

Denters, Bas; Schobben, Rob; van der Veen, Anne

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Governance of European border regions: a juridical, economic and political science approach with an application to the Dutch-German and the Dutch-Belgian border

by

Bas Denters, Rob Schobben and Anne van der Veen, Bas Denters and Rob Schobben¹

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1. Introduction

One of the consequences of European integration is the increasing permeability of national borders. This development has major effects on the position of border regions. According to many these previously peripheral (in context of the nation state) regions will become linking regions in an integrating Europe. To make most of these *opportunities*, new claims on the region's infrastructure, physical planning and environment will have to be met (e.g. provision of adequate cross-border infrastructure). These new challenges require co-ordinated action by the local and regional governments in European border regions. The EU has recognised the importance of regional cross-border co-operation and has reserved substantial funds to provide regional and local governments with incentives to set up networks of cross-border co-operation and help these regions in developing regional policies to compensate for their relative isolation.

¹ Faculty of Public Policy and Public Administration, University of Twente, P.O. Box 217, 7500 AE Enschede, the Netherlands

In response to these developments Dutch local and regional governments and linked non-governmental bodies, together with their counterparts in Germany and Belgium, have established institutions for cross-border co-operation. These networks, based on voluntary co-operation, should provide the political and administrative structures to develop and manage new regional cross-border policies. *Are these structures of governance really adequate?* Stated more comprehensively the central question in this paper is: Do these structures meet the criterion of *legitimacy*, are these new regional structures of governance fit to provide these regions with adequate regional collective and quasi-collective goods (*allocative efficiency* or effectiveness) and finally, do these new governance structures meet elementary criteria of *democratic control* over public policies and funds?

The paper provides a theoretical analysis of the potentials and problems of voluntary networks for cross-border co-operation as structures for governance of European border regions.

This discussion will be elucidated with examples along the Dutch-German and the Dutch-Belgian border.

2. Cross-border co-operation in general

When exploring euregions in a general manner one has to keep in mind that it is possible to look at this phenomenon from different perspectives. Thus the word *euregion* is multi-interpretable and it will be the objective of this section to explore these different meanings. To start with, *cross-border co-operation* in general is much broader than the euregional co-operation *strictu sensu*; therefore we will elaborate on this cross-border co-operation in general first. Secondly, euregions are shaped along the various *levels* on which governments on either part of the border seek co-operation. We will look into these levels in some more detail.

2.1 Cross-border co-operation: a classification

States co-operate across borders from time immemorial. This so-called international co-operation is regarded as a stately prerogative based on the age-old assumption of sovereignty. This ‘normal’ cross-border co-operation on an *international*² level, although of course it is of great influence on the euregional co-operation to be explored, has to be singled out at first hand. There is a simple explanation for this. When speaking of *euregional* co-operation we tend to look at forms of co-operation at a subnational level even though cross-border co-operation taken literally would imply considering the

² The word *national* is placed in italics to make it clear that what is meant here is co-operation between national or central governments. Actually, of course it is a form of international co-operation.

national variant as well. Apart from the exclusion upward we have to differ between various forms of subnational cross-border co-operation. First, on a decentral level we can distinguish between, what we would like to call, interregional co-operation and interlocal co-operation. Both forms are exponents of co-operation between decentral authorities. But, with regard to interregional co-operation the emphasis is on 'regional' authorities³ collaborating, while with regard to interlocal co-operation the accent lies on local or communal authorities. Both forms can be further divided into cross-border co-operation *at the border* and cross-border co-operation between decentral levels of government, not directly situated at the border⁴. Euregions, as the word is normally used, stands for *interregional* -meaning decentral- *cross-border* co-operation directly at the border. This can be put into a scheme in the following manner. The words in italics - taken together - represent the form of cross-border co-operation we are interested in this paper (see figure 1⁵).

Figure 1 at about here

As can be seen from the scheme, the *interlocal* co-operation is not our main interest in this paper. This separation has to be handled with care however since, as we will see later, co-operation within euregions very often has an extended-local character itself. What we mean is the cleavage between pure local co-operation, e.g. between two border municipalities⁶ and the co-operation between many local authorities on both sides of the border, which on their part form a new cross-border regional level.

2.2. Co-operation at various levels

Closely connected and partly a further clarification to the previous paragraph and anticipating on paragraphs to come are the *different levels* on which public authorities work together across national borders⁷.

³ Of course it is very hard to draw a clear-cut line between regional and local government even within one country, let alone between various countries. As a working definition we can think of a region as 'territorial unit, situated between the central and the communal level of government, that (at least partially) holds autonomous tasks, is a legal entity and whose governors are (in)directly chosen in a democratic manner'.

⁴ Examples of these are the so-called eurocities, a co-operation between several European major cities, or the (now) five motors of Europe; Catalunya, Lombardia, Baden-Württemberg, Rhône-Alpes and Wales.

⁵ When speaking of cross-border co-operation between public authorities it is possible to look at co-operation within one state as well, e.g. between two states within a federation; the border thus being an intrastate line. This form of *national* co-operation is singled out as well.

⁶ As an example of this we can use the co-operation between the Dutch town of Kerkrade and the German town of Herzogenrath institutionalized in the so-called 'Eurode- project'.

⁷ C.H.G. oude Veldhuis, *Euregio's: grenzeloos of begrensd?-Een onderzoek naar de effectiviteit en de legitimiteit van de euregio's langs de Nederlands-Duitse grens*, ('Euregions: infinite or unlimited?-A survey on effectiveness and legitimacy of the euregions along the Dutch-German border') m.a. thesis, University of Twente, Faculty of Public Administration and Public Policy, Enschede, 1995 and R.W.J.M. Uijen, H.J.M. Goverde, N.J.M. Nelissen, *Euregio's, van informele*

- a) The first form of cross-border co-operation is what we would like to call *interlocal co-operation*. This co-operation, only at a communal level, promotes a common interest that the various, contributing partners share. Very often this common interest lies in the field of economics. As can be seen from the above-mentioned scheme interlocal co-operation can take place directly at the border or between communities, not directly situated at the border but having a common interest; e.g. when all partners are major harbours within their country and they share similar possibilities and problems. Another form of interlocal co-operation are the well known *jumelages* between municipalities. These are very often based on personal contacts between public officials. These *jumelages* are mostly a form of 'interlocal co-operation not at the border'. That is why they are not discussed here. The same applies to *partnerships* of towns, which are formed all across Europe and which are very often of a trilateral or even quadrilateral nature. These partnerships tend to be somewhat more institutionalised than the *jumelages* because they often validate their co-operation through some sort of (quasi-) official document. The aim of these forms of co-operation very often do not exceed cultural meetings and exchanges.
- b) Another form of cross-border co-operation is *interregional* in nature. Like the interlocal co-operation this form is often used, this time by regional authorities, to co-operate on the basis of a common economic interest. The well-known 'four (now five) motors of Europe' is a good example of this form of co-operation.
- c) The real *euregional* co-operation stands for co-operation on a subnational level between authorities that are situated at the border. This form of co-operation can take several (juridical) forms and can have different objectives, e.g. of a cultural-, an economic- or an infrastructural nature.
- d) Finally, on a *national* level there is also co-operation that has regional dimensions. Very often this co-operation takes the form of bilateral or trilateral commissions, like the two cross-border spatial planning-commissions for the northern and southern Dutch-German border or the bilateral Dutch-Flemish language commission.

3. A general survey on the euregions along the Dutch-Belgian-German border from a juridical perspective

The first question we want to answer is: Are these juridical forms of co-operation and different degrees of institutionalisation legitimate?

To answer this question, we will have to look at the various possible juridical structures, which are currently in use regarding decentral cross-border co-operation. Additionally, we will have a look at the different degrees of institutionalisation regarding decentral

uitwisselingen tot openbare publiekrechtelijke lichamen ('Euregions, from informal exchanges to public bodies'), unpublished paper, Katholieke Universiteit Nijmegen, Faculteit der Beleidswetenschappen, Vakgroep Bestuurs-en Organisatiewetenschap, 1994.

cross-border co-operation. Then, we will present a concept of legitimacy, which we used to 'evaluate' this co-operation in general. Taking into account the cross-border co-operative forms along the Dutch-German and the Dutch-Belgian border, we highlight certain parameters of legitimacy and apply it to the cases.

3.1 Juridical 'possibilities' of cross-border co-operation and different degrees of institutionalisation

Co-operation between subnational authorities on different sides of the border can take various forms:

At the lowest level we can see an *informal or non-formal*⁸ form of co-operation. In this category the non-binding character of the co-operation is characteristic. The co-operation is thus more of a moral-political nature. Beyerlin (1989:290) speaks of 'bloße Interaktionen' that can do without any form of institutionalisation. These forms are therefore of a pure informal nature and mostly formed on an ad hoc basis. Ress (1987: 2) speaks of 'schlichte Kooperation' (modest co-operation) characterised by informal contacts and exchange of information. According to him it is better to speak of co-ordination than of co-operation since actually there is no real co-operation. Within this category it is possible to draw a distinction between co-operation with a low and co-operation with a high degree of institutionalisation (oude Veldhuis 1995: 72 en Uijen a.o. 1994: 6). The first sub-category (low institutionalisation) is characterised by the fact that these 'agreements' are juridical non-binding, that they are of a political-moral nature, that they very often only have an 'ad-hoc character', that there are only ad-hoc working groups and that they are mostly supported by only few people. The second category (high institutionalisation) like the first is juridically non-binding and of a political-moral nature. There are, however, more frequent contacts within a quasi-formal organisation between very often more people. In both types of co-operation there is no sort of democratic legitimisation.

One stage higher there is *co-operation based on civil law*. This co-operation is characterised by the fact that there is some kind of institutionalisation of the co-operation based on the civil law of one of the participating countries. It is also possible that the co-operation is based on both (or more) law systems, although it must be said that in the light of the 'loi unique' principle - which says that only one law system is applicable - there are problems connected to this multilateral civil law body. Hypothetically, there even is a third variant; the 'legal person *sui generis*' but since there is not an international legal basis for this we don't discuss it any further. There are several problems connected to cross-border co-operation based on civil law. First, there is a problem that the new established authority cannot act in a public sense. Furthermore,

⁸ By 'non-formal' we mean the kind of cross-border co-operation that knows some degree of institutionalization in the sense of f.i. declarations of intent. The aforementioned partnerships are a good example of this. By 'informal' we mean co-operation that has a rather 'loose' character and that is very often based only on personal friendships of public officials. The aforementioned *jumelages* are a good example of these forms.

since it lacks a public law basis, it cannot take legally binding public acts. This is closely related to the third problem of co-operation based on civil law; there is only a very low level of democracy related to this kind of co-operation. Control, openness of the public process, publicity, participation and representativeness all have to be missed within this category (see also: Kessen, 1992: 82).

The next option is that there is a basis for *the co-operation within public law*. Compared to the previous two forms there are several, obvious advantages:

1. it is possible to hand over certain legislative and/or administrative tasks to this new public body;
2. in a further elaborated form, this public co-operation could even take into account the cross-border judicial protection of civilians living within the euregional area; this leads to the fact that several sectoral government tasks (environment, spatial planning, education) can be dealt with, although there still will be a large degree of dependency on national authorities;
3. a next advantage is that there can be a directly or indirectly chosen public body representing the interest of the civilians living within the euregion; the co-operation is based on a formal legal document;
4. finally, most often there will be a good organisational structure connected to this form of public co-operation.

For a long time it was only possible to work together across the order in an informal/non-formal manner or by using civil law. This situation appeared to be unsatisfactory. There are several reasons for that. First, it is not possible for these non-public cross-border authorities to hold public responsibilities. This means that there is no real decision-making power in regard to policy-fields that could fall within the responsibility of these authorities. Second, since these non-public authorities have no decision-making power based on transnational public law they cannot bind either the national participating public authorities within the euregion nor the civilians living in the euregional area. Third, co-operation based on civil law is not equipped for problems that are mostly of a public character (e.g. infrastructure, employment). This is why initiatives were taken to look for a public law basis of cross-border co-operation.

In this respect mainly the Council of Europe has been very active. Its efforts led to the so-called European Outline *Convention*⁹ (further: EOC), which was signed in 1981 in Madrid (therefore also: Convention of Madrid). Its aim is to facilitate and to promote transfrontier co-operation between territorial communities or authorities within the fields of responsibility that these authorities and communities possess. The EOC is restricted to co-operation in border areas (see also: Seerden 1993: 42). An interesting question in this respect is whether the EOC has to be regarded only as 'declaration of intent' or as a juridical basis for cross-border co-operation on its own. Beyerlin (1989: 326) speaks of

⁹ Full title: European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities.

‘Dachverträge’ (umbrella treaties) and thinks that additional interstate treaties are necessary as juridical bases for cross-border co-operation (Beyerlin 1980: 590). Seerden (1993: 47) sees the two-sided nature of the EOC; in several explanatory documents we can read that the EOC is a sufficient tool for this co-operation, in reality, however, additional interstate agreements on cross-border co-operation seems to be the *conditio sine qua non* for actual co-operation between decentral authorities. In an earlier part of his book on transfrontier co-operation he comes to the conclusion that subnational cross-border co-operation is not a part of international law, but must be seen as a part of national (public) law (Seerden 1993: 34/35). Since decentral authorities don’t have the power or ability to act on an international scale; they don’t have a treaty-making capacity. In this sense the difference between ‘les relations publiques internationales’ and ‘les relations transfrontalières’ seems applicable (Seerden 1993: 37).

When the EOC is to be regarded as ‘soft law’, then we have to look for more compelling norms for cross-border co-operation. In this respect there are at least two treaties worth mentioning. First, there is a BENELUX-treaty regarding cross-border co-operation between territorial communities or authorities (*BENELUX-verdrag inzake grensoverschrijdende samenwerking tussen territoriale samenwerkingsverbanden of autoriteiten*), which was signed in September 1986 and which came into effect on 1-4-1991. On the basis of this treaty one of the three cross-border co-operative bodies was transformed into a public body (BENEGO) and one was transformed into a common administrative body (euregion Scheldemond) (Deekens 1997: 6).

A second treaty that was signed as a result of the EOC is the Treaty between the Kingdom of the Netherlands, the Federal Republic of Germany, the ‘Land’ Nordrhein-Westfalen and the ‘Land’ Niedersachsen regarding cross-border co-operation between territorial communities or authorities (Dutch-German Agreement) (*Overeenkomst tussen het Koninkrijk der Nederlanden, de Bondsrepubliek Duitsland, het Land Nedersaksen en het Land Noordrijn-Westfalen inzake grensoverschrijdende samenwerking tussen territoriale gemeenschappen of autoriteiten*). This treaty was signed at the German bordertown of Isselburg-Anholt on 23-5-1991 and it came into effect on 1-1-1993. Like the BENELUX-treaty the Dutch-German agreement makes it possible for decentral public authorities to co-operate in a public sense. An interesting question is whether or not this public co-operation forms part of international law or should be regarded as being a part of the respective domestic law systems of the countries involved. Cross-border public authorities that will fall within the scope of the Dutch-German treaty are surely no international organisations (Seerden 1993: 177 and 215) and one can say that the applicability of national law even towards these cross-border co-operations remains intact.

Basically, within this agreement there are three possible juridical forms for co-operation: Article 2 section 2 says that:

‘Notwithstanding the possibilities to co-operate on a civil law basis, co-operation can take place in the following forms:

1. making a common regulation by which a *public body* is established;
2. making a common regulation without establishing a public body or common administrative body;
3. making a common regulation by which a *common administrative body* is established.

Although, the public body is the far-reaching form of cross-border co-operation made possible, it is not possible to enact binding regulations for civilians within the territory of this newly established public body (art. 5 of the treaty). Binding norms can only be directed towards public authorities within the cross-border public body (e.g. a euregion), which have to make their own regulations to bind civilians within their territory. The internal law of the state of which the co-operating authorities form part is still applicable. This means that with regard to the supervision of the decisions that are taken by the public authority and the legal protection there can be a conflict of norms.

3.2. *Euregional co-operation along the Dutch border*

When we look at the euregions at the German-Dutch border there are several juridical forms currently in use. From north to south along the Dutch-German border there are five euregions.

Figure 2 at about here

The *Eems-Dollard* region, established in 1977 and containing parts of the Dutch provinces Groningen and Drenthe and of the German *Länder* Niedersachsen (the *Kreise* Aurich, Emsland, Leer and Wittmund and the *kreisfreie Stadt* Emden), is a organisation which has a bilateral civil law character; according to Dutch law it is a *stichting* (corporation) and according to German law it is an *eingetragener Verein* (registered association). Members of this *stichting* are communities, chambers of commerce, interlocal organisations, one professional chamber and the east-Friesian region. Currently, the Eems-Dollard region is working on a common regulation, which is based on the German-Dutch treaty on cross-border co-operation. The German *eingetragener Verein* is a member of the Dutch *stichting*. The same persons have a seat in the boards of both civil authorities. The initiative to form the Eems-Dollard region was taken by the chambers of commerce, the province of Groningen, the regional council of East-Groningen and several communities (oude Veldhuis, 1995: 27).

The EUREGIO, also called the Euregion Rijn-Ems-IJssel, was established in 1958 and is the oldest of the euregions in Europe. It contains parts of the Dutch provinces Drenthe, Overijssel and Gelderland and the German *Landkreise* Grafschaft Bentheim, parts of the *Landkreis* Emsland, parts of the *Kreis* Borken and the *Kreise* Borken, Coesfeld and

Steinfurt. The initiative was taken by communities on both sides of the border. The EUREGIO is a non-formal cross-border co-operative body, which nevertheless has a rather high degree of institutionalisation, since it has a common German-Dutch secretariat, a representative body called the EUREGIO-council and a common charter. Members are 106 communities and the *Kreise*. Like the euregion Eems-Dollard the EUREGIO is currently, at the basis of the Dutch-German treaty, trying to work out a regulation for a cross-border public body. The EUREGIO is a form of pure cross-border upper-local co-operation since its own members are the communities within the area of the EUREGIO. Recently, the euregion has concluded some 'association-agreements' with the *kreisfreie Städte* Münster and Osnabrück. Eventually, both towns will be integrated into the Euregional structure.

Between 1978, from its establishment, until 1993 the euregion Rijn-Waal was a non-formal co-operative body and currently, since 1993, it is the only cross-national public body at the German-Dutch border based on the German-Dutch treaty. Its seat is in the German town of Kleve. It is made up of the Dutch area around Arnhem and mid-Gelderland, the area around Nijmegen and the North-eastern part of the province of Brabant. At the German side it is made up of the *Kreise* Kleve and Wesel and the *kreisfreie Stadt* Duisburg. The initiative was taken by the *belangengemeenschap Rivierengebied* Gelderland (an interest-group for the River area Gelderland), the *Niederrheinische Industrie-und Handelskammer* (chamber of commerce) and the city of Emmerich. Formally, the euregion Rijn-Waal would have the power to bind its members on a public law basis. Nevertheless, within the short period that it is now working on a public law basis it shows that also in this environment the initial readiness to co-operation from all members is necessary to get things done. Apart from that only few real public tasks and responsibilities are actually handed over to the newly created public body. At the board of the public body there are members of municipalities and regional authorities at both sides of the border. Apart from that the Chambers of Commerce and the *Landschaftsverband* Rheinland are members.

The euregion Rijn-Maas North was established in 1978 and is made up of the Dutch north-and middle Limburg areas and the German *kreisfreie Städte* Mönchengladbach and Krefeld, the southern part of the *Kreis* Kleve and the *Kreise* Viersen and Neuss. The initiative was taken by the chambers of commerce and local authorities. Until 1993 its name was border-region Rijn-Maas North. Members are intermunicipal co-operation bodies at the Dutch side, the Dutch and German Chambers of Commerce and several German border-cities. The euregion has a low level of institutionalisation; f.i. it has only a very small own secretariat, which is placed in annex to the town administration of the city of Mönchengladbach.

The euregion Rijn-Maas was established in 1976 and is made up of the southern part of the Dutch province of Limburg, the Belgian provinces Limburg and Luik/Liège, the German-speaking community in Belgium and Region Aachen e.V., a registered

association made up of the *kreisfreie Stadt* Aachen and the *Kreise* Aachen, Düren, Euskirchen and Heinsberg. All mentioned public authorities are members. Since 1991 the euregion Maas-Rijn is a *stichting* according to Dutch law, which has its seat in Maastricht: in that sense it conforms to the 'loi unique-principle'. Until that period it was a non-formal co-operative form. The euregion Maas-Rijn is the only region that is made up of 'real' regional authorities; it doesn't contain an extended local element like the other regions do. It has however, since it established a Euregional council in 1995, a representative body which is made up of 60 % representatives from political bodies and 40 % representatives from societal organisations like chambers of commerce, trade unions, universities and employers. In this sense this euregion is unique and the future will show how this combined political-societal system will work out.

Another organisation worth mentioning is the *Nieuwe Hanze Interregio/Neue Hanze Interregion* a co-operation between the northern provinces in the Netherlands (Groningen, Friesland, Drenthe and Overijssel) and the German *Länder* Niedersachsen en Bremen., which was established in 1991. The participants want to strengthen the geographical, cultural and economic sense of belonging through administrative co-operation (Raven en Tromp 1993: 24). Until now the results of the co-operation are rather modest and it has to be seen whether or not it will turn into a successful cross-border organisation in the future. Divergent from the euregions is the fact that the Nieuwe Hanze Interregio has a much bigger scale. Apart from that it is also a collaboration between only regional authorities on both side of the border; only the euregion Maas-Rijn comes close to here in this respect. Actually, the *Nieuwe Hanze Interregio* shows more similarities with the 'umbrella' transfrontier organisations (Strassoldo, 1982: 129) or 'working communities' (*Arbeitsgemeinschaften*), mainly situated in the alpine-area like Alpen-Adria or Arge Alp, that cover a much bigger area than the smaller euregions.

When we look at euregional co-operation along the Belgian-Dutch border we can also see varying degrees of institutionalisation and different juridical forms.

The euregion *Benelux-mid area (Benelux-middengebied)* consists of the Dutch provinces of Noord-Brabant and Limburg and the Belgian provinces of Antwerpen, Brabant and Limburg. This co-operation is regional in character. The euregion has no legal status whatsoever and must be labelled as a non-formal form of co-operation.

The euregion *Benego* is a co-operation between 27 border communities at the Dutch-Belgian border. This is why it is to be called a extended form of local co-operation. This euregion became a public body according to the BENELUX-treaty.

The euregion *Scheldemond* is a co-operation between the province of Zeeland in the Netherlands and the provinces of Oost-Vlaanderen and West-Vlaanderen in Belgium. It has become a common administrative body based on the BENELUX-treaty.

Within the current practice of cross-border co-operation along the Dutch border several dimensions can be distinguished:

1. the partners within the co-operation, which can be further sub-divided into organisations in which only regional public bodies are members, organisations in which only (upper-) local authorities are members and organisations in which local and/or regional authorities are members next to other non-public or quasi-public organisations are members.
2. the degree of institutionalisation , varying from a very low degree without any juridical status, through ‘civil law’-structures up until public authorities.
3. the applicability of the BENELUX-Treaty and the Dutch-German agreement and on the various euregions along the Dutch-Belgian and the Dutch-German border. This third dimension is represented in the table in **bold**. Moreover, those euregions which are striving to become a public authority either under the BENELUX-Treaty or the Dutch-German Agreement are placed in *italics*.

This is shown in Table 1¹⁰:

Table 1 at about here

From Table 1 the conclusion can be drawn that there is a very scattered picture of juridical forms and degrees of institutionalisation of cross-border co-operation along the Dutch-German border and the Dutch-Belgian border.

3.3 The legitimacy of cross-border co-operation

The concept of legitimacy is multi-dimensional in character. According to Beetham (1991: 15) it embodies three distinct elements or levels. Power is legitimate when:

- 1) it confirms to established rules;
- 2) the rules can be justified by reference to beliefs shared by both dominant and subordinate, and
- 3) there is evidence of consent by the subordinate to the particular power relation.

The first and most basic level of legitimacy is that of rules conformity. From a mere juridical point of view, power is legitimate where its acquisition and exercise conform to established law. Legitimacy, in this sense, is equivalent to *legal validity* (Beetham 1991: 4). Whenever power is not exercised according to ‘the’ rules, it is *illegitimate*. In this sense, legality is an important component of legitimacy. However, this first dimension of legitimacy is not enough to understand its full meaning.

The second level can also be described as the ‘justifiability of the rules by reference to shared beliefs. When is power ‘justifiable’? First, there has to be a valid source of authority. Second, those holding power have appropriate qualities. And third, there has

¹⁰ Adapted from (and slightly changed): Uijen a.o. 1994.

to be a recognisable general interest (Beetham 1991: 17). In this sense, legitimacy entails the *moral justifiability* of power relations. Whenever rules are non-justifiable, because of their deficiency in terms of shared beliefs between rulers and governed, we speak of a *legitimacy deficit*. This level of legitimacy is closely connected to the political philosopher's idea of rationally normative principles.

The third and last element of the concept of legitimacy is the contribution of the subordinate. What is needed in this context, is consent by the governed. This leads us to the field of social science, where one is concerned with the legitimacy in particular historical societies or governmental contexts. Power relations are no longer legitimate, where *belief in legitimacy* has gone. At this level the opposite of legitimacy can be called *delegitimation*. Here we see a crucial element of Max Weber's idea about legitimacy; legitimacy derives from people's belief in it (Beetham 1991: 8). However, a given power relation is not legitimate because people believe it to be, but because it can be *justified in terms of people's beliefs* (Beetham 1991: 11).

It is to these three criteria we have to look, if we want to know what makes power legitimate (compare: Beetham 1991: 21).

The above can be put in a scheme. We have taken the figure from Beetham (1991: 20) and changed it slightly (see Table 2).

Table 2 at about here

Of course it is always difficult to apply theoretical frameworks to a given situation. We will try to make some general remarks, however, although we lack adequate public opinion survey data to make valid inferences especially with regard to the second and the third aspect of legitimacy. When we look at the different (juridical) forms of euregions along the Dutch-German and the Dutch-Belgian border, we still see a great variety in what we called the level of institutionalisation. We can only guess at the conformity of established rules or legal validity within non-formal or informal forms of euregional co-operation. Since there is no legal basis whatsoever, we can nothing but 'conclude' that the *legal validity* of these forms of co-operation is low. We are not saying that they are totally illegitimate, but there is tendency towards an inadequate legal validation.

When we look at the civil law forms of cross-border co-operation, what stands out is that these forms have a legal basis. The question remains, however, whether or not this non-public form of organisation is the most appropriate when tasks and responsibilities lie in the field of common interest.

The highest institutionalised form, which is based on public law, most certainly comes closest to a legitimate form of cross-border co-operation, when we look at legal validity. But even with regard to this form the question remains what its genuine legal basis is. Legal acts taken by public law based euregional bodies are still forced to conform to at least two national law systems. As long as this cross-border co-operation lacks a law

basis of its own (*sui generis*) or as long as there is no direct link between the European Union's legal order and that of the euregions, euregions will be 'sandwiched' between the applicability of different and often divergent law systems. A first step towards a more coherent basis for Euregional public law based co-operation would be the internalisation of the EOC in the European Union's legal order. In the future this would mean that euregions no longer need the consent of national authorities to form public authorities but can refer to European regulation. Here we touch upon the problem of sovereignty as the leading principle in the relations between states.

When we look at the *moral justifiability* of a euregional authority or its decisions, it is far from clear whether there is any kind of reference to shared beliefs. Since we speak of divided and sometimes artificial communities in the first place, it is not easy to serve a *recognisable* general interest, rather than simply the interest of the powerful (Beetham 1991: 17). Even within a national situation it is hard to secure a legitimacy, common shared moral basis for public acts.

With respect to the *demonstrable expression of consent* as the third criterion of legitimacy, the odds are also against euregional co-operation. This part of legitimacy, at least in democratic circumstances, runs through general elections. There are of course euregional forms of co-operation that involve some kind of participation. Universal suffrage through direct elections, in terms of participation probably the next-best solution¹¹, is not taken care off at all. This is why we still have to guess for the people's consent towards actions taken by euregional bodies. The best guarantee for participation is that of indirect elections of a euregional parliament or chamber of representatives. No euregion has a direct legitimacy basis through general election of its legislative body. Again, we literally come to the borders of present possibilities. It simply is not possible to let the people express their consent in euregional politics and policies by the given standards.

Concluding, we may say that the legitimate basis for euregional co-operation is rather weak. On all three aspects of legitimacy euregions show deficiencies.

According to Beetham (1991: 33) legitimacy is not the only factor contributing to the order, stability and effectiveness of a system of power; organisational capacities and resources are obviously crucial as well. We therefore will continue with a discussion on democratic control and economic efficiency. To research the criterion of democratic control and efficiency we limited ourselves to one case. From Figure 1 we chose the Euregion Rijn-Waal as a region with one of the most elaborate forms of public law based co-operation.

¹¹ It can be argued that referenda or people's initiatives are even more 'democratic'.

4. A general survey on the euregions from a political science perspective

The second question we want to raise is: “Do the new governance structures in euregions meet elementary criteria of *democratic control* over public policies and funds?” As stated above we will restrict ourselves to a discussion on the euregion Rijn-Waal (ERW).

4.1. Democratic control

The criterion of democratic control refers to the control over binding collective decisions by the citizens that are (most) affected by these decisions or by their chosen representatives. Moreover in this process each member’s interests are entitled to equal consideration. (cf. Dahl 1989:106-118). This standard implies at least that the decisions on the provision of regional collective and quasi-collective good should be controlled directly or indirectly by the most affected citizens. In her dissertation, Traag (1993) has developed a set of criteria to evaluate the democratic quality of co-operative arrangements between Dutch municipalities. These criteria are appropriate in the case of cross-border co-operation by public law too, since the legislation in the Dutch-German treaty is analogous to the Dutch law on inter-municipal co-operation.

Traag’s criteria relate to the

- possibilities for direct citizen participation
- the system of political representation and decision-making
- control of the inter-municipal assembly and executive (Traag 1993: 77-120).

These criteria will be employed to evaluate the nature of democratic control in the institutional context of the Euregion Rijn-Waal (ERW). This analysis pertains to formal regulations, although we will make some additional tentative remarks on the ‘rules in action’.

As for possibilities of direct citizen participation the most striking deficit of this co-operative body is the impossibility for the citizens in the region to elect the members of the region’s parliamentary assembly in *general and direct elections*. The Dutch-German treaty rules out this possibility since it conceives of these regional governments as a form of extended sub-national government.¹² If a co-operative body is to have a parliamentary assembly and an executive board (as is the case in the Euregion Rijn-Waal), its members are representatives of the region’s subnational governments, not of the region’s citizens. In the ERW each participating sub-national government elects one or more of the members of its supreme organ as its representative(s) to the ERW-assembly. In the case of municipal governments, small municipalities (less than 20.000 inhabitants) have one representative, medium-sized (20.000-100.000 inhabitants)

¹² In this and many other respects the Dutch-German treaty is analogous to the Dutch law on inter-municipal co-operation.

municipalities have two, and big municipalities (over 100.000 inhabitants) have three representatives. Furthermore each municipality delegates a member of its executive council to the Assembly.

Moreover, the ERW-arrangement, like most Dutch inter-municipal co-operative bodies, does not provide for a formal general procedure for direct public participation in decision-making by interested parties and persons.¹³ An important improvement is that the ERW-agreement provides for the publicity of the meetings of the assembly.

An important consequence of the regulations on the election of the members of the ERW-assembly is that it does not allow for an equal representation of citizens irrespective of their place of residence. If we conceive of the local delegations to the ERW-assembly as (rather indirect) representatives of their local electorates this system assigns highly unequal weights to the indirect influence of members of the various electorates. Each of the four delegates from Nijmegen (147.000) represents 36.750 people, whereas the two honourable members for Rozendaal (near Arnhem) each represent a mere 600. This inequality will be exacerbated if decision-making in the ERW-assembly should operate under unanimity rule. Under such a decision-rule each of the participants (municipal and other delegations), irrespective of the number of citizens it represents, has the power to veto a decision. By the letter of the agreement this is not the case. The agreement explicitly states that decision-making in the Assembly is by majority rule.¹⁴ Even though, in a strictly legal sense, a regional authority under public law operating under (simple or qualified) majority rule is authorised to make decisions concluding all of the municipalities in the region. These powers are, however, in practice circumscribed by the lack of effective sanctions in case of non-compliance and the possibility for dissidents to resign as a member (Hirschman's famous exit-option). If such an informal unanimity rule is also typical for the decision-making process in cross-border co-operation under public law, each and every of the participating municipalities, whatever the size of its population, is capable of blockading any decision it dislikes.¹⁵

The third set of criteria relate to the control of the representatives in the ERW-assembly, and the ERW-executive.¹⁶ One of the major advantages of cross-border co-operation under public law is that this form of collaboration allows for unequivocal safeguards for

¹³ One should however consider the Dutch-German treaty does not allow these bodies to enact generally binding prescriptions (Section 5)

¹⁴ Some caution is due, however. Traag's study on actual decision-making in twenty Dutch inter-municipal cooperative bodies shows that roll-call votes in the assemblies of these public authorities are unique events, because no proposals enter on the agenda unless informal consultations have resulted in unanimous consent by all the participating municipalities (Traag 1993: 243-244).

¹⁵ It is not clear, however, if these informal procedures result in a situation in which even the tiniest municipality, like Rozendaal, has the nerve and actual capability of vetoing a decision supported by all the other municipalities.

¹⁶ The ERW-executive consists of a chairman, the chairmen of the advisory committees, and those members of the assembly representing the municipal executive councils of cities with more than 100.000 inhabitants.

accountability of the members of the parliamentary assembly as well as the executive. The ERW-agreement exploits this potential for a secure legal framework for the accountability of these office-holders. First, the agreement states that *members of the assembly* are under an obligation to inform the body of the municipal government they represent on all crucial matters regarding the ERW, he is required to answer all relevant questions of his fellows from that body, and is obliged to be accountable to this municipal body. Once a member of the assembly no longer enjoys the support of the majority in this body, he can be forced to resign as a member of the assembly. In addition to these safeguards the ERW-secretariat is required to distribute the agenda, proposals and proceedings of all meetings of the assembly to all the municipalities and other participants in the ERW.

Second, according to the agreement, the *members of the executive* are required to answer all questions emanating from the assembly within four weeks. Moreover they are accountable to the ERW-assembly, and once they stop to enjoy the assembly's confidence, they will have to resign.

Nevertheless, here too, a note of caution based on the practical experiences with rather similar regulations in Dutch inter-municipal co-operative bodies, are in order. For one thing, according to virtually 75 percent of all municipal delegates in twenty inter-municipal co-operative bodies, members of the Dutch municipal councils (unless they are members of the assembly) typically take little or no interest in inter-municipal co-operation (Traag 1993: 191-192).¹⁷ For another thing, most Dutch inter-municipal executives are completely composed of full-time politicians (often mayors) recruited from the municipal executives. Council-members, typically amateur-politicians, generally lack time and other resources to serve as an executive in these executives. The same factors make it difficult for councilmen serving on the assembly to control the inter-municipal executive. All-in-all the actual balance of power between the parliamentary assembly and the executive in Dutch inter-municipal co-operative bodies is tilted heavily in favour of the latter (SGBO 1989; Everink et. al. 1993: 111-118). This might very well be the case in cross-border co-operative arrangements, like the ERW, too.

5. *A general survey on the euregions from an economic perspective*

The third question we like to answer is whether the new regional structures of governance fit to provide the border regions with adequate regional collective and quasi-collective goods on the standard of *efficiency in allocation*. Where legal questions refer to the form of the process and democratic control pertains to characteristics of the decision-making process, efficiency in allocation relates to the outcomes of decision-

¹⁷ Traag, however, also reports that according to municipal delegates, members of local executives take a much more vivid interest in regional affairs.

making.¹⁸ Efficiency in allocation is realised when the level of output of a collective good is such that the sum of the individual marginal benefits (or the marginal rates of substitution) of all the potential beneficiaries of this good equals the marginal costs (Musgrave and Musgrave: 1980: 58-61). In the case of a pure regional collective good this standard implies that the level of output should reflect the preferences of all the potential beneficiaries (or consumers).¹⁹ Assuming an equal cost-sharing agreement among the consumers, up to this efficient level of output, increasing the size of the group of consumers implies a reduction in the 'price' of the good (Litvack and Oates 1991: 222-225).²⁰ If, for one reason or another, the preferences of some of the potential beneficiaries are not considered in determining the level of output for such a regional collective good, the outcome of the decision-making process will be inefficient or sub-optimal (Olson 1971: 27-32).

Since Mancur Olson (1971) every social scientist will know that the realisation of an efficient outcome in the case of the provision of public goods cannot be taken for granted. Economic theorists, in defining the efficiency conditions for public goods, have employed models assuming known preferences. But typically such preferences are not known and political institutions and processes are necessary to reveal these preferences for public goods and to determine how to bear the costs of providing for these commodities (Musgrave and Musgrave 1980: 61). Different institutional conditions produce different results. In this section we will formulate some hypotheses on the efficiency effects of the institutional structure of the decision-making process in the case of cross-border co-operation. More specifically: we will concentrate on the case of cross-border co-operation under public law according to the Euregion Rijn Waal (ERW)-model discussed before. The ERW-model is deemed to be more appropriate than co-operation based on private law or informal agreements, when binding collective decisions with regard to regional economic development are to be made (e.g. Driesprong 1993: 76; Kessen 1993: 72).

¹⁸ The standard of efficiency in allocation is closely related to policy responsiveness or substantive democracy. Both terms refer to the actual concurrence between citizen preferences and government policy outputs (e.g. Jacobs and Shapiro 1994).

¹⁹ Pure collective goods are characterised by prohibitive costs of exclusion and non-rival consumption (Musgrave and Musgrave 1980: 57). Impure public goods are commodities characterised by joint consumption in combination with costs of congestion (Litvack and Oates 1991: 225). The standard of efficiency in allocation refers to the *provision* of goods. Provision pertains to the collective decisions on the quantity and quality of the collective goods to be provided, how the costs will be covered (prices or taxes) and who will produce the goods (Ostrom and Ostrom 19..; ACIR 1987). This paper does not deal with the case in which cross-border co-operation is established in order to benefit from increasing returns to scale in the *production* of pure and impure collective goods. Co-operation in the production of goods is considered as relatively unproblematic, since it is possible to withhold the benefits of this type of co-operation from free-riders (Denters 1985).

²⁰ In the case of impure collective goods the costs of congestion of each additional consumer will have to be considered, too. Moreover, in the rest of this paper we will, for reasons of convenience, use the simple term 'efficiency' as a shorthand for the more cumbersome expression 'efficiency in allocation'.

In this analysis we will try to anticipate the consequences (in terms of efficiency) of an institutional arrangement (the ERW-agreement) with regard to a particular structure of events (viz. the provision of regional collective goods) making various assumptions on the motives of the actors (cf. V. Ostrom 1991: 44). The formulation of hypotheses on the efficiency effects of a specific institutional structure presupposes a theoretical model. We will begin this theoretical exploration with a rudimentary rational actor model. Subsequently we will extend this simple model in several directions.

Before we will develop our model, some simplifications are due to set the stage on which our actors are to perform.

First, we assume that municipal governments are the only actors relevant in cross-border co-operation. This assumption works in two directions. On the one hand, the analysis ignores the possibility of multiple actors from one municipality. This assumption implies that all participants (e.g. members of the ERW assembly and the ERW executive) coming from a specific municipality A are considered as representatives of the interests of one collective actor, municipality A. On the other hand, the analysis does not pay attention to the possible role of provincial or regional governments, neither as a member of cross-border co-operative bodies, nor in a supervisory role. We will return to this important point at the end of the section.

Second, the number of actors is relatively large. In the case of the ERW there are 40 municipal actors; in the EUREGIO-case the number of actors exceeds 100.²¹

Third, we assume that no single actor has enough resources to provide for some quantity of this regional good in his own right. Even the provision of one unit (the technical minimum quantity) of the good is beyond the purchasing power of any of the actors. In other words, if the good is to be provided contributions by at least two potential beneficiaries in the region are essential.

Fourth, we assume that *actual* decision-making in these co-operative bodies typically operates under unanimity rule. In most cases, the ERW is no exception here, the assembly has *formal* powers to make a majority decision. In practice, however, these powers are circumscribed by the lack of effective sanctions in case of non-compliance and the possibility for dissidents to resign as a member (see the previous section).

We have just assumed that the actors on the stage of cross-border co-operation are municipalities. What are the motives determining their behaviour? In the first version of our model we assume that:

each municipal actor (m) will decide to contribute to the provision of a regional collective good if and only if the benefits of this good for the citizens of (m) exceed the price (m) must pay for it (subjective rationality).

that all the municipal actors have equal resources and equal preferences (homogeneity).

that the decision-making process is a one-act-play relating to a single issue.

²¹ It is not clear whether this makes the ERW a large or a small group in terms of Olson's taxonomy of groups (Olson 1971: 43-52).

Under these assumptions no regional collective good will be provided (Olson 1971: 5-52). On the one hand, none of the numerous actors can make a decisive contribution to the provision of the regional good. On the other hand, if such a good would somehow be provided, every actor in the region is able to reap its benefits without having to bear his share in the costs (due to the impossibility of exclusion). Under these circumstances voluntary co-operation to provide regional collective goods will not occur. None of the participants has an incentive to reveal his true preferences with regard to this collective good and contribute in proportion in bearing its costs. Consequently the good will not be provided. Even if, for some obscure motive (beyond comprehension from the model's perspective), a majority of the regional actors would honestly (on the basis of a contribution in the costs of production proportional to the true benefits) like to contribute to a collective agreement the level of output falls short of the efficient level from a regional perspective. For even in this most unlikely event, this majority will be unable to force the non-co-operative actors to reveal their preferences and contribute in the costs of providing the good. There is a clear antagonism between the interest of individual actors to play down their true preferences for regional collective goods and the regional interest in efficient levels of output for these commodities. In co-operative bodies based on a system of extended local government (with a parliamentary assembly and executive composed of municipal delegates), like the ERW, the municipal interests are most likely to prevail. This proposition is confirmed by findings from a survey of twenty inter-municipal co-operative bodies in the Netherlands. Traag finds that a vast majority (83 percent; N=191) of the members of the assemblies and the executives of these bodies in case of an actual conflict between their municipal interest and the region's interests, decided to defend the interest of their municipality (Traag 1993: 216). The ERW has an institutional structure very much like the Dutch inter-municipal authorities. This combination of theory and some empirical results support our initial conclusion: the prospects for an efficient provision of regional collective goods through cross-border co-operation operating under public law are not very good.

Of course our initial theoretical assumptions were very stringent. The analysis of collective action under less exacting assumptions has become a major industry in the social sciences. Does relaxation of some of these assumptions result in more benign effects?

First, among others Axelrod (1984) has shown that assuming that decision-making takes place over time and relates to multiple issues makes the prospect for an 'evolution of co-operation' less gloomy. Axelrod has argued that in many situations the decision to co-operate takes place under the *shadow of the future*. Non-co-operation in one setting (with regard to a particular issue or at one moment in time) might induce others to retaliate in other settings (with regard to another issue or later on). A rational actor will include these possible future consequences in his considerations. For this reason co-operation is more likely in a stable setting, in which the same participants are forced to

co-operate over a longer period, or in a setting where various issues can be linked, and a package-deal is possible.²²

Second, we might relax the assumption of homogeneity.²³ In a recent contribution Martin (1994) has argued that the assumption of heterogeneity does relate to both unequal preferences and inequalities in resources. She concludes that heterogeneity in capabilities (power) favours the development of mechanism to monitor and enforce co-operative arrangements and set up credible sanctions against non-co-operators in the case of iterated games (Martin 1994: 478-481).²⁴ Furthermore she concludes that the heterogeneity of preferences creates a “potential for mutually advantageous issue linkage, thus increasing the probability of successful co-operation” (Martin 1994: 490). In her analysis she even moves one step further when she concludes that: “institutions that rely on consensus for policy change, rather than accepting some form of majority voting, will provide fertile grounds for co-operation as long as they incorporate a number of issues on which participants have different preference intensities. Along a single dimension consensus requirements are often a recipe for paralysis” (Martin 1994: 489).²⁵

Both these theoretical contributions might offer some consolation for advocates of cross-border co-operation under institutional arrangements similar to the ERW. To begin with, the ERW is a permanent body operating on a broad range of issues (socio-economic development, education and training, transport and traffic, physical planning, culture, sports, tourism and recreation, environmental issues, health care, social issues, emergency services, et cetera). It might be argued that the variety of issues is likely to create a multidimensional agenda (including the German-Dutch dimension) for decision-making in which there is a potential for issue linkages to circumvent the dangers of paralysis inherent in (near-)unanimity rule requirements. Furthermore ERW-members are characterised by huge inequalities in resources. If we use municipal size as a proxy²⁶ the Dutch actors in ERW are highly unequal (e.g. Nijmegen: 147.000, Arnhem 134.000 but Rozendaal 1200 and Dodewaard 4000). Of course the effects of all this can only be decided on the basis of an empirical study of decision-making in the ERW and similar

²² Issue linkage is only possible if we relax the assumption of homogeneity.

²³ Olson (1971) has hypothesized that in the case of heterogeneity in small groups sometimes the most interested actor will provide at least some quantity of the collective good at his own expense (cf. Deters 1987). The other, less interested actors, will free ride on the efforts of this “large” actor. In our assumptions this possibility is ruled out.

²⁴ Here Martin’s conclusions contradict one of the conventional propositions about determinants of the success of co-operation. For instance: Ostrom, Tiebout and Warren (1961: ...) assert: “concerted action by the various units of government in a metropolitan area is easier to organize when the costs and benefits are fairly uniformly distributed throughout the area [...] More difficult problems for the polycentric political system arise when the benefits and the costs are not uniformly distributed. Communities may differ in their perception of the benefits they receive from the provision of a common public good”.

²⁵ Cf. Van Dam (1992: 149) who has made a rather similar observation.

²⁶ Municipal size is highly correlated with the size of the municipal political and administrative apparatus and its financial resources (Deters, de Jong en Thomassen 1991).

institutions. Such studies are not available as yet. We do, however, have the results of a study by Van Dam. He has studied the actual municipal economic policy efforts by Dutch municipalities. He concludes that tendencies by less interested actors to take a 'free ride' on efforts made by municipalities highly interested in the regional collective good (regional economic development) are not moderated by the participation of these municipalities in a multi-purpose inter-municipal co-operative body (Van Dam 1992: 117, 155-162). According to Van Dam, these results cast serious doubts on the appropriateness of Axelrod's "shadow of the future"-hypothesis (Van Dam 1992: 149). His study does not offer any support for the comforting ideas inherent in recent theoretical contributions. Apparently, it is difficult to reconcile conflicting municipal and regional interests within the framework of inter-municipal co-operative bodies.

Of course the results from this one study are far from conclusive. Nevertheless, it is still too early to conclude that Olson's pessimistic conclusions on the efficiency of the outputs emanating from voluntary co-operation only hold under a set of overly restrictive assumptions.

Finally, and most importantly, we have to relax the first assumption we made, that municipal governments are the only actors relevant in cross-border co-operation. Above we discussed horizontal tuning in the production of collective goods, but here we touch upon the problem of vertical tuning. The theory in economics that deals with this problem is that of fiscal federalism, where a solution has to be found for centralisation versus decentralisation. Within the boundaries of a *nation* each country has its own internal solution to the dilemma of centralisation and decentralisation (Oates 1972; Van der Veen 1993: 87). This dilemma consists of the confrontation of decentralising the provision of public and merit goods to the level of government which most fit to the tastes of consumers (given their preferences for goods and taxes, Boadway and Wildasin, 1984) and, on the other hand, centralising government tasks on a high level, because of economies of scale and external effects. Each country finds her own administrative structure with, as an example, the Netherlands as a highly centralised country and Germany as a federal state.

The question now is whether notions of fiscal federalism also can be applied to the situation of *cross-border* co-operation (van der Veen and Boot, 1995). Following the theory there is a ground to equip cross-border regions with those tasks and competencies which can not be dealt with on a (local) interior level and which need not necessarily to be dealt with on a (supra) national level. The problem which deserves attention here is that a specified structure will only be of interest as far as it facilitates or improves the functioning. There is a lot of discussion about the connection of administrative scale and functioning. In this debate juridical and economic aspects and political values play a role. The economic aspects concern efficiency arguments, the political values concern democracy and legitimacy. Although there seems to be no identical idea of the optimal administrative scale, economists, jurists and political scientists are aware of the fact that far-reaching cutting up of administration is not the best solution. From an economic point of view a patchwork pattern of administration structures will cause enormous decision-

making costs and face the problems of externalities and missing economies of scale (Oates, 1972). From the political point of view this will cripple effective decision making on supra-local matters and cause problematic policy co-ordination. And from a juridical point of view a patchwork pattern type of jurisdictions leads to undemocratic and less transparent decision making procedures and thus to less legitimacy.

Besides scale of administration, sovereignty is an important factor as well (however the latter is related to the former). As far as cross-border authorities exist yet -autonomous or as a consultation-body of composing authorities-, these are confronted with the problem of lacking competencies to affect measures which can further unification of the region and its welfare. They have little impact on regional development. Even the construction of small-scale infrastructure is not possible without intervention and exertion of higher governments. The smaller the regions are, the more acute this problem is. Until recently, neither national nor European legislation met the explicit possibility of cross-border administrative structures.

Applying Olson (1971), this dilemma may, under particular conditions, force authorities to co-operate. In recent literature the logic of collective action has been applied to situations of international co-operation (See e.g. Martin, 1994, p. 478). National states face collaboration dilemmas in case of self-interested behaviour, or co-ordination dilemmas in case of distributional conflicts. The design of institutions is in both cases strongly influenced by heterogeneous interests and capabilities. As far as we know there is no literature how local governments design institutions on cross-border matters, given the problems national governments have in collaborating or co-ordinating. It is doubtful whether an individual local (or regional) authority can bring about important changes in, for instance, spatial structure. Competencies on this matter are usually situated on a higher level of government, just because of the far-reaching spatial consequences. This justifies the conclusion that spatial external effects are an important aspect in the discussion about the rationale of cross-border co-operation²⁷. This argument is perhaps one of the most advanced. As Anderson (1983: 3) poses:

'As social and economic activities spill over the frontiers or their consequences come to be strongly felt across the frontier, different levels of transfrontier political and administrative co-operation become necessary'.

6. Conclusion

Our conclusions are far from rosy. Of course, this is to a considerable extent a consequence of our approach. We have evaluated (on an ex ante basis) the expected performance of cross-border co-operation against our exacting standards. If this approach is employed dogmatically it degenerates into adjudicating earthly practices

²⁷For an old-dated but still timely treatise of the problem of bordercrossing externalities see Sayer (1983).

employing heavenly standards. It is essential, therefore, to recognise that, to paraphrase Robert Dahl, a perfect democracy will never exist on earth. The same, of course, applies for the second standard, efficiency in the allocation of collective goods and to the third standard: legitimacy.

In earthly practices, however, these high ideals can be approximated more or less closely. We should not focus primarily on the obvious discrepancies between standards and actual procedures and practices. Whatever system we are to evaluate by these standards will prove to be wanting. Instead the interesting question should be: how big is the deficit we are willing to tolerate in a specific case? The willingness to accept deviations will probably vary with the importance of the tasks entrusted to the system or subsystem that is to be evaluated. Cross-border co-operation, more often than not, is still in its infancy. As long as the main responsibilities of the Euregions relate to cultural exchange programmes, and organising the exchange of information and ideas across borders, probably no one would mind if the organisation would fail to meet the standard of democratic control. But the targets Euregions set for themselves, become progressively more ambitious. The ERW for instance covers a wide range of responsibilities (socio-economic development, education and training, transport and traffic, physical planning, culture, sports, tourism and recreation, environmental issues, health care, social issues, emergency services, et cetera).²⁸ In as far as activities in these areas are more far-reaching than exchanging information and ideas and include the joint provision of goods and services things get different. This is even more so, since the Euregio's are the target for often generous EU subsidies. Under these circumstances these cross-border public authorities require a more solid legal foundation providing safeguards for democratic control and efficiency in allocation.

7. Outlook

In the case of the ERW Dutch and German authorities have employed the Dutch-German treaty on cross-border co-operation to establish such a legal foundation. First, it should be emphasised that the procedures adopted by the ERW imply an important improvement as compared to co-operation under private law or based on informal practices. On the other hand, we have concluded, that these arrangements are far from ideal. The most striking problem with these arrangements is the unbalanced institutionalisation of the antagonism between local and regional interests. In the current institutions of the ERW the *rights of places* (Kincaid 1995: 262) are well-protected. The ERW is, and was meant to be, a system of extended local government: its institutions are flooded by representatives of municipal governments. In such a system the rights of citizens with regard to democratic control, an adequate provision of regional collective goods and legitimate questions come in second place.

²⁸ It is not clear, however, what the actual ERW powers in each of these areas are.

In systems of public administration based on an essentially territorial division of powers among a limited number of tiers, regional problems will, in one way or another, always be difficult to handle. There will always be public needs that cut across jurisdictional boundaries. Functional federalism (Casella and Frey 1992: 639-646) might offer a more satisfactory solution for solving these problems than the forms of extended local government currently in use. Casella and Frey (1992: 640) characterise such a system as: “a regime where *individuals* organise themselves in a pattern of overlapping jurisdictions without explicit ranking, with each jurisdiction responsible for the provision of a specific class of public goods” (our emphasis; BD/RS/AV).²⁹

In such a system of functional federalism special local or regional governments, cutting across traditional jurisdictions are made responsible for the provision of specific (impure) collective goods. These functional authorities have to be made accountable and responsive to the relevant publics they serve (and not, through extended local government systems, to the guardians of the right of places). The most obvious way of securing accountability and responsiveness is through popular elections. In this case accountability is secured by electoral competition. Of course the advantages of a such a system of functional federalism will have to be balanced against the additional administrative and participation costs of such a system. In many cases these costs will outweigh the advantages in terms of efficiency in allocation and democratic control. If this is the case (e.g. when the salience of relevant issues for citizens is relatively low) alternative institutional structures might be considered. An alternative way to secure a more adequate provision of regional collective goods and services, in such a case, might be the establishment of non-elected functional regional governments (Quango's). These boards, will have to be independent from other local and regional governments, in order to avoid the dual responsibility problems inherent in the current system of extended local government. A crucial question with regard to this solution is, of course, how to secure the responsiveness and the accountability of the people to be appointed in these boards. Cochrane (1996: 212) suggests that “through a range of consultative and participative forums” in combination with mechanisms like referendums, user panels and jury models might contribute to a democratisation of such non-elective bodies.

Within the current national constitutional frameworks of the Netherlands and Germany such a system of functional federalism is almost inconceivable. But maybe in the now emerging new European constitutional order this new type of federalism (as an alternative to the hierarchical nested model of federalism) might be less utopian.

²⁹ For rather similar conceptions see: Parks and Oakerson (1989) and ACIR (1987). Cassella and Frey actually include alliances between local governments under the label of functional federalism too. Here, however, the problems of extended local government will arise.

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Figure 1: Possible forms of cross-border co-operation

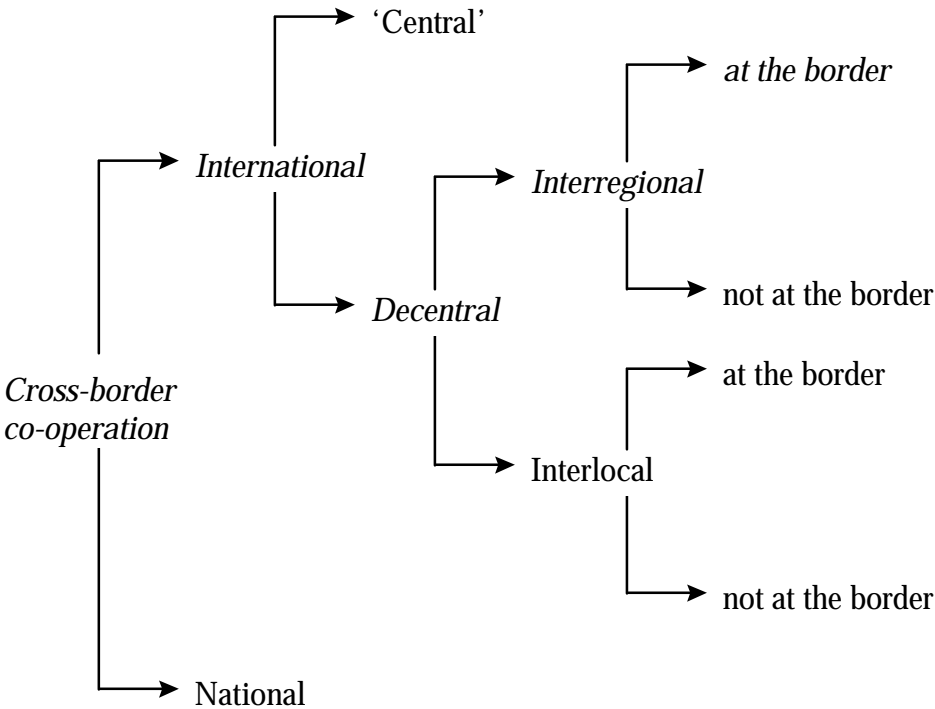


Figure 2: Cross-border co-operation along the Dutch border

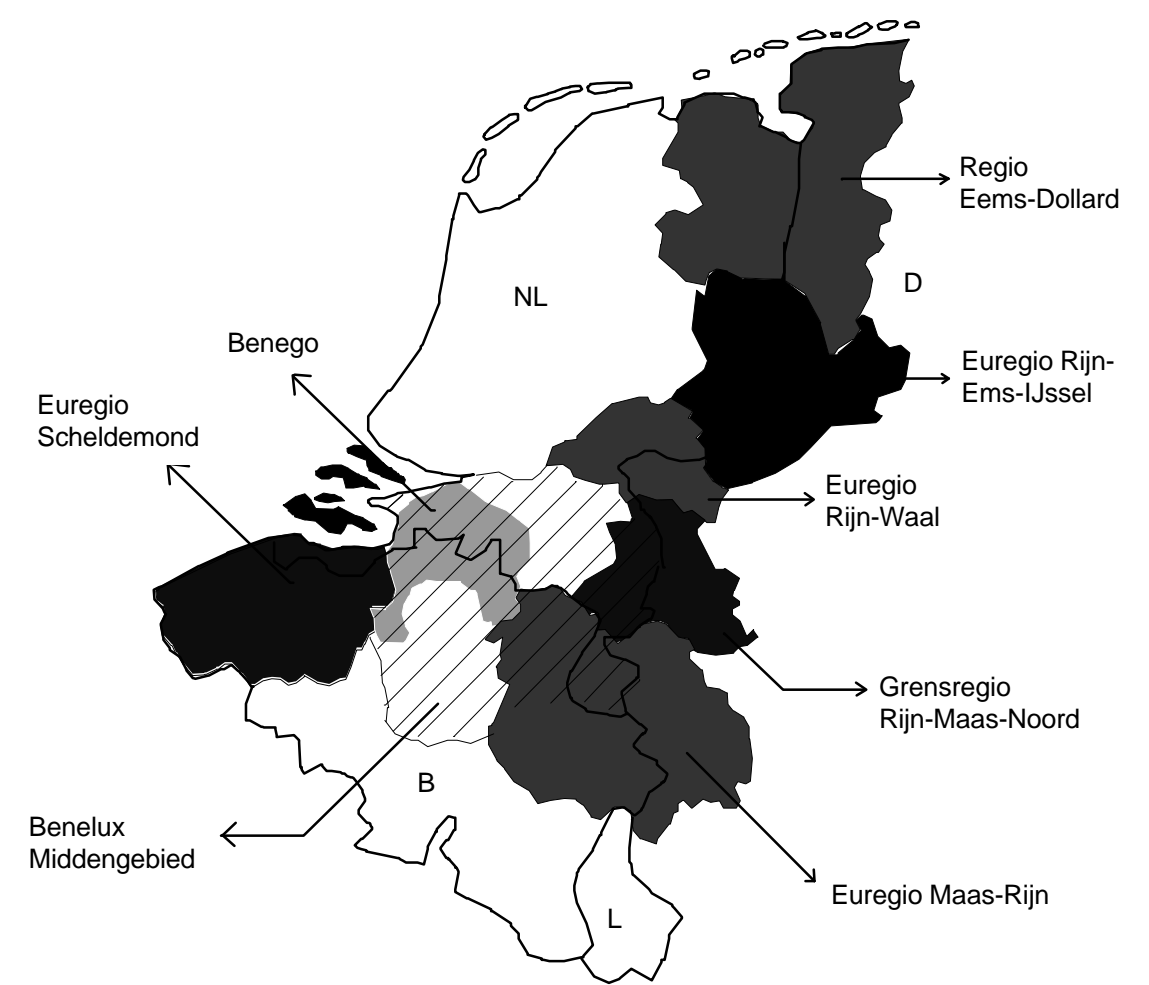


Table 1: Euregions along the Dutch-German and the Dutch-Belgian border, according to members, degree of institutionalisation and juridical status.

	PARTNERS WITHIN THE CO- OPERATION →		
DEGREE OF INSTITUTIONALI- SATION ↓	regional authorities	(extended-)local authorities	local and/or regional authorities and other organisations
low institutionalisation	Hanze Interregio / Benelux Mid area		Rijn-Maas North
high institutionalisation		<i>EUREGIO Rijn- Ems - IJssel</i>	
civil law character	Euregion Maas-Rijn		<i>Euregion Eems- Dollard</i>
public law character	Euregion Scheldemond	Benego	Euregion Rijn- Waal

Table 2: Dimensions and criteria of legitimacy

Dimensions of legitimacy	Criteria of legitimacy	if not:
law	legal validity	illegitimate (breach of rules)
political philosophy	moral justifiability	legitimacy deficit (discrepancy between rules and supporting beliefs, absence of shared beliefs)
social science	evidence of consent	delegitimation (withdrawal of consent)