
FRAME AGREEMENT FOR CROSS-BORDER COOPERATION BETWEEN LOCAL AUTHORITIES

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public administration, local self-government, local authorities, cross-border cooperation, comparative administrative law

ABSTRACT

The cross-border cooperation of local authorities, taken up based on the administrative law of each of the states, is marked by both integrating factors that refer to the similarities of the applicable system of law and separating factors arising from the principle of territoriality of administrative law. The frame agreement is a smart solution (a smart tool) of cross-border cooperation, because it enables cooperating territorial self-government units to conduct a unique operation of ‘recompensing’ separating factors with integrating factors.

I. INTRODUCTION

The starting point of the considerations is the assumption that the lack of the EU or bilateral legal grounds governing the principles, procedure and scope of cross-border cooperation means that specified objectives need to be achieved based on the administrative law of each country to which local entities are subject. Therefore, if a specific public task can best be performed through cross-border cooperation, there is an obligation to observe the provisions of administrative

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law, combined with the simultaneous monitoring of adequate legal regulations, which are in force on the other side of the border. This means that the performance of a cross-border public task is treated 'piecemeal' from the point of view of one legal order, because the system of domestic law only applies to that part of the task that is fulfilled on its territory. In other words, an identified public task is holistic by nature, but it is satisfied within the limits and based on the two independent regimes of administrative law to which the cooperating local authority entities are subject. In this specific situation, the search for smart solutions involving the disclosure of points of contact, as well as building connections between two parallel systems of administrative law, is of fundamental importance.

II. PARALLELISM OF ADMINISTRATIVE LAW

The examination of two legal orders is limited by the scope of substantive and geographic competence of the local entities responsible for satisfying cross-border needs. In this sense, the need becomes a central category of assessment of the validity of equivalent legal orders and sets the scope of necessary comparative law studies. It should be emphasised that the main trend of contemporary comparative law studies focuses on diagnosing the extent to which entire legal orders bear an influence on each other or the extent to which individual elements permeate, as in the case of the broadly discussed phenomenon of the convergence or divergence of continental and Anglo-Saxon legal systems, with regard to both setting and applying the law.¹ However, in this case, a comparison of legal regulations and the identification of the scope of similarities and differences serve the purpose of finding the answer to the question of how to ensure that a public task of a cross-border nature is performed in conditions where two equivalent legal orders are applicable.

The validity of equivalent legal orders is characterised by two factors of both an integrating and a separating nature. The integrating elements assume the need for a minimum of similarities to exist in the public law regulations of the states to which the entities of the cross-border cooperation are subject. It applies to similarities of two types, both of a systemic nature and with respect to the processes and structures in public administration. The primary condition is the existence of common axiological grounds of the legal system to which the entities involved in the cross-border cooperation are subjected. The legal doctrine most

¹ Oktawian Nawrot, Sebastian Sykuna, Jerzy Zajadło (eds), *Konwergencja czy dywergencja kultur i systemów prawnych?* (C.H. Beck 2012); Roman Tokarczyk, *Komparatystyka prawnicza* (Wolters Kluwer 2008)

frequently mentions the values that are common to the administrative law of European countries arising from the rule of law, from fundamental rights or from the right to good administration.² As for the similarity of the second type, it is accepted that the implementation of the public interest across borders requires the presence of specific similarities in the structures and tasks of public administration. The study of administrative law has seen numerous comparative studies, treating the presence of similarities between cooperating local entities in subjective and objective terms as a necessary condition for conducting cross-border cooperation.³

The main factor separating equal legal orders is the validity of the law on a given territory according to the principle of territoriality, to which not only people but primarily public administration entities are subjected, setting the scope of their authority within the framework of the local jurisdiction that is granted. In addition, with regard to the cooperation of equal entities of local administration, other than the relationship of superiority and subordination, the principle of territoriality is of fundamental importance. If, for example, natural persons can cooperate in an area relatively flexibly, having freedom to move around⁴ and, ultimately, to change the law to which they will be subjected, the local authorities, which are a creation of the national legal order that have been established to implement public law, do not have such an option. Consequently, administrative entities can choose the law that applies to cross-border activities, to which they will be subjected only if the law expressly permits this. In this case, the norms of a single legal order may be applicable on a different territory only in combination,

² John S. Bell, 'Comparative Administrative Law' in Mathias Reimann, Reinhardt Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford Press 2012); Jan Jeżewski, 'Zasada rule of law jako aksjologiczne kryterium działania administracji państw członkowskich Unii Europejskiej' in Janusz Sługoński (ed), *Dziesięć lat polskich doświadczeń w Unii Europejskiej*, vol 1 (Presscom 2014) 18

³ From the point of view of the German and Dutch law see Matthias Oehm, *Rechtsprobleme Staatsgrenzen überschreitender interkommunaler Zusammenarbeit* (Institut für Siedlungs- u. Wohnungswesen 1982); from the point of view of the German, Swiss and French law see Ulrich Beyerlin, *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit* (Springer Verlag 1988); from the point of view of the German, French and Polish law see Annette Bußmann, *Die dezentrale grenzüberschreitende Zusammenarbeit mit Deutschlands Nachbarländern Frankreich und Polen* (Nomos 2005); from the point of view of the German and Polish law, see Renata Kusiak-Winter, *Współpraca transgraniczna gmin Polski i Niemiec. Studium administracyjnoprawne* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2011)

⁴ Free movement of persons is a fundamental right of European citizens enshrined in art 3 sec 2 TEU (Treaty on European Union) and art. 21 TFEU (Treaty on the Functioning of the European Union) and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC)

with the provisions of one internal legal system⁵ or with the provisions of international law⁶ or, finally, with EU law.⁷

In summary, collective or individual needs are satisfied in cross-border cooperation on conditions where two (or several) equivalent administrative legal orders are applicable, which are simultaneously characterised by integrating factors (similarity of legal regulations) and separating factors (principle of territoriality). The principle of territoriality is a type of ‘natural’ barrier to the cross-border cooperation of local entities, because it arises from the essence of administrative law. However, the choice of the legal form of the cooperation as a frame cooperation agreement enables the cooperating public entities to conduct a smart procedure of ‘recompensing’ the separating factors with integrating factors, as discussed later in the considerations.

III. FRAME AGREEMENT ON CROSS-BORDER COOPERATION

A frame cooperation agreement is a commonly encountered form of cross-border cooperation between local authorities. It should be distinguished from a twinning agreement not concluded according to the criterion of location in the immediate vicinity of the state border, where the cooperation partner can even be a public administration entity from any part of the world.⁸

⁵ This is a situation in which the internal law of one state contains a unilateral authorisation on this matter. For example, art 24 sec 1a Basic Law for the Federal Republic of Germany of 23 May 1949 (Grundgesetz für die Bundesrepublik Deutschland vom 23 Mai 1949, BGBl. I 1949). See Matthias Niedobitek, *Das Recht der grenzüberschreitenden Verträge. Bund Länder und Gemeinden als Träger grenzüberschreitender Zusammenarbeit* (Mohr Siebeck 2001) 111

⁶ This applies to both international law presented by international organisations to Member States for ratification and bilateral agreements between states. As an example of the first type is Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs) (European Treaty Series Nr 206). As an example of the second type is Übereinkommen zwischen dem Regierungen der Bundesrepublik Deutschland, der Französischen Republik, und des Großherzogtums Luxemburg sowie dem Schweizerischen Bundesrat über die grenzüberschreitende Zusammenarbeit zwischen Gebietskörperschaften und örtlichen öffentlichen Stellen vom 23 Januar 1996, BGBl. 1997 II. See Gabriel Teïva Richard-Molard, *Die Rechtsgrundlagen des grenzüberschreitenden Kooperationsrechts zwischen Gebietskörperschaften* (LIT Verlag 2017) 187-248

⁷ For example, see art 2 sec 1a Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC). See Marcin Krzymuski, Philipp Kubicki, ‘EUWT 2.0? Reforma rozporządzenia i europejskich ugrupowaniach współpracy terytorialnej szansą na ożywienie współpracy transgranicznej podmiotów publicznych’ (2015) 6 Samorząd Terytorialny 29

⁸ Current survey reveals vital interest of Polish local authorities for twinning cooperation with Asian public authorities, mostly from China, see Adrianna Skorupska, *Dyplomacja samorządowa. Efektywność i perspektywy rozwoju* (Polski Instytut Spraw Międzynarodowych

The framework nature of cross-border agreements involves bringing the subject matter of the agreement down to purely cooperation, as an organiser's activity. Cross-border cooperation here is an instrumental objective with respect to the main objective, which is the fulfilment of public tasks.⁹ The objective of the agreement is not, therefore, to delegate the performance of a public task to the other entity¹⁰ but to simultaneously take up a number of organiser's activities (in parallel) on both sides of the border, serving the purpose of performing cross-border public tasks. Needs are identified in the cross-border dimension by distinguishing specific areas of cooperation in the agreement, which fall within the areas of responsibility of the cooperating public authorities. Areas such as spatial planning, transport and communication, tourism, municipal management, environmental protection, education, culture and sport can be mentioned as examples for these areas.¹¹ Therefore, it should be stated that the basic premise and starting point for partner cooperation is the similarity of competencies of the cooperating public authorities as well as the functions and tasks performed to satisfy identified cross-border needs. In other words, this is about the presence of competence similarities of the cooperating entities (and not competence competition¹²) in the sense that the minimum similarity of statutory competencies is a *sine qua non* condition for establishing the cross-border cooperation referred to in the frame agreement.

2015). About the legal character of twinning agreements, see Renata Kusiak-Winter, 'Umowy miast partnerskich' in Jan Boć, Ludmiła Dziewięcka-Bokun (eds), *Umowy w administracji* (Kolonia Limited 2008) 327

⁹ See Renata Kusiak-Winter, 'Współpraca ze społecznościami lokalnymi i regionalnymi innych państw jako zadanie jednostek samorządu terytorialnego w Polsce' in Jerzy Supernat (ed), *Miedzy tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi* (Wydawnictwo Uniwersytetu Wrocławskiego 2009) 422

¹⁰ It should be added that public tasks can only be transferred based on the authorisation contained in the Act. An example of such a regulation in the Polish legal order is Article 74 of the Act on the Municipal Self-Government, according to which municipalities can enter into inter-municipal agreements on entrusting one of them with the public tasks specified by them. See, for instance, the judgement of the Supreme Administrative Court of 27 September 1994, case ref. SA/Łd 1906/94; the judgement of the Voivodship Administrative Court in Gliwice of 9 May 2012, case ref. II SA/Gl 168/12 with regard to the prohibition to increase the group of entities with which agreements may be concluded. See Bogdan Dolnicki, *Samorząd terytorialny*, 5th ed (Wolters Kluwer 2012) 268

¹¹ See art 1 Agreement of 6 November 2007 between the City of Świnoujście and the Commune of Herningsdorf

¹² As Barbara Kowalczyk notes, the EU law contains conflict-of-law rules in situations of competence competition between authorities from two Member States and the so-called transnational administrative act, which breaches the principle of territoriality, is issued on their basis. See Barbara Kowalczyk, 'Zasada terytorializmu działania administracji a transgraniczność spraw administracyjnych' in Renata Kusiak-Winter (ed), *Współpraca transgraniczna w administracji publicznej* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2015) 157

If it were to be found that the identification of competence similarities is a necessary condition for establishing cross-border cooperation, it should, therefore, be assumed that the next important criterion for implementing the cooperation would be the appearance of compatible legal structural solutions. Competencies are, in fact, assigned to the appropriate structures, and it is difficult to consider these two phenomena separately. However, it is precisely amongst the basic factors that inhibit cooperation that different structural conditions are often mentioned on both sides of the border. In particular, systemic differences are indicated in the structure of the state (unitarianism vs. federalism)¹³ or in the structure of territorial self-government units¹⁴ or in the size of the structures themselves.¹⁵ Furthermore, a significant obstacle to the stability, continuity and intensity of the cooperation is the term of office of the governing bodies of the public authority.¹⁶ In addition, public entities may reorganise their internal structures within the framework of their organisational powers,¹⁷ which fundamentally determines the quality of the cross-border contacts to date.

The permanent element of cross-border cooperation should be learning and monitoring the structures and their corresponding competencies on both sides of

¹³ Peter Schoof in Joachim Beck (ed), *Grenzüberschreitende Zusammenarbeit mit deutscher Beteiligung. Ein Erfahrungsaustausch* (Euro-Institut für grenzüberschreitende Zusammenarbeit 2014) 6

¹⁴ The SWOT analysis of the Słubice/Frankfurt (Oder) urban region mentions weaknesses such as *difficult cooperation related to major differences in the size and structure of the administration and decision-making powers*, see: Local Action Plan 2010–2020 of Frankfurt (Oder) & Słubice [Słubicko-Frankfurcki Plan Działania 2010-2020], see Załącznik do Uchwały Nr XLIX/476/10 Rady Miejskiej w Słubicach z dnia 29 kwietnia 2010 roku oraz Uchwała Nr XVI/418/2014 Rady Miejskiej w Słubicach z dnia 8 maja 2014 r. w sprawie przyjęcia do realizacji Aktualizacji Słubicko-Frankfurckiego Planu Działania 2010-2020

¹⁵ With respect to the cross-border cooperation between the local authorities of Poland and the Czech Republic, Adriana Skorupska notes: *Differences in the administrative structure appear throughout the entire border area. Small municipalities on the Czech side correspond to large rural and urban municipalities with usually several or a dozen or so thousand inhabitants on the Polish side. While the structure of offices on the Polish side is developed, often with a separate unit for obtaining EU funds or cooperation, the offices on the Czech side employ 2–3 people. This results in competence differences and limits the ability to cooperate on major projects*, see Adriana Skorupska, 'Współpraca samorządowa na pograniczu polsko-czeskim' (2014) 17 (100) Policy Paper. Polski Instytut Spraw Międzynarodowych 5

¹⁶ The problem of continuity of cross-border cooperation in the light of elections to public authorities, see Julita Miłosz-Augustowska, 'Współpraca instytucjonalna na pograniczu polsko-niemieckim – stare narzędzia, nowe wyzwania. Transgraniczne doświadczenia samorządów w kontekście wyborów regionalnych' (2014) 53 Biuletyn Niemiecki 2

¹⁷ This applies, for instance, to specifying the organisational structure and principles of operation of the office in the organisational regulations assigned by the mayor in the form of an ordinance (Article 33 para. 2 of the Act on Municipal Self-Government). See Jerzy Korczak, 'Regulamin organizacyjny urzędu gminy a obowiązek publikacji w wojewódzkim dzienniku urzędowym' (2003) 4 Nowe Zeszyty Samorządowe 39

the border,¹⁸ although knowledge in this area alone is not sufficient for jointly performing tasks. In order to guarantee the achievement of the objectives of the cross-border cooperation – regardless of the political situation and the liking of individual players in the cooperation – frame agreements create structural solutions that are based on systemic similarities that exist in the administrative law of each of the countries. The new organisational ties incite direct effects in the sphere of administrative law of the states to which the cooperating public entities belong.¹⁹

Contractually structured systems of government include various levels of governance. The creation of a forum for a debate by the inhabitants, which is devoted to issues of importance to the local community on both sides of the border, should be positioned in the broadest possible dimension.²⁰ Their nature resembles legally non-binding consultations with the municipality's inhabitants intended to strengthen the legitimacy of the local authorities and democratic processes in the municipality.²¹ The organisation of joint sessions of town councils²² and joint committees of municipal councillors²³ should be mentioned at the level of the governing bodies. Their main task is to specify the overall strategy and basic objectives of cross-border cooperation.²⁴ At the level of the executive bodies, these are direct meetings of the mayors who are responsible for the implementation of the strategy and the coordination of the administration's

¹⁸ See *Podręcznik struktur i kompetencji administracyjnych* (Razem dla pogranicza Dolny Śląsk–Saksonia 2014) http://www.landentwicklung.sachsen.de/download/Landesentwicklung/Handreichung_GfG_Podrecznik_RdP.pdf. [22.03.2018]

¹⁹ See Piotr Lisowski, *Relacje strukturalne w polskim samorządzie terytorialnym* (Kolonia Limited 2013)

²⁰ In accordance with the provisions of the Local Action Plan 2010–2020 of Frankfurt (Oder) & Słubice conurbation, the Citizens' Conference is held once a year and citizens are also expected to participate in the working groups

²¹ The residents of the municipality 'form a self-governing community by law' (art 1, para 1 of the Act on Municipal Self-Government), although public authority is exercised exclusively through voting in elections and a referendum (Article 11 of the Act on Municipal Self-Government). See Bogdan Dolnicki (ed), *Partycypacja społeczna w samorządzie terytorialnym* (Wolters Kluwer 2014)

²² Article 4 of the Partnership Agreement of 29 April 2004 between the Cities of Zgorzelec and Görlitz provides that 'A joint session of the municipal councils of Zgorzelec and Görlitz on thematic issues shall be held at least once a year'

²³ In accordance with the provisions of the Local Action Plan 2010–2020 of Frankfurt (Oder) & Słubice, the Joint City Council Committee, whose task is to initialise and comment on resolutions/decisions, meets four to six times a year

²⁴ For example, the subject of a joint session of the city councils of Zgorzelec and Görlitz held on 9 May 2017 was culture and its institutions in Europe – City of Zgorzelec–Görlitz – see (2017) 8 Miejski Biuletyn Informacyjny Zgorzelec 3

activities.²⁵ This objective is also to be served by the creation of subordinated groups of departmental (sectional) managers, as well as the appointment of special collegial bodies²⁶ or posts in the office.²⁷ All the specified structures are of prime importance to the achievement of the objectives of the cooperation, because they are responsible for the fulfilment of public tasks – as a reminder – treated separately (partially) under two independent legal systems, although, in fact, we are dealing with a single cross-border public task.

It should be noted that the above contractual systemic structures are filled by authorities or their subordinate offices for which the implementation of cross-border cooperation is ‘only’ one of many organisational activities undertaken during the performance of the statutory tasks. Therefore, a special systemic solution tending towards specialisation and professionalisation of cooperation is the establishment within the frame agreement of a joint organisational unit dedicated exclusively to cross-border cooperation.²⁸ However, even in this case, the new structure, just like the previous ones, operates within the framework of the applicability of two equal administrative law orders. This means that no separate cross-border legal entity is being established, whilst the regulations of domestic law only define that ‘fractional’ part of the structures to which the seconded employees of one cooperating public entity belong.²⁹ The contractual cross-border

²⁵ According to the provisions of the Local Action Plan 2010–2020 of Frankfurt (Oder) & Ślubice, the Lord Mayor of Frankfurt and the Mayor of Ślubice meet once a month

²⁶ See, for example, the establishment of the Coordinating Commission under art 4 of the Partnership Agreement of 29 April 2004 between the Cities of Zgorzelec and Görlitz (‘Cooperation between the Cities of Zgorzelec and Görlitz is organized by the Coordination Committee. The Coordination Committee is managed by the first Deputy Mayor of the City of Zgorzelec and the first Deputy Lord Mayor of the City of Görlitz. The remaining members of this committee are appointed by the Mayor of the City of Zgorzelec and the Lord Mayor of the City of Görlitz’)

²⁷ ‘A coordinator will be appointed for conducting day-to-day work, who will act as an intermediary for both partners. He will be responsible, in particular, for advising the municipalities and supporting the working groups’. See § 4 Partnership Agreement of 17 November 2000 between the City and the Municipality of Pieńsk, Republic of Poland and the Municipality of Neisseaue, Federal Republic of Germany, see Uchwała nr XIV/1139/99 Rady Miejskiej w Pieńsku z 29 grudnia 1999 w sprawie umowy o współpracy pomiędzy Miastem i Gminą Pieńsk i Gminą Neisseaue

²⁸ The establishment of the Ślubice-Frankfurt Centre of Competence and Cooperation can be an example, see Resolution No. IV / 28/11 of the Town Council of Ślubice of 27 January 2011 regarding the conclusion by the Municipality of Ślubice (Republic of Poland) of a partnership agreement with the City of Frankfurt an der Oder (Federal Republic of Germany) under the Cross-Border Cooperation Operational Programme Poland (Lubuskie Voivodship) – Brandenburg 2007–2013 for the implementation of the project No. WTBR.01.03.00-52-010 / 09 named strengthening inter-municipal cooperation in the European Twin-City Ślubice – Frankfurt (Oder) and development of a German–Polish Centre of Competence and Cooperation (K&K) as a model of the new generation of cross-border cooperation and the authorisation of the Mayor to sign it

²⁹ As there is no single cross-border employer (one legal entity that has the capability of hiring staff) with respect to the employees of the administrative unit understood in this way, the

structure understood in this way contains a multitude of regimes regarding employee relations, social security matters and tax liabilities of employees because of the domestic law to which the public entity delegating the worker is subjected.³⁰ However, the integrating element is the identified cross-border need, which is satisfied by the competencies of the cooperating public authorities. To this end, employees having not only the substantive knowledge required for the performance of a specific public task but also language skills (obligatory bilingualism) and intercultural skills are seconded to cross-border structures.

All the contractual systemic structures described above, situated at various levels of the organisational structure, constitute a platform for information exchange, mutual learning, coordination and the creation of common solutions for satisfying an identified cross-border need. However, legally binding decisions are made in parallel and independently within the regime of the provisions of the administrative law of each of the States. Decisions are subjected to control and supervision activities in accordance with the legal procedure of each of the states. They also require the receipt of social acceptance in this respect, which is expressed in democratic processes. This is why information and communication with the inhabitants at every stage is so important.³¹

IV. CONCLUSIONS

The cross-border cooperation of local authorities, taken up based on the administrative law of each of the states, is marked by both integrating factors that refer to the similarities of the applicable system of law and separating factors arising from the principle of territoriality of administrative law.

The frame agreement is a smart solution (a smart tool) of cross-border cooperation, because it enables cooperating territorial self-government units to conduct a unique operation of ‘recompensing’ separating factors with integrating factors. The separation of cross-border cooperation embodies the barrier arising

provisions of the Rome I Regulation do not apply, see Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

³⁰ Although the agreement provides that the Stubice–Frankfurt Centre of Cooperation ‘is directly subordinated to both mayors’, the periodic appraisal of the self-government employee is conducted by the immediate supervisor in the meaning of the Act to which the seconding entity is subject. For example, in the case of employees employed in Polish territorial self-government units in clerical positions under an employment contract, the provisions of Article 27 of the Act on Self-Government Employees of 21 November 2008 (Journal of Laws of 2016, item 902) are applicable in this respect. See also Judgement of the Supreme Court of 7 March 2012, II PK 155/11

³¹ The range of tasks of the Stubice–Frankfurt Centre of Cooperation, which is responsible for promotional activities and dialogue with the public, should be mentioned as a model example

from the essence of public authority and administrative authority in the form of the principle of territoriality, as a result of which public entities cooperating across borders are subjected to ‘their own’ separate administrative law orders. In the absence of specific international legal grounds for cooperation or the existence of optional legal mechanisms, which public entities do not take advantage of, the parties to the frame agreement consciously refer to competencies and structural similarities of the administrative law of both states. The way in which the cross-border objectives are achieved is through the creation of new structural solutions within the existing organisational system of cooperating public entities without creating independent entities equipped with the attribute of legal personality. They are implemented as a result of synchronised actions undertaken parallelly and simultaneously but separately under the administrative law of each of the cooperating entities.

Frame agreements on cross-border cooperation are implemented in conditions of the coexistence of the administrative law orders of the cooperating entities. The cooperation specified in the frame agreement takes place exclusively in a horizontal arrangement, within the scope of *res interna* of the administrations between the public entities responsible for satisfying the cross-border need. The coexistence of independent legal orders means the lack of imposition or competition of these orders, but it enables simultaneous synchronised actions to be taken under the administrative law of each of the cooperating entities.

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