feasible alternative when aiming at a better horizontal cooperation with other Member States in such areas, where functional equivalence can be deemed. Especially in the administrative reality where for the case of transnational administrative cooperation it is not realistic or possible to develop substantive legal "exemptions" (avoidance of new borders and risks before the constitutional courts of the member states – how can a transnational exemption be justified at all?) mutual recognition can give – as I will show in the next chapter – a new dimension to the horizontal functioning of the EAS, allowing for a smarter inter-organizational cooperation of administrative bodies depending on different but functionally equivalent jurisdictions.

Secondly, mutual recognition creates extraterritoriality²⁷⁸. Territoriality constitutes a classical criteria of the Westphalian State, guaranteed by an external border and limiting the competence of both the state and its

275 Nicolaidis 2007: 687

276 See: www.europa/IA; The author has been – on behalf of the SEC GEN – for 10 years trainer and consultant on European Impact Assessments and has accompanied several Impact Assessment projects at EU-level

277 See Commission communication "Smart Regulation in the European Union" -COM(2010)543 (8 October 2010)

278 Nicolaidis/Shaffer 2005: 267

administration. Mutual recognition, on the other hand, extends de facto the regulation, defined by one member state onto the territory of another member state who recognizes it. Mutual recognition regimes thus can be seen as a constitutive element for an emerging global administrative law regime: "Mutual recognition represents the operation of a third, 'middle-way' of transnational economic governance... (it constitutes)...an extension of the territorial principle of national treatment and a cooperative 'mutualized' approach to the inherent demand for and challenge of extraterritoriality in a global economic order"²⁷⁹. Such a notion of extraterritoriality based on mutual recognition can also strengthen the transnational dimension of the EAS, which itself already goes into this direction but gives it a specific new dimension: The functional enlargement of a national administrative competence to the territory of another Member state, however, is a new and not yet existing in the area of public law but can lead to new and interesting managed and negotiated forms of transnational administrative cooperation²⁸⁰.

This leads to the third dimension of mutual recognition which can be understood as a new mode of governance²⁸¹ : Transnational cooperation is an example for what has been described in the context of international cooperation as governance without government²⁸², e.g. the need to develop cooperative solutions in a non-hierarchical way. One central category of such a mode of cooperation in transnational governance is social capital, built on mutual trust. Mutual recognition both depends on and contributes to the emergence of trust. The inherently difficult definition of where functional equivalence starts and where it may end needs to be negotiated amongst the partners concerned: "Instead of agreeing on common regulatory solutions, governments agree on a patchwork of equivalent national rules. It is only by focusing on this alternative to hierarchy that the growing transnational activities of national administrations become a focus of analysis"²⁸³. In a broader sense, this transnational governance may lead to a new perception within the European Administrative Space which I described as "Horizontal Subsidiarity"²⁸⁴ : When a transnational or cross-border phenomenon needs a specific e.g. adapted and thus diverg-

279 Nicolaidis/Shaffer 2005: 267

280 Beck/Larat 2015

281 Schmidt 2007

282 Rosenau/Czempiel 1992

283 Schmidt 2007: 670

284 Beck 2014

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ing solution, the concerned neighbouring jurisdictions give priority to it compared to the domestic regulatory frame. Mutual recognition can strengthen such a perspective of horizontal subsidiarity within the EAS: The "managed recognition" may lead to pragmatic choices of the best solution on either side of the border.

Finally, as the notion of governance indicates, transnational mutual recognition can also develop and/or strengthen the mode of transnational policy-making in its relation to other economic and societal actors. Based on mutual recognition, the necessary horizontal and vertical differentiation, that is inherent to the notion of multi-level-governance within the European context, can finally lead to a rationalization of new transnational relations between administrations and their respective economic and/or social environment: if more and more new transnational needs of enterprises, citizens, associations, consumers, patients etc. are articulated, which cannot effectively be handled by a single administrative approach only, mutual recognition can contribute to the emergence of new negotiated and pragmatic solutions for the transnational EAS. Innovation thus can both occur on the basis of new transnational arrangements and or the diffusion and integration of good practices of the neighbour state.

The key element of mutual recognition, as derived from the Cassis de Dijon doctrine, is the notion of functional equivalence which could indeed contribute to the strengthening of the transnational dimension of the EAS. The prospective element here would be to go beyond a case by case perspective, related to the horizontal mobility of persons, services capital and goods and develop an integrated transnational – e.g. cross-border perspective. The principle could bring clarity to many cross-border constellations where the unproductive back and forth between neighbouring administrations *de facto* leads to a high level of red tape and administrative burden, which makes cross-border activities still much less attractive than a domestic orientation – both from the perspective of individual (citizens, commuters, enterprises) and corporate (public and private organisations) actors. Combined with the principle of proportionality (only where it makes sense and where it is relevant, mutual recognition will be applied) mutual recognition has a strong potential to improve transnational and cross-border cooperation, especially, when it is based on mutually agreed *de minimis* levels: if a cross-border and/or transnational administrative case does not constitute/represents a mass-phenomenon (which in reality is exactly the case: the level of cross-border activity phenomenon is in many

policy-fields clearly lower than 5 % compared to the domestic context²⁸⁵⁾ but the typical exception to the administrative rule (because the individual case comes from a different administrative context) then – if it is the case of a neighbour administration – the public servant in charge should have the right to accept the "incoming" administrative standards. The only exception allowed then would lie in too different technical standards that is the case of non-equivalence of administrative standards. At first glance, one could expect a high number of cases of such non-equivalence due to the big differences between the politico-administrative systems in Europe, both in terms of structure and administrative culture. On the other hand, having the case of the new member states, who accepted and implemented the democratic European administrative standards relatively quickly, in mind, one could argue that all administrative systems of the European Union today are based on basic principles of the EAS which in turn are derived from the *Acquis Communautaire*. Differences between national administrations in Europe certainly do exist and indeed we are witnessing both processes of convergence and persistence of historically developed systems²⁸⁶, but it must be questioned if, at the beginning of the 21st century, they are really constituting a case of non-equivalence in the functional sense of the term or still rather symbolize the case of non-cooperation, the lack of willingness and/or incentive of mutual exchange and learning.

5.4.2 Fields of application within cross-border cooperation

With regards to typical problem constellations – which at the same time represent specific types of transnational cooperation – the following fields of application of the principle of mutual recognition seem to be promising in the context of cross-border cooperation:

Simplifying citizen's mobility: It is amazing to see that the level of transnational mobility of individuals in Europe still is clearly below 1 % but that a large part of this phenomenon is actually taking place within the European border regions (European Commission 2009). Assuming that citizens in border-regions would like to perceive and use the cross-border territory in the same way as they can do on the domestic ground of a member state – eg. choose their place of work, residence, childcare, medi-

285 For instance the 91,000 cross-border comuters in the Upper-Rhine region are representing only 3 % of the entire active population!

286 Kuhlmann/Wollmann 2013

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cal treatment and practice their consumer behaviour independently from national borders – the public services responsible for these issues on both sides of the borders should not constitute obstacles in the sense that they are practicing different standards and regulations, but should provide for a coherent administrative framing of this horizontal mobility of persons, services and goods in the cross-border perspective. However, the reality still looks different, mostly due to the fact, that the legal areas which are covered by this mobility are mostly still within the remit of national competence. Mutual recognition could bring a lot of practical facilitating for the everyday life of citizens with a border-crossing live-orientation. The list of everyday obstacles caused by the lack of mutual trust and recognition between national (deconcentrated) state administrations is long, not to mention the red tape and administrative burden this is creating both at the level of the citizens, their employers but also the competent administrations themselves.

Simplifying the management of CBC bodies: A second field of optimization which could be achieved via the application of the principle of mutual recognition is the case of cross-border bodies. Here the target groups are mostly local and regional authorities who want to improve cross-border cooperation by approaches of integrated and joint institution building. These approaches are per se representing a joint political will and thus can be perceived as symbols of mutual trust: by creating a joint organisational undertaking with a commonly managed budget and personnel that works exclusively for the jointly defined transnational tasks the partners want to actively overcome a standalone approach and develop joint functional provisions. In the case where these bodies are even equipped with a proper legal form the case of mutual recognition from a formal point of view is implemented: both the national and European as well as the public or private legal forms that can be applied for such bodies finally depend on the choice of one national jurisdiction, usually determined by the spatial seat of the body in one of the two neighbouring states. The practical functioning of such bodies is very often still limited by the difficulty to define joint implementing provisions: The symbol of a joint approach is counteracted by numerous practical difficulties when it comes both to the authorisation of such a transnational body, the every-day management of its human and financial resources and the legal supervision of its functioning. At these levels, very often a doubling and complexification of administrative procedures, formal requirements and/or reporting obligations is taking place which can be considered as one of the main reasons of the still very limited acceptance of these legal forms and which could be solved if the

principle of mutual recognition was not only implemented by the signing partners, but also the administrative framework of both states involved.

Stimulating the development of cross-border shared services: A third field of application where the principle of mutual recognition could bring a substantial innovation is the relatively new area of cross-border shared services. In the past, cross-border cooperation was mainly concentrated either on a single-project approach (INTERREG has promoted this approach significantly in the past and will certainly continue to do so in the future) or on a cross-border body approach, allowing for the coordination of partners with regards to overall development objectives of a territorial unit. Compared to this, the idea of cross-border shared-services focuses on the optimisation of both the quality and the delivery of services based on an integrated cooperative approach across national borders. Mostly classical "non-sovereign" local service categories like water and electricity supply, waste disposal, social and health services, maintenance of public buildings or green spaces, transportation, internal administrative services such as salary statements, accountancy of IT-management or even public procurement could be reorganised between neighbouring local communities with the objective to develop new economies of scale and/or to maintain services, which under a single organisational approach, would no longer be affordable (e.g. in rural and/or peripheral regions suffering from demographic change). Mutual recognition, if considered openly, could stimulate mutual learning and innovation, leading to new combinations and/or choices of good practices to be adopted by one of the partners via real processes of mutual bench-learning.

Optimizing thematic cooperation between sectorial administrations: The starting point for this fourth pillar for application of mutual recognition lies in the challenge that the integrated development of a cross-border territory (360°perspective) covers a large number of different policy fields which require a coordinative approach of sectorial administrative actors. The structural preconditions for such an approach, however, are again not very favourable because in most cases thematic administrative law – which is finally the basis for sectorial action – is either fully characterised by national standards, or a situation where Member State A may meet EU standards and Member State B or C may even go beyond this, like it is with the case of air-pollution protection, renewable energy-regimes, financing of transportation infrastructure, environmental protection, spatial planning, science and research promotion, education and training etc. etc.. As it is the case for the mobility of citizens, in these areas mostly (deconcentrated) state administration is competent, often however, on a multi-level basis

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with a rather complex mix of public, private, national, regional and local actors to be involved too. An approach could be here to insert mutual recognition clauses in areas where cross-border legal provisions are missing in thematic law. Mutual recognition could lead here to a dissemination of the same standards within a given cross-border territory. The other constellation are areas where a territorial cross-border need for optimisation is given and the absence of a joint standard leads to comparative disadvantages of the cross-border territory compared to its national "competitors". This could be the case with the area of professional training, when for instance in Member State A there is a lack of qualified people and in Member State B a high unemployment rate between young people exists: mutual recognition here would not only refer to formal diploma but also cover the very educational content, allowing for an increase of horizontal mobility dramatically and for the same career chances in the neighbouring state. Finally, mutual recognition could also promote the emergence of multi-thematic sectorial governance regimes in the interest of territorial development in various areas such as health, tourism, transport, infrastructure, environmental protection, economic promotion, renewable energy, in which a joint reflection of national standards by the competent sectorial actors from both sides of the border could lead to innovations in the sense that mutual recognition will result in combination of the best practice elements from either side of the border. Such a managed mutual recognition will finally also contribute to the emergence of a managed functional extra-territorialization within a cross-border territory which constitutes an innovative element for the prospects of a transnational EAS: The idea of horizontal subsidiarity²⁸⁷ could be further developed on a sectorial case by case basis in areas where a real added value can clearly be demonstrated by the cross-border territory.

The principle of mutual recognition has often been criticized for its danger of softening standards according to the lower level of one of the participating partners²⁸⁸. This can indeed be a risk when it comes to the question of the free movement of such goods that have been produced according to lower social and/or environmental standards – an issue that was especially discussed within the context of the political decision process of the "Bolkestein-Directive". However, as shown above, this article has argued that the principle of mutual recognition must not be interpreted in a single-way perspective. As the very term indicates its content must always

287 Beck 2013

288 Nicolaidis 2007

be mutually discussed and voluntarily decided on a bi- or multilateral level. This is why it contains a specific potential for the case of transnational cooperation within the context of the EAS. Different to the application at the level of Member States a limitation to the specific needs of cross-border territories in Europe could both facilitate its application and avoid its possible negative consequences. On the other hand, the arguments presented above were also underlying the necessity of a close cooperation between neighbouring member states willing to apply it in a given cross-border territory – especially in the light of the restrictions defined under Article 197 of the Treaty on the Functioning of the EU.

This leads to the question on how such an approach could best be realised in the real world situation of transnational policy-making. Given the institutional competences of most Member States in Europe it is evident, that such an approach will have to be decided and agreed mutually by the governments of the respective neighbouring countries in order to set a solid framing. In addition, it seems also important to demonstrate the political will to allow for flexible solutions at the level of cross-border territories from the point of view of all relevant jurisdictions. In this respect bilateral joint communications, like for instance for the case of Germany and France, could lead to a programmatic fixation of the will to experiment the principle of mutual recognition in the so-called German-Franco Agenda? Secondly, and on this basis, a careful study of sectorial fields where the principle could indeed create a real added value and in which form functional equivalences are feasible would be necessary. This could lead to the fixation of de minimis standards (both territorially and thematically) in the form of bilateral (sectorial) agreements, defining and embellishing the concrete levels/thresholds within a mutual recognition practice can be practised by the competent administrations in the future. A third step would then require the codification of the principle with regards to administrative standards and procedures at the level of prescription law within the given national thematic law framework in the form of so-called opening clauses.

The notion of trust and proximity – both preconditions for building social capital – is usually better given in a cross-border rather than a more global inter-state context: it is not an anonymous administration here, that asks for a mutual recognition of foreign procedures, but the administration from the "next door neighbour", which actors can easily learn to know better²⁸⁹, where exchanges of both practices and personnel

289 Beck 2008a

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can take place at a formal and informal basis²⁹⁰, and where the necessary administrative capacity can be built up and trained in order to effectively handle cross-border policy-problems in a professional and flexible way. On the other hand it is evident that administrative law is still strongly linked with the classical concept of territoriality. It must be questioned if Member States are at all willing to overcome this principle and enter into an open reflection on mutual recognition in order to spoon out the potentialities which I have tried to sketch above. The strong protectionist attitude of both Member States and some enterprises in the area of non-harmonized goods and the necessity of the Commission to launch together with the regulation of 2008 a proper mutual recognition policy²⁹¹ demonstrates the strong opposition that may be emerging. On the same time, this shows that the principle of mutual recognition is indeed a very meaningful and strong concept. The key word for the application of mutual recognition in the transnational cross-border context, however, must therefore be its evidence base. It will be necessary to carry out *ex ante* impact assessments in order to identify both areas and magnitudes of a meaningful implementation, especially with regards to the definition of the right *de minimis* level allowing for its application on a cross-border basis²⁹². If, however, based on the application of the mutual recognition, a cross-border phenomenon over time will exceed a defined *de minimis* level, e.g. when the exception tends to becomes the rule, it will then be ripe for the other alternative which is harmonization at EU level. This could indeed lead to a new understanding of the laboratory role that cross-border territories might play for the future of both the EAS and European integration.

290 Larat 2015

291 Lake: https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition-goods_en (30.30.2022)

292 Taillon/Beck/Rihm 2010