

Legal Perspectives Supporting Multi-Level Governance for the Benefit of Citizens

Introduction

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Legislative changes may frequently help to remove obstacles to cross-border cooperation and the development of cross-border functional areas. In the European multi-level governance system, legislative changes can be implemented at all levels, from EU to local, depending on the type of legislative action and the extent to which the national framework is favourable for the adaptation to local contexts. The scope for sub-national legislative action also varies according to the type of obstacles and topics. Irrespective of whether legislative action is the only and sufficient solution, these changes should benefit citizens in border regions in the sense that they strengthen their rights and that the solutions adequately consider the specific territorial conditions of the border regions.

This contribution reviews the legal considerations in the *b-solutions* project with a focus on solutions that (1) create systematic active subsidiarity, (2) support citizens' legislative rights and (3) facilitate the delivery of EU agendas. To this end, this chapter begins with a review of the variety of legal approaches and tools proposed in

b-solutions publications – compendia and booklets. Based on this general review, the following sections take a closer look at the legal proposals. With the help of examples, these sections examine the extent to which the proposals are likely to enhance citizens' legal rights and contribute to active subsidiarity. They also review the contribution to shifting the perspective from a single region to the whole cross-border region. In this context, the use of legal tools by cooperation structures may be of interest. As regards the contribution to the implementation of EU agendas, the analysis also examines whether and how tools and solutions differ between European policy areas.

Proposed legal solutions and tools

Most of the proposed legal solutions refer to existing tools and possibilities. However, some proposals are also more forward-looking and refer to future tools or solutions. A comparison of the main solutions proposed in the three thematic

b-solutions publications (Association of European Border Regions [AEBR] & European Commission [EC], 2021a, 2021c, 2021d) summarises which legal solutions have been proposed most frequently. At the same time, this comparison points to some peculiarities of the different policy topics, which are further discussed at the end of this chapter.

As a note of caution, the following perspectives focus on the individual legal solutions proposed rather than on whole cases of obstacles. For example, several legal solutions may have been proposed for an obstacle, either to complement each other or to present different alternatives that may help to overcome the identified obstacles. Consequently, the analysis does not compare the alternatives in terms of their suitability for overcoming particular obstacles.

Existing tools and possibilities

Starting at **EU level, existing legislation can be amended.** This refers to regulations and directives relevant for cross-border cooperation. Some examples of EU legal provisions proposed for amendment are Directive 2014/24/EU on public procurement, Decision 1082/2013/EU on electronic transactions (AEBR & EC, 2021c), Regulation (EC) 883/2004 on the coordination of social security systems (AEBR & EC, 2021d) and Directive 2008/50/EC on air quality (AEBR & EC, 2021a). Such amendments have been proposed for several policy

areas subject to EU legislation, such as transport, energy and the Regulation on the European Grouping of Territorial Cooperation (EGTC) (e.g. AEBR & EC, 2020b, 2024).

More changes to existing legislation have been proposed at national level. These may be implemented either unilaterally on one side of the border or may involve bi- or multilateral action by the countries concerned. Depending on the national governance framework, they may also be implemented at sub-national level. This change in national legislation can be implemented unilaterally or multilaterally, depending on the existence or relevance of a framework at EU level:

- Amending national legislation is often proposed to overcome differences in the transposition of EU legislation. Examples again relate to different policy areas, such as health (AEBR & EC, 2021c), environmental provisions related to wastewater management (AEBR & EC, 2021a), transport of cross-border workers in private cars, data protection or the EGTC Regulation (AEBR & EC, 2021b), to name but a few. Such amendments either concern the harmonisation of transposition or a better alignment of national transposition with the corresponding EU provisions.
- In other cases, changes to national legislation may not be linked to any EU legislation and have been proposed as unilateral or

- coordinated changes on both sides of the border. These proposals aim to remove inconsistencies caused by different national legislation. Examples of such legal solutions relate to the recognition of professional qualifications and different labour market requirements, the recognition of car emission certificates (AEBR & EC, 2021a), youth mobility, joint educational degrees or the taxation of cross-border workers (AEBR & EC, 2024).

A frequently proposed legislative solution is at the **supranational level**, aimed at amending existing agreements between neighbouring countries. The *b-solutions* analyses recognise that there are numerous bilateral and multilateral agreements that could be better tailored to the effective needs of day-to-day coordination. Examples relate to several policy areas such as health (AEBR & EC, 2021c) and cross-border planning (AEBR & EC, 2021a) in the Benelux and in the field of the transport and use of manure in agriculture between the Netherlands and Flanders (AEBR & EC, 2021b). At other borders, proposals deal with amendments to support the joint organisation of events, to improve rescue services under the French-Spanish Treaty of Bayonne and, in the case of the Øresund Agreement, with different aspects of labour market mobility (AEBR & EC, 2024). In some cases, the proposals suggest a new legal provision to complement existing agreements. Examples are the proposals for a

bilateral convention to institutionalise the recognition of diplomas under the existing framework agreement on health between France and Belgium of 2005 (AEBR & EC, 2021b).

Finally, legal action may be taken at local or regional level, using either supranational protocols or the EGTC. In some cases, it has been proposed to extend the tasks of existing EGTCs to overcome legal obstacles. Examples are the management of a special economic zone in Nova Gorica – Gorizia (AEBR & EC, 2021b), event management and other coordination activities (AEBR & EC, 2024). In other cases, proposals suggest the foundation of an EGTC to develop a common legal framework. Examples have been proposed for the management of an archaeological park (AEBR & EC, 2021b), for the establishment of a cross-border health facility, for the creation of a mobility coordination centre for public transport planning, for business development or as an action accompanying the amendment of the legal framework (AEBR & EC, 2024). The use of supranational protocols allowing the creation of cross-border structures comparable to the EGTC has also been proposed in a few cases. Examples are the use of the Benelux Grouping for Territorial Cooperation or the Karlsruhe Agreement (AEBR & EC, 2021b).

Future tools or solutions

Similar to the changes to existing legal instruments, a variety of new instruments or solutions have been

proposed, especially for the EU and at supranational level.

At the EU level the variety of proposals appears to be the most limited, but potentially the most effective, due to the impact of a changed framework on the possibilities for cooperation. Examples of new EU legislation are

- the “Business in Europe: Framework for Income Taxation” (BEFIT) initiative of 2023, which can support business exchanges in cross-border areas suffering from different tax systems between the neighbouring countries by establishing common approaches for Member States and common rules for the calculation of the tax base (AEBR & EC, 2024),
- the consideration of new EU regulations on the harmonisation of rules on wastewater and its re-use and the definition of minimum requirements to be adopted by Member States (AEBR & EC, 2020a),
- the proposal to create “new and comprehensive provisions for cross-border telework/home office to be applied in a uniform way across the EU” (AEBR & EC, 2024, p. 141).

The most frequently mentioned and potentially most impactful new tool is the legal instrument proposed by the European Commission in 2018, the **European Cross-Border Mechanism (ECBM)**, as amended in 2023 by the proposal for the so-called **Cross-Border Facilitation Tool**. Many *b-solutions* cases

“demonstrate the need to address differences in legal frameworks on both sides of the border” (AEBR & EC, 2024, p. 7). With the possibility to apply the legal provisions of one Member State in a certain territory of another Member State, the ECBM proposal aimed at overcoming obstacles arising from these legal differences (COM(2018) 373 final, 2018). The new proposal from 2023 suggests instead a procedure to facilitate the resolution of cross-border obstacles (COM(2023) 790 final, 2023). Most of the *b-solutions* cases were analysed before the amended proposal. Therefore, they refer to the ECBM rather than the Cross-Border Facilitation Tool. The variety of examples suggesting the use of the potential new tool is particularly high and refers to different obstacles in different policy areas.

For example, the *b-solutions* Compendium 2020-2021 (AEBR & EC, 2021b) mentions the ECBM as a potential solution in 18 of the 47 cases in this compendium. These cases cover all policy areas covered by the Compendium and their obstacles, including planning and institutional cooperation related to enclaves or special economic zones, various aspects of healthcare, recognition of professional qualifications, labour market and job seekers, transport, rescue and nature protection services, as well as agricultural obstacles related to the use of manure, cross-border LEADER projects or the recognition of local products. Several cases even

show that the ECBM would be able to solve potentially several or all obstacles observed in the case.

However, following the European Commission's proposal of 2023, the latest *b-solutions* Compendium only refers to such a European instrument in very few cases. This is usually with vague wording, mentioning that “a specific legal tool to allow for the harmonisation of the applicable laws” (AEBR & EC, 2024, p. 88) would be beneficial. However, this does not mean that such a tool is no longer needed but may indicate the uncertainty about the proposed tool.

While there is little evidence suggesting that new national legislation (rather than amendments to existing legislation) is needed to overcome legal or administrative obstacles, *b-solutions'* analysis frequently proposes other **ad hoc legal frameworks**, usually created through **bilateral or multilateral agreements**. Previous analyses highlighted the importance and the widespread existence of such agreements, showing that there is a wide range of general and theme-specific agreements (see ESPON, 2018, pp. 42–44). Despite this diversity of agreements, the *b-solutions* cases identified further possibilities where new agreements, rather than amendments to existing agreements, could solve obstacles. Examples include a wide range of new thematic agreements, such as agreements on river management, the potential derogation

from EU social security coordination for certain cross-border workers, permanent emergency services at the external Schengen border, different aspects of cross-border healthcare, commercial passenger transport, cross-border internships (AEBR & EC, 2024) or emergency procedures in case of natural disasters (AEBR & EC, 2021b). Typically, these new agreements have been proposed to fill current gaps in legislation and to improve coordination between neighbouring countries.

In a few cases, the level at which future tools should be developed is not clearly stated. An example is the proposal for a new directive on minimum income to support the exchange of data relevant to minimum income benefits. This proposal acknowledges the lack of a common EU framework and the fact that the responsibility for social protection and minimum income benefits lies with the Member States (AEBR & EC, 2021b).

Legal multi-level governance solutions supporting active subsidiarity

The following paragraphs review the legislative solutions presented above in terms of their suitability to support active subsidiarity. The proposal to amend national transpositions rather than to amend legislation at EU level follows the principle of active subsidiarity. An example is the proposal to provide clear information on the reimbursement of medical expenses in the national transpositions of EU Directive 2011/24/EU (AEBR & EC, 2021c). Such proposals

allow to benefit from the **adaptability of the EU level framework to different national and regional contexts**, thus supporting active subsidiarity. At the same time, the proposed amendments at national level support the transparency of reimbursement mechanisms for patients, thus strengthening their rights to benefit from cross-border healthcare (see also next section).

However, **proposals for new EU legislation** that provide a framework for tailor-made solutions by national or regional authorities according to their cross-border context are also, at least in principle, likely to support active subsidiarity.

In both cases, however, the effective degree of active subsidiarity depends on the **involvement of the local and regional stakeholders** affected by the obstacle. Experience suggests that the national transposition of EU legislation, or the amendment of such transposition, is not necessarily coordinated with local and regional stakeholders in the border regions concerned. At the same time, especially in the case of legal obstacles and the need for legal action, the national level is usually called upon to amend inconsistent or inadequate legal frameworks or to fill legal gaps. Thus, for active subsidiarity “the involvement of national parliaments and competent ministries is often required for smoother coordination with local and regional stakeholders, who are more knowledgeable of the specific obstacles that prevent or limit cooperation with

the neighbouring country” (AEBR & EC, 2021c, p. 17). This need to include local perspectives is well illustrated by the example of the wish of twin-cities to organise a joint event on a site located at and across the border (AEBR & EC, 2024). This organisation comes with very concrete obstacles and needs, which are probably not anticipated by the national authorities.

Active subsidiarity is not automatically achieved in the case of **bi- and multilateral agreements** either, although it can be assumed that these agreements are more tailored to the needs of the border regions concerned, as they are based on problems observed in cross-border cooperation and recognised by the authorities negotiating the agreement. Moreover, these agreements are not necessarily subject to national agreements, but can be approved at sub-national level under certain circumstances, i.e. for some topics and obstacles and subject to the division of competences in the neighbouring countries (see ESPON, 2018, p. 42ff).

In particular, the amendment of these agreements is usually based on the experience of local and regional cross-border cooperation and is thus a tool to include sub-national needs. An example is the Decision of the Benelux Union on cross-border emergency ambulance services, where a tailor-made amendment based on experience and local needs can improve the coordination envisaged by the Decision (AEBR & EC,

2020a). However, the active subsidiarity of bilateral agreements also depends on their effective implementation. One case in the latest *b-solutions* Compendium illustrates this by referring to the confirmation of an agreement over several years, while it has not been published and effectively implemented for more than a decade (AEBR & EC, 2024).

Another contribution to active subsidiarity can be seen where proposals **combine a legal solution with other instruments** that effectively involve local and regional authorities. An example is the combination of a proposed bilateral agreement with the development of a cross-border management plan (AEBR & EC, 2024). An element of indirect consideration of active subsidiarity can be observed in the proposed solutions, which **refer to other examples**. Often these examples result from the experiences of local and regional stakeholders involved in cross-border cooperation, who have encountered certain obstacles that have been identified in a similar way for other border regions. It can therefore be assumed that such proposals follow a bottom-up approach. *b-solutions* cases provide many of these references across cooperation themes. Examples include the proposal for a specific health agreement between France and Luxembourg, for which the MOSAR agreement between the French region of Moselle and the Saarland in Germany may be a model; the Hospital de Cerdanya EGTC, which could serve as

an example for another cross-border health facility; the possible replication of existing airrescue systems; or, for cross-border labour market integration, the adaptation of approaches implemented in other cross-border regions (AEBR & EC, 2024).

Finally, the existing **EGTC** legal instrument and the future **Cross-Border Facilitation Tool** are best suited to support active subsidiarity, as their focus on local and regional cooperation is built into their legislation. Both lend themselves to bottom-up approaches: the EGTC through its membership structure, which can be based exclusively on local public authorities, and the future Cross-Border Facilitation Tool through the starting point of an identified obstacle to launching a facilitation process. The above consideration of solutions proposing the use of either the EGTC, the previously proposed ECBM or the newly proposed Cross-Border Facilitation Tool illustrates these advantages for active subsidiarity. This is due to their potential to develop and apply tailor-made solutions, considering specific stakeholder constellations, themes and obstacles.

Legislational rights to citizens

Regarding legislative rights to citizens, two perspectives are distinguished: The following briefly examines the references of *b-solutions* to rights based on EU legislation and reviews the proposed use of legal solutions to

overcome disadvantages arising from a residence in a border region.

Citizens' rights are generally enshrined in the **Treaty on the Functioning of the European Union (TFEU)**, which sets out the four freedoms and explicitly includes cross-border mobility as part of the free movement of people. In addition to the Treaty, other **EU legislation** also aims to improve citizens' rights to move across borders. Examples include health (Directive 2011/24/EU), transport (Regulation (EC) No 1073/2009), the GDPR, the EGTC Regulation and the proposed Regulation on the Cross-Border Facilitation Tool.

However, the review of obstacles and proposed legislative solutions shows that the current state of the EU framework is not always sufficient to ensure the effective implementation of all freedoms. Examples are the recognition of professional qualifications based on Directive 2005/36/EC, the conditions for drivers between 17 and 18 years of age based on Directive (EU) 2022/2561, cross-border Citizen Energy Communities (CEC) based on Directive (EU) 2018/2001 and the mentioned directive on cross-border healthcare (AEBR & EC, 2024).

The essence of the examples suggesting, inter alia, legal action is to strengthen citizens' rights in the sense that citizens in border regions should not **be disadvantaged because of their location** close to a border. So far, only a few cases deal with economic

integration, such as special economic zones or the implications deriving from the wish to set up a company or branch across the border. Moreover, cross-border CECs seem to be an issue that has only recently attracted more interest.

The review of *b-solutions* cases clearly shows that cases of citizens' rights directly enshrined in EU legislation have been considered, as well as cases of disadvantages resulting from the location close to the border. Frequently, proposals include further legislative action, as outlined above. However, even if EU and national legislation adequately provides for citizens' rights, other obstacles may result in disadvantages for citizens in border areas. An example of *b-solutions* is an inadequate pricing system for the daily use of a tunnel by cross-border commuters, despite the conditions laid down in Directive (EU) 222/362 on vehicle tolls (AEBR & EC, 2024).

Cross-policy legislative perspectives

b-solutions cover obstacles in many policy areas of European interest that are related to cross-border interaction. However, active subsidiarity and citizens' rights have not yet been equally achieved and implemented across this wide range of policy areas. This is not least due to the different distribution of powers between policy areas. The examples show that in some areas, such as transport, health and energy, subsidiarity is particularly

difficult to achieve. Apart from the lack of competence at regional and local level, the accumulation of obstacles in these areas contributes to the observed difficulties in achieving active subsidiarity. In the case of public transport, the lack of local competence can refer to several aspects, such as the establishment of a cross-border service, diverging rules on interoperability, employment of staff and recognition of professional qualifications (AEBR & EC, 2021c).

For the specific case of energy, *b-solutions* proposes cross-border CECs based, inter alia, on the Renewable Energy Directive (REDII) and the common rules for the internal electricity market under Directive (EU) 2019/944 and for CECs. Despite the variety of legal documents regulating energy in the EU and their national transpositions, both cases analysed in the *b-solutions* Compendium 2022-2023 identify regulatory gaps at EU and national level, which add to other obstacles at different levels (AEBR & EC, 2024). At the same time, this theme highlights the importance of involving the local level, which is central to the development of CECs, which are bottom-up in nature.

Notwithstanding these differences, the review of the different *b-solutions* editions often highlights the importance of local and regional authorities also in cases and for themes that are primarily regulated at national level. There is a need to activate direct communication with lower levels of governance, which experience “bottlenecks arising from

inconsistencies identified in the national frameworks” (AEBR & EC, 2021d, p. 15). In this context, some examples of challenging cross-border healthcare may be inspiring: Building on the regional creation of Zones Organisée d’Acces aux Soins Transfrontaliers (ZOAST), other such regionally focused solutions have been proposed (AEBR & EC, 2024).

Conclusions

The *b-solutions* review shows that active subsidiarity is not explicitly stated but is implicitly referred to in many if not all cases. This applies in particular to the proposed multi-level governance arrangements. The distinction between EU, national and supranational level legislative measures suggests that the flexibility of EU regulations and directives is not questioned and that amendments are relatively rarely requested. Corresponding proposals tend to focus on gaps or lack of clarity that prevent consistent transposition across Member States.

Local and regional action, and thus bottom-up approaches, have been proposed through the use of EU legislation and supranational agreements. Examples are the extended use or foundation of EGTCs or cross-border legal structures under other agreements. These are examples of legislative solutions that support active subsidiarity. However, it must be recognised that this approach

often requires additional action by national authorities. At the same time, the proposed solutions suggest that active subsidiarity and citizens' rights in cross-border cooperation can still be strengthened, for example through an instrument such as the ECBM or possibly the Cross-Border Facilitation Tool. The crucial aspect seems to be activation through a bottom-up process in combination with legislative action at national or supranational level.

Irrespective of the level and nature of the proposed legal measures, the common ground of the *b-solutions* proposals lies in the shift in territorial perspective. The proposals focus on the entire cross-border territory as a common entity with a common problem, rather than considering only a part of the border area. The latter is often seen from the perspective of national legislation, especially when local and regional authorities in border regions are not sufficiently involved. Although *b-solutions* cases often include legislative proposals to overcome one or more obstacles, the effective implementation of citizens' rights is not only subject to legal solutions but may also require further action in the multi-level governance system, including private actors.

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