

Where there is a will, there is a way: some remarks on institutional distance in the Polish-German borderland

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Abstract:

This study concerns the problem of institutional distance between local government units and its impact on the cross-border cooperation of regional and local authorities in the Polish-German borderland. Contrary to cross-border cooperation per se, the analyzed notion is not featured regularly in the subject literature. Above all, the existing studies focus on the forms of, barriers to, and conditions for cross-border cooperation, the assessment of cross-border cooperation projects co-financed by the EU, and the broadly conceived social and economic cross-border ties. On the other hand, there is a shortage of studies analyzing the competences of various local government units with regard to cross-border cooperation. Hence, this article examines the competences of local government units with respect to cross-border cooperation based on the example of the Polish-German borderland. The adopted research method involves the analysis of the subject literature, domestic legislation in Poland and Germany, and the documents and legal acts of the Council of Europe and the EU.

Keywords:

cross-border cooperation, institutional distance, European Union, Council of Europe, Polish-German borderland

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Introduction

Cross-border cooperation is a relatively new research subject. Much like state borders and border regions, cross-border cooperation has been covered extensively by a number of researchers across political science, sociology, law, economics, and geography (Perkmann 2003), becoming an interdisciplinary notion in the process (Wróblewski 2020a, 2020b, 2020c).

Undoubtedly, the growing interest in cross-border cooperation follows from the integration processes that take place in Europe at the international, regional, and local levels. Particularly noteworthy in this context is the

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establishment of Euroregions along the borders of many European states, such as the German-Dutch EUREGIO (1958) and Rhein-Waal (1969) regions, the German-Danish Konferenz für Raumentwicklung in Nordwesteuropa (1965), or the Polish-German Neisse (1991) and Spree-Neisse-Bober, Pro Europa Viadrina (1993), and Pomerania (1995) regions. Also noteworthy in this regard was the adoption of the European Outline Convention on Transfrontier Co-operation by the Council of Europe or the Committee of the Council of Europe, and the establishment of the INTERREG and EGTC initiatives by the EU. In Polish literature, the emphasis tends to be placed on the cross-border cooperation of regions located along the Polish borders. Specifically, Polish authors focus on Polish-German cooperation, which undoubtedly results from the transformation of the Polish-German border into an internal EU border in 2004 (Greta 2008; Tomala 2004; Guz-Vetter 2002; Ciok 2004; Ciok et al. 2008; Szmigiel-Rawska and Dołzbłasz 2012; Raczyk et al. 2012; Wróblewski 2017, 2018, 2020a, 2020b, 2020c; among others), as well as the cross-border cooperation of regions located along the eastern border of Poland, mostly with Ukraine. Another staple research subject concerns the cooperation of Polish border regions with those of Russia (Kaliningrad Oblast), Belarus, Lithuania, Czech Republic, and Slovakia (Poleszczuk et al. 2013; Białobrzeska and Kisiel 2003; Dołzbłasz 2016; Andreasik et al. 2003; Bański et al. 2010; Ptáček and Mintálová 2012; Vaishar et al. 2013; Jakubowski et al. 2017; among others). As for international literature, most publications concern cross-border cooperation in the French-German, Belgian-Dutch-German, German-Austrian-Swiss and, last but not least, American-Mexican borderlands (Laine 2012; Stiglbauer and Lackinger 1980; Sanguin 1983; Leimgruber 1991; Strassoldo 1974, 1989, Minghi 1991, 1994; Decoville et al. 2010; Martinez 1978, 1994, 2001, 2006; Lawrence 2010; Perkmann 2000, 2002, 2003, 2007; Perkmann and Spicer 2007; among others). These studies mostly concern the notions and forms of, barriers to, and conditions for cooperation, cross-border management, and broadly defined social and economic ties. Still, some scholars have pointed to a noticeable shortage of well-developed theories of cross-border cooperation.

In the subject literature, there seems to be a relative consensus as to the core of cross-border cooperation², and the very notion appears to be generally understandable. In general terms, cooperation denotes a joint activity undertaken by at least two entities oriented towards the same goal. However, in the cross-border context, cooperation may pose definition-related problems. According to the

2 On the one hand, cross-border cooperation is identified with the notion of international, trans-border, Euroregional, or territorial cooperation; on the other, each of these terms is defined separately. Furthermore, in the subject literature, the notion of cross-border cooperation refers to the collaboration between different entities, such as the local government units, local and regional communities, and businesses.

European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, cross-border cooperation refers to any joint activity intended to bolster and develop neighborly contacts between territorial authorities (and local and regional communities) of at least two states. In most cases, cross-border cooperation is undertaken by means of an agreement to reach specific (and often shared) goals, resulting from the proximity of the cooperating entities. Thus, cross-border cooperation in the subject literature refers solely to the cooperation of local government units (Groupe 2007; Raczyk et al. 2012; Ciok and Łoboda 1997; Ciok 2000, 2004; Ciok et al. 2008; Makulska 2006; Heffner and Polko 2001; Durand 2015; Podadera and Calderón Vázquez 2018; González-Gómez and Gualda 2020; Beck 2018).

Cross-border cooperation agreements between border regions tend to be driven by grassroots initiatives taken at the local or regional level. These agreements are an expression of the need for cooperation and joint problem-solving. Therefore, it is crucial that local government units have an approximate scope of their respective competences in this regard. This problem is known as the institutional and organizational distance of local government units.

One could, therefore, formulate a number of research questions as to the impact of legal barriers on cross-border cooperation: Why is cross-border cooperation a commonplace phenomenon across the EU despite the frequent occurrence of institutional distance between local government units? How do local government units deal with the problem of competence differences? Are various initiatives undertaken on the grounds of European law, e.g. the EGTC, helpful in this respect? In light of the above, this study analyzes the competences of various local government units with respect to cross-border cooperation based on the example of the Polish-German borderland. Thus, the aim of the paper is to point out the major legal barriers for cross-border cooperation, and to indicate how local authorities may deal with institutional distance. The adopted research method involves the analysis of the subject literature, domestic legislation in Poland and Germany, e.g. the Constitution of the Republic of Poland, the Constitution of the Federal Republic of Germany and the secondary legislative acts, as well as the documents and legal acts of the Council of Europe and the EU.

Polish-German Cross-border cooperation in light of domestic and European legislation

The competences of local authorities with respect to engaging in cross-border cooperation are regulated solely by the domestic legislation of individual states, in particular their respective constitutions, constitutional acts, and

other legal acts specifying the competences and responsibilities of such authorities. If state authorities were to recognize the competences of local government units established on the grounds of international law, it would—to some extent—be tantamount with the loss of their control over the cross-border cooperation of the regional or local authorities (Wróblewski 2020c; Groupe 2007). Hence, international public law does not apply in this matter. However, the aforementioned competences can nonetheless be strengthened by the international obligations of state authorities, e.g. resulting from the convention of the Council of Europe and endorsed by dedicated initiatives and programs, e.g. the EU's INTERREG and EGTC. Still, the respective local government units in different states often differ in their respective competences (which often prove insufficient in their own right), producing one of the major barriers for cross-border cooperation, both in and outside of Europe (Groupe 2007; Lammers et al. 2006; Wróblewski 2020c; Ciok and Łoboda 1997; Przybyła 1997; Ignasiak-Szulc 2009; Poleszczuk et al. 2013; Białobrzaska and Marks-Bielska 2004; Decoville et al. 2010; Durand 2015; Podadera and Calderón Vázquez 2018; González-Gómez and Gualda 2020; Beck 2018).

Domestic legislation

Pursuant to article 172, section 2 of the Constitution of the Republic of Poland (Journal of Laws 1997 no. 78, item 483), local government units, i.e. provinces (NUTS2), districts (LAU1), and municipalities (LAU2) are entitled to access to international associations of local and regional communities, and to cooperate with local and regional communities in other states. However, the notion of *cooperation* is more extensive than that of *accession to international associations*. The latter refers solely to the institutional form of cooperation between territorial units. Still, not every form of cooperation has an institutional character. To this end, the legislator deliberately distinguishes between the right of local government units to have access to international associations, and their right to cooperate with local and regional communities in other states. The Polish Constitution thus specifies the right of territorial units to engage in various forms of territorial cooperation. What is nonetheless problematic is the fact that the designations employed in the Constitution are not precisely defined, either on the grounds of constitutional law or in secondary legislation.

In Poland, cross-border cooperation lies within the exclusive scope of regional (provincial) governments. Pursuant to article 18, section 18 of the *Act on Regional Government* (Journal of Laws 1998 no. 91, item 576), the regional assembly of a given province is required to specify its current and future

cross-border cooperation priorities, along with the plans to access to international regional associations (art. 75).

Conversely, regional assemblies are authorized to adopt resolutions on regional participation in international regional associations and other forms of regional cooperation (article 18, section 14). As per article 76, section 1 of the Act, the cooperation between a given region and regional communities in other states must be conducted in line with the domestic legislation and foreign policy of the state and its international obligations, based on the tasks and competences devolved to the region. Regions may participate in the operations of international regional institutions and be represented in those institutions pursuant to the regulations specified in an agreement between national associations of local government units (article 75, section 2). It should also be stressed that regional assemblies may adopt cross-border cooperation priorities and draft regional cooperation contracts solely upon prior approval of the Minister of Foreign Affairs (article 77, section 1).

In turn, the competences of district authorities are regulated by the *Act on District Self-Government* (Journal of Laws 1998 no. 91, item 578). However, the said Act does not regulate the specific competences of district authorities with respect to cross-border cooperation agreements. Instead, it merely stipulates that district authorities may engage in cooperation with local communities in other states and gain access to international associations of local communities based on resolutions adopted by district councils (article 12, section 9a).

The competences of municipal authorities are regulated by the *Act on Municipal Self-Government* (Journal of Laws 1990 no. 16, item 95). Pursuant to article 7, section 20 of the said Act, municipal authorities are tasked with undertaking cooperation with local and regional communities in other states. Adopting resolutions on cooperation with local and regional communities abroad, and on gaining access to international associations of local and regional communities, lies within the exclusive scope of municipal councils (article 18, section 12a).

Polish local government units are constitutionally authorized to establish and join unions and associations of, and enter into agreements with, local government units. Pursuant to the *Act on Municipal Self-Government*, municipalities are entitled to establish inter-municipal associations and enter into agreements with other municipalities to perform its public services; furthermore, municipalities are also entitled to establish associations with other entities to promote the idea of local government and to defend common interests (Journal of Laws 1990 no. 16, item 95, articles 64-74, 84). In turn, district authorities have the right to establish inter-district associations and establish associations with other districts

and municipalities to promote the idea of local government and to defend common interests (Journal of Laws 1998 no. 91, item 578, articles 65-75). Last but not least, regional authorities may establish associations with other entities and enter into agreements with other provinces and local government units within the province with regard to the delegation and performance of public services (Journal of Laws 1998 no. 91, item 576, articles 8, 8a, 8b).

The key aspect of the ties between constitutionally established local government units is the fact that these units can jointly perform public services (Journal of Laws 1988 no. 91, item 578, article 64). However, pursuant to article 3 of the *Act on the Accession of Self-Government Units to the International Associations of Local and Regional Communities* (Journal of Laws 2000 no. 91, item 1009), the membership of a local government unit in international associations cannot result in the devolution of the public services, real estate, or intangible property rights to any such associations or members thereof. Thus, the constitutional acts regulating domestic associations of local government units do not apply to matters of cross-border cooperation, since they fail to enable domestic local government units to perform public services together with their foreign counterparts. This state of affairs is particularly troublesome in border regions, such as twin cities, which often struggle with overcoming these very obstacles.

Pursuant to article 8b of the *Act on Regional Government*, article 75, section 1 of the *Act on District Self-Government*, and article 84 of the *Act on Municipal Self-Government*, local government units have the right to establish and participate in associations to promote the idea of local government and defend common interests. It may seem that the above goal can be reached through the membership of local government units in an international association. However, such a conviction could not be more wrong, since the right of local government units to establish associations is strictly regulated by the *Associations Act* (Journal of Laws 1989 no. 20, item 104 as amended), which fails to regulate the matters of cross-border cooperation whatsoever. Therefore, a substantial legal loophole exists in this regard.

The specific regulations on the accession of regions and local government units to international associations can be found in the *Act on the Accession of Self-Government Units to the International Associations of Local and Regional Communities* (Journal of Laws 2000 no. 91, item 1009). As per the said Act, *associations* are defined as organizations, unions, and associations established by the local communities of two or more countries, in accordance with their respective domestic legislation (article 1, section 2). Local government units can have access to international associations solely within the scope of their competences and

in accordance with the domestic legislation, foreign policy, and international obligations of the Polish state (article 2, section 1). In the event of any discrepancies between the objectives of the state foreign policy and the local government's participation in international associations, the Minister of Foreign Affairs may revoke the approval required for a given local government to access to a given association (article 10, section 2).

The terminology adopted by the legislator does raise several doubts. Firstly, the notion of *association* as termed in the aforementioned Act is used with reference to three categories that are treated as separate in the constitutional acts. Secondly, the notions of union and association as termed in the aforementioned Act are not precisely defined. Thirdly, pursuant to the constitutional acts, aside from *unions* and *associations*, the respective regional government units are authorized to enter into agreements—a prerogative that is not mentioned in the aforementioned Act. All of the above seem to indicate a degree of terminological inconsistency on behalf of the legislator.

As opposed to the Constitution of the Republic of Poland, the Constitution of the Federal Republic of Germany does not explicitly specify the rights of local government units with respect to cross-border cooperation. Pursuant to article 32, section 1 of the German Constitution, the right to undertake and maintain relations with other states is the sole prerogative of the federal authorities.

The authorities of the respective Bundeslands have the right to voice their opinions with respect to the federal agreement on the cooperation and relations of the Bundeslands with other states (article 32, section 2). The Bundeslands are also authorized to enter into cooperation agreements with other states upon prior approval of the federal authorities and within their devolved competences—among others in education, police, municipal, and healthcare services—and under the so-called *competitive legislative competence* (competitive legislation) and *exclusive legislation* (exclusive rights) principles (article 32, section 3; articles 70–74).

Pursuant to the *competitive legislative competence principle*, the Bundeslands retain their respective legislative competences for as long as the federal authorities abstain from executing their statutory competences specified in the Constitution. These competences extend over civil law, commercial law, economic law, welfare, and the regulations on the residence and settlement of foreigners³. This principle also applies to the legislative prerogatives of the

3 For a detailed catalogue of these competences, see article 74 and 74a of the Constitution of the Federal Republic of Germany, which regulates the division of legislative competences between the federal and Bundesland authorities; see also articles 91a and 91b of the Constitution, which regulates the scope of their joint competences; article 105, section 2

Bundeslands specified in article 70 of the Constitution. The Bundeslands retain their respective legislative rights provided that these rights are not granted to the federal authorities under the German Constitution.

With respect to the exclusive rights, the competences of the Bundeslands also include those of the federal authorities, provided that the federal authorities devolve them to the Bundeslands under specific federal acts (article 71). This means that the Bundeslands can enter into cooperation agreements with other states solely under the rights devolved to them by the federal authorities. Furthermore, as per article 24, section 1a of the German Constitution, the Bundeslands have the right to devolve their sovereign rights (upon prior approval of the federal authorities) to borderland institutions cooperating with neighbor states, with respect to the systems of collective security. These prerogatives are primarily intended to prevent potential cross-border threats. Such a solution does not exist in the Polish legal system.

The German Constitution only regulates the competences of federal and Bundesland authorities with regard to international cooperation. On the other hand, the Constitution does not provide a legal basis for the cross-border cooperation of lower tier government units. This problem concerns municipalities, cities, and associations of local government units alike.

However, the Bundeslands have the right to pass their own internal legislation and regulate the activities of local government units unless the Constitution stipulates otherwise (articles 83 and 84), as exemplified by the constitution, local government act, and inter-municipal cooperation act of Saarland. The right of lower-tier local government units in Germany to engage in territorial cooperation with regional and local communities in other states stems from their sovereignty, Bundesland legislation, and the documents of the Council of Europe ratified by Germany, in particular the European Charter of Local Self-Government, which requires that the federal authorities respect the right of the local government units to cooperate with foreign communities, pursuant to Art. 10, section 10 (Journal of Laws 1994, no. 124, item 607).

The problem of institutional distance and the attendant barriers for cooperation in the Polish-German borderland has been addressed in a range of letters of intent and bilateral agreements and treaties signed by the central authorities on both sides of the border. The unification of Germany, along with

of the Constitution, which regulates the legislative competences in fiscal matters; and article 115c, section 1 of the Constitution, which regulates the extension of the legislative competences of the federal authorities in matters of national defense.

the political transformation of Poland after 1989, and Germany's refusal to ratify some of the agreements signed by the People's Republic of Poland and the German Democratic Republic required that the relations between Poland and Germany be regulated anew, in particular with respect to the mutual recognition of state borders. Poland and the Federal Republic of Germany have signed a number of agreements and exchanged numerous notes to regulate their bilateral relations. Some of the major acts in this regard include the Polish-German Border Treaty (Journal of Laws 1992 no. 14, item 54), and the Treaty of Good Neighbourship and Friendly Cooperation (Journal of Laws 1992 no. 14, item 56). These two acts enabled the regulation of the Polish-German relations at the governmental level and facilitated the development of cross-border cooperation on many plains, including transboundary water management, cultural cooperation, and youth exchange programs. Such agreements constitute a condition *sine qua non* for cross-border cooperation. Without the mutual recognition of the existence of the border, sovereignty, and territorial integrity, let alone the political will to foster neighborly relations at the central level, it would be virtually impossible for border regions to engage in cross-border cooperation. The relations between neighboring states are reflected by the cross-border ties between their respective border regions, which act as a peculiar barometer in this respect (Minghi 1991; Leimgrüber 1991; Ciok 2004; Blake 1998).

The Polish-German Border Treaty is an expression of political will made by the Polish and German central authorities with regard to the regulation of their bilateral relations, recognition of state borders and territorial integrity, and acceptance of a common historical fate. At the same time, both signatories pledged to undertake their best efforts to foster a new European order in which state borders would no longer play a divisive role. However, the Treaty does not provide a legal basis for the cross-border cooperation between the two states.

The Treaty of Good Neighbourship and Friendly Cooperation (Journal of Laws 1992 no. 14, item 56) complements the Polish-German Border Treaty; it also acts as a declaration of continued maintenance and growth of good neighborly relations between the Polish and German central authorities. The signatories of the Treaty underscore the need to tighten their cooperation across different plains. Article 12, section 1 stresses the importance of cooperation between regions, cities, municipalities and other local government units, in particular in the border regions. At the same time, Poland and Germany pledge to facilitate and foster cross-border cooperation in all fields, specifically through inter-governmental committees, and to observe and promote the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities

(article 12, sections 2 and 3), in particular with regard to land management and urban planning in their respective border regions (article 13), countering environmental hazards in the Oder basin (article 16, sections 1 and 2), tourism and mutual assistance in the event of natural disasters and serious accidents (article 17; article 19, sections 1 and 2).

The Treaty obligates Poland and Germany to support cross-border cooperation. However, it does not specify the means of such support. The terms used in the Treaty with reference to cross-border cooperation, such as “the parties attach utmost importance” (article 12, section 1), “facilitate and support” (article 12, section 2), and “pursue” (article 12, section 3), are rather imprecise due and fail to specify the scope of the actual obligations of the parties due to the generic wording. Furthermore, the provisions of the Treaty are not self-executing, i.e. the Treaty does not provide a legal basis for cross-border cooperation, but merely constitutes an expression of political will of Polish and German authorities as to the governmental, parliamentary, regional, and local cooperation.

The Transboundary Water Cooperation Agreement (Journal of Laws 1997 no. 11, item 56) regulates the use of transboundary waters and cooperation with regard to water management at the central level (article 2; article 4, section 2; article 3; article 10; article 11; article 12). The Agreement does not directly regulate cross-border cooperation in this regard, even though the cooperation in managing transboundary waters (especially with respect to environmental protection and countering the pollution of surface and ground water, flood control, and ice flow management) constitutes a vital part of cross-border cooperation between local government units. Still, pursuant to article 3, section 1, point b of the Agreement, appropriate authorities and institutions (including local government units) may engage in cross-border cooperation in the above matters.

The Agreement on Cultural Cooperation between Poland and Germany (Journal of Laws 1999 no. 39, item 379) concerns the cooperation in the fields of culture, education, and science. The parties pledged to improve their mutual knowledge of culture, language, literature, and history, and to foster cultural cooperation, in particular in their respective border regions (article 16). To this end, the parties pledged to assist one another in organizing visits of cultural representatives, and cultural events, including theater performances, exhibitions, lectures, and talks (article 2). The mutual support would also be extended to activities such as teaching the neighboring country’s official language, establishing bilingual schools in border regions, expanding Polish and German programs at universities, compiling and disseminating textbooks of Polish and German as a second language, and establishing and supporting cultural institutions (articles 4-17).

The Youth Cooperation Agreement (Journal of Laws 1994 no. 3, item 12) provisioned the establishment of the Polish-German Youth Cooperation, tasked with supporting all activities enabling students to meet, understand, and cooperate with their peers across the border by means of youth meetings, exchange programs, material support, and consulting and informational services (article 1 and 2, section 1). The support is extended to public and private initiatives involving youth meetings, and school and non-school youth exchange programs (article 2, section 2). The Polish-German Youth Cooperation has the right to undertake its own initiatives or implement private and public initiatives of third parties, provided that they comply with the statutory goals of the organization, and the common interest of Poland and Germany and are financed by the applicant and/or if a given goal cannot be met by private or public entities (Journal of Laws 1994 no. 3, item 12, article 2, sections 3 and 4).

At the same time, the Agreement does not directly refer to cross-border cooperation. It does not directly influence the support of youth exchange programs in the border regions of Poland and Germany, either, even though a youth exchange makes for a special platform of cross-border cooperation for Polish and German border regions. At the same time, the Council of the Polish-German Youth Cooperation does include representatives of local municipal authorities, alongside the representatives of state authorities, organizations, and institutions (article 4, sections 1 and 2).

European legislation

Major attempts to eliminate the legal obstacles for the cross-border cooperation of local government units in Europe have been made by the Council of Europe, which adopted the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, the European Charter of Local Self-Government, and the European Charter on Regional Self-Government. However, these documents are not strictly binding and do not specify the competences of local government units in matters of cross-border cooperation. On the other hand, they provide a road map and delineate the scope of state support for cross-border cooperation and encourage the signatories to recognize the prerogatives of local government units to engage in all forms of cross-border cooperation (Perkmann 2003; Wróblewski 2020c).

The European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, also known the Madrid Convention, defines the general framework for international agreements on

cross-border cooperation, concluded between local communities and governments. Signatories of the Convention are bound to:

- support the cross-border cooperation of local communities and governments;
- eliminate any (legal and administrative) barriers to cross-border cooperation.

Thus, the appendix to the Convention includes templates of:

- international cross-border cooperation agreements;
- cross-border cooperation agreements, articles of associations, and contracts for local authorities and communities.

As opposed to the Madrid Convention, the European Charter of Local Self-Government does not refer to cross-border cooperation, but rather concerns the notion of territorial self-government of local authorities⁴. The Charter stipulates that local government units should have the full right to manage and administer public matters within the legal limits that do not explicitly exclude those matters from their jurisdiction or assign them to other authorities. However, the Charter fails to specify the detailed scope of the above rights. Instead, it obligates the signatories to define them constitutionally or through other acts of domestic legislation. These rights can also be executed in cooperation with other local government units, among others under domestic and international association of local government units.

The European Charter on Regional Self-Government has a similar tenor to the European Charter of Local Self-Government. It defines the general rights of regional governments⁵ to:

- create their own regional policies based on the specificity of a given region;
- enter into inter-regional or cross-border cooperation agreements;
- appoint joint executive or legislative authorities in cooperation with the regional governments in other states, in accordance with international law and the domestic legislation of all parties involved, thus creating a so-called cross-border region;
- participate or be represented in European organizations;

4 Territorial self-government is understood here as the right of the local communities to determine and manage public matters at their own initiative and in the interest of the local communities.

5 Regional government denotes the largest territorial government unit equipped with elected administrative authorities, located between central authorities and the local government, and granted (in line with the principle of subsidiarity) with the prerogatives to administer selected public rights on behalf of the regional community.

- participate in governmental consultations on international treaties or legal acts of European organizations that (in)directly affect the competences and interests of regional governments.

On a wider scale, cross-border cooperation is also supported under EU legislation (Virkkunen 2002; Van Houtum 1998; Gualini 2003; Perkmann 1999, 2003, 2007; Perkmann and Spicer 2007; Groupe 2007). This support includes legal, organizational, institutional, and financial measures. The legal dimension – which is of particular importance for this study – encompasses primary and secondary legislation on the EU cohesion policy, including the European Territorial Cooperation (ETC), financial instruments (ERDF, ESF), programs and initiatives for the support of cross-border cooperation (a.o. INTERREG, ETC). The organizational and institutional dimension of the EU legislation on cross-border cooperation concerns the organization and management of cross-border cooperation by the European Commission (DG REGIO) and the European Committee of the Regions. In turn, the financial dimension is implemented via programs and initiatives co-financing the cooperation projects of local and regional authorities (Perkmann 2003), such as the Phare CBC, INTERREG and ETC, IAP, and ENI programs.

To abolish the legal barriers for territorial cooperation, resulting from the different legal systems in the respective member states, the Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC)⁶ was adopted throughout the EU, along with the establishment of the European Grouping of Territorial Cooperation (EGTC) (Official Journal of the EU L 210/19; L 347/303). The EGTC provides a legal instrument for cross-border cooperation under the EU cohesion policy. The EGTC enables public entities such as:

- member states and their central authorities,
- regional and local governments,
- public enterprises or public law entities,
- enterprises commissioned with the provision of general business services,
- central, regional, or local authorities, entities and businesses of third countries,
- associations of entities belonging to at least one of the above categories,

⁶ As of now, the legal basis is provided by the Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC) regarding the clarification, simplification and improvement of the establishment and functioning of such groupings.

to establish formal structures for their cooperation. These structures are granted with the legal personality in accordance with the legislation of their country of residence⁷; furthermore, they may purchase and sell real estate, hire employees, and be parties to court proceedings. However, the EGTC does not have an industrial or commercial character. For the most part, the EGTC is financed by the contributions from its member. The EGTC register is kept by the European Committee of the Regions. So far, a total of 46 associations have been founded within the EGTC, including the peculiar European Urban Knowledge Network, none of whose members are neighboring states.

The range of cooperation within the EGTC is broad and may involve the running of cross-border transportation entities, implementing and managing cross-border development projects, developing rural areas, and sharing specialist know-how and best practices. Still, the prerogatives of the EGTC are limited in comparison with those of the individual associated members. The EGTC is also prohibited from assuming the prerogatives of public authorities. The tasks of the EGTC may include specific acts of territorial cooperation between its members, with or without financial support from the EU. On the other hand, EGTC may be tasked with the implementation of programs co-financed by the EU via the European Regional Development Fund, the European Social Fund, and the Cohesion fund, as well as other cross-border cooperation projects that may (or may not) be financed by the EU.

As mentioned above, EGTC membership may be granted to entities based in third countries, provided that they border on at least one EU member state participating in EU programs for the support of territorial cooperation or involved in territorial cooperation with at least one EU member state. At the same time, the said EU member state must recognize a given EGTC as compliant with the scope of its territorial cooperation or bilateral relations with a given third country. Moreover, the statutory seat of the association must be located within the territory of the EU member state that is a member thereof (Official Journal of the EU L 347/303).

7 The EGTC acquires a legal personality as of the date of registration or publication of its articles of association in accordance with the domestic legislation of the member state in which it has its statutory seat.

If things are so bad, then why are they so good? A few remarks on the intensity of cross-border cooperation in the Polish-German borderland

The above deliberations indicate that institutional distance constitutes a significant barrier to the cross-border cooperation of regional or local authorities, not just in the Polish-German borderland but also in all other EU borderlands. That barrier can be lifted, e.g. by establishing EGTCs. So far (i.e. by March 2021), 78 such groupings have been registered. However, no EGTC has been established on the German-Polish border so far. On the other hand, the Polish side is involved in four other EGTCs:

- EGTC TRITIA limited (Poland, Czech Republic, Slovakia);
- EGTC TATRY Ltd. (Poland, Slovakia);
- CETC-EGTC Ltd. (Poland, Hungary, Sweden, Croatia);
- EGTC NOVUM Ltd. (Poland, Czech Republic).

As for the German side, it has come into 11 EGTC agreements, most of which concern the western or southern border of the country:

- GECT Eurodistrict Strasbourg-Ortenau (France, Germany);
- EVTZ INTERREG „Programm Großregion” (France, Germany, Luxemburg, Belgium);
- Eurodistrict Saarmoselle (France, Germany);
- EGTC-European Urban Knowledge Network Limited (Cyprus, Belgium, Czech Republic, France, Germany, Luxembourg, Holland, Romania, Spain);
- EVTZ „Gipfelsekretariat der Großregion” (Luxemburg, Germany, Belgium, France);
- Interregional Alliance for the Rhine-Alpine Corridor EGTC (Germany, Holland, Belgium, France, Switzerland, Italy);
- EUCOR The European Campus (Germany, France, Switzerland);
- Eisenbahnneubaustrecke Desden-Prag EVTZ (Germany, Czech Republic);
- GECT Eurodistrict PAMINA (France, Germany);
- EGTC Euregio Meuse-Rhine (Belgium, Holland, Germany);
- EGTC Eurodistrict Region Freiburg – Centre et Sud Alsace (France, Germany).

The fact that no EGTC has been established in the Polish-German borderland so far is somewhat puzzling. One is tempted to inquire about the root

causes of such a state of affairs, particularly considering the relatively early establishment (in the 1990s) of as many as four Euroregions and the conclusion of direct cooperation agreements between local government units on both sides of the border, e.g. between the twin cities. This may indicate that either EGTCs fail to address the problem of institutional distance or such instruments are simply redundant in the Polish-German borderland. The latter seems highly implausible given the range of discrepancies between the competences of local and regional authorities in this respect. In light of the above, it seems valid to investigate the ways in which local government units overcome the problem of institutional distance.

Cross-border cooperation is understandably undertaken by local government units for specific (often shared) purposes, and as such it can take many forms (Raczyk et al. 2012; Ciok and Łoboda 1997; Ciok 2000, 2004; Ciok et al. 2008, Makulska 2006; Andreasik et al. 2003; Heffner and Polko 2001; Wróblewski 2017, 2020c). Cross-border cooperation can be undertaken both within and without the framework of legal obligations. In the former case, cross-border cooperation is established in international agreements between state authorities. Based on such agreements, bilateral governmental commissions and working groups are established and granted negotiation prerogatives with respect to the relations between the respective parties. At the same time, they do not determine the competences of local governments in this regard. On the other hand, the latter form of cross-border cooperation stems directly from local initiatives and is chiefly undertaken based on appropriate declarations or letters of intent.

Depending on the needs and competences of local government units specified in domestic legislation, cross-border cooperation may occur both on a single plane (uniplanar cooperation) and in multiple planes at the same time (multiplanar cooperation). In reality, however, cross-border cooperation almost always occurs on at least two planes. The range of cooperation may be very extensive, since it may take place on the administrative plane (e.g. exchange of best practices, joint operations of local government units, joint commissions and institutions, study visits), the economic plane (e.g. transportation and infrastructure, economic development and labor market, education and trainings, environmental protection, tourism), and the cultural plane (e.g. co-organization of cultural and sports events, supporting national minorities) (Wróblewski 2017, 2020c).

Cooperation can also have an institutional and non-institutional character. The former involves the cooperation between various types of public and private institutions. It is manifested through the establishment of different authorities, committees, commissions or working groups, and tends to be undertaken based on agreements between the respective entities. As such, its character is rather

formal. On the contrary, non-institutional (informal) cooperation involves the cooperation of individuals or groups of individuals, and thus it remains non-quantifiable and eludes the label of cross-border cooperation.

The cooperation of local authorities can also be classified based on the number and type of units involved. Naturally, one can distinguish between bilateral and multilateral cooperation. One form of bilateral cooperation can be the aforementioned twin city agreements. Multilateral cooperation occurs if at least three entities are involved that engage in direct cooperation or collaborate under the umbrella of international organizations or associations. Neither of these two modes of cooperation precludes entities of different types (i.e. local government units and associations of local government units) from engaging in collaboration. Aside from the above, one should differentiate between the cooperation of local government units of the same level or different levels (i.e. single- and multi-level cooperation). Another key factor is the financing of such cooperation. It can be financed from a government's own, external, or mixed funds. External funds include, among others, other domestic funds, partner institution's funds, international organizations' funds (e.g. EU).

In general, the subject literature provides a plethora of evidence for the intensity of cross-border cooperation in the Polish-German borderland (Guz-Vetter 2002; Ciok 2004; Ciok et al. 2008; Szmigiel-Rawska and Dołzbłasz 2012; Raczyk et al. 2012; Wróblewski 2017, 2018, 2020a, 2020b, 2020c). The degree of its intensity, however, depends on the kind of ties and the type of entities engaged in cooperation (Wróblewski 2017, 2018, 2020a, 2020b, 2020c; Raczyk et al. 2012). In principle, cooperation of local or regional authorities is characterized by a greater intensity than that between other entities. At the same time, units of approximate levels, e.g. border towns, tend to maintain more intensive relations, even in spite of their different administrative positions (Wróblewski 2017, 2020a, 2020b, 2020c; Szmigiel-Rawska and Dołzbłasz 2012), which stems chiefly from the need to resolve shared problems. Nonetheless, research has shown that the assessment of cross-border cooperation differs depending on the entity. While local government units see their cooperation in a positive light, business entities are frequently far more critical in this respect (Wróblewski 2017, 2020c; Raczyk et al. 2012).

In the majority of cases, the cross-border cooperation of local or regional authorities is undertaken based on direct agreements between them, which tend to bypass integrative superstructures and distinctly refer to the legislation on local government units as provisioned in the Madrid Convention or bilateral treaties signed by state authorities. Cross border cooperation is manifested not only through

study visits and joint sessions of communal or municipal authorities (conducted while retaining their respective institutional autonomy) but also through a range of projects or events co-organized or co-implemented by such authorities, e.g. cultural events, youth visits and exchange programs, trade fairs, etc. In many cases, local authorities also establish joint institutions with consultative prerogatives, e.g. the Słubice-Frankfurt Cooperation Centre. However, this is not tantamount to the transfer of any local government unit competences to any institutions or authorities. In most cases, cross-border cooperation has a distinctly consultative character. On the other hand, EGTC initiatives—while indisputably vital to the solution of cross-border problems—have not yet been regulated, because the scope of cooperation undertaken within their framework (e.g. TEN-T, R&D)—as can be seen in other borderlands—often exceeds the scope of cooperation of local authorities. Hence, EGTCs do not offer an unambiguous solution to the problem of institutional distance at the lowest administrative tier, where direct agreements seem sufficient to clear any such hurdles.

Conclusions

Every state tends to have a slightly different legal system and administrative division, hence local government units are often granted with different competences. This problem is particularly noticeable in border regions (not just in Europe), whose location renders them susceptible to similar problems, from unemployment, through social dysfunctions, negative stereotypes, flood control, and firefighting. Solving these problems is often easier thanks to a range of cross-border cooperation projects undertaken by local government units. With that in mind, central authorities should support such initiatives financially, legally, and administratively. At the same time, cross-border cooperation results from grassroots initiatives undertaken by local and regional authorities and/or communities of border regions. Therefore, it is vital to minimize the institutional distance between local government units on the opposite sides of the border. The problem can also be encountered in the Polish-German borderland. Still, the Polish and German regional and local authorities tend to engage in cross-border cooperation on a reasonably wide scale, and the subject literature in this regard is immensely rich.

While the Polish Constitution and secondary legislative acts ensure that local authorities can obtain access to international associations of local and regional communities and cooperate with the local and regional communities in other states, their competences in this respect are rather obscure. Similarly, the designations used in the existing Polish legislation with respect to territorial

cooperation lack specific definitions or were derived from other legal acts that do not apply to matters of cross-border cooperation, but rather to domestic competences. This leads to visible terminological inconsistencies in the legislation. What is most problematic in this respect is the fact that the membership of local authorities in international associations cannot result in the devolution of public services to the said associations or their members; furthermore, all actions undertaken in these matters must not only comply with the international obligations of the Polish states (which is a given) but also with the foreign policy of the Polish government.

Contrary to the Polish Constitution, its German counterpart makes no direct references to the rights of local government units in the field of cross-border cooperation. This extends over both municipalities and cities, and associations of local government units. On the other hand, local governments may enter into cooperation agreements with other states, with respect to strictly defined areas, including *competitive legislative competence* and *exclusive legislation*. Bundesland authorities are also entitled (upon prior approval of the federal authorities, and in specific cases) to devolve their sovereign Bundesland rights to borderland institutions cooperating with neighbor states. The Bundeslands can also regulate the activities of local government units unless the Constitution stipulates otherwise. Hence, the competences of German local authorities with respect to engaging in cross-border cooperation stem from their sovereignty, Bundesland legislation, and the international agreements ratified by Germany.

Contrary to the appearances, the conventions on cross-border cooperation adopted by the Council of Europe fail to provide a solution to the problem of institutional distance. Despite this shortcoming, these conventions nonetheless obligate state authorities to recognize the right of regional and local authorities to act on their own behalf or in the interest of regional or local authorities. Similarly, bilateral agreements are not particularly helpful in this regard, as they constitute an expression of political will or commitment to support cross-border cooperation, mostly in its administrative or financial dimensions. Bilateral treaties in themselves do not provide a legal basis for cross-border cooperation, and therefore cannot reduce the scope of institutional distance between local government units. To resolve the problem of institutional distance, one would have to adopt approximate legal solutions on the grounds of different legal systems, which is only partially possible (if not virtually impossible) in some cases.

One player of strategic importance to the reduction of cross-border cooperation barriers in Europe is the European Union. It is on the grounds of EU legislation that various programs and initiatives have been adopted that support the cross-border cooperation of border regions in the internal and external EU

borderlands. The European Grouping of Territorial Cooperation founded by the EU may provide an important answer to the problem of institutional distance between local government units across the EU (and outside of the community). This instrument enables the establishment of formal frameworks for cooperation that vastly exceed those anchored in Euroregional structures. The EGTC has a legal personality and is capable of implementing tasks commissioned by the members of the association, including the preparation, implementation, settlement, and evaluation of territorial cooperation projects co-financed by the EU. Conversely, Euroregions are merely cross-border unions comprised above all of associations of local government units, registered in accordance with the domestic legislation of a given state and devoid of a legal personality. These unions act as working versions of cross-border communities and serve specific purposes, yet they are not granted with more extensive competences, and their decisions are not binding to local government units. (Perkmann and Spicer 2007). Some authors venture so far as to define Euroregions as “states without borders,” “states within states,” or even “territorial units” (Stanaitis 2009; Kuzmin 2009; Perkmann 2003, 2007), despite the grossly exaggerated character of these claims.

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