CONCEPTUAL FRAMEWORKS OF NATIONAL LEGISLATION HARMONIZATION WITH THE MECHANISM OF INTERNATIONAL LEGISLATIVE REGULATION OF TRANSBORDER RELATIONS

The object of research is conceptual frameworks of harmonization of national legislation with the mechanism of international – legislative regulation of transborder as well as inter-territorial relations of European border states in interrelation with the integration processes. The author justifies priority of creating conceptually updated efficient organizational – legal and institutional mechanisms for transborder cooperation on the basis of provisions of the Protocol No 3 to the European Framework Convention on Transborder Cooperation Between Territorial Communities or Authorities, as well as implementation of reallocation of scope of authorities between central authorities for the benefit of territorial communities or local authorities, which will create legal foundations for efficient transborder and inter-territorial cooperation.

Key words: international law, mechanism of international – legal regulation, transborder cooperation, inter-territorial cooperation, border cooperation

Issues of transborder (border) relations of Ukraine with neighboring European states are marked by their own history, philosophy, economic and law. International European transborder relations and cooperation between local and regional authorities are topical issue and a subject of wide international discussions in science and practice [1].

There are ponderable studies of domestic and foreign researchers on the issues of international transborder cooperation of European states – Germany, Switzerland, Poland, Hungary, Romania, Slovakia and Russia [2].

At the same time the problem forming organizational – legal and institution efficient mechanisms of transborder as well as inter-territorial cooperation by way of reforming local self-governance authorities and
redistribution of scale of authorities between central authorities for the benefit of territorial communities or local authorities, on our opinion, is a crucial segment in the project “Borders for people”. [3]. On the analogy, administrative – territorial entities – border cantons of Switzerland, lands of Germany are delegated with rights within the national legislation to conclude international agreements on topics of the region’s development, border trade, tourism, cultural relations, environments etc. However this status results from historical processes of state building over centuries.

Creation of Euroregions in European practice in the capacity of international institutional entities is based on border cooperation of administrative – territorial entities on the level of cantons, lands or territorial communities of neighboring European states having common borders. The subject of legal regulation traditionally includes border trade, health protection, education, environment, tourism, recreation as well as business in border adjacent areas. According to researchers signing of cooperation agreements between border regions has a long history. Set up of Euroregions in Brussels, according to researcher of those issues Marcus Perkman, was initiated in early 50s when municipal associations set up inter-municipal associations aimed at regional cooperation at border areas [4].

According to Katri-Liis Lepik “The first Euroregion was set up in 1958 on border areas of Enschede (Denmark) And Gronau (Germany). Other international multilateral and bilateral transborder cooperation agreements like German-Danish signed on May 23, 1991 and Karlsruhe Agreement on transborder cooperation between territorial authorities and local authorities signed on January 23, 1996 created framework legal foundations for more complicated forms of transborder cooperation based on public law [5].

Signature of the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities created regional foundations of international – legal mechanisms for transborder cooperation development between European states (Madrid, 1980) (see Annex 1) [6].

Discussions on future of European transborder relations including Ukraine acquire novelty features in relation to globalization processes in international relations system, challenges and risks which naturally accompany formation of the new world order, including European one. Globalization goes hand in hand with deepened interdependence of main international relations actors in economic, social and political spheres. In the conditions of globally dependant world the state does not possess sovereign jurisdiction in the
contemporary world of global legal order. As a result of universalization of globalization processes a deepening of influence of non-state private actors (private companies) on the processes of universalization of national legislative processes is taking place, for instance activities of transnational companies in the sphere of national policy of states. "Transformation of sovereignty is taking place, but this is not an erosion resulting from global law influence. Transformation data testify about cooperation between national regulatory institutions and private actors with the aim to provide conformity to international standards" [7].

The argument in favor of this statement is the practice of transnational companies' intervention to new markets of non-EU member states of Eastern Europe, testifying to benefits of border areas for location of productions at affiliated companies of foreign investors. For instance, on border areas of Ukraine, Poland, Hungary, Slovakia, Romania the following affiliated companies carry out production activities: "Yadzaki Corp. Ukraine", "Jabil Circuit Ukraine Limited" of such well known transnational corporations as "Yadzaki Corp." (Japan) and "Jabil Corp." (USA). Legal status of the mentioned companies (legal personality of companies etc.) is defined by personal law of the legal entity (lex societatis) of the company registration place. The personal law of the legal entity is the law of the state where the entity is incorporated. The place of location of the legal entity is considered to be a location of the permanently active authority of the legal entity (article 30 of the Civil Code of Ukraine). In general various existing criteria of defining "nationality" of the legal entity is conditioned by the fact that the legal procedure of setting up, registration of statutory documents, identification of the status of management bodies, carrying out of activities may be in different countries. The given examples demonstrate that in this case national regulatory institutes of Ukraine have an adequate reaction to the transnational company needs with the aim to comply with accepted international standards. But this is the case of first of all legal conditions of investment attractiveness of neighboring countries transborder areas. In reality priority conditions for locating new productions at border areas are relatively cheap labor force, developed production and financial infrastructure, taxes, state guarantees for investment capital, repatriation of capital conditions.

Relatively clearly put political position of the European Union – no new delimitating borders dividing Europe, carrying out policy of stability and flourishing within new borders and beyond them testifies the available
political will, which is crucial for future international – legal agreements in transborder relations sphere. It is emphasized that the EU enlargement will serve to strengthen relations with Russia and to develop relations with Ukraine, Moldova, Belarus and North-Mediterranean countries on the basis of long term approaches to reform implementation, sustainable development and strengthening of trade relations [8]. Within this context the Manifest of border cooperation declared by the Association of European Border Regions gains particular significance. It recommends to national and European authorities aiming at getting Europe closer to citizens the following: “Border areas are space for projects which, even if constituted, do not aim at administrative functioning but rather create for policy coordination of local, national and European authorities in order to develop programs addressing needs of population living at border areas”.

Status of modern transborder and inter-territorial cooperation of Ukraine with neighboring border states from the viewpoint of international law is defined on the basis of formed international – legal mechanisms in the frameworks of European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (Madrid, May 1, 1980), Additional protocol (ETS No 159, Strasbourg, November, 1995) and Second protocol No 2 (ETS No 169, Strasbourg, May, 1998), ratified bilateral agreements about state border with Hungary, Poland, Romania and Slovakia, as well as bilateral international agreements in the sphere of economic, environmental, humanitarian joint projects which are real legal mechanisms in the European integration process [9].

Practical implication of the above mentioned international agreements lies in the fact that they form the basis of international – legal mechanism of international relations regulation on bilateral and multilateral levels. The subject of legal regulation of transborder and interregional cooperation is various hierarchical levels of actors, including both legal and physical bodies. Transborder cooperation based on such agreements may be carried out also between non-governmental organization at various levels (for example, states and regions, regions and provinces, regions and municipalities, local authorities and international organizations) and may correspondingly be about various cooperation spheres: political, economic, trade, cultural and scientific.

Therefore, there are reasons to state that the international – legal foundations are formed for transborder and inter-territorial cooperation of Ukraine with border EU member states.
At the same time international – legal status of European border states actors of the EU law should be considered, in particular: international rights and obligations first of all the EU members condition the scope of international rights and obligations in terms of border cooperation relations with Ukraine correspondingly. International rights and obligations of Poland, Hungary, Romania, Slovakia as subjects of law of the EU and NATO define system legal creation algorithm and limited jurisdiction of the mentioned members states as to any preferences in the sphere of regional and border cooperation. There are practically no exceptions from general legal regimen of European law for example in the sphere of trade, investment activity, export-import operation, customs procedures, environment etc.

A legal position which was formulated (in particular specifica differentia position of legal peculiarities of the mechanism of international – legal regulation (further on ILR) of transborder and inter-territorial cooperation between border EU member states with Ukraine) was conditioned by the content of international legal relations of the European Union member states.

Theoretically mechanism of international – legal regulation (further on ILR) of transborder and inter-territorial cooperation of border EU member states with Ukraine includes set of international – legal means and methods of influence on international legal relations [10].

One significant component of the mechanism of international – legal regulation of transborder relations of border states is the European Charter of local self-governance which upon its ratification (ratified by the Law of Ukraine from 15.07.1997) became part of domestic law. Ukraine accepted legislative acts lex special [11]. Analysis of the Law of Ukraine “About transborder cooperation” from the viewpoint of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities testifies in general about the de lege lata character of this legislative act in regards to real todays processes developing on the level of local and regional authorities. The mechanism of legal regulation is nonexistent, as are legal obligations. Ihor Studennikov, well known Ukrainian researcher-expert on transborder cooperation issues, also formulated his legal assessment that in essence an absolute centralization of management decision making takes place, when the general coordination of transborder cooperation is by law delegated to the specially authorized central executive authority on economic policy issues [12]. Under conditions of no financial support to transborder
cooperation programs this means that the law is only a declarative intention rather than legal algorithm of relations regulation.

Research of practice of carrying out transborder cooperation demonstrated new challenges and threats to national interests at the state border of Ukraine, in particular: illegal migration, human trafficking, contraband, drug and weapon trafficking. In this relation efficient transborder and inter-territorial cooperation requires forecasted states policy in regards to challenges and threats of global character, as well as high level of coordinated joint action programs with neighboring states. It is transborder cooperation of state having common borders is the only possible mechanism of efficient interstate policy of neighboring states in regards to solving problems of illegal migration, human trafficking, contraband, drug and weapon trafficking. This kind of approach requires conceptual decisions.

In general creation of favorable conditions for efficient and mutually beneficial cooperation of transborder cooperation subjects [13] can be reached only under condition of carrying out system reforms in internal regional policy sphere and existing political will from contractual parties of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities.

According to provisions of Madrid Convention on Transfrontier Cooperation between territorial authorities from 1980 the parties undertook within their national legislations the following obligations: solve legal, administrative and technical problems of transborder cooperation (article 4); look at possibility of support in regional and local authorities with special conditions for transborder cooperation facilitation (article 5); provide necessary information to other parties signatories of the Conventions (article 6), one's own regional and local authorities (article 7) and to Council of Europe (article 8).

Normative provisions of the Additional protocol (ETC No 159, Strasbourg, November, 1995) to the Framework convention propose model contracts / agreements on transborder cooperation adjusted to regional and local authorities needs. There are five model international agreements and six sample agreements of consultative character which lay out various level of centralization and differences in administrative structures of transborder cooperation member states[14] (see Annex 2).

The above mentioned protocol which became operational on December 1, 1998 regulates creation of permanent transborder cooperation institutions
with public-private or private-legal character with the decision making body. These permanent institutions have to motivate administrative-territorial entities and authorities to: a) conclude transborder cooperation agreements with territorial entities and authorities of other countries; b) set up permanent cooperation bodies. Decisions taken by that body shall be obligatory for territorial entities and authorities which enter the agreement.

A special attention requires Protocol No 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities in regards to associations of euro-regional cooperation adopted in Utrecht on November 16, 2009. [15]. The given protocol No3 aims to contribute to framework conditions of support and development serving interests of population in transborder and inter-territorial cooperation foreseen by the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities and Protocols to it from November 9, 1995 (ETS No 159) and on May 5, 1998 (ETS No 169).

The draft Protocol was heard in Parliament Assembly which provided its conclusion that the Euroregional cooperation is given great political importance, and also mentioned that Protocol No3 forms procedures of creating legal framework foundations for inter-territorial and transborder cooperation of local and regional authorities [16].

Main legal characteristics of Protocol No3 include the following provisions:

- Territorial communities or authorities and other bodies that can set up transborder cooperation body in the form of Euroregional Co-operation Grouping (further on the ECG) on the territory of Council of Europe member states parties of this protocol, according to conditions foreseen by it (clause 1, article 1);
- Legal personality legal capacity and legal competence and legislation applied to Euroregional cooperation association is defined, in particular: the ECG is a legal entity subject to legislation of the Party which is Council of Europe member state and where its headquarters are located;
- The ECG has the most wide legal capacity which is provided to legal entities according to national legislation of this state;
- Legislation which is applied to the type of corporate subject selected for the ECG by its members is laid out in the agreement about the ECG set up without limitation of provisions of this protocol or any other separate provisions adopted by the Party according to article 13;
- The ECG has the right for own budget and competence to fulfill it;
- The ECG can conclude contracts, hire staff, purchase movable or immovable property and bring legal proceedings (article 2);
- The ECG members are territorial communities or authorities of Parties-states, as well as relevant interested Council of Europe member states; physical bodies can not be ECG members;
- The ECG is set up by way of concluding written agreement between its founding members (Article 4);
- Statute of the ECG is a component of the agreement about its foundation (article 5);
- The ECG shall perform the tasks that its members entrust to it. These tasks shall be in accordance with the competences of the members under their respective national law and shall be listed in the agreement and in the statutes. (article 7);
- The ECG shall adopt decisions and ensure their implementation, in respect and for the benefit of individual persons or legal entities subject to the jurisdiction of the States to which its members belong. Members shall adopt or facilitate all necessary measures falling within their competences in order to ensure that the ECG’s decisions are implemented. (clause 2, article 7);
- The tasks given to an ECG shall not concern the exercise of regulatory powers. The ECG shall not be empowered to take measures which might affect the rights and freedoms of individuals, or to impose levies of a fiscal nature. (clause 3, article 7);
- The ECG may not exercise competences that territorial communities or authorities exercise as agents of the State to which they belong,
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- The ECG has the most wide legal capacity which is provided to legal entities according to national legislation of this state;
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- The ECG may not exercise competences that territorial communities or authorities exercise as agents of the State to which they belong,
except where duly authorised. It may exercise competences that States members of the ECG confer upon it. (clause 4, article 7);

- The ECG shall be established for a limited or unlimited period of time, to be specified in the agreement and the statutes. (Article 8);

- The ECG – or, if its assets are not sufficient, its members jointly – shall be liable with regard to third parties for its acts, including debts of whatever nature, even if those acts do not fall within its tasks. (article 9);

- The ECG shall be liable to its members for any breach of the law to which it may be subject. The organs of the ECG shall be liable with regard to the ECG for any breach of law they have committed in the exercise of their functions. A State on whose territory it is intended to set up the headquarters of an ECG may prohibit the registration or publication of notice of an ECG if one or more of its prospective members has limited liability.

- In the event of a dispute between the ECG and its members, the competent courts shall be those of the State in which the ECG has its headquarters. (Article 10);

- Decisions and acts of the ECG shall be subject to the same supervision and administrative and judicial review of the legality of acts of territorial communities or authorities as those required in the State in which the ECG has its headquarters. (article 11);

- Where the ECG carries out any activity in contravention of the provisions on public policy, public security, public health or public morality of the States to which its members belong, or in contravention of the public interest of the said States, the competent authority or body of these States may prohibit that activity on its territory or require those members that fall under its jurisdiction to withdraw from the ECG unless the latter ceases the activity in question.

- The management and budget implementation of the ECG shall be
subject to financial audit in accordance with the national law of the
Party in which it has its headquarters (article 12).

Therefore, analysis of Protocol No 3 to the European Outline convention
about Transfrontier Cooperation between Territorial Communities or
Authorities in relation to Euroregional Cooperation Groupings (ECG)
conditions the possibility to shape the conclusion that ECG forming on
transborder areas may serve to further development of organizational – legal
mechanism of transborder cooperation under condition of its ratification by
the Parliament and harmonization with the national legislation of Ukraine.

The main hindrances on the way to Madrid Convention implementation by
states – actors of international law and of additional Protocols are differences
in national law and order and lack of expressive social – economic and
political preconditions. These discrepancies prevent from direct application
of systems of models of the Outline Convention. The legal characteristics
of the Convention and additional Protocols testify that the Convention and
additional protocols are multilateral international agreements that create legal
frameworks for international – legal regulation of transborder cooperation.
Based on these provisions states are obliged to set up conceptually new
updated efficient organizational – legal and institutional mechanisms for
transborder cooperation fulfillment.

Therefore, on the assumption of the initial thesis that international law is
international policy *, it would be logical to deepen the mentioned topic in
particular: in the basis of setting up and further development of international –
legal mechanism of transborder relations regulation of European neighboring
countries is political will of actors of these processes.

This factual condition claims the role of system constituent condition
of conceptual foundations for harmonizing national legislation with the
mechanism of international – legal regulation of transborder as well as inter-
territorial relations of European border states in relation with globalization
and integration processes.

Pragmatically, at the bottom of further prospects of efficient transborder
cooperation development as well as of inter-territorial cooperation of the
EU member states and Ukraine and correspondingly of mechanism of
international – legal regulation of interstate transborder relations the priory
direction, on our opinion, is implementation of the following activities:

a) set up conceptually updated efficient organizational – legal and
institutional mechanisms for transborder cooperation on the basis of
implementation into national legislation of provisions of Protocol No 3 to the European Outline Convention about Transfrontier Cooperation between Territorial Communities or Authorities in terms of Euroregional Cooperation Groupings (ECG), adopted in Utrecht on November 16, 2009;
b) implement reallocation of the scope of powers between central authorities for the benefit of territorial communities or local authorities, that will create legal foundations for efficient transborder and inter-territorial cooperation. General legal backgrounds for participation of local territorial communities and authorities in transborder cooperation are laid out in the European Charter of local self-government (ratified by the Law of Ukraine from 15.07.1997) and Protocols No 2 and No 3 to the European Outline Convention about Transfrontier Cooperation between Territorial Communities or Authorities.

References


3. Загальні правові підстави для участі в транскордонному співробітництві місцевих територіальних громад або власників здійснюють Європейська хартия місцевого самоврядування (ратифікована Законом України від 15.07.1997 р.), закони України «Про місцеве самоврядування» (від 21.05.1997 р.) та «Місцеві державні адміністрації» (від 09.04.1999) а також Протокол № 2 до Європейської рамкової конвенції про транскордонне співробітництво між територіальними об'єднаннями або владами, який стосується міжтериторіального співробітництва, а саме:“...враховуючи укладення 9 листопада 1995р. Додаткового протоколу до Рамкової конвенції, який стосується правових наслідків діяльності, що здійснюється в рамках транскордонного співробітництва, та правового статусу будь-яких органів співробітництва, створених згідно з угодами про транскордонне співробітництво“.


Молдова від 11 березня 1997 р.
European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities

Madrid, 21.V.1980

Preamble

The member States of the Council of Europe, signatories to this Convention,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members and to promote co-operation between them;

Considering that, as defined in Article 1 of the Council of Europe Statute, this aim will be pursued in particular by agreements in the administrative field;

Considering that the Council of Europe shall ensure the participation of the territorial communities or authorities of Europe in the achievement of its aim;

Considering the potential importance, for the pursuit of this objective, of co-operation between territorial communities or authorities at frontiers in such fields as regional, urban and rural development, environmental protection, the improvement of public facilities and services and mutual assistance in emergencies;

Having regard to past experience which shows that co-operation between local and regional authorities in Europe makes it easier for them to carry out their tasks effectively and contributes in particular to the improvement and development of frontier regions;

Being resolved to promote such co-operation as far as possible and to contribute in this way to the economic and social progress of frontier regions and to the spirit of fellowship which unites the peoples of Europe,

Have agreed as follows:

Article 1

Each Contracting Party undertakes to facilitate and foster transfrontier co-operation between territorial communities or authorities within its jurisdiction and territorial communities or authorities within the jurisdiction of other Contracting Parties. It shall endeavour to promote the conclusion of any agreements and arrangements that may prove necessary for this purpose with due regard to the different constitutional provisions of each Party.