

# Should EGTCs have competences, and not only tasks? Underlying visions of cross-border integration

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## Abstract

Should EGTCs have competences, and not only tasks? The question points at a controversy about the nature of cross-border cooperation, and more specifically, of cross-border governance structures. The EGTC regulation and its dominant interpretation, say that EGTCs have tasks, not competences. However, the discussions that took place while negotiating the Aachen Treaty chapter about CBC, signed in 2019 between France and Germany – whose common border presents a number of EGTCs – have shown that different visions exist on the topic. The chapter outlines the rationales underlying these visions, and their complementarity for the development of cross-border integration. It also explores how these visions replicate challenges and discussions about the European project itself.

Some theoretical hypotheses on institutional vs functional approaches, based on literature about multi-level governance and pragmatic sociology, are presented and applied to the European context. The underlying influence of Saint Simon's functional approach on French vision and policies, but also on personalism and integral federalism (in particular Denis de Rougemont), and therefore on discussions about the EU is explored. The chapter describes the specific case of CBC and EGTCs as tools for its governance, and how the controversy about EGTCs' tasks or competences has been reactivated by the negotiation of the Aachen Treaty. It assesses its relevance against the evidence of effective governance of cooperation and investigates the influence of Saint Simon and Rougemont on visions about CBC issues, in the light of the Covid crisis; and ends with some conclusions and recommendations for cross-border governance and the use of the EGTC tool.

**Keywords:** border, cooperation, multi-level governance, functional approach, personalism

## Introduction

Should EGTCs have competences, and not only tasks? The question may sound byzantine; it points at a controversy about the nature of cross-border cooperation (CBC), and more specifically, of cross-border governance structures. The EGTC regulation and its dominant interpretation, say that EGTCs have tasks, not competences. However, the discussions that took place while negotiating the Aachen Treaty chapter about CBC, signed in 2019 between France and Germany – whose common border presents a number of EGTCs – have shown that different visions exist on the topic. The present chapter explores the rationales underlying these visions, and their complementarity for the development of cross-border integration. It also explores how these visions replicate challenges and discussions about the European project itself.

The chapter will: (1) present some theoretical hypotheses on institutional *vs* functional approaches, based on literature about multi-level governance and pragmatic sociology, and their application to the European context; (2) explore the underlying influence of Saint Simon's functional approach on French vision and policies, but also on personalism and integral federalism (in particular Denis de Rougemont), and therefore on discussions about the EU; (3) describe the specific case of CBC and EGTCs as tools for its governance; (4) present how the controversy about EGTCs' tasks or competences has been reactivated by the negotiation of the Aachen Treaty, and assess its relevance against the evidence of effective governance of cooperation; (5) explore the influence of Saint Simon and Rougemont on visions about CBC issues, in the light of the Covid crisis; and (6) end with some conclusions and recommendations for cross-border governance and the use of the EGTC tool.

### **(1) Theoretical hypotheses on institutional *vs* functional governance, and application to the European context**

The chapter is based on diverse theoretical hypotheses: literature about multi-level governance (Hooghe & Marks, 2001) comparing governance I and II types; about hard *vs* soft planning (Faludi, 2013; 2018); and about „*inter-territorialité*“ (Vanier, 2008); having in common to oppose institutional *vs* functional approaches (for a summary, Peyrony, Perrin & Sielker, 2020). „Pragmatic sociology“ provides a broader context for these hypotheses.

In the field of territorial development policies, institutions such as states, or local authorities within these states, are geographically limited by borders. On the other hand, functional areas, related to physical or socio-economic functions (e.g.: water catchment areas, travel to work areas, etc.), are characterised by interdependencies/flows, that often cross (administrative, national) borders (e.g.: in the case of functional

urban areas, CB agglomerations). Public policies may privilege a framework based on the institutional approach, called „governance I“ by Hooghe & Marks (nested authorities, citizenship based on belonging to territorialised communities, hard planning), or on the functional approach, called „governance II“ by Hooghe & Marks (variable geometry, overlapping spaces, multi-appartenance, soft planning). The following scheme sums up their respective advantages and dis-advantages – having in mind that for Hooghe & Marks, the question is not to choose one or the other, as they are in fact complementary. In a country like France, „federative intercommunality“ (type I) and „*syndicats intercommunaux à vocation unique*“ (SIVU, originated in the XIXth century, dealing with water supply, garbage treatment or energy) (type II), co-exist. The discussion between supporters of an integrated, federative approach, wishing to aggregate functional areas within single territorial limits, and supporters of variable geometry and „*inter-territorialité*“ (Vanier, 2008), is certainly there for a long time.

Table 1: Multilevel governance: advantages and disadvantages of institutional and functional areas

<b>Multilevel governance</b>  (Hooghe & Marks)	<b>Institutional areas</b> (governance I)	<b>Functional areas</b> (governance II)
<b>Advantages</b>	<b>democratic</b> integrated approach of common good  <b>cohesion based on political identity, collective interest</b>	<b>efficient</b>  <b>cohesion based on economy, networks, interdependence</b>
<b>Disadvantages</b>	<b>inefficiency traps</b> (F.Barca) <b>miss the reality</b>  “poverty of territorialism” (Faludi)	<b>overlapping, complex technocratic</b>  for « anywheres », not for « somewheres » ? (Goodhart)

Source: Own elaboration

These two approaches find an echo in “pragmatic sociology”, illustrated by Serres (1995), Latour (1993), Boltanski & Thévenot (2006), describing interactions between human actors and frameworks involving objects, allowing their coordination. The latter have described six “cities”, or spheres of justification: market; civic; industrial (or functional); opinion; inspired; and domestic that are a powerful tool to explore

collective action, including public intervention (Peyrony, 2014; 2018). In each country, these six spheres coexist, enter into conflicts and compromises through arrangements which are specific to this country. What is important is the interrelations between these spheres. In other words, each of us, as a person, is simultaneously: an economic agent, a citizen, a user of public services (functional city), an informed individual, an inspired individual, an individual involved in human links.

Two “cities” are particularly relevant when analysing public policies: the “civic” city equivalent to the institutional approach (governance I), and the “industrial” city, equivalent to the functional approach (governance II). Such analytical lens can be applied in various contexts, from local – the functioning of a CB hospital (Peyrony & Faure, 2020), to the European project itself (Faludi & Peyrony, 2011).

The complexity grows with the number of territorial levels implied in policy processes, that try to combine more proximity with the persons’ daily lives, and adaptation, in the context of globalisation, to increasing interdependences at larger scales, such as continental regions. The difficulty to reach a collective understanding of what should be done at what scales, within which spatial areas, contributed to recent crises such as Brexit in the UK, “populist” votations in Switzerland, or „yellow vests“ riots in France. The issue, for practitioners as well as politicians, is to adapt policies to this complex environment: to combine approaches going local and global, while simplifying complexity. Goodhart (2017) has opposed „anywheres“, mobile people able to act in variable geographies – and „somewheres“, people trying to resist such evolutions. How to avoid losing „somewheres“ on the way, is a major challenge for designers of public policy.

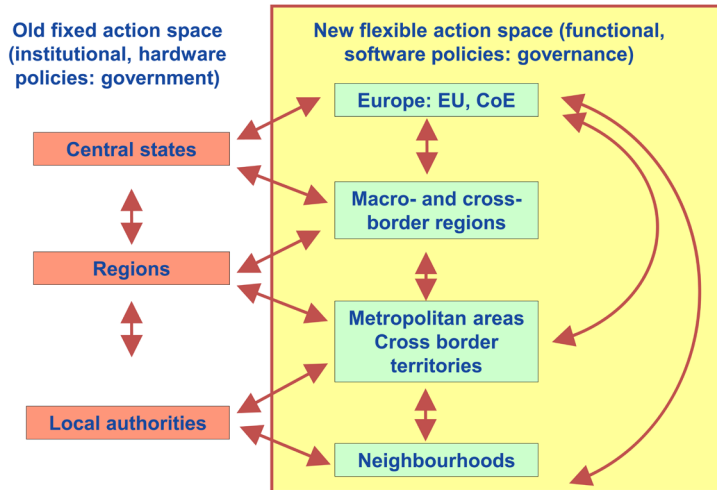
In the European context, the following schema (EC, 2010) gives an idea of spaces that are at stake. According to Barca (2009), the cohesion policy and its shared management scheme find their justification on the need to pull local authorities out of the “inefficiency trap, “resulting from closed territorial boxes. More recently, the issue of discrepancy between territorial institutions and functional realities (Faludi, 2018), has been considered as central in the prospective scenarios drawn by the European territorial reference framework (ETRF) (ESPON, 2019).

Among key territorial challenges for the future of Europe, ETRF identifies “growing interdependencies” and “functional mismatch at all scales”, between the impacts of economic and societal developments and the geographical jurisdictions of decision making, creating problems of efficiency and legitimacy in political institutions and demanding territorial reforms and/or more territorial cooperation at all scales and between sectors.

Figure 1: Multi-level government and governance

## Multi-level government and governance

*Adapted from EC, Cities of tomorrow, 2010*



In the 17<sup>th</sup> century, the Peace of Westphalia has been the beginning of the modern international system, based on the concept of sovereignty: each nation state has exclusive sovereignty over its territory, including for the definition of its internal organisation. But this regime has been disrupted by increasing interdependencies, networks overpassing administrative borders and emergence of functional areas. The attempt to stick to a narrow approach of sovereignty and territories, nested like Russian dolls, has been coined by Faludi (2018) as “territorialism”. Against it, he advocates for a neo-medieval approach of planning, dealing with fuzzy borders and overlapping sovereignties. In the future, the paramount challenge will be how to reinvent democracy and effective government taking on board such evolutions.

The ETRF project proposes four different scenarios, based on different responses to changes on political geographies: “muddling through” (sticking to a narrow interpretation of sovereignty and identities, with territorial reforms exclusively led within states); “enabling cooperation” (with more cooperation among states, regions and cities, better acknowledgement of metropolitan areas, development of functional cross-border areas, and multi-level place based European policies); “new territorialities” (a prospective scenario implying institutionalisation of functional areas, non-exclusive sovereignty and project oriented delimitation – this scenario would correspond to the full implementation of the Aachen Treaty, in the framework of European legislation, as we will see later); and “post territorialities” (with more bottom-up processes, and role of international arbitration centres). The latter model is close to the concept of functional federalism with its “functional, overlapping and

competing jurisdictions” (FOCJ) (Frey & Eichenberger, 1999), based on specialised public agencies, exemplified in Switzerland with its functional communities. According to ETRF, this scenario is the only one to assume a deterritorialisation of politics, and the emergence of spheres of governance attached to networks instead of places.

## **(2) Underlying visions: influence of Saint Simon’s functional approach on French vision and policies, on personalism and integral federalism (in particular Denis de Rougemont), and therefore on discussions about the EU**

As Boltanski and Thévenot have shown, it is important to understand visions behind the actors’ justifications. This is even truer in the European or cross-border context, where several countries have to match internal frameworks of policy discussion (Peyrony, 2014; 2018). Let us explore the opposition of institutional *vs* functional approaches, beyond the field of spatial planning and territorial development. It can be rooted in the history of political ideas and sociology, and in their different understandings in European countries. The French philosopher Saint-Simon (Musso, 1999), fellow of Lafayette in the American War of Independence, came back to Europe convinced of the need to substitute “the government of men by the management of things”, and to promote the United States of Europe. Saint-Simon was fascinated by technical networks, such as hydraulic structures he studied in the Netherlands; in a quasi-mystical vision, he considered such networks as the blood stream of societies. Such a vision prefigures the will to conciliate governance I and II: human communities based on territories, designed on the basis of objective characteristics, that would prevent human conflicts. The fertility of Saint-Simon’s thought has been multiple, in political and philosophical fields, but also in diverse cultural contexts.

In France, in the political field, he influenced French bankers and engineers at the origin of the development of technical networks in the second half of the 19th century: the national railway system, the Suez Canal, etc. In the case of France, the privileged scale has been the national one of the “hexagon”— such hexagons geometrically allowing the world to be paved with a community of nation states.

Philosophically, through Auguste Comte, Saint-Simon is at the origin of French sociology. Durkheim, *vs* Spencer’s liberal individualism seeing market as the cement of societies, understood social integration in modern societies as the effect of “organic solidarity”, through the growing differentiation and interdependence of individuals. Durkheim, against a pure “market” approach, coined the concept of cohesion, based on social division of labour, but also public intervention (Peyrony,

2018). At the beginning of the 20th century, Durkheim inspired both Léon Duguit, a professor of public law and its theory of public services legitimating the state, and Léon Bourgeois, a politician who elaborated the “solidarist” doctrine, and was later the first President of the League of Nations.

But on the other hand, Saint Simon also influenced utopian socialists such as Proudhon, and through them, the personalism of Emmanuel Mounier, that has in turn influenced some of the EU founding fathers and later Jacques Delors (Martin de la Torre, 2014); and the integral federalism of Denis de Rougemont and Alexandre Marc (Goehrs, 2018).

In the view of Mounier, Marc and Rougemont, influenced by the Christian social doctrine, the concept of person should be preferred to the abstract concept of individual. Inserted in networks of relations, persons may have various spheres of belonging, communities that can be natural, functional, elective (association), in all spheres of society (political, economic, social, cultural, linguistic) and at different levels (local, regional, national). The nation is only one of these communities. The state should not have a monopoly on legitimacy to produce legislation (legal pluralism). Flexible contracts should be preferred to the myth of a single contract between the individual and state. The statute of each person should be differentiated, deduced from legal links implied by belonging to various communities.

For Rougemont (1977), persons and groupings should be protected against the oppression of state; many problems of the 20<sup>th</sup> century find their origin in the collusion between state and nation. Following René Girard and its theory of the sacred containing violence, Rougemont writes:

*”It is the nation state that maintains ”the violence of all against all”, this standardising gravity, cause and means of centralisation, alignments, police regimes, state-national frameworks destroying old communities and not tolerating new ones, whether local, or supranational as were the parishes and the Church, or the communes and Empire. Or as the Regions and Europe will be tomorrow”. Rougemont (1977: 254)*

*”Any pretension to standardise individuals and their behaviours at the expense of the diversity of vocations, gifts and charisma, any legal measure that refuses to take into account regional and cultural differences in customs, language, teaching or liturgy, is in fact violence against the person. “ All this violence leads to the erasure of differences”, writes Girard, for whom, on the contrary, order, peace and fertility are based on differences: it is not the difference, but its loss that causes violent confusion.”” Rougemont (1977: 313)*



For Girard, the sacred is ambivalent, with its sunlit side (the pure blood of the divinity), and its dark side (the dark blood of the initial murder's victim) – even if in fact it is the same blood, the one of the victim deified by primitive societies, and later the blood of ritual victims, often chosen among strangers. The nation state is indeed similarly ambivalent, with its sunlit side, offering protection and identity – the pure blood of the nation's body, but also its dark side: the impure blood on the other side of the border. The border itself is a sacred, therefore ambivalent institution: it is both a skin and a threat.

Regions should be defined on the functional basis of the needs of inhabitants; each commune could belong to as many functional regions as it would estimate necessary to manage its activities. Rougemont has been particularly critical of the French state, as one of the protagonist of the world wars of the 20<sup>th</sup> century; but also as a nuclear power, as well for military and civil uses that he fought as an early ecological militant. For Rougemont, Europe, as a federation of functional regions, should allow autonomy of persons and communities, through free administration, differentiated integration, and entanglement of differentiated normative spaces.

So, Saint-Simon's thinking has influenced two apparently diverging visions of common good: the one incarnated by unitary nation states, personified by France; and the one incarnated by federalism, personified by post-world war Germany, or – even more – Switzerland. The European construction is in fact based on a dialectic between these two approaches. The former MEP Philippe Herzog (2018), as the rapporteur of a report about public services, managed to obtain a majority through a compromise between supporters of national and local public services (as for energy), respectively in unitary and federal states.

Together with Faludi (2011), on the basis of a prospective study about mobility (Bieber, Massot & Orfeuil, 1994), we have proposed four scenarios for Europe, depending on more or less weight given to Governance I or II at European level. Weak Governance I and II characterise what we called the Anglo-Saxon scenario – without thinking of Brexit at the time. France and Germany illustrate how public policies require a combination of institutional and functional approaches, and compromises between “civic” and “industrial” cities. Comparing these two countries is all the more insightful as they developed different – but not incompatible – approaches to multi-level arrangements, from territorial planning issues to the European construction itself. France generally adopts a functional, constructivist, “Saint Simonian” approach, mainly at national level, and projects it at the European level, while Germany illustrates a “Rhineland” approach, more sensible to personal responsibility and the involvement of political institutions at different scales, in the spirit of federalism and subsidiarity. An authentic European approach would consist in combining the two methods and visions – therefore reconciling two different posterities of Saint-Simon.



Table 2: The Four Scenarios for Europe

Governance at European level	Governance Type II weak	Governance Type II strong
Governance Type I weak	Anglo-Saxon	Saint-Simonian
Governance Type I strong	Rhineland	European

Source: Own elaboration

### (3) The specific case of CBC and EGTCs as tools for its governance

In Parts 1 and 2, we have presented different views about multi-level territorial governance, and the way they are combined in the European construction. Let us now focus on the iconic case of borders and cross-border territories. In the European context of single market (Four Freedoms) and cohesion policy (Interreg) (MOT, 2017), cross-border cooperation and integration have developed, and given birth to cross-border interactions at various scales: local (based on functions needed on a daily basis: work, shopping, basic public services); regional (based on “higher” functions – needed only at some moments of life: airport, university,...); macro-regional (related with TEN-T, transnational river basins or mountain ranges). The challenge of how to simplify complexity and combine institutional and functional approaches is here all the more difficult, as the understanding of such stakes generally differs across borders. Moreover, cross-border integration is obviously challenging the Westphalian order. It is now necessary to revisit usual approaches about CBC.

In his heterodox doctoral thesis about the border, dated 1928, Paul de La Pradelle (Perrier, 2019) makes the distinction between the border as the line delimiting national sovereignties, since Westphalian treaties; and as a zone of cooperation between nations. For him, the border is a complex territorial regime: envisaged by internal public law, it is the mode of expression of unity and cohesion of state – the boundary (Brunet-Jailly, 2005); for international public law, it is a contact and relation zone between states. In a cross-border context, two national systems meet and have to match. Brunet-Jailly recalls that boundaries bind nation states; the ‘boundary’ belonging to the same semantic field as ‘bind’. Before being a limit with another country, a boundary is directed inwards. National systems frame daily life and also the way people think. While managing borders, public policies have to perform two tasks: delineate a limit of sovereignty between two states (each of them with its specific legislation, political and administrative culture, welfare systems, etc...), so as to assure peace, independence, security; and allow cooperation across the limit, so as to connect public services and favour growth of international trade. So on each border, according to La Pradelle, three zones coexist: an intermediary zone, with

mixed competences; and two zones of exclusive competence. In his memories, Jean Monnet (1976) tells how, as number two of the League of Nations, he had to design the new border resulting of the Treaty of Versailles between Poland and Germany in the Silesian region, and simultaneously to develop cooperation so as to keep alive pre-existing functional links.

The limit between two states disturbs individual activity, as it cuts a milieu of economic and social density and deprives professionals of the range necessary for their daily activity. In other terms, the border is a functional zone, with people living in it, crossing the border on a daily basis. So domestic public services tend to trespass the state limit, which requires neighbouring states to sign bilateral conventions about the status of borderers and cooperation regimes of public services on the border, organising the degradation of the border as a limit. The administrative regime of cross-border cooperation consists in erasing, in the transition zone, the rigour of the limit for individuals and states. This regime establishes a local interpenetration of neighbouring states' public services. For La Pradelle, it is a blueprint of the future international border regime, where borders of sovereignty will be transformed into functional borders.

Such an approach is of course enhanced by EU integration (single market, Interreg and cohesion policy acknowledging "cross-border regions" in article 174 TFEU), but has existed before. Let us consider the ES-FR border, one of the oldest European borders (1659, Pyrenees Treaty), with now the iconic Hospital of Cerdanya, managed as an EGTC. This border has never been a "natural border". As soon as the border was delineated, specific arrangements have been designed together with the Treaty to manage the border and the needs of local inhabitants (grazing rights etc...). In the 19th century, borders were subject to international public legislation and agreements, e.g. around BE, DE, FR, to define a special status for borderers (such as CB workers or entrepreneurs, doctors and other professionals...); to develop public services (CB railway...); or to allow a right of pursuit.

How to involve domestic institutions in CB governance at different scales? To explore the black box of cross-border governance, it is useful to use the Council of Europe's mapping of obstacles and solutions to CBC, based on a consultation of Member States in 2011. Its analysis by the ISIG institute (2013) provides a typology of border obstacles including criteria such as the level of solution (local, national or European); the sectoral policy concerned (employment, transport, etc); and the nature of obstacles. ISIG identified six factors of obstacles: institutional; administrative; economic; expertise (obstacles linked with lack of knowledge); cultural; and lack of propensity to cooperate. They correspond to the six "cities", spheres of coordination of actors in open societies identified by Boltanski and Thévenot (see Part 1): civic, industrial (or functional), market, opinion, inspired,

and domestic. To solve border obstacles and to build cohesion requires new cross-border arrangements involving the six “cities” (Peyrony & Faure, 2020).

EGTC is considered to be the reference tool for CBC governance. Now we can move to the core question of this chapter: “Should EGTCs have competences, and not only tasks?” The EGTC regulation says: “An EGTC shall act within the confines of the tasks given to it, namely the facilitation and promotion of territorial cooperation to strengthen Union economic, social and territorial cohesion, and the overcoming of internal market barriers. Each task shall be determined by its members as falling within the competence of every member, unless the Member State or third country approves the participation of a member established under its national law even where that member is not competent for all the tasks specified in the convention.” (Art. 7(2) of the EGTC Regulation)

This statement can be analysed with the grid presented above. Here “competence” has to be understood as a category belonging to the legal, institutional, civic “city”, whereas “task” has to be understood as belonging to the industrial, functional “city”. This has so far been the doctrine for most CBC stakeholders. EGTCs are not supposed to have specific competences. The members of an EGTC conduct their missions in the scope of their common capacity. The bodies that implement cross-border cooperation are more or less formalised or institutionalised, unlike their constituent authorities that have well-defined legal statutes and competences, and fixed geographical administrative borders. Despite the establishment of dedicated statutes such as the EGTC, these organisations do not replace the authorities that are their members. Indeed, in the orthodox conception, the delimitation of national borders and the internal territorial organisation are fundamental attributes of the sovereignty of each state. CB organisations are not intended to replace the units or authorities that constitute their membership. (Peyrony, Perrin & Sielker, 2020). It is this doctrine that is subject to a new discussion, on one of the borders with the oldest cooperation: the French-German border.

#### **(4) How the controversy about EGTCs’ tasks or competences is reactivated by the negotiation of the Aachen Treaty; its relevance against the evidence of effective governance of cooperation**

Let us consider the border between France and Germany, where cooperation was already developed in the 60s, and where complex cross-border governance has been established. The French-German case raises issues about the institutional evolution of cross-border bodies.

Figure 2: The map of the French-German border



Source: MOT

Eurodistricts, established with the impulse of the 40<sup>th</sup> anniversary of the Elysée Treaty in 2003, deal with local scale areas: Saar Moselle; Pamina; Strasbourg Ortenau; Centre sud Alsace and Trinational Basel – all of them EGTCs, except the latter one, while Greater region and Upper Rhine deal with the two regional scale areas.

On 22 January 2019 in Aachen, Chancellor Angela Merkel and President Emmanuel Macron signed a new treaty on cooperation and integration between Germany and France. This agreement extends the Élysée Treaty of 1963 with a strategy of convergence, encompassed within a common commitment to European integration. While the Elysée Treaty had raised a controversy about its compatibility with the European construction, the Aachen Treaty insists that the French-German

cooperation “promotes European unity, efficiency and cohesion”, and is “open to all Members States of the EU.” (Preamble of the Treaty of Aachen)

The Aachen Treaty marks a real recognition of cross-border cooperation as a central element, with Chapter IV being entirely devoted to it. Its main objective is the elimination of cross-border obstacles to facilitate the implementation of projects and simplify the daily lives of border region inhabitants. To this end, “the two countries shall provide local authorities in border regions and cross-border entities such as Eurodistricts with appropriate competences, dedicated resources and accelerated procedures to overcome obstacles to the implementation of cross-border projects” (Art. 13(2)); and “if no other instrument allows them to overcome such obstacles, adapted legal and administrative provisions, including derogations, may also be provided for.” (Ibid.) The Treaty focuses on Eurodistricts as they are products of the French-German cooperation, while the two Euroregions involve other states – Switzerland or Luxembourg.

The wording of the Treaty: “the two countries shall provide local authorities in border regions and cross-border entities such as Eurodistricts with appropriate competences” (ibid.), even if it remains cautious, seems to open a new possibility.

Should EGTCs, or equivalent cross-border bodies, receive specific competences (for instance, to manage public services)? While Germany and France share common objectives within the Aachen Treaty, the understandings differ on both sides of the Rhine. Behind it, we find the discussion about institutional *vs* functional approaches presented in Parts 1 and 2.

So far, Germany has insisted on legal competences for Eurodistricts, while France has focused on their technical competences (agencies). Should the governance of an EGTC be elected by direct universal suffrage? Traditionally Germany links legal competences with the issue of democracy – *cf* the constant position of the Karlsruhe court monitoring democratic control, and, for instance, conditioning more competences at EU level with an increased role for the EP.

The CBC Karlsruhe Agreement (1996) already prescribed that German Länder can transfer in certain cases sovereign competences to local cooperation institutions, insofar conditions of internal law are met. Baden-Württemberg’s present coalition agreement stipulates that cross-border organisms should be provided with real competences, and representatives elected by universal suffrage at the cross-border level.

Sylvain Waserman (2018), the French MP who established a report for the French government to prepare the Aachen Treaty, advocated that cross-border local authorities be provided with exclusive competences: their own fiscal resource with the creation of “*EPCI transfrontaliers de proximité*”; and the ability to establish a binding

cross-border plan (*“schéma de développement transfrontalier opposable”*). This proposal was not retained by the French negotiators, who objected that it wouldn't be compatible with the French constitution.

On the contrary, the Eurodistrict Pamina's position about the Aachen Treaty underlined that “the proposal to transfer competences of Länder and regions to Eurodistricts raises more questions than it brings answers, as Regions and Länder are not comparable” (Harster, 2018). Pamina considers itself as a platform for mutualising competences, facilitating territorial cohesion, not substituting for existing competent authorities on either side of the border. Nevertheless, Pamina supports the proposal to introduce exception and differentiation clauses in national legislations for border territories.

Are functional arrangements the ultimate model for European territorial cooperation? Is this model lacking a real cross-border democratic dimension? Let us discuss these two questions on the basis of the effective situation on the ground.

So far the EGTCs or equivalent structures on other borders exert missions, not competences. In the case of CB public services, let us consider the CB Cerdanya hospital: the EGTC delivers CB care but the two competent domestic health systems (France and Catalunya) still exist, with their rules, funding mechanisms etc., coordinated by the EGTC. In the case of CB structures supporting the governance of CB territories, let us consider the most integrated ones, Basel or Geneva CB agglomerations: the action of the Trinational Basel Eurodistrict, or the Greater Geneva Local Grouping of Cross-border Cooperation (LGCC, Karlsruhe Agreement), is based neither on specific competences, own fiscal resources, nor regulatory planning competences. They neither manage urban services, nor develop major investments, as local authorities would do in purely domestic contexts for such agglomerations, staffed with thousands of agents and large budgets. Significant investments, like those necessary for CB tramways, are processed by specific, sectoral organisations. They play only a coordinating role – which, by the way, is essential. So the functional approach prevails.

Does it mean that we have reached an optimal situation? If we get back to considerations raised in Part 1, functional arrangements do not solve all problems. The functional approach leaves aside the major issue of people's consent. In the case of Greater Geneva, and more widely Switzerland *vis à vis* its neighbours and the European Union, many voices, qualified as populist, regularly contest CB integration, flows of CB or migrant workers, and Swiss funding of CB investments. The advanced democratic Swiss context allows votations, the results of which have to be implemented by authorities; some of these votations have blocked or delayed CB or European integration. The lack of involvement of populations, beyond the stakeholders of CBC, is an issue on every border; to overcome it, innovative actions,



such as CB development councils and micro-project funds targeting civil society, are implemented, often with the support of Interreg funding. Whether they meet the CB democratic challenge remains an issue.

Another issue lies in the paradoxical statement that, the more CB territories are integrated, the more obstacles seem to appear. This certainly contributes to border citizens' dissatisfaction, as the Covid crisis has recently confirmed. This challenge is acknowledged by the Aachen Treaty: the setting-up of a Franco-German Cross-Border Cooperation Committee is one of the Treaty's flagship measures. It comprises

*“such stakeholders as national, regional and local authorities, parliaments and cross-border entities such as Eurodistricts and, where necessary, the Euroregions concerned. This Committee shall coordinate all aspects of cross-border observation (...), draw up a common strategy for identifying priority projects, monitor on an ongoing basis difficulties encountered in border regions and elaborate proposals to address them, as well as analyse the impact of new legislation in border regions.” (Art. 14)*

This Committee echoes the proposal of the European Commission for a new regulation on “a mechanism to resolve legal and administrative obstacles in a cross-border context” (COM, 2018). Such a mechanism would allow to “apply, for a common cross-border region, in a given Member State, the legal provisions from the neighbouring Member State if applying its own laws would present a legal obstacle to implementing a joint project”, under the control of the states concerned and for a cross-border project (COM 2018) – echoing La Pradelle's thesis.

The regulation would also make it compulsory to create cross-border coordination points at national or regional level, acting together on each border to resolve obstacles, and with the European cross-border coordination point, already created. It represents an innovation in terms of designing a multi-level architecture for overcoming obstacles. If it were to be validated by the European Council and Parliament this mechanism would represent a paradigm shift, “empowering border areas to manage their own integration (functional-horizontal) and institutionalise a policy pathway for resolving border-specific legal or administrative obstacles (institutional-vertical)” (Engl & Evrard, 2019). Yet, since its proposition numerous concerns have been raised – also by Germany – as to the legal justification, state sovereignty, compliance with the subsidiarity and proportionality principle. The French government supports the initiative, considering that, beyond the traditional “*égalité républicaine*”, differentiation and experimentation have to be promoted, including in border areas, as shown with the creation of the “*collectivité territoriale d'Alsace*”. Whether such a paradigmatic change can be implemented through an ordinary law or requires a constitutional reform, remains to be seen. The provisions of the Aachen Treaty appear to be at the forefront of such an evolution (Peyrony, Perrin & Sielker, 2020).



EGTCs are quoted by the ETRF project as a legal tool allowing facilitation of stable cooperation. The project mentions that the EGTC regulation cannot solve all problems, as many issues during the operation of EGTCs relate to national legislation. This is where the ECBM regulation – not mentioned by the ETRF project – would bring new solutions.

So it appears clearly that the dialectic between institutional *vs* functional approaches is still active. The Aachen Treaty, opening-up the issues of CB structures' competences and of a mainstreamed adaptation of national legislation to a CB context; and its echo at European level with the ECBM proposal completing the CB tool box, confirm that these issues are relevant, but not yet solved.

## **(5) Underlying visions: the influence of Saint Simon and Rougemont for CBC issues; some light from the Covid crisis**

As we have done in Part 2 for the general discussion about functional *vs* institutional approaches, let us now try to understand visions behind the actors' justifications, in the specific case of CBC.

As said in Part 1, several EU's founding fathers shared visions influenced by the philosophy of Christian personalism (Martin de la Torre, 2014). We will now explore how this is also true for the actors in the specific field of cross-border cooperation. For this, we will rely upon Charles Ricq's "Handbook of transfrontier cooperation" (2006) for the Council of Europe.

Ricq (2006: 186-188) argues for "shared sovereignty" and defining "frontier zones", transfrontier regions based on the daily problems facing the local populations, "areas for micro-integration", transfrontier horizontal subsidiarity, weakening political demarcation, symbols of European integration. "As all these problems occur in frontier areas of varying sizes, some writers, including Denis de Rougemont, have defined transfrontier regions as "variable geometry" areas of everyday life; they see the solution to these problems as depending more on "sectoral agencies" of varying sizes than on administrative or political divisions". A "law of frontier relations" as an independent branch of public international law remains to be invented" – so Ricq says, seeming to echo La Pradelle's views.

Ricq, referring to Delors' "forward planning unit" scenarios<sup>1</sup> – also quoted by the ESPON ETRF project, lists "new prospects and anticipated scenarios for transfrontier cooperation".

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1 These scenarios were coordinated by Jérôme Vignon, adviser to Delors, both of them influenced by Christian personalism. Later J. Vignon coordinated the White Paper "European governance" (2001)

The first scenario consists in status quo – at the time where Ricq wrote the report. The second scenario

*“would involve taking account of the strides made in operational instruments for transfrontier cooperation by way of bilateral or multilateral interstate agreements, the most advanced specimen of which is the LGCC prescribed in the Karlsruhe Agreement (1996). It would have the advantage of leaving individual states still in control of their transfrontier relations (as international relations), territorial sovereignty”.* (Ricq 2006: 187)

This scenario matches the present situation, with the EGTC regulation, and its interpretation as it stands now.

The third scenario “would be predicated on a long term outlook for the political integration of Europe conceived as attainment of a ”still virtual federation” that would presuppose fresh transfer of powers, hence sovereignty, to (...) “European federal structures”(Delors)”. (Ricq 2006: 188) It matches with the shared sovereignty spirit of the Aachen Treaty, or the ECBM regulation, in their most ambitious interpretation.

The fourth scenario would be founded on the idea of frontier regions becoming genuine “European territorial communities”, straddling a frontier and governed by Community law alone. It would depend still more than the previous ones on Europe’s completed political integration. There, Ricq, inspired by Rougemont, seems to argue for a European federation of functional regions – eventually crossing current borders (Trillo, 2007).

Ricq raises the question:

*“Are transfrontier elected representatives, administrations, budgets, and the like, or quite simply the obvious exceptions to national law for the frontier territorial communities belonging to a given state, imaginable at the present stage? It is still allowable to dream of “transfrontier regions on a human scale”, reaching beyond national confines, with strictly functional interdependent powers of a very advanced kind, conducive to the territorial cohesion of transfrontier areas and thus to reconstruction of genuine transfrontier territories “depoliticised” in functional terms for the greater benefit of all the frontier populations concerned.”* (Ricq, 2006: 189)

This conclusion clearly sounds both Saint Simonian (functionalisation and depoliticisation), and inspired by Rougemont (mitigation of nation states).

More recently, Manuel Goehrs (2018) has argued for an approach of EGTCs that would be based on federal local citizenship, differentiation of individual rights, multiple belonging of persons to various communities of interests. He views EGTCs as an opportunity to experiment with differentiation, in which contractual

subsidiarity, adaptation of local and national administrations and multi-level governance would allow adjustment to on-going social and territorial transitions.

Some voices (Arjakowsky & Arnaud, 2019) advocate for European legislation that would make it possible for the citizens to share different legal orders, according to their multiple belongings and lived territorialities. Cross-border regions are emblematic arenas to explore and test social and political evolutions. Such perspectives imply a new way to look at Europe; not from the capitals but from peripheries and borders (Balibar, 2009), as places to resolve contradictions between states, and to invent a shared or post-sovereignty.

So, reaching the end of this exploration, we still face different visions, for both CB and EU integration, with strong arguments for each of them. It is interesting to look at these scenarios in the light of the recent Covid crisis.

Let us first recall some facts about the Covid crisis' impact on borders. In March 2020, most borders were closed by states without any coordination – suddenly all decisions were taken in purely vertical processes from local to national levels, ignoring the other side of borders. This had severe effects on the life of persons living near borders. Happily, cooperation soon resumed, starting from the local level, where the action of CB structures – many of them EGTCs – was determinant to relaunch dialogue and inform the population; and at European level, where the EU reacted appropriately by recalling the need to respect – as far as the sanitary necessities allowed it – the Four Freedoms, and to adopt proportionate measures. This was required, in particular for cross-border or seasonal workers – for themselves; but also for businesses or public services on the other side of the border and for flows of goods, vital for the working of economy. But it is not only about the economy: people were hurt in their personal lives; suddenly it became impossible to visit family on the other side of the border, or to reach one's second home. Of course, such limitations also existed in purely domestic contexts for obvious sanitary reasons. But there is no reason that people living on a border, having their life basins at 360° around, should be discriminated against – all the more so because most of the time border controls were not based on health criteria (such as measure of temperature or tests). Moreover, the border closure sometimes reactivated nationalist representations, leading to insults against “others”.

In any case, this crisis has revealed deep interdependencies across borders, and in the future, for economic, social, and simply human reasons, neither general reconfinement nor such systematic border closure will be acceptable. Future measures will have to be based on more personal responsibility, subsidiarity, and coordination between actors. The public modes of intervention have been challenged, as well in general and in the cross-border context, which appears to be a showcase for the need of inter-territoriality and multi-level governance (from local to Europe).

Now let us consider different visions about CB governance.

The first vision, status quo, corresponds with the ETRF “enabling cooperation”, and with Charles Ricq’s second scenario. Respecting the mainstream border doctrine, it may sound reasonable at first sight. Reacting to the Covid crisis, Michel Foucher (2020), recognised border specialist, defended them, against “Delors’ Europe without borders, great single market ignoring the symbolic dimension of the border”, as a tool of national sovereignty, creating a sense of belonging. For Foucher, in case of crisis, answers happen at state level. Human societies need an anthropological distinction between inside and outside. To open the door we need a door. We have to rethink our limits. Borders belong to the category of limits – territorial, legal or ethnic. A collectivity requires bans, limits in all fields; to favour an opened world, but with a control on openness.

Nevertheless, this scenario is not acceptable in the light of the Covid crisis, which has revealed even more the sacred nature of the border, its ambivalence and its human cost. First it should be said that for Delors (1994: 285) “the nation represents an essential element of personal identity and collective belonging”. But extending what has been said in Part 2 about nations, borders have a sunset side, providing a feeling of unity and protection – widely phantasmatic – and a dark side, their violent impact on persons living on two sides of the border, and on representations – the coming back of “us and the others”. Like all institutions, the border contains violence (in the two meanings of containing). It is a tool to maintain national integrity on both sides of it, preventing violent disintegration that may result from crises, including sanitary crises, as history teaches. But it is violent by itself, a sort of necessary evil. Experiences of persons having had to cross the borders in this period, beyond the factual constraints, that are acceptable – after all, everybody was impacted by limitations of mobility, not only people on borders – revealed the arbitrary nature of controls not based on rationality (sanitary criteria), but on absurd administrative criteria, close to ritual acts. Borders, that are suddenly not predictable, cannot be approached rationally, seem to demand secrecy, clearly belong to the category of “sacred”: the last remaining transcendence (Beckouche, 2001). As Michel Serres (2015) recalls, beneath any border is buried a sacrificial victim. Rougemont is right, when criticizing nation states, to convene Girard and its analysis of Christianity revealing the innocence of sacrificial victims, contesting institutions, and defending the persons against them.

Having stated the limits of status quo, what of other visions about the future of borders? The second vision corresponds with ETRF’s “post-territorialities”. It may appear as a setback scenario, largely unrealistic, both for political and economic reasons – it would be a pure “anywhere” scenario, excluding de facto “somewheres”, who have been the main victims of the Covid crisis. Nation states,

whatever deficiencies they have shown, have been and will be the main actors of solidarity, during the sanitary crisis, and in the following economic crisis. Foucher is right on the still prevailing role of the state as the framework of collective action and financial solidarity.

The third vision corresponds with “new territorialities”. The perspectives given by the Aachen Treaty to EGTC’s options move in this direction. It appears as an ambitious scenario, nevertheless realistic in the midterm. It leaves open diverse options, expressed by Charles Ricq’s scenarios three and four, depending on more or less Europeanisation.

The choice has not to be made now; it is rather a process, where choices will have to be made on more or less importance to be given to functional/Saint-Simonian, or institutional/Rhineland approaches. These choices will have to avoid symmetric risks: too much institutionalisation (new CB regions replacing the old domestic ones?): territorialism; or too much functionalisation, with the risk of social and political disintegration.

## **(6) Some conclusions, and concrete recommendations for cross-border governance and the use of the EGTC tool**

The point is not to choose between institutional or functional approaches, but to combine them across borders, taking the best of arrangements already existing in neighbouring states. The case of the French-German border, with the innovations proposed by the Aachen Treaty in its specific chapter dedicated to cross-border cooperation (role of Eurodistricts, multi-level cross-border cooperation committee), can provide some inspiration for the development of cross-border and European integration, all the more that the difference between the two countries is huge: it shows that cross-border cooperation can advance, in spite of very different territorial and policy frameworks across borders. It could be the forefront of a generalisation of the cross-border mechanism that the European Commission has proposed.

The point is to take the best of the two national approaches – and also of the neighbouring Switzerland: the “Saint Simonian” approach, based on functionalism, strategic planning, “*inter-territorialité*”, and the “Rhineland” approach, based on responsibility and subsidiarity. The French-German situation also demonstrates that the state capacity remains a significant variable in the advancement of territorial and cross-border cooperation. (Peyrony, Perrin & Sielker, 2020). The Franco-German experience can inspire certain developments of European cross-border cooperation in three main directions.

The first one is the development of local CBC governance structures – exemplified by EGTCs, particularly those acting at the level of CB living areas. In concrete

terms, the challenge is to develop their competences in the two meanings of the word: legal capacity of action, based on more involvement of the population, as it is understood on the German side; and technical capacity of action, as it is understood on the French side. In any case, such structures should benefit from transfers of appropriate capacity, dedicated resources and accelerated procedures to overcome the obstacles to the implementation of their cross-border projects, leaving open the adequate combination of institutional (hard) and functional (soft) approaches, depending on national contexts. The terms of the Aachen Treaty, or the project of ECBM, can inspire such institutional evolution. Without determining the matter of legal competence for EGTCs, citizens should be more systematically involved through civil fora, or people to people projects. This evolution can be a first step towards a more formal democratisation of cross border bodies, like cross-border elections.

The second direction is the systematisation of cross-border multi-level governance, that has been missed so much during the Covid crisis. The monitoring of cross-border cooperation should be reinforced through a multi-level harmonised mechanism, which could on each border jointly coordinate cross-border affairs at all levels: within each state (interministerial co-ordination and coordination with territorial authorities); between states and territorial authorities, including CB governance structures such as EGTCs, and with EU authorities. Such a mechanism could be in charge of coordinating the transposition of EU directives and regulations; contribute to the co-elaboration of EU or intergovernmental policies (cohesion policy, other EU policies, territorial and urban agendas), and coordination of EU programmes, with a core role of the Interreg programmes; coordinate cross-border observation; define a common strategy for choosing priority projects and monitoring the difficulties encountered in order to find solutions.

In any case, and without prejudice to the degree of institutionalisation for EGTCs, real life always requires going beyond borders; through horizontal cooperation with neighbouring territories, and coordination with lower and upper scales, or through vertical cooperation, both bottom-up and top-down, according to the German «*Gegenstrom prinzip*» (counter current principle).

The third direction is shared observation and scientific support to cross-border cooperation. For most inhabitants of the planet, the Covid crisis has been, through the limitation of mobility, a living experience, revealing interdependences of all sorts (economic, relational, etc.) and at all scales (local, national, global). Bruno Latour's book "Down to earth: Politics in the new climatic regime" deals with the deadlock of local/national *vs* global opposition, and the need to "land": i.e. to identify collectively the territories where we live; it is also a vibrant plea for Europe. During the Covid crisis, Latour proposed that each of us should describe what activities,



with what interdependencies and what consequences, we want to keep or not in our future daily life (food, health, work, leisure, etc.). Our collective capacity to describe experiences and expectations within the territories in which we live, including cross-border ones, and to take decisions, will be key for our future.

This calls for the setting up of an operational system of cross-border observation, linking local, national and European observatories at the service of CB data production and analysis. This project can draw on the French and German initiatives. Sharing a better common knowledge on cross-border dynamics can contribute to shared narratives, and to build a common one, which, beyond diverse institutional or functional evolutions, represents another crucial issue for European and cross-border integration. This chapter has investigated visions underlying policy discussions about cross-border and European integration. It is necessary to give room to processes exploring different scenarios, possible futures for our local, national, European institutions, and for the management of borders, to decide together. Delors' s forward planning unit, C. Ricq, and more recently ESPON with the ETRF project have showned the way. The forthcoming conference on the future of Europe will be an opportunity, also to explore a transnational democracy acknowledging our interdependencies. Local CBC governance structures such as EGTCs, involving citizens, should play a leading role there also.

Let us now conclude. We need a paradigm shift. Each person is as well, sometimes across the border – as worker and economic agent; user of public services (e.g. patient); local, national and European citizen; and taxpayer; but also as an informed or inspired person; a member of families or communities.... We have to put persons at the centre of thought and action, for both humanitarian and efficiency reasons, so as to break our institutions' vertical, bureaucratic logics which have shown their limits. The starting point shouldn't be administrative procedures, but territorial ecosystems, "*bassins de vie*", where day to day life of persons, may be either disrupted by closed borders, or facilitated by cooperation. On this condition the old notion of Westphalian linear borders, undermined by the crisis, shall be overcome. Such a personalist approach is not an additional option, but a necessity.



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