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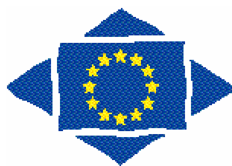

Committee of the Regions

THE EUROPEAN GROUPING OF TERRITORIAL COOPERATION – EGTC –

CdR 117/2007 (Study)

EN

For more information about the Committee of the Regions' activities relating to the EGTC, please refer to http://www.cor.europa.eu/egtc.htm
or send an email to egtc@cor.europa.eu.

This study was carried out by external experts. It does not reflect the official position of the Committee of the Regions.

Study carried out by GEPE under the supervision of Professor Nicolas Levrat in the context of the CoR's research programme.

Under the supervision of the Unit for Policy Analysis, Studies & Inter-institutional and Legislative Planning (Mr Gianluca Spinaci, Mr Jarolaw Lotarsk and Ms Lucia Cannellini) and the COTER commission secretariat (Mr Damian Lluna Taberner).

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FOREWORD

It gives me great pleasure to introduce the study on the European Grouping of Territorial Cooperation (EGTC). This research represents a new contribution by the Committee of the Regions to the ongoing analytical discussion and political debate that are taking place at various levels about cohesion policy and European governance.

In our enlarged Europe and beyond its borders, territorial cooperation, supported by European cohesion policy, involves an increasingly large number of regional and local authorities and socio-economic partners. It is also through these very tangible achievements on the ground that Europe can raise its hopes and achieve its aims of cohesion, competitiveness and solidarity.

However, strengthening and integrating our territories calls for a spirit of innovation in the governance of how we cooperate at European level. We need more structured cooperation, inter alia at legal level, with the emphasis on participation that is open to the various levels of government and to a plurality of stakeholders in local development.

With this in mind, the EGTC, as the new legal instrument provided for by Regulation 1082 of 5 July 2006, reflects the ongoing development of governance and organisational solutions in European territorial cooperation. It has every potential to move us forward significantly over the coming years.

The Regulation on the EGTC clearly brings added value by providing a Community legal framework to all relevant stakeholders. As with any legislation of Community origin, we now have a responsibility to make a joint effort to achieve its implementation in all the Member States. Consistent application of the EGTC across the various Member States will be the keystone of the measure. We must all make every effort to ensure that the diversity of our legal cultures is not an obstacle to action.

The Committee of the Regions hereby publishes its study on the EGTC, with an open and constructive mindset. With this same mindset, we would like to cooperate with all local and regional authorities, national authorities, and the European institutions to monitor the application of the EGTC on the ground and to ensure that the lessons from cooperation initiatives inspired by the new European regulation are learned at European level.

Michel Delebarre
President of the Committee of the Regions

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LIST OF ABBREVIATIONS

AER	Assembly of European Regions
AEBR	Association of European Border Regions
ERDF	European Regional Development Fund
ESF	European social fund
EGTC	European grouping of territorial cooperation
EEIG	European Economic Interest Grouping (Regulation (EC) no. 2137/85)
LTCG	Local transfrontier cooperation grouping (Karlsruhe and Brussels agreements)
CBCB	Cross-border cooperation body (generic term)
EP	European Parliament
ENP	European Neighbourhood Policy
CIP	Community Initiative Programme
OP	Operational programme
R	Regulation
RENTI	*Réseau d'étude des normes transfrontalières et inter-territoriales* (Research network into cross-border and inter-territorial standards)
SE	European company (Regulation (EC) no. 2157/2001
SEC	European Cooperative Society (Regulation (EC) no. 1435/2003)
CETS	Council of Europe Treaty Series
TECE	Treaty establishing a Constitution for Europe
TEC	Treaty establishing the European Community

SYNOPSIS OF THE STUDY

The adoption, in July 2006, of the Regulation establishing a European Grouping of Territorial Cooperation, was both a major change in the legal framework for territorial cooperation, and an understandable evolution thereof. It was a major change because it is the first Community instrument with regulatory scope in the field. It was also a change because it brought this cooperation between authorities located in different European states, which had hitherto by its nature been a fringe phenomenon, to the heart of the integration process.

Another reason it was a change was that this Regulation allows for the possible involvement of states, alongside local and regional authorities and territorial cooperation entities with their own legal personality. From the point of view of law on cross-border cooperation, the precursor of territorial cooperation, this is an entirely new prospect. This possibility, as long as it is used, should make it possible to inject a dose of multi-level governance into the management of areas adjacent to internal borders, which constitutes a much-needed consolidation of the territorial dimension of the integration process.

These changes arose out of the opportunity provided by the reform of the Structural Funds made necessary by the 2004 enlargement, the need to focus expenditure and to redirect funding flows from cohesion policy, which led to the community initiative programmes being abandoned and cooperation between local and regional authorities, which was considered as a vector of territorial cohesion, being made a priority objective. This is a major change in the Community approach to this type of cooperation.

Despite the achievements of INTERREG, financing of cross-border projects runs into practical and legal obstacles, which justify the development of a new and distinct legal framework. This does not mean, however, that the achievements of previous practices have not been maintained. For example, the distinction between the three strands of cooperation under the INTERREG III programme has been kept. The priorities for each one are very similar to the previous ones, thus enabling continuity of ongoing cooperation actions. Similarly, the achievements relating to Community funding of cross-border programmes are maintained (single OP without national breakdown, overseer principle, etc.).

From the point of view of legal mechanisms, the referral to national law is largely maintained, though in strict legal terms, the terms and conditions of that referral are different.

1. The origins of the EGTC

Adoption of a Regulation providing a legal framework for territorial cooperation was by no means self-evident, partly because the Treaty establishing the European Community does not provide an explicit basis for adoption of such an act. However, Article 159 TEC was used in the end.

The EGTC Regulation also takes inspiration from elements developed in previous legal frameworks; four distinct sources for a European law on territorial cooperation can thus be identified.

1) Firstly, agreements between states aimed at resolving specific neighbourhood issues.
2) Secondly, Council of Europe law, based on a 1980 framework convention, to which additional protocols were added in 1995 and in 1998.
3) Similarly, bilateral framework agreements, which have facilitated a number of useful advances in legislation.
4) Finally, Community law has developed incentive and funding mechanisms for cross-border cooperation (INTERREG).

Within this framework, numerous practices and rules relating to the funding of cross-border operations have been developed. These are also contained in the EGTC Regulation.

2. *The characteristics of an EGTC*

The particular characteristics that this Regulation confers upon the EGTC mean that this is a tool that will be suitable for certain cooperation objectives, and less so – or indeed not at all – for others. Moreover, the fact that members can in part define the arrangements for their cooperation under a convention and statutes should allow for diversity in types of cooperation, reflecting the diversity of the stakeholders and their expectations.

This Regulation does not, therefore, seek to standardise how territorial cooperation is carried out in practice; instead, it should make it possible to maintain the diversity of situations and achievements arising out of past experience, inter alia in terms of cross-border cooperation. Consequently, public bodies in countries with a liberal approach will have more opportunities, whilst those in countries with a restrictive approach in this area can be expected to gain few if any additional rights from this Regulation.

The identifying characteristics of EGTCs are their members (b), their functions (c) and the law that applies to them (d). Conversely, they all have seven defining characteristics (a) in common.

A) DEFINING CHARACTERISTICS

1. Firstly, the cross-border nature of the organisation, which requires that it have members "in at least two Member States".
2. Secondly, the EGTC has a legal personality under Community law and may, on a case-by-case basis, be given a legal personality under public or private national law.
3. Thirdly, an EGTC enjoys "the most extensive legal capacity accorded to legal persons under […] national law". However, this wording needs to be put into context, as the EGTC's capacity is in particular limited to carrying out the tasks that are assigned to it by its statutes. This principle of specialisation, common to all cooperation bodies (i.e. the body does not have generalised powers, but can only act within the powers assigned to it) applies to EGTCs. However, this study highlights the fact that the cumulative effect of the EGTC Regulation's provisions limiting EGTCs' capacity for action leads to excessively restrictive arrangements. Unless these are interpreted very flexibly, EGTCs will be very limited in terms of what they can do.
4. Fourthly, an EGTC must be governed by a convention and statutes.

5. Fifthly, EGTCs have a single registered office, the location of which has significant legal consequences, as it determines, among other things, the secondary law applicable to the EGTC and the bodies responsible for supervising it. It should also be pointed out that these relations with domestic law appear complex, as the terms of the Regulation frequently refer to rules under domestic law, which gives rise to some legal uncertainty.
6. Sixthly, in order to be able properly to express its wishes as a legal entity in its own right, the EGTC must have organs. The Regulation requires the existence of an assembly, in which all members are represented, and a director. However, it leaves it to the members to establish other organs if appropriate.
7. Seventhly, EGTCs have an annual budget.

B) MEMBERS

Three categories of potential members are identified. These are:

1) EU Member States;
2) Local and regional authorities of EU Member States. However, their capacity to participate will depend on the scope of their competences under national law.
3) Other players, inter alia bodies whose funds are considered to be mainly public and associations of stakeholders belonging to the previous categories.

C) TASKS

EGTCs are established mainly to carry out the following three tasks:

1) managing the Structural Funds;
2) carrying out strategic cooperation;
3) if appropriate, acting as a vehicle for the operational implementation of a cooperation project.

The EGTC is primarily aimed at achieving the aim of European territorial cooperation, which is structural policy priority number 3 for the period 2007-2013. However, it can also be useful for actions relating to Community policies other than structural policy, or to carry out cross-border, transnational or interregional cooperation, without Community funding.

Moreover, and because of its possibly heterogeneous makeup, it could prove to be a useful instrument for developing European governance, continuing along the lines of the White Paper on this subject adopted by the European Commission in 2001.

(D) LAW APPLICABLE TO EGTCS AND THEIR ACTIVITIES

National law, which of course differs from one country to another, plays an important role in the establishment and operation of EGTCs, Thus, Article 2 of the Regulation, entitled "applicable law", appears to contain rules that seem clear, whereas the legal reality is far more complex.

Firstly, because the rules set out in the Regulation refer repeatedly to national law, which makes the situation less than clear.

Secondly, because different phases and different actions of the EGTC are subject to different rules.

Thus, the rules that apply to the establishment of the EGTC depend, in accordance with Article 4 of the Regulation, on each national law.

The rules applicable to the interpretation of the convention and statutes are those set out in the law of the place where the EGTC has its registered office.

As for the EGTC's acts, these are subject to different controls depending on their nature; for example, the rules on financial control vary depending on whether or not the control relates to activities financed by Community funds.

Given the changing and complex nature of these various legal frameworks, it would be helpful to establish and maintain a register of the various national legislation applicable to this area.

Indeed, the Regulation will fall far short of creating a uniform effect throughout the Union. Moreover, the variation of all the factors concerning members, the tasks assigned to the EGTC, and the different laws applicable to different actions carried out by EGTCs means that the EGTC is not a single type of structure. Therefore, it is appropriate to identify different types of EGTC, which will be subject to different legal constraints.

At the same time, the implication of the complex relationship between the provisions of this Community regulation and national laws should be that national laws are adapted so as to be compatible with this form of cooperation. This process could, in the relatively long term, generate a unifying effect, not least because Article 16 of the EGTC regulation requires that the Member States take the appropriate measures to ensure effective application of the regulation. This requirement will prompt legislative or regulatory momentum in the Member States which should encourage the development of territorial cooperation and increase the legal certainty of its framework.

3. *The need for stakeholders to adopt clear strategies*

This situation calls for strategies, first of all for the Member States, whose situation vis-à-vis the development of EGTCs seems especially complex, as these take on several roles at the same time. Thus, they are the negotiators of the EGTC Regulation (which may be revised on a proposal from the Commission from 2011); they can potentially be members (Article 2 of Regulation (EC) No 1082/2006); they have obligations as legislators to adopt provisions giving effect to this Regulation (Article 16); and they have control functions assigned to them. Each State should have a clear vision of the role that it intends to play under this territorial cooperation and ensure that its activities in the various fields opened to it by the Regulation are consistent. Failure to do so could cause serious difficulties with implementing this Regulation. The adoption of a national strategy for territorial cooperation would be helpful.

The Commission has an interest in the implementation of EGTCs gaining positive momentum. However, not least because of the numerous legal difficulties highlighted by this study, it would seem desirable that the Commission adopt a flexible approach to the implementation of this Regulation.

As to where the Committee of the Regions fits in to the implementation of this regulation, Article 5 of which designates it as a recipient of information from members relating to the creation of EGTCs, it has a major interest in asserting its important role in this subject area. Consequently, this study suggests that it develop an *action plan*, which would look like this:

1. Design by the Committee of the Regions of a specific instrument for monitoring territorial cooperation, by setting up an operational public database on EGTCs in Europe.
2. Appointment of a rapporteur each year, who would give the Committee a progress report on territorial cooperation – highlighting progress and problems – and making proposals with a view to an opinion being adopted by the Committee; the Commission, similarly, will be required to submit a report based on this Regulation and propose possible changes. The Committee of the Regions would position itself as the specialised institution in this matter, as provided for by Article 265 of the EC Treaty.
3. Creation of a territorial cooperation observatory; either under the auspices of the Committee alone, or in partnership with other institutions. The establishment of a Community agency, monitored by the Committee of the Regions in conjunction with the Member States, might even be worth considering.
4. Encouraging and supporting the establishment of a network of existing EGTCs.
5. Proposing, if appropriate, the creation, based on the mechanism set up by Article 42 of the Regulation on the European Economic Interest Grouping, of a Contact Committee bringing together the relevant Community institutions and the Member States.

INTRODUCTION

On 5 July 2006, the European Parliament and the Council, acting under the co-decision procedure, adopted a new EU Regulation on the European Grouping of Territorial Cooperation (EGTC)[1]. Although it was adopted within the clearly-defined framework of economic and social cohesion policy, this Regulation is as unprecedented as it is remarkable. Above and beyond the implementation of a policy coordinating the Structural and Cohesion Funds, this Regulation, for the first time, provides a Community legislative framework for cross-border, transnational and inter-regional, i.e. territorial, cooperation[2]. As an extension of, and based on the achievements of, the INTERREG Community initiative, this Regulation offers the possibility of significant changes in the cooperation between sub-state public authorities within the European Union and, to a lesser extent, at its external borders.

The first significant change is that the existence of a Community legal framework will, for the first time, allow a common legal basis to apply to the external activities of local and regional authorities throughout the European Union. This should lead to the development both of national legal frameworks for this cooperation – the provisions of the Regulation frequently refer to national law, and require these legal frameworks to be adjusted to the possibilities opened up by its provisions – and of practices more firmly rooted in law. The mechanisms that ensure the proper application of Community law will be used to implement this Regulation, and the various and often informal existing cooperation practices should thus be changed into stronger, more legally certain, and more transparent relationships. Thus, thanks to this Regulation, territorial cooperation should move from being a marginal, specialised activity to being at the heart of the process of European integration.

Another significant change is that, contrary to current practice, the EGTC expressly provides for the participation of national governments alongside local and regional ones, as fully-fledged stakeholders in this territorial cooperation. Aside from the fact that this possibility will revolutionise practices that have been established for decades, it should also make it possible to take into account the particular situation of small countries with centralised territorial structures, which would thus be better able to cooperate, on an asymmetrical basis, with the large regions with extended powers of certain large European countries. The possibility of involving local and regional authorities and national governments in a single cooperative structure also offers huge potential for developing multi-level governance. This new legal entity, the EGTC, thus contains the seeds of significant developments, for local and regional authorities, for making territorial cohesion – a concept proposed and defended by the Committee of the Regions, inter alia during the drafting of the Treaty establishing a Constitution for Europe[3] – a reality, and also for the integration process as a whole, not least in that it will facilitate the implementation of some of the principles put forward by the Commission in its *White Paper on European governance*[4].

These factors fully justify the Committee of the Regions' interest in studying this Regulation and its potential. Moreover, the content of the Regulation, in its final version, owes much to the proposals made in the consultative opinion of the Committee of the Regions[5]. Finally, cross-border cooperation, under the terms of the Treaty of Amsterdam, which is one form of territorial cooperation, is the only specific area of competence that the EC Treaty expressly attributes to the Committee of the Regions. This subject area thus contains much that is of great interest to the Committee.

1. The conditions under which the study was carried out

This GEPE study was commissioned by the Committee of the Regions before the adoption on 5 July 2006 of Regulation (EC) 1082/2006 establishing a European Grouping of Territorial Cooperation. Consequently, the style and the substance of this study have had to be based on successive versions[6], and have evolved accordingly during the drafting phase.

The Committee of the Regions wanted jurists from countries with differing practices and legal frameworks in the area of territorial cooperation to carry out a largely prognostic and critical piece of work based on an analysis of the legal characteristics of the EGTC and of the possibilities of implementing it. Following the entry into force of the Regulation on 1 August 2006, the study became more analytical in nature. The relevance of the hypotheses examined and the solutions put forward can only be the greater as a result. The forecasting aspect of the exercise should not, however, be ignored, as the conditions for the effective implementation of this Regulation are not yet met[7].

At the same time, the Committee of the Regions did not want a purely theoretical, legal analysis. It also required practitioners to be consulted in order to shed the light of their experience of cross-border, transnational or inter-territorial cooperation on the provisions contained in the EU regulation and their relevance[8]. Two working meetings were held between legal experts and practitioners at the headquarters of the Committee of the Regions in Brussels, the first on 18 and 19 May 2006, the second on 21 and 22 September 2006. The text of this study results from the exchange of views between the experts and practitioners, who did not always agree with each other.

Both groups expressed concerns about the implementation of this Regulation and the conditions for establishing the first EGTCs. Most of the practitioners consulted expressed concerns about the time limits for adopting national rules allowing this new legal entity to be established. The Regulation provides that, within one year, Member States must "make such provisions as are appropriate to ensure the effective application of this Regulation"[9].

For their part, the legal experts were very confused by the text of Regulation (EC) 1082/2006, as both its content and the conditions for its implementation make it look more like a directive than a regulation. The jurists consider the nature and the content of the text to be excessively vague, which could prejudice the effective and rapid implementation of its requirements. Finally, the practitioners, for their part, are concerned at the "late"[10] adoption of this regulation in the light of the planning process for the Structural Funds covering the period 2007-2013.

Thus, the purpose of the study underlying this publication is not just to celebrate this major development in European law benefiting Europe's regions, cities and municipalities, and the territorial cohesion of the continent becoming a reality. The aim is also to highlight the questions raised by the implementation of these new instruments, with the aim of proposing solutions and avenues for the future development of territorial cooperation. However, the authors are in no doubt that the implementation of the EGTC in the practices of territorial cooperation will lay the foundations for a sweeping change in the practices of cooperation between European local authorities, and in their capacity to undertake concrete projects within a common structure, the EGTC.

Sadly, this change has not been accomplished simply by this Regulation having been adopted. Whilst there can be no doubt that this text has considerable potential, the fulfilment of the promises it contains will require decisive and concerted action by numerous stakeholders, be they at European level (Commission, Committee of the Regions, and probably at a later stage the Parliament and the

Council), national level (executive and legislature), or sub-national level (local and regional players and groups and associations thereof). Cooperation, particularly of the cross-border variety, is sadly littered with promising and well-written texts which, for lack of concrete action to turn intentions into results, remain just empty words.

One of the aims of this study is therefore to look at, and propose to the relevant stakeholders, avenues for developing action that will enable both the successful implementation and the use of the potential of this Regulation.

2. Study plan

The study and the publication resulting from it have been divided into two parts, each of which is sub-divided into three chapters. The final chapter (Chapter 6), which is relatively short, highlights the potential of the innovative solutions proposed by Regulation (EC) no. 1082/2006 of 5 July 2006 and contains proposals and recommendations aimed at encouraging the maximum use of the provisions and mechanisms set out in this regulation. The other chapters constitute the body of the research carried out.

Part one looks, in legal terms, at the experiences and achievements of cooperation among local and regional authorities in Europe up until the time of drafting of the EGTC Regulation. The first chapter retraces the stages and principles of the development of law relating to cross-border, then inter-territorial and transnational, cooperation, up until the emergence of a Community legal framework for territorial cooperation (Chapter 1). This initial approach is necessary not least because, as stated in the 15th recital of the EGTC Regulation, recourse to an EGTC is optional[11]. In addition, the Regulation recognises the existence of a "Council of Europe acquis" in terms of a legal framework for cross-border cooperation, and states that it "is not intended to circumvent those frameworks"[12] that existed before it and will continue to exist alongside it.

One therefore needs to know these other legal frameworks (Chapter 2) in order to be in a position to assess the extent to which these new rules fit in to the existing body of law, or indeed overlap with some of its rules (more on this at the end of Chapter 4, in Part 2, as it impacts on the implementation of this Regulation), or instead differ from them.

To close this first part, a chapter will be dedicated to issues in European territorial cooperation at the time this Regulation was being drafted. This chapter provides an opportunity to highlight the relative importance of the factors that led to the adoption of this Regulation, and thus to shed light on the reasons that underlie some of the solutions adopted (Chapter 3).

The second and main part is dedicated to the potential for territorial cooperation from 2007 onwards. The first chapter is devoted to the presentation and analysis of the EGTC in its context, along with a well-informed and detailed legal analysis of the Regulation establishing the EGTC (Chapter 4). This chapter ends by setting out a typology of the various legal categories of EGTC and highlighting, in relation to existing legal frameworks, the innovations and similarities of the rules relating to the EGTC with those frameworks. It provides a possible basis for drawing up a method for the practical implementation of EGTCs.

The presentation and analysis of the numerous and substantial legal issues connected to the implementation of this Regulation make up the body of Chapter 5. A final chapter will then attempt to

outline what the various stakeholders expect, both of these new rules and of each other, within this new legal framework. This chapter, Chapter 6, proposes some avenues (mainly to the Committee of the Regions) for encouraging recourse to the EGTC and for facilitating the optimal, and if possible fast, fulfilment of the potential of the EGTC Regulation.

However, this study was not able to analyse the national rules relating to the implementation of the EGTC, as those who set it up had initially hoped. The solution adopted, which is unusual for a Community Regulation, according to which Member States "shall make such provisions as are appropriate to ensure the effective application of this Regulation" [13] within one year [14] implies development of national legislative and regulatory frameworks. This would mean that any study of current solutions would rapidly become obsolete, and a study of future solutions would be premature. Thus, this legal analysis of the national rules relating to the implementation of this Regulation could not be carried out within the framework of this study and therefore remains to be done.

PART 1: EMERGENCE AND CHALLENGES OF THE LEGAL FRAMEWORK FOR EUROPEAN COOPERATION BETWEEN REGIONAL AUTHORITIES BEFORE THE EGTC

CHAPTER 1: FROM CROSS-BORDER TO TERRITORIAL COOPERATION

The adoption, in July 2006, of the Regulation on a European Grouping of Territorial Cooperation, was both a major change in the legal framework for territorial cooperation and an understandable evolution thereof. It was a "major change" because it is the first Community instrument with regulatory scope in the field, and because it brought cooperation between authorities located in different European states to the heart of the integration process, where it had previously been a fringe phenomenon. This chapter aims to explain these changes and their context.

The first major contextual aspect in this field is the evolution of borders and their meaning in Europe. Owing both to the deeper integration and the enlargement of the European Union, the borders within and surrounding the Europe of 2006 have changed in just a few years, and in many ways.

Although these changes have not removed the need for cooperation between sub-national bodies – quite the opposite – they have made it necessary to update the legal framework on which this cooperation must be pinned (A).

Nonetheless, there are still complex legal problems which remain relevant. The exclusion of these relations from the traditional scope of international law and the linking of certain of their consequences to national law have resulted in the cooperation relationship itself being caught in a state of legal uncertainty. Moreover, the complexity of the legal solutions means that they are unsatisfactory in operational terms (B).

From the outset (1975), cross-border cooperation had a minor role in the development of regional policy in the Community. For almost twenty years, the development and extension of the INTERREG programme set the scope for the EU's cross-border relations. The programme moved from a strict neighbourhood focus to interterritorial and transnational cooperation but did not, however, lead to development of a specific legal framework (D).

The reform of the Structural Funds made necessary by the 2004 enlargement provided the opportunity for real change in the EU's approach to this cooperation. The need to focus expenditure and redirect funding flows led to the Community initiative programmes being abandoned and cooperation between regional authorities, which was considered as a vector for territorial cohesion, being made a priority objective (E).

Moreover, owing to the efforts of the Committee of the Regions, the concept of territorial cohesion was incorporated into the draft Constitutional Treaty, and found

its place in the reform of the Structural Funds: firstly as the third priority objective of cohesion policy, and then in the definition of the EGTC, which changed from "cross-border" (as it was called in the Commission proposal) to "territorial".

This chapter therefore explains the levels of innovation and continuity that led to the emergence of the EGTC in 2006.

Although Regulation (EC) No 1082/2006 was the Community's first legal instrument to include regulatory provisions applicable to structures for cooperation between regional authorities[15], the regulation of such activities had begun to be developed before this date. In fact, one of the main obstacles to the development of cooperation between regional authorities located in different States was legal in nature. Local initiatives began to be undertaken in the mid-1950s[16], and by the 1970s these had extended to European level, with, for example, the creation in 1971 of the Association of European Border Regions (AEBR) and the first European Conference of Border Regions held by the Council of Europe in Strasbourg in 1972 (A).

When the ERDF was set up in 1975[17], the European Community was able to offer financial support to cross-border cooperation activities.

In 1980, the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities was opened for signature, under the auspices of the Council of Europe. It provided the first European legal framework for cooperation, although it was still restricted to neighbours (B).

It was not until 1996 that, as part of the Community initiative INTERREG II, the Commission offered financial support for cooperation activities extending beyond the strict limitations of neighbourhood[18] (C), and in 1998 the second protocol to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities was opened for signature, in the context of the Council of Europe (D).

Following the Committee of the Regions' request to develop territorial cohesion policy in addition to economic and social cohesion[19] (E) and the reform of the Structural Funds made necessary by enlargement (F), a Community regulation has now emerged which concerns a legal tool for the development of territorial cooperation. This first chapter will give a brief overview of the historical, institutional and regulatory framework surrounding this new instrument, the European Grouping of Territorial Cooperation (EGTC)[20], in order to gauge whether it could connect with acquired experiences and dovetail with existing instruments, as expressly provided for in Regulation (EC) No 1082/2006[21], or whether, on the contrary, it represents a break away from the acquis.

Here, a first difficulty emerges (which may seem purely semantic but which, in fact, conceals ideas which are often quite far removed from the reality of the cooperation initiatives in question), regarding the very name given to this cooperation:

- "transfrontier", i.e. limited to neighbours in the context of the Madrid Outline Convention[22], its additional Protocol[23], the INTERREG [24,] INTERREG II A[25] and INTERREG III A[26] initiatives;
- " interterritorial" in the context of Protocol No 2 to the Outline Convention[27];
- "transnational" for INTERREG II C[28] and INTERREG III B[29];

- "cross-border" in Article 265 of the Treaty establishing the European Community as amended by the Treaty of Amsterdam;
- "interregional" for INTERREG III C[30].

Under the terms of Article 1(2) of the Regulation establishing an EGTC, territorial cooperation covers "cross-border, transnational and/or interregional cooperation"[31], but apparently does not intend to replace these terms. Moreover, the practitioners consulted during the writing of this study[32] did not seem overly enthused by the new name, and most of them announced that, for now, they would continue to use the terminology they employed before, unless they were to form an EGTC.

This first chapter aims, therefore, to place this territorial cooperation in context.

A. THE ORIGINS OF CROSS-BORDER COOPERATION

Like any complex phenomenon, cross-border cooperation has its roots in a number of specific factors and circumstances. The objective of those involved in this cooperation is to offset the structural disadvantages imposed by their location, on the edge of their country and confined by the limits placed on the system (legal, economic, social, or even linguistic, cultural, religious, etc.) as a result of proximity to an international border. Thus, in a booming and politically stable Europe, local players on either side of certain European borders, dependent on different systems but sharing common problems and interests (border workers, cross-border pollution, land-use planning or security issues, etc.), have tried to join forces in order to find practical, fast solutions to their requirements, without having to go via the traditional channels of inter-State relations. In other words, the aim is to resolve a problem that is both cross-border and local in nature, without turning it into an international affair in which the local players would be forced to look to their capital cities in the hope that the Ministry for Foreign Affairs would take an interest in this local issue.

This development of cross-border cooperation in Europe is justified by two factors which are linked to the relative importance of borders on the continent. Firstly, more than anywhere else, Europe bears the "scars of history", i.e. its borders: "the result of geography being repeatedly pillaged by history, or the environment by politics, or culture by economic interests and national prestige, current borders were drawn for historical reasons which have, for the most part, ceased to be reasons"[33]. This phenomenon has reoccurred during the recent history of several parts of the continent, and a number of new international borders have appeared in Europe[34].

Secondly, the importance and permeability of European borders are evolving. The key focus of the European integration process has been to significantly reduce the relevance of national borders for European economic players, in order to create a large market in which national borders no longer stand in the way of the free movement of workers, goods, services and capital. This phenomenon, which has proved a great success, has been strengthened by the achievement of economic and monetary union, and the abolition of border controls (Schengen area), resulting in the twofold nature of European borders. On the one hand, internal borders have become less important for the reasons given above, while on the other, external borders have been tightened up, given that access to the unfenced area of the EU requires stricter controls than access to solely national territory.

When it comes to the main players in cross-border cooperation, this dual situation has required their cooperation to be stepped up, as stressed by the European Commission in 2004 in its proposal for a Regulation on EGTC, and as recognised by the European Parliament and the Member States when

they adopted the regulation. In fact, the "strengthening" of external borders simply increases the need for cooperation in order to overcome the "border effects" generated. As regards internal borders, the progress made by European integration also increases the need for cooperation. The liberalisation of trade and movement enabled by the four freedoms and other developments of European integration also benefit private economic players, who can develop and locate their economic activities throughout the EU with greater freedom from legal and economic obstacles. However, the increased movement of economic players and products generates a greater need for cooperation between public players, whose role it is to oversee these activities and provide public services that meet the requirements of Europeans. Although the mechanisms for cooperation were developed in a particularly progressive way at EU level (making it possible to provide a common response to the requests and needs of European citizens [35]), there is a growing gap between the requirements of private players whose activities are no longer limited by national borders, and local public players (regional or local authorities) which, due to a lack of appropriate legal instruments and mechanisms, remain confined to national regional spheres that do not allow them to effectively meet the legitimate needs of European citizens (who, for their part, have the means to overcome borders).

Thus, the reasons and needs underpinning the development of cross-border cooperation do not only remain, but are exacerbated – in terms of both internal and external borders – by the European integration process.

B. THE BASIC LEGAL PRINCIPLES OF CROSS-BORDER COOPERATION

From a legal standpoint, cross-border or territorial cooperation poses structural problems. When it comes to public law, legal systems – in Europe at least – have a two tier-structure, neither of which is able to incorporate the requirements of non-sovereign regional players (regional or local authorities) in a satisfactory way. National legal systems are fully separate (in terms of public law) from one another, and are interconnected by means of another type of legal system, public international law, which is based on the equal sovereignty of its original subjects, i.e. the States.

When it comes to public national law, authorising a regional authority to act beyond national borders means either losing control and accepting that cross-border activities will be subject to the territorial sovereignty of the neighbouring State, or trying to extend the scope of a State's own public laws to the territory of the neighbouring State, disregarding its territorial sovereignty (which, if done unilaterally, is prohibited by public international law).

For a State, accepting that local authorities should be privy to relations governed by public international law would either mean leaving them to their own devices – and thus recognising their sovereignty, which would not be without consequences for national unity – or admitting that they are acting legally on behalf of the State, with the resulting risk of entertaining international commitments towards other States (international liability of the State) for actions over which the national authorities had no control. Thus, neither solution would be acceptable to States.

As for authorising regional authorities to apply private international law mechanisms to cross-border cooperation (enabling private players subject to different national jurisdictions and laws to find solutions binding them to some national – or even third-party – legal system), the State would again risk "losing all control" over its authorities, as the actions carried out under private international law mechanisms could be qualified and have legal consequences in a foreign legal system. Moreover,

citizens whose interests and rights with regard to the activities of regional or local administrations were protected by public national law would run the serious risk of being faced with administrative acts subject to foreign law, and for which the protection provided by national law would be ineffective. For these two reasons, this solution would not be acceptable.

Thus, it would appear that cross-border relations between local or regional authorities located in different European States could not be governed by national law, public international law or private international law. It was therefore necessary to develop *ad hoc* legal solutions[36]. This was done within the framework of the Council of Europe by means of specific bilateral agreements (see Chapter 2 for information about the solutions applied).

Essentially, the solution involves:

- a) prohibiting relations between a regional authority and a foreign State, so as to avoid any problem relating to State international liability in international law;
- b) leaving a certain degree of legal imprecision in the cross-border relationship[37];
- c) ensuring that the implementation and legal effects of the rights and obligations resulting from the cross-border relation are subject to public national law (chosen according to the place where the legal effects would apply, or according to the law usually applicable to the citizen, or according to the head office of the cross-border cooperation body).

This relatively complex legal solution has proven quite unsatisfactory in practice, partly because of its complexity and the resulting legal uncertainty for those involved, and partly because of the fundamental inequality between the partners in such cooperation initiatives, some of whom are operating within their national legal framework while others are forced to operate in a foreign legal and administrative environment which does not match their frame of reference or political, administrative and legal culture.

These various restrictions are extensively covered in Council Regulation (EC) No 1082/2006 on EGTCs. This is somewhat regrettable in that, as the court of Justice has unambiguously maintained since 1963, "the Community constitutes a new legal order of international law […] the subjects of which comprise not only the member states but also their nationals"[38]. According to the legal experts that drew up this study, this new Community legal system should also allow for direct cooperation between regional authorities, sidestepping the abovementioned limitations of national and international legal systems. Unfortunately, the Court of Justice has proven hesitant in acknowledging the specific role of regional authorities within the Community legal system[39] and, as a result, the regulation under consideration relates more to traditional international legal solutions, rather than effectively (or innovatively) harnessing the potential of Community law to deal with territorial cooperation.

C. Community funding: requirements and extension to areas connected via INTERREG (strands B and C)

The European Commission proved very early on to be aware of the truly transnational nature of this cross-border cooperation between players at sub-national level. Insofar as this activity could not by its very nature be confined within the borders of a single Member State, it had to form a key component of Community action. Thus, as soon as resources became available, the European

Commission opted to support cross-border cooperation initiatives. Since 1975, mainly through the commitment of budgetary resources, Community support has been increasing both quantitatively, in terms of the volume of funding, and qualitatively, through the establishment of conditionality requirements showing the Community's willingness to promote the development of these test areas for local-scale European integration. The draft regulation follows on from this approach, as will be shown below.

The first possibility for direct action[40] by the Community to promote cross-border projects[41] emerged in 1975, after the accession of the UK and in response to one of its demands, when a new European fund was set up to support regional development policies[42]. Although regional policy remained under national control and Community action consisted essentially in handing out funding to Member States (to be used for regional development projects), Article 5 of the regulation on these funds allowed the Commission to use a small portion (less than 5%) to finance innovative actions. One of the criteria established in Article 5 was that the Commission should, in particular, take into account "whether the investment falls within a frontier area, that is to say, within adjacent regions of separate member states"[43]. Thus, while remaining within a national context, consideration was given to the limits of the national territory. From border to cross-border was only one step – one that the Commission was constantly attempting to take.

This was achieved in 1990 when the INTERREG programme was set up[44], the main aim of which was to help both the Community's internal and external border regions to overcome specific development problems resulting from their relative isolation within national economies and the Community overall[45]. The establishment of the INTERREG programme (via the Regulation on the coordination of the Structural Funds[46] and a Communication from the European Commission[47])was made possible by adding a new title on economic and social cohesion to the TEC, by means of the Single European Act (1987). The new Articles 130a to 130e required the Community to develop the coherence of its structural initiatives, which would help it to create a true Community regional policy (on which this study will not focus). INTERREG was a Community Initiative Programme (CIP). The Commission's objective in providing this financial support perfectly met the needs that the beneficiaries themselves considered as central to their cooperation initiatives (see section A above). The objective was to be met through three types of actions, i.e.: the programming and joint implementation of cross-border programmes, the introduction of measures to improve the flow of information across borders, and the establishment of common institutional and administrative structures to support and encourage cooperation[48]. Therefore, the aim of making it possible to set up cross-border institutional structures (such as the EGTC) has existed since this Community initiative first emerged.

The programme's second incarnation (INTERREG II, 1994-1999) went so far as to explicitly define the main priority objective for the award of Community financing as support for the establishment of "shared institutional or administrative structures"[49], which again largely tallies with to the purpose of the regulation under consideration.

The INTERREG II programme also extended its scope beyond the strict neighbourhood dimension: firstly, it gained a strand B, relating to the completion of energy networks[50] (which is not of relevance here, and was not included in the scope of INTERREG III. For this reason, we will not dwell on the subject). However, in 1996, the Commission proposed extending the Community's INTERREG II C initiative to "transnational cooperation on spatial planning"[51]. The main objectives of this new strand were:

- "to help restore the balance between different areas of the European Union through structuring measures that serve Community interests by contributing to the promotion of economic and social cohesion. […]
- to foster transnational cooperation initiated in this field by Member States and other authorities […];
- to improve the impact of Community policies on spatial development"[52].

By going beyond the cross-border dimension (the Communication expressly refers to the "joint development of other transnational groupings going beyond simple cross-border cooperation") the aim, however, was to apply the same cooperation criteria in larger geographical areas. The Commission therefore announced that "priority will be given to proposals made in cooperation with regional and local authorities which include the creation of development of shared institutional or administrative structures, where possible within existing cooperation frameworks, […]"[53], which, from an institutional point of view, corresponds with the ambition also stated for cross-border action. This second objective evolved little, becoming strand B of the INTERREG III initiative[54].

Strand C of INTERREG III concerned interregional cooperation, "intended to improve the effectiveness of policies and instruments for regional development and cohesion through networking, particularly for regions whose development is lagging behind and those undergoing conversion"[55], on "specific topics to be defined by the Commission, after consulting the Committee of the Regions"[56].

These three strands fall within the scope of territorial cooperation. The greatest share of resources, both under INTERREG III and in the context of the new priority objective 3 for territorial cooperation, is devoted to cross-border (neighbourhood) cooperation. Owing to the increase in initiatives carried out, this also requires the most effort in terms of institutional cooperation solutions, which is why the Commission had initially favoured cross-border cooperation for the EGTC before extending its scope to all levels of cooperation, at the request of the Committee of the Regions and the Parliament.

D. THE EXTENSION OF CROSS-BORDER COOPERATION RULES TO OTHER MEANS OF COOPERATION (INTER-TERRITORIAL OR TRANSNATIONAL)

The legislative framework, whether in the context of the multilateral agreements reached by the Council of Europe or bilateral agreements, was restricted to the neighbourhood dimension – which was fairly logical, in the latter case (neighbouring states resolving neighbourhood problems through a neighbourhood agreement). In the former case, this restriction to the neighbourhood dimension was due to the fears of Council of Europe Member States that some regional authorities would use these cross-border relations to develop an actual network of international relations in parallel to the State's[57]. These fears proved, essentially, to be unfounded. In parallel, legal doctrine had shown that from a legal point of view, there was no reason to differentiate between neighbourhood relations and regional authorities' other external relations[58]. Thus, in 1998, the Member States of the Council of Europe agreed to open for signature Protocol No. 2 to the Convention of Madrid, which enabled signatory States[59] to acknowledge the application of the same rules (those of the outline convention and, where appropriate, its additional protocol) to inter-territorial cooperation, defined as "any concerted action designed to establish relations between territorial communities or authorities of two or more Contracting Parties, other than relations of transfrontier cooperation of neighbouring authorities,

including the conclusion of cooperation agreements with territorial communities or authorities of other States"[60] – which is very broad.

In parallel, it is worth pointing out the development of decentralised cooperation, in the framework of both international relations and the Community (particularly owing to funding from the European Development Fund in the context of the implementation of the Lomé agreement), which – when it came to relations with remote non-EU countries – relied particularly on the expertise and know-how of local or regional players. Although not legally comparable to cross-border cooperation in its strictest sense, particularly because regional authorities do not execute their own powers but are auxiliaries to the foreign policy of a larger political body (State or EC), this practice also helped develop the idea that external action by regional authorities did not necessarily have to be confined to neighbours.

E. THE REFORM OF THE STRUCTURAL FUNDS AND THE EMERGENCE OF A NEW PRIORITY OBJECTIVE FOR TERRITORIAL COOPERATION

Since the outset, economic and social cohesion policy has set two priority focus areas for the Community: a) to combat economic and social discrepancies with the aim of "reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas"[61]; b) to ensure the effectiveness and coordination of the Funds with one another and with the other existing financial instruments[62]. It was in line with this second objective that the European Commission developed the thrust of its structural policy, emphasising the need to focus Community action on specific objectives (hence the notion of priority objectives), which called for programming, partnership, etc. The conditions for granting Community support under the structural policy could be called into question for the programming period beginning on 1 January 2007.

The EC's structural or cohesion policy had, since 1988, seen relative continuity in its development conditions. The 1988-1993, 1994-1999 and 2000-2006 programming periods corresponded to financial packages (Delors I, Delors II, Agenda 2000) or "multiannual financial frameworks"[63]. However, the enlargement of the EU to include ten new Member States in 2004 imposed two new restrictions on this structural policy.

Firstly, given the extent of the challenges and the "cost of enlargement" (as the regions in the new Member States would have to make significant efforts to catch up with the economic development of the "old" Member States), there was criticism from some quarters of the inefficiency and complexity of the Structural Funds, and it was proposed that the mechanism be replaced by simple transfers of resources to the least developed States[64]. In response to these criticisms, the Commission suggested focusing its action on a reduced number of priority objectives; for this reason the number of objectives was reduced to three and the Community Initiative Programmes, including INTERREG, were abolished.

The entry of ten new Member States would have significantly increased the development gaps[65], and resulted in the funds being mechanically channelled to the new Member States, to the detriment of the old Members, unless there was an in-depth reform of the award criteria for the 2007-2013 programming period. More than 90% of these Structural Funds – i.e. over one third of the Community budget – were invested in infrastructure in order to enable regions whose development was lagging

behind to close the economic gap, or to facilitate the economic reconstruction of regions facing structural changes. The main criterion for awarding these resources was the level of development of the regions in question; only regions whose per capita GDP was below 75% of the Community average could benefit from this financial aid. As regions in the Member States which joined in 2004 were substantially less wealthy than those in the "old" Member States, the rules defined for allocating Structural Funds would automatically result in almost all the funds being distributed – if the old criteria were maintained – to the new Member States, and therefore no longer paid to the regions in the old Member States which used to share this much appreciated aid.

It was therefore necessary to find new criteria for allocating these resources, so that the distribution of funds for 2007-2013 would be more geographically balanced. One of the criteria for priority allocation of the structural funds was therefore based on the cross-border nature of actions, as borders represent an obstacle to regional development, whether regions are within the EC's upper wealth bracket (old Member States), or the lower bracket (new Member States). Since the first Communication on INTERREG was issued, emphasis has been placed on the need to help border regions overcome specific development problems resulting from their relative isolation, and not on the basis of per capita GDP. This regulation was also proposed concurrently with the disappearance of the Community Initiative Programme INTERREG (and, incidentally, all the other CIPs) and its transformation into priority objective 3 which, although it resembled a NIP[66], had to concern more than one Member State simultaneously.

This context therefore explains why the older Member States today support the development of new criteria for the awarding of the Structural Funds. Among these, the cross-border nature of actions would appear to be a self-evident and non-discriminatory criterion, as the border regions of new Member States are also confronted by these border effects and could, therefore, benefit from the new priority objective 3 of the structural policy for the next programming period (although as less of a priority than under the previously used economic development criteria)[67]. Although this cooperation has been made a priority objective rather than a Community Initiative Programme, the amounts allocated to it do not vary greatly (4% of the Structural Funds, i.e. 1% of the Community budget; while objective 1 was allocated 78.5% of the funds and objective 2 was granted 17.2%). This budgetary programming for 2007-2013 is only a transition phase, however, and it is quite possible that its "priority objective" status will eventually enable territorial cooperation to receive substantially greater resources. This would fall within the dimension of territorial (rather than just economic and social) cohesion as called for by the Committee of the Regions and enshrined in the Treaty establishing a Constitution for Europe[68]. Conversely, the absence of a reliable legal instrument enabling players in border areas to develop truly cross-border projects means that the emergence of projects which meet the objective will be haphazard; for this reason, it is useful – and indeed necessary – to develop Community regulations to enable cross-border projects to be developed.

In addition to this key point in the development of the context of European integration (enlargement to CEECs), the institutional and economic difficulties encountered as a result of enlargement and the fact that limits will one day have to be placed on the territory of the Community (which has grown considerably since 1957) have led the Member States and the Commission to consider the concept of an EC neighbourhood policy[69], seemingly located midway between foreign policy (2nd pillar of the EU) and the accession policy maintained since the early 1970s, to which it would constitute a viable alternative. Insofar as the cross-border dimension has always been linked to neighbourhood issues[70], this context, while secondary to the reform of the Structural Funds, is also

likely to make it easier for the development of the regulation of cross-border relations, by means of Community legislation, to be accepted.

Thus, as announced by the Commission in the conclusions of its third report on cohesion, in this context, the Commission intends to propose a new legal instrument in the format of a European cooperation structure ("Cross-border regional authority"), in order to allow Member States, regions and local authorities to address – both inside and outside Community programmes – the traditional legal and administrative problems encountered in the management of cross-border programmes and projects[71].

In this way, territorial cooperation has emerged, along with its accompanying legal instrument – the European Grouping of Territorial Cooperation. This study aims to assess the EGTC's potential for developing cooperation between sub-national-level authorities in Europe.

CHAPTER 2: EXISTING LEGAL SOLUTIONS IN EUROPE

There are four different sources of European law on territorial cooperation. All four are relevant and useful to study as, despite having a large number of innovative components, the Regulation on a EGTC is also based upon elements developed within these earlier legal frameworks.

Furthermore, the Regulation on a EGTC clearly states that its purpose is not to replace existing legal frameworks. This will allow those involved in such cooperation to choose a specific legal framework.

First of all, since the 1960s agreements between States aimed at settling specific neighbourhood issues at borders have enabled both States and regional bodies to form partnerships within joint international structures. While this form of cooperation has lost its relevance given the solutions developed by the Council of Europe, the possibility of bringing together within a EGTC both regional bodies and Member States should allow us to take a fresh look at the achievements of these initial models for cooperation (B.1).

The second body of rules on territorial cooperation is Council of Europe law, based upon the Outline Convention of 1980, to which additional protocols were added in 1995 and 1998 (A.1). Council of Europe law is international in origin and has not been adopted by all EU Member States.
Consequently, its principles may serve as a basis, but its rules are not applicable everywhere (A.1.1).

This law, which the Regulation on a EGTC describes as the "Council of Europe acquis", was the first to recognise the right of territorial communities to cooperate beyond national borders (A.1.2). It also established the principle of referring to national law for the fulfilment of obligations agreed within a transfrontier framework (A.1.3). Furthermore, this law was the first to develop the idea of setting up transfrontier cooperation bodies (the EGTC is an example of this), making it possible to structure such cooperation and put it on a permanent basis (A.1.4). Finally, with the second protocol in 1998, this body of rules developed within the framework of neighbourhood relations was extended to apply to cooperation between partners situated some distance from each other (A.1.5). All of these developments have been incorporated into the Regulation on a EGTC or provide a basis for it.

The third significant source is Community law, which has not approached the subject from the same angle as the Council of Europe – a regulatory and normative approach – but has developed mechanisms to encourage and provide financial support for cross-border cooperation (INTERREG). Within this framework, a large number of practices and rules for financing cross-border action have been developed, which have also been incorporated into the Regulation on a EGTC (A.2).

It appears that the instruments of Community law, which were not specifically designed to govern cooperation between authorities (particularly the EEIG), have nonetheless been employed for this purpose, with relative success. Although their specific features were not quite suited to the needs of cooperation between public authorities, this experience has shown the benefit of developing a Community instrument to establish legal structures which transcend national frameworks (A.2.2).

Since the 1990s, western European countries have been developing bilateral framework agreements in order to provide a legal framework that is more specific and thus better adapted for the purposes of cooperation between their authorities and those of a neighbouring State. Although, as rules, they cannot substitute the EGTC, owing to their limited scope of territorial application, in legal terms this generation of bilateral agreements has enabled useful progress to be made (B.2).

These are agreements that develop the boundaries to be placed on the material scope of cooperation agreements (B.2.1). Furthermore, they provide for the possibility of using a cooperation agreement to entrust the implementation of a common task to a single partner (B.2.2). Above all, some of these agreements develop the novel idea – which is central to the concept of the EGTC – that the joint cooperation structure does not have to be based upon national law (as required by the rule on reference to a pre-existing body of national law), but first and foremost on the common will of partners, i.e. through statutes (B.2.3).

Both the coexistence of mechanisms that differ from the EGTC but have a similar objective, and the influence of solutions developed within these various legal frameworks are important to understand in order to obtain a better grasp of the potential significance of establishing the EGTC.

Some associations which bring together regional stakeholders with an interest in solving problems in border areas, in particular the Association of European Border Regions (AEBR), supported by some of the most active sponsors of this school of thought[72], had called for the adoption of an instrument of Community law to govern at the very least cross-border cooperation, ideally transfrontier or territorial. The shared objective was to adopt a legal instrument to be applied uniformly, capable of replacing the range of legal rules and principles which currently apply to Europe's various borders. This diversity, which is detrimental to legal security and effective cooperation, stemmed from two issues which a secondary act of Community law appeared to be able to fully resolve.

The first issue is the range of sources of this law and the varying degree to which they have been adopted by European States. The second is the effect of legal rules, even identical ones, in each national legal system, which derive from an international legal system. Since it is the provisions of the national legal system which determine the legal effect of international norms on domestic law, solutions vary from one State to another; and in the absence of a common oversight mechanism (and unfortunately international texts, with one exception[73], do not provide for one) this difference in territorial application may constitute a major obstacle to the development of territorial cooperation based on clear and predictable legal solutions. We will see in this study that the Regulation is unfortunately unable to offer a satisfactory solution to this first issue. However, uniform application, not only of the norms of the Regulation, but also of the referrals it provides for, can be expected in the future (see end of chapter 3 below).

As far as the range of sources is concerned, three principal sources – applicable to varying degrees depending on each European border – coexist prior to the entry into force of Regulation (EC) No 1082/2006. We are going to examine them briefly in this chapter, for two reasons.

The first is that the Community Regulation on a EGTC, while it incorporates certain innovative features representing a clean break with previous practices and norms (e.g. the participation of the State as a full member of a cross-border cooperation body, something which differs from solutions

developed in the European convention-based instruments examined below), is also to a large extent based on the convincing experience of cooperation at various European borders (see chapter 5 below). In view of this, it is necessary and useful, particularly for the purposes of interpretation, to know the origin of these rules, many of which have been incorporated into Regulation (EC) No 1082/2006, occasionally in a somewhat "higgledy-piggledy" fashion.

The second reason is that the Community Regulation, far from representing a new legal structure designed to replace the previous ones, is intended to coexist alongside them and to allow the relevant stakeholders to choose whether to use a pre-existing structure (based on one of the three sources that we will examine below) or the new Community Regulation. Recital five clearly states this limited ambition, "This instrument is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community." In order therefore to find out why stakeholders in territorial cooperation might be interested in using the Regulation on a EGTC, it is important to know about the alternative legal solutions. The objective of this chapter is thus to provide a summary of these solutions.

This chapter will be subdivided into three parts; sources at European level (A), those coming under bilateral or multilateral agreements (B), and those based on national law (C). What we are interested in this chapter is not so much to set out in detail specific solutions which would probably not be transposable on other European borders, but to highlight the structure of legal mechanisms which are to be found – or rather stand out – in Regulation (EC) No 1082/2006.

A. AT EUROPEAN LEVEL (MULTILATERAL)

While the term "European law" is often simply referred to by users as "Community law", it is important to recall that there is another European institution with the power to produce norms at European level. Since the 1970s, this institution has developed legal rules intended to provide a framework for the cooperation activities of territorial communities in various European States. What is more, Council of Europe law is recognised in the recitals of Regulation (EC) No 1082/2006 as having a quite specific role, since recital five refers to it as the "Council of Europe acquis", something which "provides different opportunities and frameworks within which regional and local authorities can cooperate across borders". We are therefore going to dedicate a major section (A.1) to the study of these frameworks.

While Regulation (EC) No 1082/2006 represents an initial attempt within the Community legal system to lay down a legal framework for cross-border, interregional, transnational or territorial cooperation, these matters have in fact been the subject of a number of acts, specifically in connection with the Structural Funds, which are also important factors in explaining the structure and scope of certain provisions of the Regulation on a EGTC. We will therefore examine these issues below (A.2).

1. Council of Europe law

In certain areas, the Council of Europe acts as a tremendous "European laboratory", providing a framework to create and test innovative solutions to complex issues facing European States in their mutual relations. This is true of the relatively new field of transfrontier cooperation, an area in which the solutions proposed by the Council of Europe to enable territorial communities or authorities to

develop such relations are a remarkable illustration of the capacity of this organisation to propose a European legal framework for the development of this practice which existing rules and frameworks did not even provide for. However, the regulation of this field also highlights the limits of the organisation's effectiveness.

The Council of Europe, according to the terms of its statute, may adopt Recommendations applicable to Member States, and, where appropriate, conventions or agreements, which are then governed by the conventional rules of international law. In explicit terms, unlike what happens within the Community framework, the Council of Europe does not produce secondary law. When a convention-based instrument is adopted in the Council of Europe, from a legal point of view, it does not have an automatic binding effect through the simple fact of its adoption; only at this stage is it opened for signing by Member States, a signature which will then be submitted for ratification in accordance with the requirements and procedures specific to each national legal system.

Consequently, an international convention of this kind will have legal effect in a Member State only if it is ratified by that Member State. What is more, each State may express reservations or draw up declarations, something which enables States to carefully adapt the extent of the obligations they have agreed to undertake to the specific nature of their legal systems and the possible limits to the political commitment of their governments or parliaments. At the same time, while it cannot be denied that, thanks to the flexible arrangements for approval by States, the regulatory output of the Council of Europe is significant in terms of quantity and quality, it should however be stressed that in the majority of cases there is an absence of any international mechanism for legal oversight, monitoring whether or not commitments are actually being kept.

However, in new areas where the potential for development and legal consequences have yet to be clearly identified by States, this relative "legal weakness" of the instruments of the Council of Europe proves to be an asset, allowing national authorities to contemplate innovative solutions which, as far they can see, appear to involve limited risks, specifically because of the flexibility of the commitment. This is exactly what has happened in the field of territorial cooperation.

1.1 The difficulties involved in establishing legal rules

The European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities[74], opened for signature by Member States of the Council of Europe on 21 May 1980 in Madrid, was the crowning point of years of study and effort within the institution. As far as the Parliamentary Assembly was concerned, it was supposed to be the cornerstone of the new system that the Council of Europe knew that it had to construct in order to provide a legal framework for the practices that were being actively carried out at various European borders. In 1964, the Parliamentary Assembly asked the committee on local authorities to examine the appropriateness of and, where necessary, arrangements for cooperation between the local authorities of various Council of Europe Member States, particularly between neighbouring authorities situated on the borders of Member States[75].

But even more so than the European parliamentarians, it was local authorities situated on borders (brought together within an effective organisation - *The Association of European Border Regions*) which were calling for the adoption of such an agreement at European level. In their view, the Council of Europe seemed to be the body that was most appropriate and most capable of championing their

request. For these local and regional authorities, proximity to an international border meant serious constraints in dealing with specific local issues falling within their areas of responsibility, such as the conveyance and treatment of water, refuse collection, management of the labour market (when the jobs pool was cross-border in nature), the development of local public transport or certain emergency or public health services (fire brigades, hospitals). Even if there was a fear amongst certain governments that these specific requests concealed wider political demands (the spectre of separatism is never far from the minds of some national leaders) this fear was not born out, neither at the time, nor has it been since.

Nonetheless, as a result of such fears, those responsible for drafting a convention within the Council of Europe were less inclined to contemplate the development of a legal framework which risked encouraging such practices. Initially therefore they tried to avoid incorporating this matter into their work programme, and national parliamentarians and regional and local elected representatives would have to throw their full weight behind this issue in order to make progress[76]. Therefore, although the need to adopt a legal instrument appeared to be obvious to the organisation's subsidiary bodies, the decision-making bodies, controlled by the foreign ministries, showed reluctance in accepting the opening for signing of a convention[77]. Consequently, the legal scope of its provisions was clearly more limited than had been envisaged by its proponents. Thus when the text was finally adopted in 1979, the Parliamentary Assembly, while welcoming this outcome, regretted "the fact that the outline convention contains numerous extremely vague terms, and that the convention thus lacks precision and compelling force"[78].

It is true that the content of the Outline Convention was excessively modest, not to say lacking in substance. The principle "obligation" is set out in the first article, which reads as follows: "Each Contracting Party undertakes to facilitate and foster transfrontier cooperation 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."

The commitment to "facilitate and foster" does not really allow the authorities concerned to regard themselves as having a right to engage in transfrontier cooperation; especially as the text of the Convention does not offer any means of developing this cooperation and establishing a legal framework for it. As the Explanatory Report adopted by European ministers at the same time as the Convention states[79], "This is an undertaking of a general kind which takes account of the situations in the various states ratifying the Convention. It implies a favourable attitude on their part towards any cooperation problems submitted to them, especially as regards the conclusion of agreements and arrangements"[80].

Furthermore, to provide those foreign ministries that did not want to leave the door too wide open for relations between sub-state authorities with even more reassurance, this cooperation was limited to the immediate neighbourhood, as Article 2 states that, "For the purpose of this Convention, transfrontier cooperation shall mean any concerted action designed to reinforce and foster neighbourly relations between territorial communities or authorities within the jurisdiction of two or more Contracting Parties and the conclusion of any agreement and arrangement necessary for this purpose"[81].

As a matter of fact, in order to get round the opposition of foreign ministries and avoid producing a completely watered-down text, the solution of an Outline Convention, with minimal regulatory

content, and an appendix on "Model and Outline Agreements, Statutes and Contracts on Transfrontier Cooperation"[82] was adopted. As the Explanatory Report states, "The graduated system of models and outlines appended to the Convention (but not forming an integral part thereof) is designed to provide states on the one hand, and territorial communities on the other, with a choice of forms of cooperation best suited to their problems. Accordingly, the Convention does not preclude either the use of different forms of agreements or the adaptation of the appended models to each specific case of transfrontier cooperation"[83]. In more explicit terms, the Explanatory Report states that, "The fact that they have been appended to the Convention does not oblige Contracting Parties to use them or even, if they do intend to use them, to apply them as they stand (...). The reference to these models in the Convention does not give them treaty force but merely implies an undertaking by states to pay them all due attention"[84].

It would be fair to say therefore that, from a legal point of view, the text of the 1980 Convention does not have any direct legal effect whatsoever[85]. Consequently, Regulation (EC) No 1082/2006 does not include any principles from the Convention.

On the other hand, it should be stressed that while the convention's legal content has received an unfavourable assessment, its indirect impact (political, we might say) on the development of transfrontier cooperation in Europe has been considerable.

First of all, the Convention represents a recognition of the existence of transfrontier cooperation and of the right of territorial communities – within clearly defined limits and in particular with due regard for the requirements of the territorial sovereignty of the State in which they are situated – to develop such activities outside the national territory and legal system. The discrepancy between this political recognition and the absence of practical legal solutions in the Convention for territorial communities led to the development of international agreements of more limited geographical scope between neighbouring States wishing to promote the development of such cooperation[86].

Secondly, the existence of this Convention led to the "normalisation" of this matter, which emerged from the sidelines with clear transfrontier institutional achievements, such as the Euregio, the *Communauté de Travail des Alpes occidentales*, *Alp-Adria*, *Arge-Alp*, the *Communauté de Travail des Pyrénées*, the *Communauté de Travail du Jura*, the *Conseil du Léman*, and more recently a number of Euroregions in Central Europe, which refer to this text as underpinning the basis of their approach. The establishment of these institutions show a political acceptance, particularly by the foreign ministries of the States concerned, of the reality of transfrontier relations; but the bodies that have been set up see their scope for action very much limited owing to the absence of a relevant legal framework, established in advance; hence the need for new measures.

1.2 The recognition of the right of territorial communities to cooperate and the rule on referral to their own competences

An initial tentative and discreet attempt to recognise the right of territorial communities to engage in transfrontier cooperation appears in the European Charter of Local Self-Government, a major instrument of the Council of Europe, whose scope extends well beyond issues relating to transfrontier cooperation[87]. For example, Article 10 of the Charter, entitled "Local authorities' right to associate", includes a third paragraph, which reads as follows, "Local authorities shall be entitled, under such conditions as may be provided for by the law, to cooperate with their counterparts in other States."

Strictly speaking, this is not a recognition of a subjective right[88] benefiting territorial communities, but the possibilities for cooperation do seem to be more real here than in the convoluted and unconvincing wording of Article 1 of the Outline Convention. For example, the Explanatory Report of the European Charter explains that, "Direct cooperation with individual local authorities of other countries should also be permitted, although the manner of such cooperation must respect such legal rules as may exist in each country and take place within the framework of the powers of the authorities in question"[89]. But neither is this simply an undertaking "to foster and promote"; rather, this is about ensuring that such cooperation is possible.

Clearly, neither the Charter nor its Explanatory Report provides information on how this possibility should be realised. There is only a reference to "provisions of the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities (21 May 1980, ETS No 106) [which] are particularly relevant in this respect, [...]"[90]. The wording of this referral is surprising, as if commentators on the Charter (who could not have been any more official) were themselves not convinced of the effectiveness of the provisions of the Outline Convention; it is not mentioned that they are enforceable nor that they offer a legal framework for such cooperation, just that they "are particularly relevant in this respect".

The reality of these weaknesses became clear following a study carried out by the Secretariat of the Council of Europe in 1990. This study highlighted the fact that neither the solutions in the Outline Convention, nor even the appended model and outline agreements, were being used as set out: either by States or by the territorial communities of States which had ratified the Outline Convention[91]. It was therefore decided that in 1992 work would begin on an *Additional Protocol to the Outline Convention*[92]. This was opened for signature on 9 November 1995 at the headquarters of the Council of Europe, in Strasbourg. So far, this Additional Protocol has been ratified by 17 Member States[93], while seven have signed it but have yet to proceed with ratification[94].

The principal aim of this Additional Protocol was to complete the work that began with the Madrid Convention. The 15 years that have elapsed since the Outline Convention was opened for signing show that the fears of foreign ministries, namely that the development of this cooperation would strip them of their monopoly on the international relations of the State and undermine the territorial integrity and political cohesion of European States, were groundless.

Furthermore, as we have seen, the study carried out by the Secretariat of the Council of Europe in 1990 highlighted the fact that none of the States party to the Outline Convention believed that the provisions of the Convention had actually been applied to cooperation taking place at their borders.

Finally, organisations which had sprung up along European borders since 1980 in an attempt to provide a stable institutional framework for cooperation that until that point had been isolated, suffered from a legal deficit (the absence of a statute providing them with a legal personality and the problem of which of the legal systems concerned had jurisdiction). There was therefore a desire to remedy this shortcoming.

For this reason, in contrast to the Outline Convention, the Additional Protocol of 1995 had substantive content. For example, and this is the principal achievement of this convention-based act, the Protocol explicitly states that, "Each Contracting Party shall recognise and respect the right of territorial communities or authorities under its jurisdiction and referred to in Articles 1 and 2 of the Outline Convention to conclude transfrontier cooperation agreements with territorial communities or authorities of other States in equivalent fields of responsibility, in accordance with the procedures laid

down in their statutes, in conformity with national law and in so far as such agreements are in keeping with the Party's international commitments" (Article 1 (1)).

This time, the subjective right of territorial communities (within the limits of their equivalent fields of responsibility[95]) to develop transfrontier relations was recognised. These communities no longer had to rely on the commitment of States to "foster and promote" such cooperation, but were fully entitled, on their own initiative, to undertake transfrontier measures. This principle is found in all legal instruments established after the Protocol[96]. It lies at the heart of territorial communities' right to cooperate beyond their national borders. It is also found in the Regulation on a EGTC, which states in Article 3 (1) that, "An EGTC shall be made up of members, within the limits of their competences under national law, belonging to one or more of the following categories [...]". This is thus an achievement of the Council of Europe, which not only stands alongside Regulation EC No 1082/2006, but even serves as a basis for it.

1.3 The rule on referral to national law for the purpose of implementation

Given that territorial communities may cooperate and that this cooperation may be based not only on legal rules but also result in legal acts – even the establishment of institutions – it is important to know which law will be applicable to these acts adopted within the framework of transfrontier cooperation. A clear rule on the implementation of decisions taken within the framework of transfrontier cooperation has therefore been formulated:

"Decisions taken jointly under a transfrontier cooperation agreement shall be implemented by territorial communities or authorities within their national legal system, in conformity with their national law. Decisions thus implemented shall be regarded as having the same legal force and effects as measures taken by those communities or authorities under their national legal system." (Article 2).

This rule establishes a strange dichotomy. As stated in the Explanatory Report, "The principle adopted is that a decision by an advisory body does not in itself have any legal force or legal effects and has to be the subject of a decision by each of the territorial communities or authorities party to the agreement so that it is, "transposed" into the national legal system to which the territorial communities or authorities belong, complying with the rules and procedures linking them"[97]. So, "decisions" taken at transfrontier level do not themselves have legal force, but they impose on communities that have adopted them the obligation to "transpose" them into their national legal systems, in order to provide them with legal force. The question remains as to the nature of the obligation imposed on communities which are party to a transfrontier decision-making process: moral, political, based on the rules of good neighbourliness, ... ? Neither the Protocol, nor subsequent instruments, provides a satisfactory solution to this issue[98]. The solution adopted in subsequent texts is generally to refer to national law to determine the nature and scope of obligations[99] (often the law of the State where a transfrontier cooperation body has its head offices, if such a body has been established)[100], which upsets the balance amongst the parties concerned and makes it difficult for members whose national law is no longer applicable by virtue of such a rule to accept substantial legal commitments. Regulation EC No 1082/2006 adopts the solution that involves the least uncertainty – the applicable law is the one of the Member State where the head office of the EGTC is located (Article 8 (2) (e)) - but is the least fair. This could be regarded as regrettable. As regards the law applicable to implementation, more innovative solutions appear in subsequent agreements (and in Article 2 of the Regulation on a EGTC).

The Council of Europe's contribution here is therefore limited to the principle of referral to national law, and does not cover how this referral might be realised.

1.4 The possibility of establishing a common legal structure

Another major contribution of the Additional Protocol is that, by way of responding to a request from local stakeholders and "sticking to" a practice widely carried out (specifically in the form of "working communities"), it provides for the possibility of providing transfrontier cooperation bodies with a legal status: the Protocol stipulates that, "A transfrontier cooperation agreement concluded by territorial communities or authorities may set up a transfrontier cooperation body, which may or may not have legal personality" (Article 3). Where appropriate, this legal personality will be "defined in the law of the Contracting Party in which its headquarters are located" (Article 4). Alternatively, an institutional structure of this kind might be considered as "a public law entity and that, for the purposes of each Contracting Party's legal system, any measures which it takes are to have the same legal force and effects as if they had been taken by the territorial communities or authorities which concluded the agreement" (Article 5). This second solution does not seem to be absolutely clear as regards the legal consequences that it might entail, and several countries have decided to approve only the legal arrangements consistent with the provisions of Article 4, ruling out the possibility of two public law entities in parallel, amounting to a single institutional system, as envisaged in Article 5. Furthermore, such a choice is expressly authorised in Article 8 of the Protocol.

This principle of two legal systems operating simultaneously and in parallel does not appear to have been implemented in practice. Broadly speaking, it is the system of referral to a single law, chosen on the basis of where the transfrontier cooperation body has its headquarters, which has prevailed. But while the Council of Europe has been innovative (following in the footsteps of the 1986 Brussels agreement and the Isselburg-Anholt agreement), the rules of referral that it proposes are too general to be clearly effective. A system based on referral to national rules requires detailed and specific consideration of the institutions and legislation of the countries concerned, which is not possible with a legal instrument designed to apply in over 40 European States. It is for this reason that despite the undeniable progress that this Additional Protocol represents, it does not seem to have been applied generally; instead, States wishing to offer their territorial communities a legal framework to develop transfrontier relations with the public entities of neighbouring States tend to draw up international agreements of more limited territorial application and with far more specific content, in the majority of cases bilateral agreements (see section B below).

1.5 The extension of rules on cooperation beyond neighbours

On 5 May 1998, a second protocol was opened for signing by members of the Council of Europe. Fifteen Member States of the Council of Europe are party to it[101], while seven others have signed it but have yet to proceed with ratification[102]. According to Article 2 of the Outline Convention of 1980, "For the purpose of this Convention, transfrontier cooperation shall mean any concerted action designed to reinforce and foster neighbourly relations between territorial communities or authorities within the jurisdiction of two or more Contracting Parties." Consequently, the rules on transfrontier cooperation drawn up within the framework of the Council of Europe apply only to neighbourly

relations, and not to relations between territorial communities which are not geographically close to each other.

While the practical and political issues involved in cooperation between territorial communities situated some distance from each other are certainly different from those involving cooperation between neighbouring authorities, the legal issues and rules necessary for the development and administration of such cooperation "beyond the neighbourhood" are the same. Some observers and commentators have already raised this point[103].

Furthermore, study of practice shows that relations beyond the geographical neighbourhood have also been developed quite extensively, perhaps as a part of the process of globalisation[104]. It was therefore important that there were legal rules, adopted at European level, to regulate this type of cooperation, as there are for neighbourhood cooperation.

The content of the second additional protocol could be summed up in three very short articles, in particular Article 3, which states that, "The Contracting Parties to this Protocol shall apply, mutatis mutandis, the Outline Convention to interterritorial cooperation." Article 4 uses the same wording with reference to the Additional Protocol, which is more important in terms of legal effect, as we have seen. Furthermore, Article 1 defines "interterritorial cooperation" in very broad terms, as "any concerted action designed to establish relations between territorial communities or authorities of two or more Contracting Parties, other than relations of transfrontier cooperation of neighbouring authorities, [...] ". This covers everything, even if this definition is too broad in our view. As for the term "interterritorial", which was eventually adopted to refer to this type of cooperation, after a long period during which they had proposed the use of the term "interregional", the proponents of this text took account of the fact that a large number of cities had also developed this type of cooperation; hence the use of this broader term. This presents problems especially when such cooperation involves communities which are not, by nature, territorial, such as the French-speaking Community of Belgium. In our view, the term "transfrontier cooperation" seems to better reflect and encompass the diversity of existing situations. The English text of Article 265 of the Treaty of Rome, as amended in Amsterdam, uses the term "cross-border cooperation"[105].

1.6 Draft of an agreement on a uniform law

In spite of this, the government and independent experts consulted by the Council of Europe believed that the regulatory framework provided by the Outline Convention and its two Protocols remained inadequate, specifically because it resulted in too broad a range of bodies engaged in trans-European cooperation[106]. In particular, as far as the legal statute of "Euroregions" was concerned, in 2004 the Council of Europe experts were of the view that however inventive it was, the system established by the Additional Protocol was incomplete. It contained hardly any basic rules of its own while the national rules to which it referred in most cases varied from one legal system to another. It was also very complex. These various factors made the Protocol difficult to use[107].

For this reason, a group of government experts came up with the idea of a draft supplementary protocol with a view to offering Member States a complete framework for the establishment of Euroregions, under a new pan-European legal form, called "Euroregional Cooperation Groupings" (ECG).' This draft, which would complete the Additional Protocol of 1995, was limited to proposing a statute for Euroregions consisting of a set of relatively detailed international rules, combined with

complementary national rules to which they referred[108]. The draft was ambitious both in terms of its legal form[109] and its objective, since it involved setting up cooperation bodies with general responsibility for promoting, supporting and developing, for the benefit of the populations concerned, neighbourly relations between its members[110]. What is more, the draft was so ambitious that it would change its legal status. The idea of an additional protocol to accompany the Outline Convention and its first protocol[111] was abandoned in early 2006 in favour of a draft of a new convention[112]. Unfortunately, the draft submitted met with limited approval on the part of Member States and the majority of those who expressed views on this matter preferred to adopt a non-binding declaration, rather than a legal text of international law[113]. It is therefore unlikely that a legal instrument of this kind will see the light of day in the near future.

It should be stressed, however, that the approach adopted by the Council of Europe experts differs from the solutions found in Regulation (EC) No 1082/2006 on the EGTC on several points. First of all, their goal was to create a uniform law, leaving only limited space for national rules which, by virtue of traditions and State structures, differ from one State to another. The result is a detailed and complex international text – draft protocol No 3 of 2004 contains 76 articles, the preliminary draft convention of 2006 has 68 articles. This contrasts strongly with the Regulation on a EGTC, which contains only 16 articles and very few provisions of substantive law. What is surprising here is that the Community institutions, which by means of a Community Regulation are able to adopt legal rules with direct and uniform effect throughout the Community[114], largely refrained from doing so, with Regulation (EC) No 1082/2006 containing only a very limited number of provisions of substantive law. At the same time, the Committee of Experts of the Council of Europe, which has at its disposal legal instruments that are structurally unsuited to producing law with uniform effect - since international conventions are not necessarily ratified by all States and do not necessarily have the same legal effects in each national legal system - has sought to achieve this, so far without success. So, by default, the failed but noble ambitions of those who drew up the draft legal instruments within the Council of Europe have undoubtedly highlighted - putting aside the possible disappointment regarding the somewhat inadequate content of the Regulation on the EGTC - the sound nature of the European Commission proposals, which have succeeded in producing a directly applicable regulation within a very reasonable period of two years.

In short, the contribution of the Council of Europe has been vital in terms of principles but far less tangible as far as the adoption of effective and applicable rules is concerned. While the Council of Europe has unquestionably played a pioneering role in drawing up legal rules on transfrontier cooperation in Europe, its success in actually implementing these rules has been limited; in our view, there are three major reasons for this. That said, the very modest practical outcomes do not prevent these legal rules from having a degree of influence on the content of other international agreements and practices in the field of transfrontier cooperation.

First of all, not all EU Member States are bound by the rules adopted within the framework of the Council of Europe. Cyprus, Estonia and Greece, for example, are not bound by the Outline Convention of 1980. In these three particular cases, it is easy to see the political reasons why these States have not wanted to encourage neighbourhood cooperation between their territorial communities and partners situated along disputed borders. As far as the first additional protocol is concerned, apart from the three States mentioned above, which cannot become party to it, there are also Belgium, Denmark, Spain, Estonia, Finland, Hungary, Ireland, Italy, Malta, Poland, Portugal, the Czech Republic, Romania and the United Kingdom; in other words 17 States of the 27 members of the EU

which are not bound by a single major rule on transfrontier cooperation – remember that the Outline Convention contains no legally binding provisions! In the light of this alone, the adoption of Regulation (EC) No 1082/2006 represents tremendous progress. As far as interterritorial cooperation is concerned, Belgium, Denmark, Spain, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Malta, Poland, Portugal, the Czech Republic, (Romania) and the United Kingdom, that is to say 19 States of the 27 members (or 18 out of 25), are not bound by European legal rules. Consequently, this 'Council of Europe acquis' is more a question of principles than applicable law, and for a majority of EU Member States, the entry into force of Regulation EC No 1082/2006 on the EGTC offers the first multilateral legal framework for territorial cooperation.

Secondly, as for any text of international law, the legal effects of the Outline Convention and its Additional Protocols on the legal persons of a national legal system (in this case territorial communities and where appropriate private individuals) are determined by this national legal system via the implementing bodies that it designates (executive and judiciary principally). This is a slight but significant difference from Community law, which, since the well-known judgement of the Court of Justice of the European Communities of 1963, has direct and uniform effect in all States which are party to the Community treaties.

The legitimate objective of a law on transfrontier cooperation - which would have to cover legal relations deriving from situations linked with several (national) legal systems and very likely to have effect in these systems - would be to produce a uniform law, applicable to such relations, regardless of the territory and legal system in which they would have effect. The reality is quite different, and the transposition of the rules of the completed Outline Convention and its Additional Protocols into national legal systems is far from resulting in uniform solutions. For example, the provisions of the Additional Protocol which refer to "the law of the Contracting Party" are interpreted very differently in each State; some States consider that such a referral applies only to laws specifically drawn up to cover transfrontier cooperation, while others view it as authorising the use of any national legal text, provided that it is of a legislative nature.

For this reason, the Council of Europe law cannot succeed in creating a body of uniform rules applicable to transfrontier cooperation wherever this cooperation takes place in Europe; this limits the practical significance of Council of Europe law both for States and territorial communities.

And thirdly, as it is unable to propose rules with uniform legal effect in all national legal systems, the Council of Europe has instead put forward rules on transfrontier cooperation law which are applicable to or, where appropriate, link one or several national legal systems. For this reason, the transfrontier cooperation law of the Council of Europe contains hardly any substantive rules of its own; even recognition of a right to transfrontier cooperation is based on referral to the competences of each territorial authority, as laid down by national law.

A "legal strategy" of this kind is perfectly viable and capable of producing effective results. In practice, however, referrals to national legal systems involve very specific rules, often in terms of content, even in nature, which differ from one national legal system to another. In order to reassure central authorities that these international texts do not leave territorial authorities exposed to a world fraught with the dangers of international relations, and to provide territorial communities keen to develop such cooperation with the maximum legal security, it is important that referrals to national law are as specific as possible.

The diversity of the institutional and legal systems of the 45 Member States of the Council of Europe makes it impossible to carry out referrals specifically aimed at certain rules or institutions of each national legal system by means of a single European convention-based instrument. It is for this reason that, parallel to the development of rules at European level, within the Council of Europe, a number of States have established bilateral agreements (or multilateral obligations, such as the Karlsruhe agreement of 1996 which applies to four States[115]), making it possible to carry out referrals tailored to the specific features of the legal systems concerned.

This relatively harsh overview of the contribution of the Council of Europe to the development of a transfrontier cooperation law does not, however, diminish the important role that this organisation has played or may still be called on to play in the future[116]. The very modest practical outcomes do not prevent these legal rules developed within a multilateral European framework from having a significant influence on the content of other international agreements and practices, including the Regulation on the EGTC, as we will see below. One criticism is that Council of Europe law is not formulated in a way that enables it to be implemented easily and directly. On the other hand, it cannot be denied that in political and conceptual terms the joint efforts of European States within the Council of Europe have resulted in the recognition (1980) and later the actual establishment (1995) of a European law on transfrontier cooperation.

2. Community law

In Community law, procedures for adopting instruments are better defined and more effective than in conventional international law, even where this is set forth in an elaborate institutional framework such as that of the Council of Europe[117]. On the other hand, Community law requires those with authority, particularly the Commission, which has sole right of initiative[118], to be able to base their action on a power conferred on the Community by the EC Treaty[119]. The EC Treaty does not lay down any basis for specific powers in the field of territorial or cross-border cooperation[120], which is why no specific EC legal framework has thus far been developed.

The Treaty of Rome did contain a specific clause allowing appropriate decisions to be made, where all the Member States agreed, "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers ..."[121]. However, this clause only covered "one of the objectives of the Community" in the context of the operation of the common market. It is accepted by legal theory and case law[122] – and explicitly by Article I-5 of the Constitutional Treaty – that national or subnational procedures for achieving these Community objectives, and the implementation of Community rules and European integration, must not impact on Member States' organisational structure. Therefore, the provisions of Article 235 cannot be applied in this kind of situation.

However, when the Treaty of Rome was amended in Amsterdam, the concept of cross-border cooperation[123] was introduced into the Treaty. It is, in fact, stipulated that "the Committee of the Regions shall be consulted by the Council or by the Commission where this Treaty so provides and in all other cases, *in particular those which concern cross-border cooperation*, in which one of these two institutions considers it appropriate"[124]. This phrase is, to say the least, curious, as provision is made for the Committee of the Regions to be consulted on a matter which does not appear to be governed by the EC Treaty. However, as will be shown, Community policy was addressing this issue long before the Amsterdam amendment.

2.1 Cross-border cooperation in the area of economic and social cohesion: requirements laid down by the regulations introducing financial instruments

Cohesion and the major policy related thereto were introduced in two stages. First of all, the European Regional Development Fund was set up in 1975. Then the Single European Act (1987) included a new title in the Treaty, on economic and social cohesion policy (Articles 130 A to 130 E TEC, currently Articles 158-162 TEC).

In 1975, Article 5 of the ERDF Regulation stipulated that the Commission, when deciding on the conditions for granting financial assistance from the ERDF, was to examine in particular "whether the investment falls within a frontier area, that is to say, within adjacent regions of separate Member States"[125]. The Commission fully applied this criterion and when, following the amendment of the EC Treaty by the Single European Act, it was given the task of coordinating and streamlining use of the Structural Funds, it set up in 1990 a Community Initiative Programme known as Interreg, which was extended until 2006. In this framework, the Commission identified three types of priority actions, namely:

- joint implementation and planning of cross-border programmes;
- introduction of measures to improve information flow on all sides of borders;
- setting-up of joint institutional and administrative structures to support and encourage cooperation[126]. Thus, even without a legal basis underpinning the drafting of regulatory measures, the Commission urged national and subnational players in cooperation around border areas to set up joint cooperation structures. However, not having the legal capacity to propose a Community regulatory framework to this end, the Commission confined itself to playing a role of encouragement. A good many "Community rules" were therefore adopted on cooperation (only "transfrontier" – i.e. neighbourhood – cooperation, at the time). It was not until the Interreg II programme (1994-1999) that strands B (transnational cooperation) and C (interregional cooperation) were included in the Interreg programme; from then on they were part of territorial cooperation.

The Community initiative Interreg II pushed even harder for joint institutional structures: the relevant notice stated that, when granting Community assistance to border areas under the Interreg II initiative, the Commission was to give priority to proposals made in cooperation with regional and local authorities in border areas and, in internal border areas, to proposals comprising the creation or development of shared institutional or administrative structures for widening and deepening cross-border cooperation between public institutions, private organisations and voluntary bodies. As far as possible, these institutional or administrative structures were to have the power to implement projects planned jointly using their own resources[127]. The Commission's aims detailed in this notice tally completely with the objectives which the EGTC is supposed to achieve.

However, mere encouragement, based on the principle that systems other than Community law (in particular developed by the Council of Europe) lay down rules enabling joint cross-border institutions to be set up, did not work. Indeed, the legal difficulties were substantial enough to make it almost impossible to set up a cross-border institutional structure which was clearly defined in legal terms (as regards both its existence and the legal rules applicable to these actions) and could be responsible for implementing cross-border projects. Moreover, while not losing sight of the objective of cooperation

along internal and external borders, the Commission had to take into account criticism – particularly from the Court of Auditors[128] – when defining the CIP Interreg's priorities. The possibility of a working arrangement in a specific field between the Council of Europe, which would develop the regulatory framework allowing the creation and operation of cross-border structures, and the EC, which would encourage development of cross-border (and subsequently transnational and interregional) activities, proved to be unrealistic.

2.2 Use of a Community legal instrument intended for a different purpose: the EEIG

Taking into account the implications of the implementation of the common market in terms of economic players' organisational needs, in particular to cope with the opportunities and constraints related to this great market, the Commission proposed the creation under Community law of a European Economic Interest Grouping[129]. This proposal was based on the observation that "to bring about this single market and to increase its unity a legal framework which facilitates the adaptation of their activities to the economic conditions of the Community should be created for natural persons, companies, firms and other legal bodies in particular; … to that end it is necessary that those natural persons, companies, firms and other legal bodies should be able to cooperate effectively across frontiers;"[130].

Thus, while the objective of a grouping of this kind ties in with cooperation between local and regional authorities located on different sides of national borders – local and regional authorities are for the most part legal entities and can therefore be covered by virtue of this – it should, however, be pointed out that its purpose "is only to facilitate or develop the economic activities of its members to enable them to improve their own results". Now, when implementing cross-border, transnational or interregional cooperation, local and regional authorities are not generally pursuing a direct economic goal (on their own behalf[131]), although the overall objective of economic and social cohesion is economic development.

The mainly economic and ancillary nature[132] of the European Economic Interest Grouping makes it ill-suited to cross-border cooperation activities, although some successful experiments have nonetheless been carried out using this instrument. The list of examples includes: the *La Thuile - La Rosière "Sud Mont-Blanc"* EEIG (management of ski resorts), *The cross-border agency for the Bayonne-San Sebastian Eurocity* EEIG, the *Euroregion* EEIG, associating Brussels, Flanders, Kent, Wallonia and the Nord-Pas de Calais region, and the *TRIURBIR* EEIG, associating the towns of Castelo Branco (Portugal) and Caceres and Plasencia (Spain).

Moreover, unlike the EGTC, the European Economic Interest Grouping has to have recognised legal capacity but does not necessarily have to have recognised legal personality[133]. Now, in the field of cooperation, particularly cross-border cooperation, one of the difficulties lies precisely in the lack of clear rules on the legal personality of a joint cooperation body. These two difficulties mean that the European Economic Interest Grouping does not have a structure suited to the needs of cross-border, transnational or interregional cooperation between subnational public authorities, as, moreover, is explicitly acknowledged by the Community institutions: the recitals of the Regulation on a European Grouping of Territorial Cooperation state: "The existing instruments, such as the European economic interest grouping, have proven ill-adapted to organising structured cooperation under the Interreg initiative during the 2000-2006 programming period" [134].

It can therefore be concluded that, although the European Economic Interest Grouping has in certain specific cases served as a legal channel for a particular cooperation activity, it is more as an example of a flexible transnational cooperation structure than as a legal instrument as such that it is relevant to cooperation between local and regional authorities from different Member States.

On a wider note, it is therefore clear that, although Community law has encouraged the development of territorial cooperation (through the conditions for granting financial assistance) and provided a number of instruments which could in certain circumstances be used to facilitate transnational cooperation (such as the EEIG), it has not, until the adoption of the Regulation on an EGTC, proposed a suitable, effective legal framework providing appropriate legal certainty for development of cooperation.

B. AT BILATERAL (OR MULTILATERAL) LEVEL

Unlike the legal rules which exist or could exist at European level and could, where necessary, as such prove applicable to the implementation of cooperation activities within the EU, it goes without saying that the practical solutions laid down in bilateral or multilateral agreements are by their nature not directly applicable at European level except with a view to cross-border cooperation carried out within the geographical area covered by the individual agreement in question. On the other hand, some of these agreements have facilitated the development of useful legal solutions, either as alternatives or as models detailing the operation of EGTC-type cross-border structures. It is therefore because of the legal solutions whose development they have facilitated, regarded as models, that we are interested in these solutions developed in the field of bilateral cooperation.

It is necessary, both in terms of historical progression and in terms of the legal provisions and principles laid down in these agreements, to make a distinction between neighbourhood agreements, which regulate issues concerning the different sides of a particular border between Member States on an *ad hoc* basis(1) – which could include procedures for grouping together different public players in a framework similar to that of the EGTC – and agreements signed between Member States with a view to proposing a legal framework for subnational public players' cooperation activities (2). In both cases – particularly because it is less difficult to find a common solution when there are only two or a few partners – the solutions identified are more appropriate and innovative than those developed at European level.

1. Ad hoc solutions

There are numerous agreements between neighbouring Member States, a number of which are explicitly intended to develop cooperation across a border. However, unlike the Regulation on an EGTC, these agreements do not set up a legal framework within which players can develop specific cooperation initiatives according to their needs; on the contrary, they regulate specific situations by means of mechanisms geared to a clearly-defined situation (i.e. institutional) and issues. They therefore hardly hold any interest as regards Regulation (EC) No 1082/2006, both because they only concern relations between two adjacent countries and not transnational or interregional cooperation, and, most importantly, because the approach underpinning them is different from that of the

Community Regulation. However, it would be very useful to examine them from the point of view of setting up EGTCs, particularly heterogeneous EGTCs[135], grouping together Member States and local and regional authorities.

Indeed although, as has been seen above[136] and will be shown later on (see paragraph 2 of this section, below), the legal requirements regarding the definition of a legal framework for future activities necessitated a clear distinction to be made between countries, on the one hand, and local and regional authorities, on the other, with clear compartmentalisation of these different entities, *ad hoc* neighbourhood agreements did not have to take this separation into account. In fact, in coming to an agreement on procedures for specific cooperation, which they would help to implement, (sovereign) countries were free to decide to involve their local and regional authorities in cooperation mechanisms. And they were not backward in doing so. Thus, the cooperation mechanisms for numerous agreements of this kind included bilateral commissions or committees which often involved local or regional authorities alongside national authorities. Joint commissions such as these were set up (and many of them are still operating) across borders in Western Europe in the late sixties or early seventies last century. Agreements were thus concluded:

- between the FRG and the Netherlands, setting up a commission for land-use planning (1967);
- between France, Germany and Luxembourg, setting up an intergovernmental commission for cooperation in border regions (1969);
- between France and Belgium, setting up a commission for land-use planning in border regions (1970);
- between Belgium and Luxembourg, within the framework of Benelux, setting up a sub-commission for regional cooperation (1971);
- between France and Germany, setting up a commission for cooperation in the field of land-use planning (1971);
- between Germany and Switzerland, setting up a bilateral commission for land-use planning (1973);
- between Germany and Austria, setting up a commission for land-use planning in border regions (1973);
- between the Canton of Geneva and the French Departments of Ain and Haute Savoie (but signed by France and Switzerland and not the subnational entities referred to in its title), setting up a commission for the study of neighbourhood issues (1973);
- between Germany, France and Switzerland, setting up an international commission for study of solutions to neighbourhood issues in the border regions (1975);
- between France and Italy, setting up a border commission (1981).

Thanks, in all probability, to the undertakings given in the context of the Council of Europe and subsequently reproduced bilaterally to set up a legal framework which would then allow cooperation to be pursued at the initiative of subnational authorities, these cooperation procedures were gradually abandoned. However, it should be noted that, since 1993, this practice has been reintroduced in relations between countries of central and Western Europe, and many cross-border initiatives have resulted from what were initially inter-state agreements. Thus, for example, although its title might be deceptive, the Carpathian Euroregion (in the operation of which local players are involved) is the product of a 1993 agreement between the Hungarian, Polish, Slovakian and Ukranian Foreign Affairs Ministers. Likewise, the Stability Pact for South-Eastern Europe was adopted in Cologne by state

representatives but involved local and regional players in the procedures for implementing cooperation initiatives.

Cross-border cooperation became associated with the subsidiary principle, with national players using framework agreements to establish legal frameworks (see below) and local and regional players negotiating and implementing specific projects within these frameworks. Regulation (EC) No 1082/2006 is therefore a kind of revolution, restoring Member States' position as players in territorial cooperation projects so that they are no longer confined to the role of establishing legal frameworks[137], seeing them once again as players in a system of management which follows the principles of multi-level governance of relations between European Member States and their regions[138]. Moreover, these principles have, since 2001, underpinned the approach to European governance advocated by the European Commission[139], and the Regulation on an EGTC merely incorporates them into the specific context of territorial cooperation.

Thus, it might be interesting to look at the various *ad hoc* mechanisms put in place in the context of bilateral cooperation with a view to planning practical solutions for setting up heterogeneous EGTCs.

2. Framework agreements

The main approach for developing cross-border cooperation, particularly from the late 1980s onwards, was a clear division of labour between countries, which established legal frameworks for cooperation between subnational entities from different countries, and regional or local players, which, within the framework of their own remits and with a view to meeting the needs of the communities concerned, defined and implemented specific cooperation projects. The 1980 Madrid Outline Convention reflected this, making a distinction in its appendix between agreements to be signed between [CoE member] states, on the one hand, and those to be signed between local authorities, on the other. (See point A.1.1. of this chapter, above.)

These framework agreements developed the concept of a structure for cooperation between subnational entities and laid down cooperation arrangements which very often involved the setting-up of a cross-border cooperation body with legal personality. Looking at the different solutions found and proposed, we will see how relevant they are to the EGTC (and vice versa, in that it is by no means mandatory to use an EGTC[140], which means that, insofar as they are in a region or area in which a solution has been laid down by a bilateral framework agreement, some local and regional players could favour these legal solutions "to the detriment" of the EGTC.).

The following cooperation arrangements seem to be relevant: The possibility for regional and local players to opt for cooperation enshrined in law but without specific legal structure (without a cross-border cooperation body) (2.1). Then, the possibility for one partner to be empowered by the other(s) to perform a task on behalf of their community (2.2). A more complex case, which needs to be divided into subcategories, is where a cross-border body is set up (2.3); a distinction should be made here between cross-border cooperation bodies without legal personality (2.3.1), cross-border cooperation bodies with legal personality under private law (2.3.2), cross-border cooperation bodies with personality under public law by referral to a structure existing under national law (2.3.3) and cross-border cooperation bodies whose characteristics are defined principally by the partners and to a lesser extent by national law (2.3.4).

2.1 The possibility of an agreement on cross-border cooperation without a permanent structure (convention)

This solution is the simplest in legal terms and could be effective for some tasks which merely require regulation. Thus, for example, an agreement on cross-border fiscal retrocedence or on joint financing of a concern located in one Member State alone may very well be wholly regulated by a convention, without the need for a permanent cooperation structure to be set up to implement the solution. This was implicitly provided for in the Additional Protocol to the Madrid Outline Convention (Article 1(2) and Articles 2 and 3 referred to "transfrontier cooperation agreements" although these were not defined anywhere). We know that these agreements could not have direct effect[141], that they entailed "only the responsibilities of the territorial communities or authorities which have concluded [them]"[142] and that, where appropriate, they could "set up a transfrontier cooperation body" (Article 3). On the other hand, no indication was given as to the law applicable to the Convention itself. Fortunately, this was corrected in subsequent bilateral agreements.

The 1986 Benelux Convention was more explicit, as it envisaged the signing of administrative agreements[143], but little is known about what law was to apply to them or any constraints on their content.

The Isselburg-Anholt agreement, signed between Germany and the Netherlands, provided for its part for the signing of public law agreements between public bodies, provided that under their domestic legislation the public bodies in question were authorised to do this[144]. Thus, the signing of these agreements was, where necessary, subject to the provisions of domestic law. The agreements had to be in written form[145] and had to include both a provision on the conditions under which cooperation could be terminated[146] and a provision laying down the arrangements for the partners to honour their undertakings where they were liable to third parties on the basis of the agreement[147]. In line with the Additional Protocol to the Madrid Outline Convention, it was also stipulated that, except where otherwise stated in the convention in question, the applicable law was that of the contracting country in which the obligation arising from the agreement was to be made good[148].

The Bayonne Treaty (France-Spain) provided for cross-border cooperation conventions, which were to define cross-border cooperation arrangements under that Treaty[149] and enable local and regional authorities to set up and manage public services and facilities and to coordinate their decisions[150]. However, in areas of common interest, as in the case of the EGTC, it was specified that a convention could not define police or regulatory powers or the responsibilities discharged by local or regional authorities or their bodies as entities invested with state authority (France) or acting under authority delegated by the state (Spain)[151]. Lastly, it was specified, as in the Isselburg-Anholt agreement, that the parties could choose to apply either of the two party countries' laws to the agreement, but also that, in the event of a dispute over compliance with its requirements, the competent court would be that of the contracting party whose law had been opted for[152]. This provision was very useful in terms of legal certainty but had the disadvantage of increasing the disparity between the legal situations of the partners under the cross-border cooperation agreement as one would be forced to develop, as regards both substance and procedure, in line with the law of the neighbouring country rather than its own.

A further contribution on this matter came from the constraints laid down by the Karlsruhe agreement for this kind of cooperation convention, which was worded more clearly, to the effect that a cooperation convention could not define the powers exercised by a local authority as an entity invested with state power, nor police powers, nor regulatory powers[153]. Even more interesting, although it may seem to go without saying, is the provision that a cooperation convention could not modify the statutes or powers of local or regional authorities or of the local public bodies which were part thereof[154]. Then the Valencia Treaty (signed between Spain and Portugal), set forth a list of possible elements for inclusion in cooperation conventions between local and regional authorities, distinguishing between aims, objectives and subjects, excluding the same elements as the Karlsruhe agreement[155]. These constraints, which have been taken up by the Regulation on an EGTC[156], therefore seem to have been commonly accepted, with the exception of the 1985 Benelux agreement, which stated that where a convention was used to set up a public cooperation body, local and regional authorities could grant it regulatory and administrative powers[157]. This isolated solution does not seem to have been implemented much in practice, and the constraints on tasks which can be regulated by a convention between subnational authorities are appropriate.

However, it should be stressed that the constraints laid down by the various agreements discussed are less extensive than those laid down by Article 7(4) of the Regulation on an EGTC, which, by banning all tasks relating to "powers conferred by public law", makes it impossible to carry out any assignments whatsoever, as the powers of local and regional authorities are defined by public law in all European countries. This is even a fundamental principle of the concept of the rule of law, which all EU Member States are required to respect under Article 6(1) TEU[158]. If we compare its provisions with those of other agreements, we see that, with respect to assignments which can be carried out as part of territorial cooperation, it may be that the 2006 Regulation is excessively restrictive.

Another interesting conclusion that can be drawn from this comparison exercise is that, in all legal instruments, cooperation on the basis of a convention between partners – without that necessarily leading to the setting-up of a permanent cross-border cooperation structure – is an autonomous cooperation arrangement, which is not the case in the Regulation on an EGTC. Thus, in cases where cooperation does not necessarily require a cross-border cooperation body, Regulation (EC) No 1082/2006 would not be appropriate[159] and it would be useful for the partners concerned to adopt a different legal framework instrument on which to base cooperation; such arrangements are far from existing at all Europe's borders.

2.2 Cooperation convention empowering one of the partners to perform a task of common interest

This solution, which is relatively undemanding in institutional terms, could be very effective where performance of a task is clearly confined within the boundaries of one of the partners. It was explicitly provided for in the Isselburg-Anholt agreement, which made the creation of a mechanism of this kind the main element of public law agreements[160], and the Karlsruhe agreement, which specified that one or more partners could, under a cooperation convention, confer on one of them or on a cross-border cooperation body an assignment, authority or a public service concession[161]. The agreement stated that, in such circumstances, the partner or cross-border cooperation body performing one or more tasks for the other was to do so on behalf and on the instructions of the latter[162] and with due

regard for the domestic law of the partner giving the instructions (Article 6(1)). This solution seems complex in terms of effectiveness and legal certainty.

It should be stressed that this specific cooperation arrangement is explicitly provided for in Article 7(5) of the Regulation on an EGTC, but with one distinctive feature, as in this case one of the partners can be empowered to perform the tasks laid down by the EGTC. Does this solution, which is wholly unprecedented in respect of existing arrangements, derive from the structural difficulty caused by the fact that the Regulation on an EGTC does not provide for the possibility of adopting a convention without setting up an EGTC – i.e. a complication arises from the restrictive wording of the Regulation? On the other hand, is this an unprecedented rule intended to facilitate the creation of a joint cross-border body even if it means allowing it, particularly when faced with the potential danger of its action being blocked, to get round the problem by, on the basis of a unanimous decision by the EGTC members, transferring the task initially assigned to it to one of these members? That is not clear from our research. The fact remains that, despite similarities, there are considerable differences between the solutions laid down by the bilateral framework agreements and the solution provided for in Regulation (EC) No 1082/2006.

2.3 Possible creation by the partners of a cross-border cooperation body

This solution, which in practice is very important, is fully in line with the goal of the Regulation on an EGTC. It is also in line with an objective that the Commission has for a long time been assigning to bodies launching cross-border cooperation programmes, namely setting up a single authority which can manage the programme and measures on both sides of the border[163]. That said, although in practice the possibility of setting up these structures is widely acknowledged, legal solutions vary considerably. Thus, in some cases, the creation of structure without legal personality is provided for, or where legal personality is provided for, this can be under either public or private law. As we can see, the EGTC differs in a number of respects from the solutions already in practical use.

Some agreements, based on the Additional Protocol to the Madrid Outline Convention[164], started by laying down the principle of using a convention to set up a transfrontier cooperation body and then give details of different types. Thus, the Karlsruhe and Brussels (2002) agreements stated that transfrontier cooperation conventions could provide for the creation of bodies without legal personality (Article 9), the creation of bodies with legal personality (Article 10) and the creation of a local transfrontier cooperation grouping (Article 11) in order to ensure the effective implementation of cross-border cooperation[165]. Most referred directly to specific types of transfrontier cooperation body. The Regulation on an EGTC only provides for one type of cross-border cooperation body, so its sole objective is clear right from Article 1.

2.3.1 Creation of a structure without legal personality

The most simple case, provided for in practically all bilateral framework agreements, this solution does not meet the territorial cooperation needs identified by the Commission, which for some time has been calling for the option of a joint institutional structure which can, in particular, manage funds (e.g. open a bank account in its own name[166]). However, a possible solution could be for a body to have legal capacity but not its own legal personality – e.g. a government department, which might have its

own legal capacity while still being part of the state, which is a legal entity. Thus, also with a view to cross-border cooperation but *a priori* in respect of private economic bodies, the Regulation on the European Economic Interest Grouping states: "A grouping so formed shall … have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued" [167], while leaving it up to Member States to decide whether these groupings should have legal personality. This solution could therefore, despite its informal nature and limited symbolic weight, prove to be possible, even though the Regulation on an EGTC does not provide for this option.

However, a number of these bilateral framework agreements made it explicitly clear that structures without legal personality of this kind could not pass acts with binding (legal) effect, with regard to either third parties or their members. This applied to the intermunicipal work grouping provided for in Article 7 of the Isselburg-Anholt agreement of 25 June 1991. Article 9 of the Karlsruhe agreement of 23 January 1996 stated that these bodies without legal personality or budgetary autonomy, such as conferences, intermunicipal work groupings, study and reflection groups and coordination committees set up to study issues of common interest, make cooperation proposals, exchange information or encourage the bodies concerned to take the necessary measures to implement the specified objectives, had in any case to observe a minimum degree of formality. Article 9 of the Brussels agreement of 18 September 2002 made exactly the same statement.

This cooperation arrangement stops far short of the goals announced in the context of the various versions of the Interreg programmes in respect of establishing joint institutional structures. These structures will therefore not provide competition for EGTCs at all. However, because they are easy to set up and operate, they could prove useful for developing initial elements of cooperation for authorities which do not yet have substantial experience of how cross-border or transnational mechanisms work.

2.3.2 Creation of legal personality under private law

Theory and practice vary considerably on this issue. Some authors feel that the participation of foreign public partners depends solely on the conditions set by each national legal system for participation in its private law legal forms. Consequently, for these authors, if the tasks or assignments entrusted to a particular structure can be performed by a private law body – it goes without saying that use of public authority by a body with private law personality is in most legal systems banned or limited by strict rules on delegation of authority (such as in the context of a concession contract or a contract delegating authority for a public service) – and the national law in which the party authority is registered does not oppose this[168], participation in a national or foreign private law legal entity is a possibility which does not require particular regulation. The 1986 Benelux Convention took the same line: Article 1 stated that, without prejudice to cooperation possibilities under private law, the territorial communities or authorities of the contracting parties, mentioned in Article 1, could within the bounds of the powers conferred on them by the domestic law of their country cooperate on the basis of the Convention. According to the Convention, therefore, this solution was possible outside the legal framework defined by the Convention itself. The same rule could be preserved after the entry into force of the EC Regulation on an EGTC; within the limits described above, this kind of cooperation is still possible.

Other bilateral agreements defined participation in these private law structures, even requiring it to be explicitly provided for by domestic law[169].

In practice, a distinction needs to be made between two main types of private law structures to which public entities have access to form their cooperation framework. On the one hand, there is the possibility of using non-profit cooperation structures, which can be grouped together generically as associations. These are relatively flexible legal structures and the limits on their economic activities do not usually pose problems for local and regional authorities (which do not pursue profit-making on their own account). On the other hand, these structures operate in a way that by no means guarantees the rights of third parties (i.e. citizens), which means that it is sensible to recommend limiting use thereof to quite specific cases in which citizens' rights – safeguarded by the provisions of national public law – are in little or no substantial jeopardy. In addition to these legal entities made up of their members, it should be pointed out that countries following the German legal tradition permit use of non-profit legal structures set up with their own financial resources – along the lines of foundations[170] – which can indeed prove useful for targeted actions which do not require public authority but need capital to be raised (e.g. to set up an economic operator contributing to the establishment of land reserves as part of a cross-border land-use planning project, or to provide cross-border support for private – particularly cultural, educational or sporting – initiatives.

The second type is private commercial structures (joint-stock companies, cooperative societies, limited liability companies etc.). As in the case of the European Economic Interest Grouping (the scope of which specifically covers economic activities), this solution is possible provided that the cooperation activity is primarily economic (e.g. joint management of infrastructure or services which can be used for a fee)[171]. The most important question in this case is whether, under the rules of their national public law, local and regional authorities will be able to access these structures, which may be governed by foreign law, to perform activities which they are empowered to carry out as public authorities.

It should also be pointed out that, in some countries[172], semi-public companies associating private and public partners can be set up for the provision of certain public services in particular. French law even specifies explicitly that these structures (local semi-public companies) can be used to bring French and non-French local and regional authorities together alongside private operators[173].

Access to all these structures will be possible. It should be stressed that in this connection, while Regulation (EC) No 1082/2006 explicitly confers legal personality on EGTCs, it does not on the other hand specify whether they are to be governed by public or private law. Depending on the secondary national laws applicable (under Article 2(1)(c) of the Regulation) an EGTC may, according to the assignments entrusted to it in particular, be governed by private law. (For discussion of this point see chapter 4, section A, paragraph 2, below). Even in this case, however, it would not be possible for the EGTC to be identified with a pre-existing legal form governed by private law and it would therefore merely be a question (not without legal implications – far from it) of defining the particular legal form used for the EGTC more specifically.

2.3.3 Creation of legal personality under public law

In legal terms, this is the most complex case. In effect, whereas private law legal structures define relations between partners in order to enable the new structure, where appropriate, to carry out its own

activities, which are separate from those of its members, in respect of its members or third parties, but do not necessarily incorporate the legal structure strictly into a specific legal framework (the new legal entity is founded on national private law but that is not necessarily the main framework within which it will develop), the situation is very different as regards public law. Each country's public law is based on a precise hierarchical structure into which the new public law legal entity will have to be incorporated. Thus, in legal terms, the issue is much more complex and warrants much more detailed analysis, not least as regards framework agreements.

Technically, there are two ways of creating cross-border legal structures with legal personality governed by national public law. The first is to adapt personality governed by national public law intended for cooperation (within the national framework) between public law bodies (such as municipalities); this is discussed in point 2.3.3.1 below. The second is to authorise local and regional authorities from different countries to create a specific legal structure geared to their needs (thus catering better for the specific requirements of cross-border cooperation initiatives) and then incorporate it into the public law of the countries concerned. The latter solution is that adopted for EGTCs. While it seems the best option, as it can be geared to the specific needs of the partners in a territorial cooperation initiative, it raises complex legal questions with regard to its incorporation into national legal systems (2.3.3.2.).

2.3.3.1 CREATION OF LEGAL PERSONALITY UNDER PUBLIC LAW BY REFERRAL TO A STRUCTURE EXISTING UNDER NATIONAL LAW

This solution is the one most frequently adopted in bilateral framework agreements. The agreement merely authorises access to public establishments for cooperation between local and regional authorities existing under domestic law. These include voluntary municipal consortia[174] or equivalent structures[175], or even public interest groupings[176]. The advantage of this solution is legal certainty. In effect, insofar as the legal structure of a cross-border cooperation body corresponds to a legal form under national law, its operating arrangements and the legal principles applying to it are already known, not least thanks to relevant national case law. However, the need to be able to adapt national rules to the peculiarities of cross-border situations must not be underestimated. Bilateral framework agreements are thus primarily provisions allowing local and regional authorities access to a particular legal structure, and they lay down few, if any, basic rules.

The situation is not, however, very satisfactory when it comes to the relationship between partners. Indeed, the partner or partners located on the side of the border whose law has been chosen will be in a much more favourable legal environment than their foreign partner(s). This structural inequality in the situations of the parties makes the solution unsatisfactory.

Then there is the case of a general referral to the cooperation structures which exist in each national legal system. It makes sense that this was the solution opted for by the Additional Protocol to the Madrid Outline Convention, which cannot refer specifically to each national cooperation structure given the diversity of the national situations of each Member State. Thus, with regard to defining the characteristics of legal personality, there was a referral to "the law of the contracting party in which its headquarters are located". This law could be an ordinary law or a specific law in national legislation laying down or adapting a specific cooperation structure for cross-border initiatives. The terms of the Karlsruhe and Brussels (2002) agreements were just as general but they were demanding as regards

rules catering for the specific cross-border nature of the grouping, stating that local and regional authorities or local public bodies could form part of bodies or create such bodies with [legal] personality if the latter were a type of body which was entitled under the domestic law of the contracting party in which their headquarters were located to include foreign local and regional authorities[177]. The referral to national law made in the bilateral framework agreement is therefore only effective if national law itself is adapted. Apart from the fact that there is no legal mechanism guaranteeing the application of an agreement of this kind, this situation is very similar to the relationship established by Regulation (EC) No 1081/2006 between domestic and international law.

2.3.3.2 CREATION OF A LEGAL PERSONALITY UNDER AN INTERNATIONAL AGREEMENT ON THE BASIS OF STATUTES REFERRING TO NATIONAL LAW

This is the solution which is most similar to that envisaged for the EGTC. It is found in the most recent agreements, notably the Karlsruhe (1996), Valencia and Brussels (both 2002) agreements. The advantage of this solution is that it makes it as easy as possible for partners to adapt the legal structure of their cross-border cooperation body to their specific needs. Thus, the convention and the statutes can define the main, essential characteristics of the cooperation body – a local transfrontier cooperation grouping (LTCG) under the Karlsruhe and Brussels (2002) agreements – within the constraints of domestic law. Article 11 of the two latter agreements stated, to the same effect, that the local transfrontier cooperation grouping was subject to the domestic law applying to the public inter-municipal cooperation establishments of the contracting party where its headquarters were located.

This statement reveals two basic differences between the local transfrontier cooperation grouping and the EGTC. Firstly, it is clear that the two agreements are worded in such a way as to permit cooperation between local authorities rather than, as in the case of the EGTC, incorporating (where appropriate) many different players with different statutes. However, this point of view should be seen in context, as in practice[178] regional as well as local authorities are able to form part of these cooperative structures, and this is, moreover, explicitly confirmed by the French legislator, which likens the EGTC to an open mixed consortium, i.e. associating subnational authorities from different levels[179]. This first difference is not, therefore, as important as might have been imagined.

The second difference has more significant implications. In effect, EGTCs – or the statutes of a cross-border structure provided for by the Valencia agreement[180] – must comply with domestic law. As regards the EGTC, Article 2, on applicable law, establishes a hierarchy[181] which allows the statute of an EGTC, insofar as its provisions do not go beyond the bounds of what is authorised by Regulation (EC) No 1082/2006, to take precedence over the rules of domestic law[182]. The EGTC will thus be a legal entity under Community law, and not a legal entity defined by a national legal system to which subnational authorities governed by a foreign legal system are allowed access by an international instrument (in the case in point a bilateral or multilateral convention such as the Karlsruhe, Brussels or Valencia agreements).

Two other major differences remain to be pointed out between the structure of the local transfrontier cooperation grouping and that of the EGTC. Firstly, the EGTC does not cover cross-border cooperation alone but applies to all kinds of local and regional cooperation, and secondly, Member States can form part of these structures, and this has major legal implications (to be discussed below, particularly in chapter 5).

C. AT NATIONAL LEVEL

In principle, particularly given the principle of territoriality that applies in public law, national law is ill-suited to regulating a situation which by its very nature includes elements outside the state framework within which it applies. Indeed, national rules can only be effective when combined with the rules of at least one other legal system, whether this is another national legal system (which authorises participation by its public law bodies in cooperation governed by a national legal system of another country), or rules laid down by international law, such as the provisions of a multilateral or bilateral agreement like those discussed above, which provide the legal basis for national legislation (usually by referral) to lay down rules having legal effects in a cross-border situation, or, lastly – and this is the great innovation of the Regulation on an EGTC – rules laid down by Community law. Thus, national law cannot independently issue rules claiming to apply to cross-border or transnational cooperation situations.

Quite apart from the fact that many public national provisions are in any case applicable – whether with regard to defining local and regional authorities' powers and arrangements for exercising them[183] or to guaranteeing citizens' rights in respect of public authorities' actions[184] – national law is useful in two respects. Firstly, to regulate access by these public law bodies to territorial cooperation activities, and secondly, to provide a suitable legal framework within which cross-border or territorial cooperation structures located or active in the country in question can operate with the greatest possible legal certainty.

As regards the first point, consensus seems to be emerging in Europe that countries should not unduly restrict their subnational authorities' access to cooperation activities. This consensus is taking the form of international commitments by European countries, particularly under the two Additional Protocols to the Outline Convention of the Council of Europe[185]. And even going beyond specific commitments, the supreme court of a country such as Italy, which always makes the possibility of its subnational authorities taking part in cross-border cooperation subject to a covering national agreement[186], dismissed the national government's case disputing the participation of a province and two regions in an Interreg III A programme run by Austria and Italy because they had not obtained prior agreement from the government. In the case in point, in its judgment of 8 July 2004[187], the Italian Constitutional Court ruled that no additional national act was necessary as the subnational bodies were merely implementing a Community programme further to acts already accepted by the Italian government (in particular the OP). Therefore, it is – directly applicable – Community law which gives subnational authorities, over and above the reservations expressed by Italy regarding the implementation of the Madrid Outline Convention, the autonomy to implement cross-border measures covered by this framework.

Thus in this matter, which is important in respect of the implementation of the EGTC – because of Article 4(3) of the Regulation, which permits countries to restrict access to this legal structure – countries' scope for passing restrictive legislation seems diminished. However, Article 16(1)(2) of the Regulation on an EGTC explicitly authorises each Member State, "where required under the terms of that Member State's national law … to establish a comprehensive list of the tasks which the members of an EGTC within the meaning of Article 3(1) formed under its laws already have, as far as territorial cooperation within that Member State is concerned." Without being explicitly restrictive, the wording of this provision leaves the option open for a Member State to draw up a list which it will

subsequently use in a restrictive way when applying Article 4(3) (see chapter 4, section D(1) below for a detailed analysis of this eventuality).

As regards the second point, the adoption of rules in the national legal system catering for cross-border structures, the role of national legislation is important: both because an international agreement refers to structures under national law and because, as, moreover, required by the Community Regulation on an EGTC, Member States are called upon to adopt a legal framework which supplements Community rules. This is provided for by Article 2 of Regulation (EC) No 1082/2006, "in the case of [the moreover quite numerous] matters not, or only partly, regulated by this Regulation" and is even required by Article 16 of the same Regulation, under which Member States "shall make such provisions as are appropriate to ensure the effective application of this Regulation.".

Now that the need for these national rules is clear, there are two possible approaches. One would be to attempt to harmonise cross-border cooperation structures across the European Union. This was – within an even wider legal and geographical framework – the stated aim of the Proposal for a Protocol[188] and then the Draft European Convention Containing a Uniform Law on Transfrontier Groupings of Territorial Cooperation (TGTC) of the Council of Europe, in which Member States declared that they were "convinced that this objective can only be achieved through the adoption of a uniform law". However, when the Proposal for a Protocol was drawn up, the consultant still expressed doubts regarding the suitability of such an approach, noting that, insofar as the aim of the protocol on Euroregions should, it would seem, to be to produce a completely uniform law applicable to similar relationships, whatever the country and legal system in which these relationships would have effect, that would lead in reality to the establishment of a complete legal system departing from each country's ordinary legislation[189]. Thus, this approach still seems unlikely to come to anything, as serious objections as to its appropriateness have been raised by a number of Member States.

The Community approach is not, on the other hand, aimed at harmonisation; the fifth recital of Regulation No 1082/2006 states that the instrument "is not intended to … provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community". It should be pointed out, however, that the obligation laid down in Article 16 of the Regulation could well lead to harmonisation of solutions at Community level, much more quickly and effectively than a hypothetical Council of Europe convention, whose ratification process – provided that the countries came to an agreement on the principle for adopting an instrument of this kind, which is not the case at present – would undoubtedly be lengthy and not uniform. In any case, it is too early at this juncture to be able to analyse the national laws which will be adopted to ensure the effective application of the Regulation on an EGTC. The conclusions of this study (see the last chapter below) will put forward proposals to this end to enable the Committee of the Regions to assist the European Commission[190] in monitoring and analysing the national legislation ancillary to the Regulation on an EGTC.

CHAPTER 3:
ISSUES ASSOCIATED WITH PREPARATION AND ADOPTION OF REGULATION (EC) No 1082/2006

Although in material terms we are not concerned here with a regulation on coordinating or managing Structural Funds, but with a separate regulatory instrument, this regulation is closely linked to Community structural policy (A).

This chapter shows the Commission's constant concern to support and develop such cooperation between local and regional authorities (A.1).

However, provision of financial support to local and regional authorities participating in such cooperation does not permit the development of institutionalised cooperation mechanisms (A.2).

Moreover, financing of cross-border projects runs into practical and legal obstacles, making it necessary to develop a new and distinct legal framework (A.3).

However, despite this obvious need, adoption of a Regulation providing a legal framework for territorial cooperation was by no means self-evident, partly because the Treaty establishing the European Community does not provide an explicit legal base for adoption of such an act (B.1), and partly because not all Member States were convinced that adopting such a Regulation was necessary or appropriate (B.2).

The reference to cross-border cooperation added to Article 265 TEC is not a sufficient legal base for drawing up a Community act. However, it should be emphasised that the Committee of the Regions attaches great importance to this reference, as such cross-border cooperation is the only specific field in which the Treaty acknowledges a particular competence for the Committee of the Regions (B.1.1).

The Commission, guided by very understandable and logical considerations, decided to base its proposal on the chapter relating to economic and social cohesion, as the Treaty did not contain a clear legal base for adoption by the Community of a legislative act enshrining cooperation between local and regional authorities in law (B.1.2).

An analysis of the adoption process shows that the Commission's proposal benefited substantially from recommendations set out in the Committee of the Regions' opinion and in amendments proposed by the European Parliament. Contributions from these two sources enabled the provisions of this regulatory tool to be improved in quality and precision, while extending its scope (beyond cooperation between direct neighbours) and taking the interests of local and regional authorities more closely into account (B.2).

The EGTC Regulation was adopted simultaneously with the Structural Funds regulations and concerns territorial cooperation, a subject which also falls within

their scope; however, the EGTC Regulation differs from the latter regulations in terms of its legal base, its effects over time and its objective (B.3).

This regulation, which has the potential to engender major developments in the European integration process in that it provides a Community legislative tool enabling local and regional authorities of the European Union to participate directly in cooperation which is enshrined in Community law, appeared at an important juncture in the process of ever closer integration between Member States of the European Union: on 1 May 2004, the European Union underwent unprecedented enlargement, enabling ten new states - most of which (eight) had abandoned socialist economic and political systems several years earlier – to become fully involved in the integration process, and as a result to make full use of the various legal mechanisms and financial transfers associated with that process. Even though this integration of new members has by no means undermined the achievements of the European Union's institutional and legal structure, it has nevertheless caused major upheavals in certain policies, and in economic and social cohesion policy in particular.

Since 1988[191], this policy had undergone remarkable development, while striking a balance between, on the one hand, the constraints imposed by the Treaty concerning concentration and coordination of Structural Fund intervention, and on the other, the European Commission's constant concern – backed up by Member States on numerous occasions[192] - to involve local and regional authorities[193] as closely as possible in programming and implementing a policy which, since 1 January 2007, has been the main item on the budget of the European Union. With nearly 36% of the Community budget allocated to this policy, it will be endowed for the first time with more resources than the Common Agricultural Policy. Like all regulations on coordination and management of the Structural Funds, the EGTC Regulation was published for the 2007-2013 programming period, in OJ No L 210 of 31 July 2006. However, it is not officially a regulation of this type, but is a form of "specific action… outside the Funds" within the meaning of Article 159(3) TEC; in view of this, its period of validity is not limited to 31 December 2013, unlike the other regulations adopted at the same time. For example, (see Appendices I and II below) note the difference between the wording of Article 17 of Regulation (EC) No 1082/2006 on the EGTC and Article 24 of Regulation (EC) No 1080/2006 of 5 July 2006 on the European Regional Development Fund. In the former case (the EGTC Regulation), the Commission can if necessary present proposals to amend the regulation, whereas the ERDF Regulation stipulates that "the European Parliament and the Council shall review this Regulation by 31 December 2013". That said, the regulation is to say the least closely linked to the Structural Funds regulations, first of all because of its subject. The territorial cooperation which EGTCs are intended to enable is in line with priority objective No 3 of Regulation (EC) No 1082/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999. In addition, Article 7(3) makes it clear that "specifically, the tasks of an EGTC shall be limited primarily to the implementation of territorial cooperation programmes or projects co-financed by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund". Likewise, the second paragraph of the same Article 7 EGTC Regulation explicitly refers to Article 6 of the ERDF Regulation of 5 July 2006.

The legal base is also found in the chapter on economic and social cohesion, given that the Regulation is conceived as a specific action which proves "necessary outside the Funds" within the

meaning of Article 159(3) TEC. This legal base makes it clear that the action is outside the Structural Funds; however, at the same time the logic of the Treaty makes it quite clear that such an action is closely linked to economic and social cohesion policy. Finally, the fact that the regulation was adopted on the same date[194] as the other regulations on the Structural Funds leaves no room for doubt as to the importance of this link.

We begin with a brief discussion in the conditions and reasons for substantial changes introduced in 2006 to coordination and management of the Structural Funds. We will therefore present the specific issues linked to priority objective No 3 concerning territorial cooperation, which "replaces" the INTERREG community initiative (section A). Although disciplines such as political science and economic analysis may provide numerous explanatory factors, the present study is concerned with the legal aspects of developing territorial cooperation. The analysis will therefore focus on the legal issues linked to the need to develop territorial cooperation and to find a satisfactory legal base in Community law, as well as on the resulting constraints. The second section of this chapter will look at the process of adopting the EGTC Regulation (section B).

A. TERRITORIAL COOPERATION ISSUES IN THE CONTEXT OF COMMUNITY COHESION POLICY

Despite major reforms to Community cohesion policy, largely as a result of enlargement on an unprecedented scale in 2004, in view of increased economic disparities in various parts of the EU which were caused by enlargement, cross-border, transnational and interregional cooperation was not neglected. On the contrary, in the new programming period what had been a Community initiative was transformed into a priority objective of Community structural policy, and a legal structure in Community law was proposed to enable cooperation between local and regional authorities – an area which from its very beginnings right up to the present day had suffered from the lack of a legislative framework. It was the combination of these two phenomena which justifies the commissioning of this prospective study by the Committee of the Regions on the future of such territorial cooperation.

However, when the study was launched, it was concerned with hypothetical issues. Neither the legal framework applicable to the Structural Funds during the 2007-2013 period nor the EGTC Regulation had yet been adopted. As we shall see (in section B.1), in the latter case the text of the Regulation changed considerably – and mostly for the better – between the Commission's initial proposal and adoption on 5 July 2005.

In order for us to understand these developments, it is important to discuss the reasons which underlay the process of preparing and adopting Regulation (EC) No 1082/2006, before going on (in Chapter 4) to analyse the choices which informed the drafting of the Regulation. First of all, we need to understand why and to what extent cooperation between local and regional authorities both within the EU and across its external borders is a key issue for European integration as well as a legal question of unusual complexity which calls for original and, for the time being, precarious solutions. Thus, the first section of this chapter discusses the issues, whereas the second part looks at the process. As in the rest of the study, the subject is discussed mainly from a legal perspective.

1. The importance of territorial cooperation from a Community perspective

As the European Commission pointed out in its Third Report on Economic and Social Cohesion, "cooperation between countries and regions is an essential element of EU cohesion policy"[195]. As was noted in the first chapter, the European Commission very quickly showed its awareness of the inherently and necessarily European nature of this cooperation between local public players, situated on one side or the other of national borders. Due to the nature of the players involved, conventional international cooperation in the form of an intergovernmental process is inappropriate, nor, given the activities covered, can it be confined to national competences. Cooperation, which was originally cross-border, and is now territorial, is an intrinsic and distinct factor of European integration. As we have also shown in the first chapter of the study, European integration, far from making it less necessary to develop such cooperation, has meant that public territorial players - who are faced with growing de-territorialisation of activities by private actors in Europe, while their own activities continue to be bound by legal constraints arising from the principle of territoriality linked to national systems of public law - are even more in need of mechanisms enabling them to fully exercise their competences in the European context.

Thus, cross-border cooperation emerged as a peripheral public activity by various local and regional authorities, in the case of a mismatch between the scope of their activities to meet the needs of individuals and their geographical and institutional remit – whether at local, regional or national level; it remained subject to very particular constraints, within the intersecting competences of sub-state entities. This was all the more so in an area characterised by full economic interaction, as in the case of the European Community.

Thus, having started in response to the needs of certain private players faced with difficulties arising from the presence of an international border in their surroundings (cross-border workers, cross-border pollution, rationalising the provision of various local services using infrastructure which is dependent on geographical factors), the cross-border activity of a growing number of local and regional authorities is developing and is being presented as a forward-looking public policy. Decision-makers are taking a cross-border approach to spatial planning and are envisaging integrated regional economic development which transcends a strictly national frame of reference. Partnership with players on the other side of a border is becoming a common feature of local public action, and is helping to drive a real "horizontal integration process" at European level[196].

The European Commission, which is aware both of the need for such territorial cooperation and of its potential for European integration has supported such activity since 1975 through the ERDF. However, in the absence of an appropriate legal base and of a political context authorising innovative developments in this area, Community activity has been limited.

The legal solutions proposed to date have thus been out of step with local players' practices and have held back cross-border development - or at the very least they have prevented the qualitative quantum leap forward in development which the overwhelming majority of stakeholders in cross-border projects would like to see. The current logic of cross-border cooperation, which is defective in terms of legal security and inappropriate to the requirement for equality between parties to a contractual-type relationship is in danger of holding back both the ambitions of local and regional authorities to engage in cooperation, and the will of States to adapt legal frameworks.

These circumstances call for a change of strategy and of logic in the development of rules applicable to the still growing needs of populations faced in their daily activities with the effects of international borders within the Community. This is all the more crucial in a context of neighbourhood. Hence, the European Commission initially targeted its legal instrument at cross-border cooperation, before extending its scope to territorial cooperation, at the request of the Committee of the Regions and the European Parliament.

2. The shortcomings of instruments providing financial incentives

The adoption of a legal framework in Community law was also imperative from a strictly legal point of view. Besides, the legal base for this regulation (Article 159(3) TEC) implies that in order for it to be used, "specific actions" - or one such action in the present case - must "prove necessary" to the achievement of economic and social cohesion - a condition which this case meets, from a legal point of view.

Indeed, while a Community initiative programme has existed since 1990 to provide financial support for cooperation activities between local and regional authorities across all EU borders, this regulation prioritises the need for stakeholders in such cooperation and beneficiaries of Community funding "to establish common institutional and administrative structures to foster and encourage cooperation"[197] This ambition to enable the creation of institutional cross-border structures, of which the EGTC is a variant, was further developed in the second version of the programme (INTERREG II, 1994-1999). The Community initiative went so far as to explicitly set support for "the creation of shared institutional or administrative structures"[198] as the main priority for granting Community funding, which once again closely corresponds in many respects to the purpose of the draft regulation under review.

However, the means - and in particular the legal means - of achieving this ambition were inadequate. As a result, the European Court of Auditors in particular emphasised that implementing activities under this programme caused problems in terms of compliance with the principles for implementing the budget. For example, the Court noted that "the measures agreed within the framework of the 31 OPs do not always correspond to the transfrontier nature of this CI. An examination of the OPs showed that little of the planned expenditure directly related to transfrontier cooperation measures. Most grouped together measures located on both sides of the border and which often did not involve any interregional cooperation in their implementation. These projects could have been carried out within the framework of other existing Community interventions"[199]. It also concluded that "all these findings show that significant progress needs to be made with a view to strengthening the transfrontier partnership. The operations under the various programmes could have been completed just as well, if not better, within the framework of a traditional OP"[200].

As a result of these criticisms, which the Commission responded to by citing the very lack of an effective legal instrument to enable such cross-border structures to be set up and operated, the INTERREG III programme (for INTERREG II it was already too late, and no progress could be made on this front) did not set such ambitious objectives for the institutional structures of cross-border cooperation[201]. The draft regulation under review is precisely intended to bridge this gap between, on the one hand, the Commission's political priority endowed with growing budgetary resources to

support cross-border actions, and on the other the lack of an instrument providing a legal framework to enable implementation of policies of an essentially cross-border nature.

However, it should be noted that the proposed regulation laying down the legal framework for such cross-border structures was only formulated almost 15 years after the fruitless attempt to promote such structures for cross-border cooperation solely by means of financial incentives. We can only speak of an attempt here, because in practice, the lack of a reliable legal solution to enable the creation and operation of such cross-border institutional structures did not permit those involved to create shared structures of this type.

Indeed, in a special report on programming the INTERREG III Community initiative, the Court of Auditors was still concerned about the "the projects' lack of a cross-border character and the absence of cross-border cooperation, inter alia, in the management of the Community Initiative programmes"[202]. As before, the Court of Auditors attributed this problem to the lack of a suitable legal structure, and noted in passing that establishment of European Economic Interest Groupings had not been successful[203]; in its conclusions, it also made clear that, if the initiative was renewed after 2006, "the work begun on legal instruments for cooperation should continue so that they can be applied to Interreg"[204]. This recommendation of the Court has been heard, and even if cooperation is no longer happening in the context of INTERREG, it is clear that the use of a reliable and effective legal instrument for cooperation, whether cross-border or territorial, is a solution which represents considerable progress and bridges the yawning and long-lasting gap between the declared goal of achieving territorial cooperation in the context of economic and social cohesion, and what has actually been achieved.

3. *The legal issues of financing cross-border projects in Europe*

As the Commission rightly points out, activities involving cross-border and inter-territorial cooperation "are also more complicated to implement than other Structural Fund programmes"[205]. This is all the more so in the case of financing cross-border and transnational activities by public players. It should be remembered that in all countries which respect the principle of the rule of law – i.e. according to Articles 6(1), 49(1) and 7 TEU all EU Member States – the use of public funding is subject to relatively strict monitoring. However, in the case of joint activity by public players from different legal systems, the requirements of the different systems are not necessarily compatible. Obviously, this can cause problems for the development of specific activities involving cross-border or territorial cooperation.

From the point of view of the Community, the problem is that support from Community funds is almost invariably accompanied[206] by support from national funds (additionality principle). In the case of cooperation which is genuinely transnational or cross-border, it is not enough to align Community and national legal systems; at the very least, requirements under the Community legal system and the two national legal systems - which do not necessarily have compatible public accounting rules and provisions - must be aligned.

Partners in cooperation activities have often mentioned this problem as a constraint on the co-financing capacity of joint bodies and therefore the operational capacity of cross-border structures. Admittedly, a working document published in 2000 by the Association of European Border Regions shows that such problems are often cited even when no real legal obstacle exists, and in many cases

there are practices which enable the financing of cross-border activities despite the legal constraints linked to the management of public funds within each country[207].

With regard to the Community, the Commission[208] is responsible to the Council and to the Parliament[209] for implementing the budget; the latter two institutions are assisted in monitoring by the Court of Auditors[210]. In practice, and particularly in the implementation of cohesion policies, the Commission supports programmes which Member States are responsible for drawing up and managing[211]. In the context of programmes relating to the future priority objective no. 3, the achievements of the INTERREG programme have been fully incorporated into the ERDF Regulation[212] (single OP for the entire area concerned, singly managing authority, single account, eligibility of expenditure, monitoring committee, etc.) At the same time, it should be noted that one of the main benefits of adopting a regulation to enable establishment of a structure for territorial cooperation – i.e. the EGTC – is the possibility of an entity capable of managing joint programmes in a cross-border, transnational or interregional context; from this point of view it is disappointing – though probably technically unavoidable – that Article 6 of the EGTC lays down rules for controls of the management of public funds which differ depending whether or not Community support is involved[213].

From the national perspective, the situation depends on public accounting rules in each Member State. It goes without saying that the State itself has the capacity to manage funds outside the national public accounting system. In the case of local and regional authorities, the situation is sometimes more complex: contributions to a "foreign" legal structure can cause problems for national auditing authorities, even if the local or regional authority in question is participating in such a structure. Even the existence of clear international rules stipulating that expenditure from the budget of a cross-border cooperative structure is of an obligatory nature for the participating local and regional authorities does not always convince the financial authorities of some countries. In view of this, failure by the EGTC Regulation to stipulate that expenditure from EGTC budgets is compulsory for its members is a regrettable loophole which threatens to undermine the effectiveness of this legal structure for States whose national administrative authorities are inclined to be uncooperative.

B. THE PROCESS OF ADOPTING REGULATION (EC) No 1082/2006

An analysis of the process of adopting this regulation will reveal its positive development during the period from the Commission's initial proposal on 14 July 2004 to its adoption on 5 July 2006 – a very short period for adopting legislation of such complex and innovative nature. This analysis will also highlight the key role played by the Committee of the Regions and the European Parliament in developing its content, particularly in terms of taking the interests of local and regional authorities into account more closely. The key role played by these two institutions and by the Committee of the Regions in particular also justifies the special interest of the latter institution in ensuring effective, prompt and optimal implementation of the regulation.

1. The foundation of the new legislation: legal base in Community law

The requirement for a legal base for all secondary Community legislation follows directly from the principle of legality which is at the heart of the Community legal system[214]. Besides, Community legal acts can be annulled on the grounds of lacking a clear legal base[215], and the principle of explicitly assigning competences to the Community was spelt out in the Maastricht Treaty in the article on the subsidiarity principle, which stipulates that "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein"[216]. Thus, before drafting any Community legislative act, a legal base for a proposed regulation must first be identified. To what extent is this true in the case under review?

1.1 Introduction of cross-border cooperation in the Treaty

When the Treaty establishing the European Community and the Treaty on European Union were revised in Amsterdam, a phrase was added to the first sentence of Article 198(c) (now Article 265) concerning the conditions for mandatory consultation of the Committee of the Regions, stipulating that "the Committee of the Regions shall be consulted by the Council or by the Commission where this Treaty so provides and in all other cases*, in particular those which concern cross-border cooperation,* in which one of these two institutions considers it appropriate"[217]. The surprising thing is that this is the first time that the Treaty refers to such cooperation. Of course, the process of consulting the Committee of the Regions is part and parcel of implementation of Treaty provisions by the institutions. Until the Commission presented its proposal for the EGTC Regulation, it was difficult to discern a specific purpose for this provision, as it seemed of only hypothetical relevance.

However, the reason for addition of this reference is fairly easy to explain. The newly created Committee of the Regions immediately found itself having to deal with a process of revising the Treaties[218]. Although revision is a sovereign competence of the Member States, the institutions make them aware of their opinions and their demands in the course of the procedure[219]. The Committee of the Regions did so by issuing a substantial own-initiative opinion[220] calling for a series of improvements to the Treaty establishing the European Community, both in terms of strengthening its own institutional position and of reflecting the interests of local and regional authorities more closely in the Treaty. With the latter consideration in mind, the Committee called for the Treaty to spell out the importance of cross-border and territorial cooperation[221]. The Intergovernmental Conference was therefore partially complying with the Committee's demand by introducing the above-mentioned phrase. Of course, the wording may be somewhat surprising, given that it confers a particular consultative competence to the Committee itself, instead of acknowledging the importance of cooperation – thus enabling development of an appropriate Community legal framework – which is what the members of the Committee of the Regions actually asked for.

However, the existence of such a reference, though difficult to evaluate from a legal perspective – is of relevance in that it concerns action by the Community – and by the Committee of the Regions in particular – in the field. Indeed, this is the only reference to a specific area (a kind of specific responsibility) in the Treaty articles devoted to the Committee of the Regions. The proposal for specific monitoring of implementation of the regulation by the Committee of the Regions rests on the legal base of this particularity[222].

Thus, Article 159 which the EGTC Regulation is based on specifically provides for consultation of the Committee of the Regions – and also of the European Economic and Social Committee – and it should be emphasised that several of the recommendations of the Committee of the Regions opinion[223] were taken up by the Commission in its revised version[224] and retained in the text adopted on 5 July 2006. It is also true that these proposals by the Committee of the Regions were broadly in line with those of the European Parliament, which, under Article 251 TEC has the power of co-decision in the adoption of "specific actions" within the meaning of Article 159(3).

Also, although this reference to cross-border cooperation in the Community Treaty cannot be seen as constituting a legal base for Community action in the field, it is nevertheless clear that it confers particular legitimacy on action by the Committee of the Regions on this, the only specific competence which the Community legal system explicitly confers on the Committee of the Regions. Moreover, in view of the legal principle of *effet utile* frequently invoked by the Court of Justice in its case law, the existence of this provision could be of particular relevance if the validity of the EGTC Regulation was questioned in the Community courts. If the Member States accepted this wording for Article 265 TEC, they must have specifically envisaged a Community competence in this field.

1.2 What is the legal base for the regulation on territorial cooperation?

As we have just seen, Article 265, which contains the only mention of cross-border cooperation, is clearly not sufficient as a legal base for a Community legislative act. We therefore need to find another legal base. There are a certain number of general rules for conferring competencies in the Community Treaty. Two of these are invoked the most frequently: Article 308, and Article 94 et seq.

Article 308 – which has become Article 235 – stipulates that: "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures". With regard to this provision and its possible use, two important points should be emphasised. On the one hand, the wording clearly shows that the use of this provision should be subsidiary in nature. It can only be invoked if the Treaty has not provided the necessary powers to attain one of the objectives of the Community[225]. In addition, in the accompanying procedure the European Parliament is only consulted, and therefore has no decision-making powers; although consultation is a formal obligation[226], the institutions which consult the Parliament are not required to take account of the resulting opinion. This is also one of the reasons[227] why the European Parliament often contests acts adopted on this basis[228]. This procedure also requires the unanimity of the Member States (unlike Article 159(3) used for the EGTC Regulation).

The other provision conferring broad powers which go beyond the competences explicitly mentioned in the Treaty is Article 95 TEC[229], which provides for the Council or the Parliament to adopt directives (Article 94) or measures (Article 95) "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". Unlike Article 308 TEC, these powers are not of a subsidiary nature. However, it is not certain whether EGTCs are directly linked to the establishment and functioning of the internal market; moreover the purpose of the EGTC Regulation is

not to approximate the provisions laid down by law, regulation or administrative action in Member States, as Recital (5) in the regulation rejects such an approach[230].

On the other hand, in the field of economic and social cohesion the Treaty provides a base for specific competences; the wording of these provisions recalls that of Article 308 in terms of the conditions for Community legislative authorities to make use of them. What is different here is the use of the co-decision procedure (Article 251 TEC) for implementing measures taken on the basis of this particular competence, enabling full involvement of the European Parliament. Although specific actions envisaged here in Article 159(3) TEC take place outside the funds which are managed as part of economic and social cohesion policy, they have to remain within the general framework of such a policy, "without prejudice to the measures decided upon within the framework of the other Community policies". Such actions must therefore confine themselves to economic and social cohesion policy.

This explains why the regulation does not set out to create a general Community framework for territorial cooperation, as Recital 5 points out; if it did, it would exceed the powers which have been conferred on the Community and could therefore be invalidated. Rather, its main purpose is to enable the use of a Community legal structure required for implementing key economic and social cohesion policy objectives. As for territorial cooperation, it is just as legitimate an objective of economic and social cohesion as – for example – regional competitiveness. Besides, as part of the as yet incomplete process of revising the Treaties, the Committee of the Regions[231], the Commission[232] and finally the Member States at the intergovernmental conference have accepted territorial cooperation as a new objective to be included in the Treaty, together with economic and social cohesion[233].

There is therefore a clear legal base for the regulation in the Treaties – although the existence of such a legal base was far from obvious. For example, the study by the Committee of the Regions on trans-European cooperation between local and regional authorities (carried out under the auspices of the Association of European Border Regions) identified Articles 308 and 159(3) as possible legal bases, but felt that insofar as the current Treaty did not provide for the creation of a Community framework instrument, the second main problem was to add an adequate legal base to the Treaty[234]. Usage of the potential of this legal base in the text adopted on 5 July 2006 is perfectly appropriate. In addition, this legal base provided for consultation of the Committee of the Regions and co-decision with the European Parliament, thus enabling these two institutions to join forces in the process of adopting this act and to exert a positive influence on its content, as we shall see in what follows.

2. *Adoption of the regulation*

Despite the legal complexity and political sensitivity of the issues involved, adoption of the regulation was surprisingly fast, with a period of less than two years between presentation of the Commission's proposal[235] and adoption of the regulation under the co-decision procedure. By way of comparison, the regulation on the European Economic Interest Grouping was adopted eleven years after the Commission's proposal, the regulation on the European company took twelve years, and the regulation on the European Cooperative Society "only" took ten. The link with Structural Funds programming and the constraints arising from enlargement probably helped to bring the process of adopting this regulation to such a rapid conclusion.

It should also be noted that the content of the Commission's proposal was relatively unambitious, or even minimalist[236], in that it contained few provisions of substantive law, which in all probability made it less controversial.

The Commission's proposal adopted on 14 July 2004 contained 15 recitals and nine articles. The explanatory memorandum was just one page long. With regard to this final point, it should however be pointed out that part of the third report on economic and social cohesion policy discussed the need for this regulation in view of reforms of the Community's structural policy following enlargement, and in practice it may therefore be considered as part of a larger-scale explanatory memorandum. As for the proposal, its title only mentioned cross-border cooperation. This can easily be explained, for two reasons: firstly, this type of cooperation is of a more specific nature and as a result the need for appropriate legal structures as holders of rights and obligations vis-à-vis third parties is felt to be most pressing here; secondly, this is the type of territorial cooperation where by far the largest sums of money are involved.

Apart from this, the proposal had serious deficiencies in terms of the bodies of a EGTC and the relevant decision-making procedures, including those for the adoption of statutes. Fortunately, these shortcomings were corrected in the revised proposal presented by the Commission in early March 2006. Finally, there were practically no provisions in the proposal for monitoring the participation of sub-state bodies in a EGTC. Most of the improvements in the version adopted in July 2006 are to do with this aspect.

One possible explanation for the provisions on monitoring may have had to do with the wording of Article 2(1) of the proposal concerning the composition of the EGTC, which stated that "the EGCC can be made up of Member States and/or regional and local authorities and/or local public bodies, hereafter referred to as ‘members’". The Committee of the Regions and subsequently the European Parliament disliked this wording; both of them emphasised its ambiguity, and pointed out that "the very nature of trans-European cooperation is that it should also be open to regions and local authorities without Member State involvement"[237]. This demand was fully consistent with existing experience of cross-border cooperation, which even under the legal instruments existing prior to the Commission's proposal was reserved to sub-state public authorities, to the exclusion of States. However, the Committee of the Regions together with the Parliament welcomed the inclusion of States alongside local and regional authorities.

The second important contribution of the Committee of the Regions was its desire – shared by the Parliament – not to limit this legal instrument to cross-border cooperation, but also to use it in trans-European cooperation including transnational and interregional cooperation as well as cross-border cooperation[238]. On similar lines, but using the term "territorial cooperation" – which has the advantage of tying in with the third priority objective of the forthcoming programming period for the Structural Funds – the European Parliament also requested this amendment, which was accepted by the Commission and the Member States without any problems.

The third specific request of the Committee of the Regions was to keep a register of EGTCs[239] - a request which the European Parliament supported in its second reading, after it was taken up by the Commission in its revised proposal[240]. It may therefore be noted that the Committee of the Regions has put forward some substantial proposals; after November 2004, the Committee was also the first to make its views known, and these were taken up by the Parliament and accepted by the Commission and the Member States.

The European Parliament's proposed amendments were on the same lines as those of the Committee of the Regions, with some useful additions on arrangements for monitoring EGTC acts and the responsibility of EGTC members, together with notification requirements for the establishment of EGTCs (publication in the Official Journal).

The Member States negotiated this draft regulation in parallel with the very difficult negotiations on the financial package for the 2007-2013 period. Very little headway was made on the regulation until the issues of contributions to the Community budget and distributing expenditure were settled. However, once agreement was reached on this point, the Member States made relatively rapid progress, despite strong opposition from certain countries. The Austrian presidency performed a very valuable task in preventing decoupling of this draft regulation from the Structural Funds regulations, thus enabling its adoption in summer 2006. We will discuss the provisions of the regulation in greater detail in the next chapter; at this point we should once again emphasise that the adoption procedure provided for in Article 159(3) authorises adoption of such a regulation by the procedure set out in Article 251 TEC (i.e. co-decision), which requires only a qualified majority in the Council. In this case, unanimity was not achieved.

It is quite possible that the price to pay for such rapid adoption will be various loopholes and imperfections in the regulation, which will become apparent during the implementation phase. However, given that, firstly, use of this legal structure is not compulsory for Member States (according to the first article, establishment of an EGTC is left to the initiative of its future members), and that, secondly, States have wide-ranging monitoring powers pursuant to Article 4(3) and national legal provisions for participation by their public sub-state entities, and finally that there is also a revision clause for 2011, such shortcomings as may be identified in this study and over the course of the next few years are a very small price to pay for the benefits of a legal instrument in Community law for implementing territorial cooperation.

3. *Regulation (EC) No 1082/2006 and other regulations on the Structural Funds for the 2007-2013 period*

There is a particularly close connection between this regulation and the Structural Funds regulations, such as Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, and Council Regulation (EC) No 1983/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.

Regulations (EC) No 1081/2006 (on the European Social Fund), No 1084/2006 (on the Cohesion Fund) and No 1085/2006 (establishing an Instrument for Pre-Accession Assistance) are less relevant to this study, even though they are part of the same group of regulations[241].

In terms of both economic background and timing, the regulation under review is closely linked to these other regulations, as it was adopted at the same time as the regulations on economic and social cohesion. The Commission's proposal for an EGTC Regulation was presented on the same day as the proposals for regulations on the Structural Funds, on 14 July 2004. In addition, Regulation (EC) No 1082/2006 was adopted together with Regulations No 1080 and 1081, on 5 July. Regulations No 1083 and 1084 were adopted on 11 July, and Regulation No 1085 on 17 July. There was no legal

necessity for almost simultaneous adoption of these acts, and several Member States strongly advocated decoupling adoption of the EGTC Regulation from that of the other Structural Funds regulations. Fortunately, nothing came of this.

However, the legal base of the regulation makes it clear that it is a specific action outside the Funds (third paragraph of Article 159 TEC); there can be no doubt that this condition is met.

Moreover, the Structural Funds regulations are linked, in terms of content and of resources provided for implementation of the economic and social cohesion policy, with multi-annual Community funding, and they therefore have limited legal effects over time. All these regulations will have to be reviewed by 31 December 2013 at the latest[242]. By contrast, the EGTC regulation has effects which are not limited over time, although there is a review clause in Article 17 of the regulation; this obliges the Commission to forward to the European Parliament and the Council a report on the application of the regulation and proposals for amendments, where appropriate. However, there is no obligation for the Parliament or Council to review the regulation. The Commission's argument to justify this derogation to the rule which has consistently been applied to Structural Funds instruments since 1988 was mainly based on a literal interpretation of the Community Treaty, as the EGTC Regulation is based on the third paragraph of Article 159 TEC and is not a Structural Funds regulation. In addition, this regulation differs from the other regulations discussed in this section in that it does not involve any particular financial commitments for the Community. Finally, the objective of developing territorial cooperation within the Community through permanent legal structures would not be met if the regulation on which those structures was based ceased to be effective on a particular date[243].

Nevertheless, the regulation clearly has close links with Regulation (EC) No 1083/2006 laying down general provisions on the Structural Funds, which introduces priority objective No 3 and determines the resources which are allocated to it. For example, Recital 6 of Regulation (EC) No 1082/2006 refers to Regulation (EC) No 1083/2006. Article 21 of this regulation specifies that slightly over EUR 7750 million are earmarked for this priority objective, with 73.86% (EUR 5 576 358 149 for cross-border cooperation, 20.95 % (EUR 1 581 720 322) for transnational cooperation and 5.19% (EUR 392 002 991) for interregional cooperation, cooperation networks and exchange of experience[244]. There is also a particularly close link with the ERDF Regulation, which defines procedures for implementing such territorial cooperation[245]. Article 7(3)(3) of the EGTC Regulation also refers to Article 6 of the ERDF Regulation by prohibiting Member States from limiting the tasks that EGTCs may carry out without a Community financial contribution, unless those tasks include at least the cooperation actions listed under Article 6 of the ERDF Regulation.

Thus, this regulation differs from the Structural Funds regulations in terms of legal base, effects over time and objective, despite having been adopted with them as part of a package. In spite of this, the EGTC Regulation is, as we have just pointed out, closely linked with implementation of the Community's structural policy for the 2007-2013 period.

PART 2:
THE POTENTIAL OF TERRITORIAL COOPERATION FROM 2007

Although unable to predict how this Regulation will affect the development of territorial cooperation or propose an authentic interpretation of this new Regulation, which its implementation and, where appropriate, legal decisions, will provide, this part seeks to examine and highlight the significance of the choices made during the preparation of the Regulation.

The first chapter, which forms the heart of this study, will provide a detailed analysis of the text of the Regulation and seek to explain the legal consequences of the provisions it contains (Chapter 4). In particular, this chapter will highlight, in relation to the current legal and practical *acquis* of cooperation between territorial authorities in Europe, the solutions provided by the development of this *acquis* and those that represent significant innovations.

The next chapter will look at the challenges involved in implementing this Regulation, both at Community level and within the national legal systems, on which the effective implementation of the Regulation will partly depend (Chapter 5). Finally, a short chapter containing some prescriptive elements will focus on the roles the Regulation confers on the various actors at Community (the Commission, Parliament and, in particular, the Committee of the Regions), national and local level (Chapter 6).

CHAPTER 4:
LEGAL FRAMEWORK OF THE EGTC AND ITS POTENTIAL

Although this new legal tool, the EGTC, is innovative and important, the particular characteristics conferred on it by this Regulation make it a tool that will be well suited to certain cooperation objectives and less so – or not at all – to others. This chapter should be looked at from a positive perspective – in order to understand what an EGTC is – and a negative perspective – in order to identify which elements, although legitimate (and at times central) objectives of territorial cooperation projects, do not necessarily require recourse to the legal form of an EGTC.

The format of the Regulation does not make it easy to identify the challenges and potential of an EGTC, even though the content of the provisions in the adopted version is clearer than those in the drafts discussed (A).

The EGTC must be described in relation to its seven characteristics (B), the members it comprises (C) and the tasks given to it (D).

The characteristics of an EGTC are:

1. The cross-border nature of the body (B.1), which implies that it must be composed of members 'located on the territory of at least two Member States'. That means in particular that bilateral cooperation across external borders of the EU is not possible.

2. An EGTC has legal personality (B.2). Although this is stipulated in Article 1(3) of the EGTC Regulation, it gives rise to legal questions that are not clarified in the text. The authors of this study show that an EGTC has legal personality under Community law (B.2.1), but insofar as the law applicable in the territory in which an EGTC has its registered office plays an important role in determining the legal form of an EGTC, an EGTC may, depending on the case, be governed by public or private law (B.2.2).

3. Legal personality implies 'the most extensive legal capacity accorded to legal persons under that Member State's national law'. This wording must be put into perspective, however, as an EGTC's capacity is, in particular, limited to carrying out the tasks specified in its statutes (B.3).

4. An EGTC must be governed by a convention and statutes. The coexistence of two different legal instruments would not appear to be justified; however, the requirements of Regulation (EC) No 1082/2006 on the content of each allow for a relatively precise definition of the limits within which the future EGTCs must remain. A number of difficulties or formulations to be avoided are set out in this paragraph (B.4).

5. The Regulation's requirement for the establishment of a single registered office is a characteristic that has far-reaching legal consequences as it determines, in particular, the subsidiary legislation to be applied to an EGTC and the organs

supervising it. This can lead to significant disparities among the partners. Moreover, although not prohibited by the Regulation, transferring the registered office from the territory of one Member State to another Member State would be a complicated and tricky operation from a legal perspective (B.5).

6. To be able to express its intention as a legal personality, an EGTC must possess a number of organs. The Regulation requires the existence of an assembly, in which all members are represented, and a director. However, members are free to decide on the other organs as appropriate (B.6).

7. An EGTC must have an annual budget, which must be adopted by its assembly. Although not stipulated in the Regulation, members' contributions to the EGTC budget shall be considered as compulsory expenditure (B.7).

The third section (C) of this chapter examines the categories of prospective members of an EGTC. Five categories of members are listed in Article 3 of the Regulation, which could result in the composition of EGTCs being very complicated and, in some cases, very diverse. Nevertheless, the stipulation that each prospective member may only operate within the limits of its competences under national law should limit the flexibility in terms of composition of an EGTC.

The possibility of EU Member States participating in a territorial cooperation body is a reversal of the practice that previously excluded them from such structures. The rules on the controls prior to the establishment of an EGTC by national authorities do not appear to apply to the states themselves (C.1).

Regional authorities (C.2) and local authorities (C.3) can of course participate in EGTCs. Their capacity to participate will depend, however, on the scope of their competences under national law.

The possibility of other actors – particularly bodies whose funds are considered to be primarily public (C.4), associations of actors in the previous categories (C.5) or other actors from non-Community territories – participating in an EGTC, and the consequences that would entail, are also examined.

The principle of speciality, shared by all cooperation bodies (i.e. that the body does not have general competence but can only act within the limit of the competences assigned to it), applies to EGTCs. Nevertheless, this study demonstrates that the cumulative effect of the provisions of the EGTC Regulation limiting its capacity for action results in an overly restrictive solution, and that without a more flexible interpretation – for example based on the principle of effectiveness – the EGTCs could be prove to be highly ineffective tools (D).

One of the priority tasks specifically envisaged by the Regulation is achieving the objective of European territorial cooperation, which is the Priority Objective 3 of the structural policy for the years 2007-2013. The study suggests that the EGTC is not only one method of achieving this objective, but also that its very establishment can be considered as contributing to the achievement of this objective (and thus can be subsidised by the Structural Funds, where appropriate in the form of a pilot scheme). The various aspects of this objective, as set out in the Regulations on the Structural

Funds, are then examined (D.1).

The EGTC also allows for the implementation of measures under Community policies other than the structural policy, as stipulated in Article 7 of the Regulation. Thus, due to its possibly heterogeneous composition, it could prove to be a useful instrument in developing European governance, following on from the White Paper that the European Commission adopted on this topic in 2001 (D.2).

The EGTC is also a structure that partners can adopt for cross-border, transnational or interregional cooperation that does not benefit from Community financing (D.3).

The study emphasises, however, the extremely restrictive nature of Article 7(4) of the Regulation, strict application of which could hinder the implementation of a number of projects by an EGTC (D.4).

The fifth section of this chapter (E) looks at the question of the law applicable to an EGTC and its acts. Although an initial reading of Regulation (EC) No 1082/2006 might suggest a simple solution, since Article 2 of the Regulation entitled 'Applicable law' contains rules that appear to be clear, the reality is much more complex. On the one hand, the rules contained in the Regulation often refer to national law, which makes the situation quite complicated (E.3); on the other hand, different phases and different acts of an EGTC are subject to different rules.

The rules applicable to the establishment of an EGTC are thus set out: in accordance with Article 4 of the Regulation, they are subject to the relevant national law and enable the states to exert broad control over the participation in an EGTC of bodies subject to their law (E.1).

The law applicable to the interpretation of the convention and statutes is that of the country where an EGTC has its registered office (E.2). This is a clear and simple rule but it does not ensure that the parties to a convention are treated equally.

An EGTC's acts are subject to different types of controls, depending on their nature: the rules on financial control vary according to whether the activities are financed by Community funds or not; in the latter case, the Regulation seems to lack clarity and standard procedures should be envisaged (E.4.1).

Moreover, extraordinary controls to protect the public interest may be carried out by any Member State concerned; although such measures should only be used in exceptional circumstances, it is important to point out that the procedures for these controls are not clarified either (E.4.2).

Members can to a large extent determine in the convention and the statutes the rules that will govern their mutual relations. In many cases, however, the laws of the state where the EGTC has its registered office will apply (E.5).

An EGTC's contractual relations with third parties may be governed by the law chosen by the parties, where no binding rules exist. However, in many cases (e.g. employment relations), the principle of territorial application will determine the rules with which these relations will have to comply (E.6).

Under Article 12 of the Regulation, there are a number of different solutions to the

system of liability of the members of an EGTC with regard to third parties, ranging from limited responsibility to very broad responsibility, and in some cases continuing after they have ceased to be members of the EGTC. This diverse range of possible situations reflects the diverse range of national situations in terms of the procedures concerning the liability of public bodies (E.7).

Member States' liability will depend on their situation in relation to an EGTC. If they are not members of the EGTC, they will not have any liability for the latter's acts, unless they are responsible for the use of Community funds (E.8). If they are members of the EGTC, they are subject to the same rules on liability as the other members.

Finally, an EGTC may be wound up as a result of implementation of a corresponding provision in its statutes or on an application by a competent authority. In the latter case, the public law applicable to the acts of this authority will apply. In all instances, the rules on liquidation should be those of the state where the EGTC has its registered office (E.9).

Given the variation in all these factors – the members, the tasks given to EGTCs and the different laws applicable to different acts carried out by EGTCs – it becomes clear that an EGTC is not a single type of structure. It is therefore important to identify different types of EGTCs, which will be subject to different legal constraints. Six criteria to categorise EGTCs are proposed (F).

Finally, a summary presenting the main elements of continuity and the most significant innovations of the EGTC form the conclusion of this lengthy chapter (G).

As demonstrated in the previous chapter, the concrete legal form of an EGTC will not be determined by Community law alone. Numerous elements of national law will also play a part in the definition of a given EGTC. As a result, the present analysis cannot be exhaustive and will thus concentrate on the provisions of the Community Regulation. This is necessary for two main reasons.

Firstly, the innovative content of this Regulation, in relation to both the legislation on cross-border cooperation developed in Europe over the last 30 years (see Chapter 2 above) and the pre-existing Community legislation (see Chapter 3, sections C and D above), warrants a detailed and analytical commentary of its text. We have also highlighted above that there may be three possible types of relations with the national legal systems (see above, Chapter 3, section D, paragraph 2.2) depending on the content of each provision. This second point will therefore entail for each provision an analysis of the effects in terms of the relationship between the Community provision and national legislation. Taking into account these two parameters, for each provision in question we will provide the most probable interpretation – based on preparatory work and on the principles of interpretation of Community law – and its likely effects as regards the national laws.

It is important to note that the experts felt that it was preferable to present the EGTC in terms of the specific characteristics of this cooperation instrument, rather than sticking to the format of the Regulation, which will be discussed initially (A). The EGTC will then be examined in four sections. The first will present and analyse the main characteristics of the EGTC (B). The second will look at the members that can make up an EGTC and the specific impact that these different categories of

members may have on different types of EGTC, either at the time of their establishment or in terms of their operating procedures (C). The third section will focus on the tasks that an EGTC can carry out (D), while the last section will look at the law applicable to an EGTC and its acts (E). This last and important section will demonstrate that this issue cannot be dealt with from just one perspective and that different responses have to be provided in accordance with the type of tasks carried out by an EGTC or the actors involved.

Consequently, although the EGTC is a unique cooperation structure founded on Community law, the broad spectrum of tasks, actors and legal provisions involved mean in practice that the EGTCs may be relatively diverse in terms of their form and legal status. The last section of this long chapter thus proposes a typology of the different legal categories of EGTCs (F), each accompanied by a brief consideration of the implementing methods and pertinence of the solutions offered by the law.

To conclude this central chapter, a short section (G) will emphasise the innovative nature of the solutions provided by this Regulation or, where appropriate, the extent to which they follow on from the existing rules and practices. It should be pointed out, finally, that although this necessary analysis seeks to clarify the significance of the various provisions of the Regulation, it does not provide an overall view of the consequences of establishing an EGTC, which will to a large extent depend on the way in which the Regulation is implemented in the different national contexts. This final chapter must also be read in conjunction with the following chapter, which will highlight the potential difficulties involved in implementing the provisions of the Regulation, according to the experts and professionals consulted (Chapter 5 below).

A. FORM AND CONTENT OF REGULATION (EC) NO 1082/2006

As we saw in the previous chapter, the way in which the EGTC Regulation is written is somewhat surprising as in many respects it is more like a directive than a regulation. However, this particular type of regulation, which establishes a new legal personality, drawing some of its characteristics from a Community act and others from national legislation, to which the act refers, is not unique and can be compared to the Regulations on the European Economic Interest Grouping (EEIG), on the European Company (SE) or the European Cooperative Society (SEC). What is striking in this instance, however, is the brevity and conciseness of the rules, which nevertheless deal with a subject that is for the most part as complex as those dealt with in the three other cases mentioned above. The EGTC Regulation only contains 18 articles, taking up six pages in the Official Journal, while the Regulation on the European Economic Interest Grouping has 43 articles (9 pages in the OJ). The Regulation on the European Company has no less than 70 articles and two annexes (21 pages in the Official Journal) while the Regulation on the SEC has 80 long articles, taking up 24 pages in the Official Journal.

This drafting restraint is all the more surprising since the scope of the Regulation appears to be extremely large, covering cross-border cooperation[246] as well as transnational and inter-regional cooperation (currently strands B and C of the Interreg III initiative), which were added following converging opinions on this matter from the Committee of the Regions[247] and the European Parliament[248]. In addition, it would appear that the European Commission's main objective with its initial proposal was to establish a cross-border structure that could be used for the implementation of Community contributions within the framework of the cohesion policy. Insofar as the correct implementation of the budget is always the ultimate responsibility of the Member States, its goal was

to establish a structure that the Member States and, where appropriate, their local authorities, could use to process Community funds within a framework that was not strictly national (e.g. cross-border projects). Thus the Commission's initial proposal does not contain any rules regarding controls of the participation of territorial authorities prior to the establishment of an EGTC and Article 2 of the initial proposal stipulates that 'the EGCC can be made up of Member States and/or regional and local authorities […]', which does not seem to allow the establishment of a such a legal structure by territorial authorities alone, without their Member States. The Committee of the Regions and the EP reacted accordingly and called for this wording to be changed. The Commission agreed to this but it now means that a Member State must carry out prior controls if its territorial authorities wish to form an EGTC without the state's participation. Provisions to that effect (primarily Articles 4, 13 and 14 of the final version) were thus added, resulting in a somewhat confused text.

Looking at it in order, the text firstly defines an EGTC (Article 1), the law applicable to it (Article 2), the members that may form an EGTC (Article 3), the methods and procedures for the establishment of an EGTC and acquisition of legal personality (Articles 4 and 5), the rules on an EGTC's management of public funds (Article 6), the tasks an EGTC can carry out (Article 7), the rules on the convention (Article 8) and statutes of an EGTC (Article 9), the organisational principles (Article 10), and the provisions concerning its budget (Article 11), its dissolution and its liquidation (Articles 12 to 14). There then follows a very important article on the jurisdiction as regards an EGTC's acts (Article 15) and the final provisions (Articles 16 to 18).

A number of criticisms must be made of this configuration, however. Firstly, and this would appear to be the main problem, Article 2 on the applicable law only covers certain aspects, and important principles that derogate from the ranking order indicated in this article appear in Articles 4, 12, 13, 14 and 15. In our view, the heading of Article 2 and the fact that specific rules are dispersed throughout the text is likely to lead to errors on the part of the prospective users of this instrument.

Secondly, the fact that a broad range of members can form an EGTC undoubtedly has a significant impact on the applicability of the rules on controls set out in Articles 4, 13 and 14; in particular, it would appear obvious that if a state wishes to be involved in an EGTC, the control procedures designed to be applied to territorial cooperation between local authorities are not going to apply to the state itself. Some indications in this respect would have been helpful to clarify the scope of these rules. Similarly, in terms of the application of national legislation to an EGTC, in the case of public law this could be problematic where a foreign state is involved.

Thirdly, the distinction between conventions and statutes, taken over from existing cross-border cooperation framework instruments, does not make any sense in this instance. In fact, in all previous experiences the establishment of a cross-border cooperation body has been only one possible means of achieving cross-border cooperation; less formal and complex forms of cooperation may be employed by the partners. This is not the case here, however: this Regulation only seeks to authorise the formation of a particular type of cross-border cooperation body, the EGTC, and the distinction between a convention and statutes is rife with complications and confusion.

Fourthly, it would probably have been more logical to put the article on the control and management of public funds (Article 6) next to the articles on the budget (Article 11) and the financial liability of members in the case of dissolution (Article 12).

Despite these criticisms of the format, the wording of the provisions in the adopted version is generally clearer and more complete than the texts proposed in the earlier versions – which does not

hide the fact that problems remain, as we will show below – and the issue appears to be dealt with comprehensively, if at times in a somewhat elliptical fashion.

B. THE CHARACTERISTICS OF AN EGTC

The EGTC is a new instrument that Community law offers to partners involved in territorial cooperation. It is important to remember that use of this legal cooperation structure is subject to the wishes and needs of the partners involved in cooperation. Recital 8 of the final version stipulates that 'recourse to an EGTC should be optional', which seems to confirmed by Article 4(1) of the Regulation, which states: 'The decision to establish an EGTC shall be taken at the initiative of its prospective members'. This necessary condition shows that it is not on the basis of a criterion laid down by Community law that an EGTC may be formed, but following a choice by the parties. More importantly, in the Regulations on the Structural Funds for 2007-2013, there is no provision, either in the General Regulation[249] or in the ERDF Regulation[250], that requires an EGTC to be used for any activity concerning management of the Structural Funds. Nonetheless, as stipulated in the first paragraph of the recitals, 'the harmonious development of the entire Community territory and greater economic, social and territorial cohesion imply the strengthening of territorial cooperation. To this end it is appropriate to adopt the measures necessary to improve the implementation conditions for actions of territorial cooperation'. Thanks to this Regulation, Community law therefore possesses a tool allowing, where appropriate, for better implementation of territorial cooperation, available to the partners involved in such actions.

In order to help prospective partners to decide whether recourse to this tool corresponds to their common needs and objectives, this first section will clarify the main characteristics of an EGTC. Seven characteristics are identified and detailed below. It is important to understand, too, that elements that can – and clearly will – have enormous influence on the partners' decision on whether or not to use such a structure, for example as regards the financing of specific cooperation actions (in some cases from the Community budget), are not determining factors in the decision to establish an EGTC. This last consideration is quite important and we would emphasise that, innovative and important as this new legal tool is, the specific characteristics conferred on it by the Regulation mean that it is a tool that will be well suited to certain cooperation objectives and less so – or not at all – to others. This first section should be looked at from a positive perspective – in order to understand what an EGTC is – and a negative perspective – in order to identify which elements, although legitimate (and at times central) objectives of territorial cooperation projects, do not necessarily require recourse to the legal form of an EGTC.

The seven characteristics of an EGTC are as follows:

1. its 'cross-border' nature;
2. the existence of legal personality;
3. the location of this new legal person at a single registered office, which must be situated on the territory of the Community;
4. the recognition in each national legal system of extensive legal capacity;

5. the possibility for the members of an EGTC to define, in a convention and statutes, the characteristics of the EGTC's tasks and operation;
6. the existence of organs to express the desires of this new legal person and act on its behalf;
7. a budget.

Each of these characteristics and their significance will be examined in detail below.

1. Cross-border nature

The European Commission's original proposal[251] sought to establish a European grouping of cross-border cooperation[252]. For important political reasons, the Committee of the Regions[253] and the European Parliament (first amendment, taken over by the Commission in its amended proposal of March 2006) wanted the title of the Regulation and the name of the tool it defined to be changed. It is now therefore known as a grouping of territorial cooperation. However, this territorial cooperation – a neologism in European legal vocabulary – encompasses cross-border, transnational and/or interregional cooperation[254], in other words the facets covered by the three strands (A, B and C) of the Interreg III programme.

The term 'territorial cooperation' also refers to territorial cohesion[255], which does not necessarily have a dimension that transcends national borders. As far as the EGTC is concerned, however, this dimension is necessary. In fact, Article 3(2) of the Regulation, concerning the composition of an EGTC, stipulates: 'An EGTC shall be made up of members located on the territory of at least two Member States'. Consequently, an EGTC must inevitably have a cross-border dimension.

It is important to note that this inseparable link to a cross-border dimension in the broadest sense – i.e. not necessarily limited to neighbourhood – applies in different ways to the EU's internal and external borders. Indeed, although the importance and benefits of cross-border cooperation at the EU's external borders are widely recognised[256], according to this Regulation the establishment of an EGTC specifically for an external border of the Union cannot be proposed for legal reasons. In fact, the last paragraph of the recitals, added at the very end of the negotiations, highlights that concern and the reasons why this Regulation cannot provide a solution to it. It thus states: 'The third subparagraph of Article 159 of the Treaty[257] does not allow the inclusion of entities from third countries in legislation based on that provision. The adoption of a Community measure allowing the creation of an EGTC should not, however, exclude the possibility of entities from third countries participating in an EGTC formed in accordance with this Regulation where the legislation of a third country or agreements between Member States and third countries so allow'.

Consequently, the participation of entities from third countries, or third countries themselves, in an EGTC is not prohibited; however, pursuant to Article 3(2) of the Regulation, an EGTC must be made up of members located on the territory of at least two Member States. A bilateral cross-border EGTC at an external border of the EU is therefore not possible under the terms of the Regulation[258].

2. *Legal personality*

This is the most fundamental characteristic of the EGTC. Not only is it a 'cooperation instrument at Community level'[259], it above all allows for the establishment of a cooperation structure with its own legal personality, which implies a legal capacity that authorises it to act directly in relation to its members, Community institutions or third parties. Given the difficult development of European legislation (in the broadest sense) on territorial cooperation (Chapters 1 and 2 above), this is a key aspect of such cooperation.

In the EGTC Regulation, this matter is dealt with simply and categorically. In fact, Article 1(3) of the Regulation states: 'An EGTC shall have legal personality'. This is indisputable and undoubtedly an important aspect of this tool. Nevertheless, the clarity of the wording conceals two substantial and complex legal questions, which both relate to the nature of this legal personality. First of all, does it mean legal personality under Community law, or legal personality under national law, upon which Community law confers certain rights and prerogatives throughout Community territory? Secondly, irrespective of the response to the first question, it is important to determine whether the legal personality is governed by public law or private law[260].

These two questions, which are undoubtedly quite technical, have, depending on the response, a substantial impact on the laws – particularly at national level – that will apply to these structures and, where appropriate, the legal remedies that will be available to an EGTC or may be used against its person or its acts. We will therefore attempt to respond to these two questions on the basis of the information available. The first, in our opinion, allows for a clear response in favour of a legal personality under Community law, while the second cannot be resolved in advance, given the current legal situation; as far as we are concerned, the parties will be able to choose whether their EGTC's legal personality will be governed by private law or public law[261]. The characteristics of the national laws may limit the options available, or impose one or other solution.

2.1 Legal personality under Community law

Insofar as an EGTC unquestionably has legal personality, the wording of Article 1(3) of the EGTC Regulation being unambiguous in this respect, we need to determine whether this personality implies legal personality under Community law, or legal personality that is based on national law but that Community law requires all Member States to recognise. The response is unclear since elements of both national law and Community law combine to confer legal personality on each EGTC. It would thus appear that it is Community law that recognises the legal personality of an EGTC (Article 1(3)) and stipulates that an EGTC 'shall have in each Member State the most extensive legal capacity accorded to legal persons under that Member State's national law'[262]. Similarly, Article 2 states that the laws of the Member State where the EGTC has its registered office apply only 'in the case of matters not, or only partly, regulated by this Regulation', which seems to indicate that Community law takes precedence over national law, and would thus suggest that the legal personality is governed Community law.

Yet at the same time, it is following registration or publication 'in accordance with the applicable national law in the Member State where the EGTC concerned has its registered office [that] the EGTC shall acquire legal personality on the day of registration or publication, whichever occurs first'[263].

Similarly, numerous national laws[264] are applicable and affect the very existence of an EGTC. Finally, 'the law applicable to the interpretation and enforcement of the convention […] shall be the law of the Member State where the EGTC has its registered office' (Article 8(2)(e)).

Despite the complexity of the issue, we feel it is possible to opt without hesitation in favour of legal personality under Community law for the following reasons.

First of all, we should point out that a very similar question was examined by the Advocate-General in her conclusions presented on 12 July 2005 in Case C-436/03 between the European Parliament and the Council on the validity of the Regulation on the Statute for a European Cooperative Society. In fact, one argument put forward by the European Parliament was that 'the Regulation does not contain a complete legal framework' or, as expressed by Parliament, that an SEC can only exist in conjunction with national law[265]. This raises questions about the legal nature of the SEC: is it a new legal form governed by Community law or a national company of European character, as stated by the Commission and Parliament? In this respect, the Advocate-General states that 'it is not finally established, in particular, where the dividing line runs between genuine or completely new legal forms and those new legal forms to which national law also applies'[266]. Emphasising that 'academic writers have tended to take rather the view that it is a pan-European form of company, a European legal form, a legal person governed by European Community law or a supranational business structure'[267], the Advocate-General rightly concludes that 'what is vital, therefore, is the legislative content of the regulation'[268].

In this respect, it would appear that there are two key elements. Firstly, one of the recitals mentions 'the specific Community character'[269] of an SCE while another is even clearer and refers explicitly to 'the introduction of a European legal form […]'[270]. Secondly, while noting that although 'the Regulation makes various references to national law and affords it application in wide areas relating to an SCE'[271], the Advocate-General emphasises, however, that the Regulation 'contains one express provision that clearly sets out the ranking order of the law applicable: Article 8 clearly accords priority to the Regulation'. Combining this finding with the fact that 'large parts of the Regulation, certainly, contain genuinely new provisions'[272], she concludes that 'the new legal form of an SCE was created by the Regulation at issue. […] the Regulation therefore creates a Community structure in parallel with national structures'[273].

If we now return to Regulation (EC) No 1082/2006 of 5 July 2006 and apply the criteria set out by the Court to the specific case of an EGTC, we can follow the main argument, i.e. that the law applicable to an EGTC as stipulated in Article 2 of the Regulation follows exactly the same ranking order as that of Article 8 of the Regulation on an SEC. As the same causes should logically produce the same effects, we must therefore conclude that on the basis of this fact alone an EGTC is a legal form governed by Community law, and as stated by the Court in relation to the SEC Statute, 'that finding is not affected by the fact that the contested Regulation does not lay down exhaustively all of the rules applicable […] and that, for certain matters, it refers to the law of the Member State […]'. We should also point out in the case of the only other cross-border cooperation structure founded on an international text and governed by its own statutes, which we examined in Chapter 2 above, the local transfrontier cooperation grouping provided for in the Karlsruhe and Brussels Agreements, it is stipulated in Article 11 of each of these agreements that 'this local grouping is subject to the national law applicable to the public establishments for cooperation between local authorities in the state in which the party has its registered office'[274]. The opposite applies; these are clearly structures governed

by national law, while in the case of the EGTC, like that of the SEC, Community law and the statutes founded on Community law take precedence over national law.

Moreover, as in the Regulation on the SEC, paragraph 8 of the recitals to the EGTC Regulation states that 'it is necessary to institute a cooperation instrument at Community level for the creation of cooperative groupings in Community territory, invested with legal personality'[275]. It is thus clearly indicated that the wish of Parliament and the Member States in adopting this Regulation is to institute a legal person under Community law, rather than to force the Member States to recognise a national legal form. In addition, it is even more evident than in the case of the European Cooperative Society that the EGTC does not correspond to any existing legal person under national law. Indeed, it is quite clearly Article 1 of Regulation (EC) No 1082/2006 that confers the legal personality and legal capacity on this new legal person. The references to national law do not change anything in this instance.

Although it is the registration or publication in accordance with national law that enables an EGTC to acquire legal personality (Article 5 of the Regulation), it is the Regulation that requires the Member State where the EGTC has its registered office to accept the registration of this legal structure that did not previously exist under national law. It is also the Regulation that stipulates that it is the day of registration or publication, whichever occurs first, that legal personality is acquired, which in some cases may be contrary to national rules that might provide for a longer period of time between publication and acquisition of legal personality. Similarly, where the Regulation stipulates that 'in deciding on the prospective member's participation in the EGTC, Member States may apply the national rules', this means, on the contrary, that for the other elements involved in the formation of an EGTC, the Member States apply the Community rules instead of the national rules. In addition, where Article 12 states that 'as regards liquidation, insolvency, cessation of payments and similar procedures, an EGTC shall be governed by the laws of the Member State where it has its registered office', this means that all the other aspects relating to the operation of an EGTC are, on the contrary, not governed by the national rules, except under the conditions laid down in Article 2 of the Regulation, i.e. 'in the case of matters not, or only partly, regulated by this Regulation'.

It is therefore established that the EGTC is a legal person governed by Community law and that certain aspects of an EGTC are governed by national law, either because this is stipulated in Regulation (EC) No 1082/2006 or because the Regulation says nothing about them.

2.2 Legal personality under public law or private law?

This issue is not dealt with in the Regulation. The Netherlands and Italy had hoped that Article 1 of the Regulation would indicate that the legal personality of an EGTC was a matter of public law[276]. However, this proposal was rejected. When looking at the existing legal provisions applicable to cross-border cooperation we saw that cooperation bodies governed by both private law and public law may be created[277] to provide a structure for cross-border cooperation. In the absence of any clear choice in the text of the EGTC Regulation, it would appear to be possible for an EGTC to be a public or private law entity, where this is permitted under national law.

There is no doubt that the nature of the provisions of the Regulation, the rules on the prior controls of the participation of entities by the state concerned, based in particular on a conception of the general interest (Article 4(3)) or the public interest (Article 13(1)), and the decision not to allow an EGTC to carry out tasks that concern 'the exercise of powers conferred by public law or of duties whose object

is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers […]' inevitably suggest that public law applies.

It should be noted, however, that recourse to private law is not expressly excluded. Furthermore, some of the prospective members of an EGTC may be private law entities, in accordance with either paragraph 1(d) of this article[278] or the last subparagraph of the same paragraph[279]. What is even more interesting is that the wording of Article 7(4) ('the tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law […]')[280] suggests that only management activities governed by private law may be assigned to an EGTC[281]. This would thus imply that this structure carries out activities that by their very nature are governed by private law, and that it would therefore be simpler to form an EGTC under private law.

As regards the provision in Article 15(3) on jurisdiction, which states that 'nothing in this Regulation shall deprive citizens from exercising their national constitutional rights of appeal against public bodies which are members of an EGTC in respect of: (a) administrative decisions in respect of activities which are being carried out by the EGTC; (b) access to services in their own language; and (c) access to information', this may apply to an EGTC that is either a public law entity or a private law entity. What is does indicate, however, is that, irrespective of the legal form of an EGTC and the law applicable to it, the relationship between the citizens and the bodies that exercise public powers on their behalf is not affected by the participation of such bodies in an EGTC. Therefore, this provision does not provide any helpful indications for determining the law applicable to the legal personality.

As regards the provision on the law applicable to the convention[282], it clearly states that national law applies, but not if this will entail public law provisions (e.g. rules on cooperation between public authorities, law on administrative contracts or law applicable to public establishments for cooperation between local authorities) or private law provisions (contract law, law on associations[283] or company law). Indeed, it is entirely possible to imagine a convention subject to public law that, given the nature of the public entities involved, establishes a body that is subject to private law, in line with the ranking order laid down in Article 2 of Regulation (EC) No 1082/2006.

Therefore, this issue cannot be resolved by reference to the terms in the EGTC Regulation. There are two solutions: an EGTC subject (in accordance with Article 2 of the Regulation) to the private law of a Member State (e.g. the law on associations) or an EGTC subject (in accordance with Article 2 of the Regulation) to the public law of a Member State (e.g. the law on cooperation between local authorities). Several criteria will have to be examined in order to determine whether an EGTC's legal personality is governed by private law or public law. The criteria should be considered in the following order:

The tasks given to the EGTC: are the tasks governed by public law (the boundary in this instance is not always clear and, for example in the area of public services, the limits between public and private law can vary from one state to another) or by private law? This would appear to be the most important criterion as far as we are concerned.

The legal solutions offered by the law of the state where the EGTC has its registered office (criterion imposed by Article 2(1)(c)): under this legal system do public authorities have access to a specific type of structure governed by private law or public law? This criterion is as important as the previous one. However, where different solutions are possible depending on the legal systems in question (the law of the states involved in the formation of a specific EGTC), the solution most likely

to comply with the first criterion (the tasks) should influence the partners' choice of where to locate the EGTC's registered office (and thus the national law applicable).

The third criterion is of course the intention of the partners establishing the EGTC. Insofar as they can determine the tasks given to the EGTC in the statutes, we also recommend that they determine the national legal form that will govern the EGTC in the appropriate ranking order. Naturally, where applicable, the national courts dealing with this matter would not necessarily be bound by this choice, particularly if imperative provisions of national public law required a different choice. However, this indication could be an important element for a court's assessment of the situation, and could consequently improve the legal certainty for an EGTC's members.

In the case of an EGTC involving a state other than the state where the EGTC has its registered office, the most simple solution would be for it to be treated as a private law structure, and thus subject to national private law, rather than as a public law structure.

3. Extensive legal capacity, but limited to specific tasks

'An EGTC shall have in each Member State the most extensive legal capacity accorded to legal persons under that Member State's national law. It may, in particular, acquire or dispose of movable and immovable property and employ staff and may be a party to legal proceedings.'[284] This provision incorporates, *mutatis mutandis*, Article 282 of the EC Treaty[285], which deals with the Community's legal capacity in the legal systems of each of the Member States. It is a strong symbol, but we feel that the provision is misleading.

In fact, this legal capacity will be limited by the tasks given to an EGTC, since Article 7(2) stipulates that 'an EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion and be determined by its members'. It is thus a principle of conferral – as for the European Community in accordance with Article 5(1) of the EC Treaty – that limits an EGTC's capacity for action.

This limitation is not just substantive, depending on the competences conferred on an EGTC; it is also territorial. In fact, Article 8(2)(b) states that the convention governing an EGTC must specify 'the extent of the territory in which the EGTC may execute its tasks'. Consequently, although an EGTC's capacity for action is to be determined under national law as equivalent to the most extensive legal capacity accorded to legal persons in that Member State's legal system, there are some substantive and territorial limitations. Of course, irrespective of the national provisions on the capacity of legal persons such as may be represented by an EGTC under national law, the limitations laid down in Regulation (EC) No 1082/2006 will take precedence over the national provisions, in accordance with the ranking order established in Article 2 of the Regulation.

The principle of substantive limitations on the competences of legal persons is not a problem in itself; in fact it is the general rule[286]. What poses a problem in this instance, however, is that Article 7(2) states that the tasks given to an EGTC must 'all fall within the competence of every member under its national law'. This risks leaving an EGTC with very few substantial tasks[287], and thus a relatively limited capacity.

In conclusion, we should point out that the questions relating to legal capacity and legal personality may be treated with some flexibility[288]. Finally, irrespective of the characteristics national legislation might confer on the legal personality governing an EGTC at national level, the capacity of this EGTC should always be that provided for in Regulation (EC) No 1082/2006, in accordance with the ranking order established in Article 2 of the Regulation, subject to the limits laid down in the Regulation itself that we have highlighted above.

4. Established by a convention and governed by statutes

As demonstrated in the analysis of the structure of this Regulation, the distinction between the statutes and the convention does not appear to be overly justified as far as the formation of an EGTC is concerned.

In fact, these two documents are adopted by the same actors, i.e. the members of the EGTC being formed, using the same procedure – unanimous approval[289] – and very probably at the same time. The Regulation stipulates that 'the statutes of an EGTC shall be adopted on the basis of the convention'[290], which suggests that the convention comes first. Yet given that both the convention and the statutes must be sent to the Member State (i.e. the state provided for in the treaties, which 'shall designate the competent authorities to receive the notifications and documents'[291]) so that it can approve them within a deadline of three months ('as a general rule', according to the second subparagraph of Article 4(3), which allows for exceptions), it should seem logical to most actors to forward both documents at the same time.

It is possible that members of a future EGTC might forward the documents in two stages: firstly forwarding the convention, then, once it is approved and adopted, drawing up the statutes, forwarding them for approval and then adopting them. However, this scenario seems highly unlikely for two reasons. Firstly, it would take a great deal of time and present a double risk during the controls (since a convention alone is of little use in the context of the implementation of this Regulation); it seems highly implausible that this option would be chosen. Secondly, there is no certainty that the states would agree to examine and approve a convention on its own, without the statutes. In fact, the states have a deadline of three months to reach a decision on the formation of an EGTC in which one of its authorities will participate (see point E.1 below for the elements relating to this procedure) 'from the date of receipt of an admissible application in accordance with paragraph 2'[292]. Yet paragraph 2(b) of this article states that each prospective member of an EGTC must 'send that Member State a copy of the proposed convention and statutes referred to in Articles 8 and 9'. It would therefore be up to the competent State authorities to determine whether prior approval of the convention is possible, or whether a request for approval of the convention alone must be considered incomplete and inadmissible since the second subparagraph refers explicitly to the convention and statutes.

The only procedural difference between these two documents is their amendment. According to Article 4(6), 'any amendment to the convention' must be approved by the Member States, while only 'substantial' amendments to the statutes need to be approved. In addition, the members of an EGTC may lay down less strict rules (e.g. qualified majority) for amendments to the statutes than for amendments to the convention[293], which thus allows a certain flexibility as regards organisational matters.

According to Article 8(2), the convention must specify at least the following:

- 'the name of the EGTC';
- 'its registered office, which shall be located in a Member State under whose laws at least one of the members is formed' (this point is discussed in detail in point 5 of this section below);
- 'the extent of the territory in which the EGTC may execute its tasks': this provision, which is similar to requirements in bilateral agreements on cross-border cooperation[294], on the one hand is phrased too restrictively[295], and on the other makes little sense for EGTCs formed for the purposes of transnational or interregional cooperation;
- 'the specific objective' of the EGTC. This expression only appears in Article 8(2)(c); there is a further reference to an 'objective', which is to 'facilitate and promote cross-border, transnational and/or interregional cooperation', which is clearly much broader than the specific objective. There is also a reference to 'specific actions' (second subparagraph of Article 7(3)), to 'tasks and competencies' (Recital 10)[296], to 'territorial cooperation projects or programmes cofinanced by the Community' (Article 7(3) and Recital 11), and of course to tasks, which is the generic term used by Regulation (EC) No 1082/2006 to describe, notably in Article 7, the activities assigned to an EGTC by its members. Finally, Article 5(2) mentions 'the objectives' of an EGTC, which must be published in the Official Journal of the European Union. The 'specific objective' is therefore not specified in the Regulation. It is probably a provision with general scope that clarifies the goals pursued by the partners in establishing an EGTC. Although the terms differ somewhat, it may correspond to 'the objectives' referred to in Article 5(2) of the Regulation. In order to avoid too much confusion as a result of the many different terms and phrases used – as is often the case in the Community Regulation, in our view – we would recommend that this specific objective should correspond as closely as possible to 'the objectives' to be published in the EU's Official Journal;
- 'the tasks' of an EGTC: the use of the singular in the French version here is surprising, particularly as Article 7(1) states that 'an EGTC shall carry out the tasks given to it by its members in accordance with this Regulation' (plural used in the French version in this instance). As with the 'specific objective' – reference is made elsewhere to 'the specific objectives and tasks of the EGTC' as a single requirement – the idea represented by this requirement probably refers to a general provision;
- the 'duration' of an EGTC: no restrictions are laid down in the Regulation. Nevertheless, looking at past experiences of cross-border cooperation bodies, we will recall that the Court of Auditors, taking up the guidelines laid down by the Commission for the Interreg III initiative, emphasised that it was preferable that 'preparation and management be centralised, preferably at a permanent cross-border organisation'[297]. Considering the amount of time and political capital involved in setting up such a structure, it would be preferable to provide for a long, or even unspecified, period of time. In the latter case, however, the formulation can put off prospective partners and a good solution may be to establish it for a relatively long specified period of time (e.g. 10 years) that can be tacitly renewed for a further long period (e.g. 5 years), which means that at the end of this first period any of the parties can decide to withdraw from the structure, but also that it can continue to operate for a new predetermined period without any negotiations if none of the parties are opposed to this;

- ‘the conditions governing its dissolution’: in this instance, the parties to the convention have few options available to them. In fact, Article 12 of the Regulation provides for referral to the legislation of the Member State where the EGTC has its registered office for its liquidation and liability of its members, elements that must be taken into account at the time of dissolution. Moreover, Article 14 of the Regulation states the following: ‘Notwithstanding the provisions on dissolution contained in the convention, on an application by any competent authority with a legitimate interest, the competent court or authority of the Member State where an EGTC has its registered office shall order the EGTC to be wound up if it finds that the EGTC no longer complies with the requirements laid down in Articles 1(2) or 7 or, in particular, that the EGTC is acting outside the confines of the tasks laid down in Article 7’. It should be noted, however, that ‘the competent court or authority may allow the EGTC time to rectify the situation’ but that ‘if the EGTC fails to do so within the time allowed, the competent court or authority shall order it to be wound up’. As can be seen, the parties have only minimal powers of discretion when it comes to the question of dissolution.

Moreover, and despite not being required by the Regulation as far as the content of the convention is concerned, although along the same lines, the experts believe that it is important to draw the attention of prospective members of an EGTC to the provision in Article 13 of Regulation (EC) No 1082/2006, which allows ‘a competent body’ of a Member State where ‘an EGTC carries out any activity in contravention of a Member State’s provisions on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State’ to ‘prohibit that activity [of the EGTC] on its territory or require those members which have been formed under its law to withdraw from the EGTC unless the EGTC ceases the activity in question’. This provision of the Regulation clearly applies to the members of an EGTC; Article 2 also stipulates clearly, although it would appear logical, that the Regulation takes precedence over the convention and the statutes. However, it would be wise for the parties to establish an internal procedure or internal rules in case one of these eventualities – an EGTC being prohibited from operating in the territory of one of the members concerned or one or more members of an EGTC being required to withdraw from the EGTC by their Member State – arises.

What is quite surprising, too, is that the Regulation does not require either the convention or the statutes to contain a provision on the possible withdrawal of a member. This silence could be interpreted in two ways, neither positive. The first would be that this silence is the equivalent of a ban on withdrawal. Perhaps in the case of an EGTC with a specified lifespan such a solution would be acceptable, but it would make it difficult to form an EGTC with an unspecified lifespan (despite the fact that the possibility of establishing permanent cooperation structures is one of the Commission’s stated objectives within the framework of its support policy, at least for cross-border cooperation). This would be regrettable. The alternative would be to conclude that the Regulation has not provided for this case in point because its authors considered that the withdrawal of a member inevitably implies the dissolution of an EGTC. Nothing in the preparatory work suggests, however, that this scenario was envisaged; such an interpretation would thus be excessive. This unexplained silence on the part of the Regulation leads us to believe that it is possible, and desirable according to the experts, for the question of a member’s withdrawal (the conditions and consequences) to be regulated by the convention establishing the EGTC. Naturally, the solution chosen by the partners may also be to prohibit members from withdrawing or to decide that a withdrawal implies dissolution of the EGTC. However, it would be better for this matter to be resolved at the outset in the convention.

If that were not done and a member were to withdraw, voluntarily or in accordance with the procedure laid down in Article 13, the parties to the convention that wished to continue cooperating within the framework of an EGTC that had lost a member could attempt to do so by implementing the procedures for amending the convention and the statutes, provision of which is obligatory. We should point out, however, that this solution will inevitably require the approval of this amendment by the states, pursuant to the procedure laid down in Article 4 of the Regulation (in our view, this is probably also the case if a specific procedure is already laid down).

- ‘the list of the EGTC’s members’;
- ‘the law applicable to the interpretation and enforcement of the convention, which shall be the law of the Member State where the EGTC has its registered office’. As written – incorporating a proposed amendment by the EP – this provision makes little sense because it is a substantive rule. The Regulation governs this matter, and its inclusion in the text of the convention cannot under any circumstances diverge from this Community provision. This solution – that the same law is applicable to both the interpretation and enforcement of the convention and the EGTC at national level (in the ranking order laid down in Article 2 of the Regulation) – has the advantage of offering greater coherence since the same principles of interpretation are thus applied to the EGTC and to the convention governing it. However, it has the drawback of increasing further the disparities between the parties as some are obliged to comply with a foreign law, both as regards their participation in an EGTC’s activities and, where appropriate, when exercising their rights in relation to their partners on the basis of the convention. This is all the more true in the light of the second subparagraph of Article 15(2), since the competent courts will also be those of the Member State where the EGTC has its registered office;
- ‘the appropriate arrangements for mutual recognition, including for the purposes of financial control’: it would be difficult to include this provision in a convention of an EGTC that comprises authorities of a Member State, but not that Member State itself. Indeed, territorial authorities are not responsible for determining such arrangements. In this instance, the actors should ask the competent national authorities to endorse the wording of such a provision in advance, or hope that the authorities, as required by Article 16 of Regulation (EC) No 1082/2006, will adopt a national procedure or rules allowing territorial authorities formed under their laws to incorporate such a provision in the convention establishing the EGTC of which they will be members;
- ‘the procedures for amending the convention, which shall comply with the obligations set out in Articles 4 and 5’: pursuant to this provision the parties will have to determine whether the convention may be amended using a decision-making procedure other than the unanimity required for the initial adoption of the convention.

Of course, the parties to the convention are free to include other provisions in that convention, so long as they comply with the Regulation and their responsibilities under national law. We recommend, however, that where feasible the interested parties should try to keep the text of the convention as simple as possible.

As far as the statutes are concerned, apart from containing ‘as a minimum, all the provisions of the convention’, Article 9(2) also stipulates that they must specify the following:

- ‘the competencies of the EGTC’s organs’: this wording is not ideal. Under Article 10, an EGTC must have at least two organs, an assembly and a director. In addition, the statutes

may provide for 'additional organs with clearly defined powers'[298]. If it is clear that the director and the additional organs are organs whose competencies must be defined, what is the situation regarding the assembly? The Regulation is silent on this point. Taking into account the existing bilateral conventions and agreements in particular, we would be keen to ensure that this requirement concerning the organs does not extend to the assembly, which consists of representatives of the members[299] and should thus have general competence for dealing with all the matters that concern the EGTC[300]. Although not stipulated or required by the Regulation, we would strongly recommend that this principle of general competence of the assembly be stipulated in the statutes in order to avoid any difficulties at a later stage with regard to the functioning of the grouping, especially in terms of the relations between the director and the assembly. We also feel that it would be difficult to regulate all competence matters in the statutes and that perhaps it might be appropriate to include a reference in the statutes to internal rules of procedure that could be adopted by the assembly for a number of aspects, defining only the main competencies of the director and any other organs;

- 'the operating provisions of the EGTC's organs': once again we recommend sticking to principles in the statutes, and for detailed matters referring to internal rules of procedure to be adopted by the assembly (which of course must be clearly provided for in the statutes);
- 'the number of representatives of the members in the relevant organs': this provision gives rise to some confusion with regard to the allocation of tasks between the assembly – the organ in which the members are represented and that supervises all other organs – and the director, where provision for representation of the members would be difficult given that there is only one director, as indicated in Article 10(1)(b). As a consequence, this requirement can only be applied if, pursuant to Article 10(2) of the Regulation, other organs in which provision is made for representation of the members are mentioned in the statutes;
- 'the decision-making procedures of the EGTC' and, naturally those of each of its organs, notably their meeting arrangements and voting procedures (quorum, majorities, etc.). We would note in this respect that the practices of other cross-border cooperation bodies with legal personality and organs in which the members are represented often have complex rules on the distribution of votes – there is no requirement that all members must have the same number of votes, and the weighting of votes could vary according to the different categories of members or else votes could be distributed equally between groups from the same state – that allow complex balances to be achieved or guaranteed;
- 'the working language or languages';
- 'the arrangements for the functioning [of the EGTC], notably concerning personnel management, recruitment procedures and the nature of personnel contracts': we feel that this is quite a sensitive aspect from a legal perspective. Each national law contains rules on the employment conditions governing employees of public bodies. These rules could apply due to the location of the registered office, which allows for referral to national law. In this regard, the question of the legal form of the EGTC's personality – private law or public law – could have substantial implications for the rules applicable in this matter. Yet at the same time, since Article 9(2)(d) states that the statutes may regulate this matter and the ranking order in Article 2 allows the rules in the convention or the statutes to take precedence over national law[301], the members could lay down rules in the statutes that

derogate from the national law usually applicable to the members of the EGTC. It is therefore important for the parties to stipulate these rules clearly in the statutes, where appropriate in derogation of the law applicable in the territory, to allow the specific requirements of the cross-border or transnational context to be taken into account. It is entirely possible that some derogations will thus be necessary due to the particular nature of these operations, which go beyond the national framework. However, provisions that are too far removed from a national legal system could prompt the competent national authorities provided for in Article 4 of the Regulation to impede, or even reject, the formation of an EGTC under these terms. We also feel that it would be useful to draw up these provisions for inclusion in the statutes in close cooperation with the various actors concerned;

- 'the arrangements for the members' financial contributions and the applicable accounting and budgetary rules, including on financial issues, of each of the members of the EGTC with respect to it': in fact, the parties have little latitude in this regard since Article 11(2) of the Regulation stipulates that 'the preparation of [the EGTC's] accounts including, where required, the accompanying annual report, and the auditing and publication of those accounts, shall be governed as provided for by Article 2(1)(c)', i.e. by the national laws of the state where the EGTC has its registered office. Nevertheless, in addition to the arrangements for contributions and the accounting and budgetary rules, it would also be desirable for the members of an EGTC to include in its statutes, or in the accompanying convention, the principle whereby the members' contributions to the budget are compulsory. This provision does not appear in Regulation (EC) No 1082/2006 and experience has already shown that in the absence of any clear provision on the matter, major difficulties can arise, either with the deliberative assemblies of certain bodies or with the national control authorities;
- 'the arrangements for members' liability in accordance with Article 12(2) [of Regulation (EC) No 1082/2006]': once again Article 12 lays down relatively clear substantive provisions and the parties would appear to have little room for manœuvre. However, the obligation to reproduce in the statutes the substantive provisions contained in the Community Regulation, insofar as this is an issue that directly affects third parties, would appear useful from the point of view of publication, since Article 5(1) provides that the statutes must be registered or published in the Member State where the EGTC has its registered office, thus enabling third parties to get information about this important aspect. Moreover, nowhere is it stipulated that the issue of members' liability with regard to one another must be included in the statutes or regulated by the Regulation. In our view, this matter should be regulated in advance by one or more provisions in the statutes;
- 'the authorities responsible for the designation of independent external auditors': this provision does not in itself pose any major difficulties, except in cases where a national law does not require recourse to such an external audit (e.g. for an EGTC governed by private law not managing Community funds). In that situation, the requirement for this element to be included in the statutes should, as far as we are concerned, be interpreted as a requirement that independent external auditors be competent to verify the accounts of any EGTC, irrespective of the national laws, this requirement of the Regulation taking precedence over national law in accordance with Article 2(1) of the Regulation;
- 'the procedures for amending the statutes, which shall comply with the obligations set out in Articles 4 and 5': the principles and questions mentioned above concerning

amendments to the convention apply in the same way to the statutes. It is important to note that as far as the statutes are concerned, unlike the convention, all amendments must be registered or published (in accordance with the applicable national laws) at national level. However, non-substantial amendments to the statutes may be approved by the parties alone, without the need for controls by the national authorities, as provided in Article 4 of the Regulation.

5. A single registered office on EU territory

The question of an EGTC's registered office is a vital one. In particular, it determines the law applicable to the registration or publication of the statutes (Article 5 of the Regulation), to the EGTC in the corresponding ranking order (Article 2(1) of the Regulation) and to the convention before any other law (Article 8(2)(e)), to liability with regard to third parties in the case of insolvency (Article 12(1)), to control of the management of public funds (Article 6(1)) and, where appropriate, to formal dissolution (Article 14). Unlike the more flexible and less formal cooperation procedures often used in cross-border or transnational cooperation, the solutions of a registered office that rotates with the presidencies or activities divided among the different partners without a main registered office, are not viable in this instance. In fact, as for the other types of cross-border cooperation bodies with legal personality defined by their statutes[302], this personality must be governed by a national legal system, which is determined by the location of the registered office. The Regulation does not provide for the possibility of transferring the registered office from one state to another[303] and even if this were perhaps possible, insofar as we have demonstrated that an EGTC's legal personality is governed by Community law rather than national law, we would not recommend it under any circumstances. In fact, the numerous referrals to national law necessitated by the legal structure chosen for the EGTC by Regulation (EC) No 1082/2006 will mean that an EGTC with its registered office in a given Member State will have a legal structure that is broadly influenced by the national law of that Member State. Of course there may be rare exceptions to this, but a proposal to transfer such a structure as it stands to another legal environment would be risky – undesirable legal consequences brought about by the interaction of the EGTC's statutes and operating provisions with a new legal environment seem inevitable – and, indeed, absurd. On the face of it, it would appear to be simpler to dissolve the EGTC and establish a new one.

As we have already mentioned several times, this choice of a single registered office and the legal consequences it entails result in major inequalities between the parties to an EGTC. That being the case, since Article 2(1) of the EGTC Regulation stipulates that an EGTC's statutes may provide for derogations to national laws, some of the most glaring aspects of these inequalities could, if necessary, be remedied in this way.

We should also point that due to the numerous legal consequences entailed, the decision on the location of an EGTC's registered office must be made after careful consideration, taking into account the advantages and disadvantages of the legal environment of the state in which the EGTC is to be formed. This aspect will provide for an interesting comparative study of the national laws and regulations that will be adopted to ensure the effective application of the Regulation in accordance with Article 16.

Naturally, since the location of an EGTC's registered office implies the combined application of Community law and national law, it may only be located on EU territory (as explicitly required by Article1(1) of Regulation (EC) No 1082/2006, since the obligation to implement the provisions of this Regulation cannot apply to third countries).

6. Organs that express its wishes

Like any legal person, the EGTC must possess organs that, on the one hand, enable it to express its wishes, and on the other, allow for representation of its members. The organ responsible for representation will be a director, under Article 10(1)(b) of the Regulation. This choice corresponds to the Anglo-American managerial tradition, but conflicts with the practices in Latin countries, where the main function of representation is carried out by a president, generally with an electoral mandate. Since the Community Regulation will have direct effect, the Latin countries will adapt. An EGTC and, where appropriate, its members, pursuant to Article 12(2) of the Regulation, are liable for the acts of the director even if he is acting outside his competences or 'where such acts do not fall within the tasks of the EGTC'. Thus the confidence of third parties in the reality of an EGTC's legal person – which, we must remember, has 'the most extensive legal capacity accorded to legal persons' – takes priority over the protection of its members' financial interests.

The other organ provided for by the Regulation is the assembly, 'made up of representatives of its members' (Article 10(1)(a)). According to the Regulation, the assembly does not have any power of representation. In our opinion, however, an EGTC should be liable for its acts. The Regulation does not provide any details whatsoever of the arrangements for members' representation in the assembly and, as we have just seen, it is left to the statutes to deal with this matter (Article 9(2)(a)). In the same way, the Regulation is silent on the relations between the assembly and the director, once again leaving this matter to the statutes. In our view, the statutes should indicate that the assembly is the EGTC's main organ and that it appoints (elects) the director and supervises his activities. These questions should be dealt with in the statutes, according to the operational needs of each EGTC.

Other bodies may be provided for by the statutes, but the Regulation requires their powers to be clearly defined (Article 10(2)). The trend in cross-border or interregional cooperation structures without legal personality of setting up more organs should not be repeated in the EGTCs. Only organs fulfilling an operational requirement should be envisaged. If members would like broader representation in an EGTC's bodies, it would be preferable to set up committees within the assembly rather than creating new organs with specific powers.

7. A budget

An EGTC has an annual budget, which must be approved by the assembly (Article 11(1)). We have already expressed our scepticism about the fact that the expenditure this budget imposes on the members is not considered to be compulsory expenditure in the Regulation itself. We strongly recommend that this principle be included in the statutes of all EGTCs. Moreover, the budget will contain 'in particular, a component on running costs and, if necessary, an operational component'. The questions of the budget's structure and size will depend to a large extent on the tasks given to the

EGTC and the means at its disposal. We should remember, however, that the main objective of the EGTC Regulation, as stated by the European Commission in its Third Report on Economic and Social Cohesion, is to provide a tool for the implementation of cross-border, transnational or interregional projects within the framework of Community structural policy, in particular through the use of Community funds in programmes under Priority Objective 3 of the Community structural policy for the period 2007-2013. This policy has a financial envelope of over EUR 7.75 billion for the period in question. Although all the experts consulted and those responsible for this programme in the Commission are aware that no EGTC will be established in time to manage funds under this multiannual financial framework from the outset, the eventual goal is to be able to use the EGTCs primarily for this purpose. This is expressed in Article 7(3) of the EGTC Regulation, which states: 'Specifically, the tasks of an EGTC shall be limited primarily to the implementation of territorial cooperation programmes or projects cofinanced by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund'.

It is also essential, from the point of view of both the experiences that will be gained with the first EGTCs and the rules applicable at national level to these legal persons governed by Community law, to ensure that precise, effective rules are drawn up at both national and Community level. The practices in the different Member States concerning the availability of public funds are extremely varied and it would be better within the framework of this territorial cooperation to agree on a small number of principles to allow for the definition of the budgetary and accounting rules of the different legal systems. We should note in this regard that, although it is the national law of the state where the EGTC has its registered office that applies to the budgetary and accounting provisions, when it comes to the control of the management of public funds 'where the tasks of an EGTC mentioned under the first or second subparagraph of Article 7(3) include actions which are cofinanced by the Community, the relevant legislation concerning the control of funds provided by the Community shall apply'. There is therefore the possibility, where necessary, of enacting specific Community rules that are applicable in this cross-border or transnational context.

C. THE PARTNERS THAT CAN ESTABLISH AN EGTC

Article 3 of the Regulation defines the members that 'within the limits of their competences under national law'[304] may establish an EGTC in conformity with the corresponding Regulation. The Regulation itself defines five categories of prospective members, which will be examined below: Member States (1); regional authorities (2); local authorities (3); 'bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts' (4); and 'associations consisting of bodies belonging to one or more of these categories'(5). In addition, taking into account the other aspect of Article 3(2) – which states that 'an EGTC shall be made up of members located on the territory of at least two Member States' – we will also look at the possible participation of members (which may belong to any of the five categories defined above) from third countries (6).

However, before presenting and analysing these different categories of prospective members, three elements warrant further consideration.

Firstly, the categories described – and not defined – by this article of the Regulation are far from homogeneous, both in reality and from a legal perspective. In fact, for each of these categories, the Regulation refers to the limits of their competences under national law. It is also important for each of the 25 – soon to be 27 – Member States to determine in relation to each of the categories the competences under national law of the prospective members of an EGTC. Thus the effects of this provision, which refers explicitly to national law, will vary considerably from one Member State to another. This is all the more true given that some categories do not exist in certain Member States. For example, certain states[305] do not at present have organised 'regional authorities' with competences enabling them to join an EGTC.

These differences in competences and structural variations in the political, legal and administrative organisation of the territories on either side of a border have often hindered the development of effective cross-border cooperation[306]. As such, and this is the second point of consideration, the very liberal approach adopted by this Regulation in relation to the composition of the EGTCs seems, conceptually at least, to be very promising and full of potential. It should make it possible to bring together in *ad hoc* structures actors that are involved in implementing effective territorial cooperation, according to the provisions on organisation and competences in force in the territory in which they operate as public authorities. However, we have two reservations with regard to this situation. First of all, the potential imbalances in the composition of EGTCs, to take into account the different ways in which competences are allocated in the Member States, are going to produce a somewhat complex situation. This might leave the actors or the authorities responsible for approving their access to an EGTC (in accordance with the principles and procedures set out in Article 4 of the Regulation) reluctant to support its establishment. Secondly, such an approach should also mean that within a single state a task that entails particular competences of different levels of public authorities (local, regional or national) can be carried out jointly by several public actors, including in a cross-border or transnational framework. That is the principle and the very foundation of the concept of multi-level governance, developed on the basis of political science theory since the beginning of the 1990s[307], and taken over by the Commission in its White Paper on European Governance[308]. From this point of view, the wording of Article 7(2) of the EGTC Regulation, which states that the acts of an EGTC must 'all fall within the competence of every member under its national law', is much too restrictive. In fact, it means that bodies from the same state cannot participate in the same EGTC unless they all have the same competences concerning all of the tasks given to the EGTC. This limits substantially the scope of the open approach suggested by the liberal phrase 'an EGTC shall be made up of members […] belonging to one or more of the following categories' proposed in Article 3 of Regulation (EC) No 1082/2006.

The third consideration concerns the Member States as potential members of an EGTC. As we saw in the first chapter above, for substantial legal reasons the Member States had been kept out of the circle of actors directly involved in cross-border or interregional cooperation, their role being confined to that of regulator of these processes, especially through the conclusion of framework agreements. This Regulation not only reintroduces the Member States as potential actors in this cooperation – a Copernican revolution for certain actors that have developed their practices within a legal framework to which states have had no access; it also restricts the EU Member States' role as regulator since there is now a Community Regulation that regulates – admittedly not in a binding manner since recourse to an EGTC depends on the goodwill of the actors involved in a particular type of cooperation – the legal framework that allows cross-border cooperation bodies to be set up. Nevertheless, the Member States do not lose this supervisory role completely because the Regulation frequently refers to national law;

Article 16 even calls on the states to 'make such provisions as are appropriate to ensure the effective application of this Regulation'[309]. In addition, under Article 4 of the Regulation – but also to a large extent under Articles 13 or 14 – the state preserves its role as coordinator of the territorial cooperation activities of bodies formed under its law. Indeed, the role of the Member States can under no circumstances be limited to the possibility offered to them in Article 3 of becoming a member of an EGTC.

1. Member States

As we have just pointed out, this provision gives the Member States a new role in the field of territorial cooperation that is distinct from the role they had under the previous legal frameworks. However, we would point out first and foremost that the Member States' role in the concrete application of cross-border or decentralised cooperation varied considerably depending on the extent to which the competences were decentralised. For example, in the cooperation between France and Germany, the State in France, which is still a highly centralised country, is ever-present, notably through its 'deconcentrated' territorial administration (prefects). In Germany, on the other hand, the Federal State is not present at all, the Länder being responsible for the development of the provisions that regulate such cooperation, giving priority to the direct involvement of their local actors. As a result, the Karlsruhe Agreement primarily provides for cross-border cooperation based on the mechanisms for cooperation between local authorities and excludes the states as potential actors in this collaboration. However, one of the local cross-border cooperation groupings set up on the basis of this Agreement, aimed at allowing France and Germany to jointly manage the Kehl Euro-Institute (at the border with Strasbourg), includes the French State as one of the partners[310], thus contradicting the clear text of the Karlsruhe Agreement. So although from the point of view of 'legal orthodoxy' the possibility of a Member State becoming a member of a cross-border cooperation body seems revolutionary, it actually coincides with certain proven practices. Furthermore, following the 2004 enlargement to include a number of new members where the State administration still plays a considerable role, this type of partnership between the State and territorial authorities in cross-border projects should be developed, as highlighted by several of the experts consulted during the preparation of this study.

The Member State referred to in Article 3 of Regulation (EC) No 1082/2006 means, in legal terms, the legal person of the State, rather than its component parts[311]. Similarly, it means the state as a whole, represented by the competent authorities that it appoints itself, and not the state exercising territorial functions through decentralised administrations[312], as may be understood in some cases, notably in the Madrid Outline Convention[313].

Finally, it is important to note that it is not the Member State in the sense meant by the Treaties, a sovereign body responsible for all the competences that are not expressly allocated to the Community. This article means the Member States 'within the limits of their competences under national law'. Depending on the type of institutional organisation, the central State authorities do not have full competence under national law; on the contrary, there are numerous functions and competences that are assigned to or reserved for some of its component entities. This is especially true in federal states, but also applies in many other situations. According to this article then, a state's participation in an EGTC is thus subject to the national provisions on the distribution of competences. It is certainly true that an actor's capacity to join an EGTC will be verified by the authorities of the Member State

concerned, as provided for in Article 4 of Regulation (EC) No 1082/2006, but it must be possible for this control procedure and the decisions reached to be appealed in the national courts, as expressly provided for in the second subparagraph of Article 15(3) of the Regulation. Consequently, where a Member State participates in an EGTC whose cooperation objectives do not fall within its competences under national law, it should be possible for this participation to be contested in the competent national court by the injured party with that competence.

2. Regional authorities

This expression dates back in Community law to the wording of Article 263 of the EC Treaty concerning the Committee of the Regions, amended in Nice (2000). Today this provision reads as follows: ‘A Committee, hereinafter referred to as the “Committee of the Regions”, consisting of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly, is hereby established with advisory status’, which implies that a regional authority must constitute a politically legitimate entity and thus be clearly distinguishable from a decentralised and regionalised administration of the state. Naturally, in order to become a member of an EGTC, it must have its own legal personality under national law, distinct from that of the state.

The extent of its capacity to become a member of an EGTC is determined by the extent of its competences as defined in national law. That being the case, within the limits of the competences conferred on it under national law and in accordance with the procedure laid down in Article 4 – see section E.1 below – the Regulation provides regional authorities with a genuine right to become a member of an EGTC, and if appropriate these authorities may appeal to the national courts to ensure that that right is respected. In fact, territorial authorities may only refer a matter to the European Court if acts of the institutions are involved; in this instance, however, it is most likely that it would be the national authorities that might be tempted to place excessive restrictions on this recognised right, notably during the prior approval procedure provided for in Article 4 of Regulation (EC) No 1082/2006. In that case, the matter may be referred to the national courts, in line with the general principles of Community law whereby the national courts normally have jurisdiction for ensuring compliance with Community law, and on the basis of the clear provision in the second subparagraph of Article 15(2) of the Regulation. In this case, if the national courts consider that the case relates to the interpretation of Community law, they may refer the matter to the Court of Justice for a preliminary ruling (procedure provided for in Article 234 of the EC Treaty); the Court of Justice will give a ruling on the interpretation of the Community rules in question. There is thus a genuine right, guaranteed by accessible recourse to legal proceedings.

3. Local authorities

The considerations outlined in relation to regional authorities apply, *mutatis mutandis*, to local authorities. We would simply point out that experts generally agree, at times a little hastily in our opinion, that the competences allocated at local level in the various EU Member States are less diverse than those at regional level[314]. Where this is true, cooperation is easier.

4. Bodies governed by public law referred to in Article 3(1) of the Regulation

Due to a lack of space, this study cannot provide a detailed analysis of all the entities in all the Member States covered by this provision[315]. Suffice it to say that the inclusion of this category in the bodies suitable for participating in an EGTC reflects the desire of the authors of the Regulation not to limit participation to 'political' actors alone, but to encompass the entire diversity of actors involved in territorial cooperation. Although past experience shows that there have been cases where actors other than public authorities have been involved in territorial cooperation, the number and diversity of bodies covered by this provision lead the experts to fear that some of the positive characteristics of territorial cooperation might end up being diluted in relations of another type, i.e. if use of an EGTC were to become very frequent among these bodies, some more so than others, without the involvement of any public authorities as such. Nevertheless, the experts were unable to gather any information indicating that such bodies would be prepared to make frequent use of this particular form of cooperation (indeed, many of those consulted were not even aware that the EGTC Regulation existed or that they could benefit from it).

5. Associations consisting of bodies belonging to one or more categories

This particular category is potentially very interesting for cross-border cooperation or in a transnational or interregional context.

At cross-border level, it is important to remember that all the legal solutions developed to offer common cross-border management methods are highly complex due to the difficulty involved in integrating the national legal systems, whose provisions or structures are not necessarily compatible. Unfortunately, as demonstrated in this study, the EGTC Regulation is no exception to the rule. This complexity, intrinsic to cross-border cooperation itself, increases according to the number of actors involved in a particular structure. It might prove useful, in the context of cooperation involving many actors on both sides of the border – or in the context of asymmetric cooperation involving many actors on one side of the border and just one on the other side – to encourage the actors located on the same side to join forces in an association governed by their national law that can then become a member of the cross-border cooperation structure.

This solution does not on the whole reduce the complexity of the legal and political relations, but it does reduce the complexity in the cross-border framework, transferring part of the management to a 'uninational' framework. The advantage is that the national legal structures for cooperation – depending, of course, on each national legal system's resources in this respect – are generally more secure from a legal perspective than the cross-border cooperation structures. The complexity at the most delicate legal level is therefore reduced. The national structures may be governed by public law – e.g. a particular public cooperation body – or by private law (an association governed by private law) as the only decisive factor according to Article 3 of Regulation (EC) No 1082/2006 is the fact that its members must belong to one of the aforementioned categories.

As regards transnational or interregional cooperation, it is important to emphasise the important role played by certain associations of local or regional authorities in this area: the Association of

European Border Regions of course, but also the AER, CCRE, CPRM and EUROCITIES in particular. It is fortunate that these associations may, where appropriate, be involved in an EGTC, a legal structure governed by Community law and with legal personality. Indeed, even if past experience in this area reflects a strong resistance to change, it is possible that one or more of these 'European associations' whose legal status is attached to a particular national legal system may decide to take this opportunity to create a legal person under Community law to transform the legal nature of their grouping into an EGTC. Finally, we would point out that national associations of local or regional authorities could also participate directly in an EGTC in this way, and given the important role some of these associations play in certain Member States (especially in northern Europe and in the new Member States), this is an interesting prospect for the development of territorial cooperation in Europe.

6. Non-Community partners

As Recital 16 of the EGTC Regulation rightly emphasises, 'the third subparagraph of Article 159 of the Treaty does not allow the inclusion of entities from third countries in legislation based on that provision'. As we pointed out in relation to the location of the registered office, this Regulation imposes a number of restrictions on the Member States and therefore cannot apply to third countries, at least without their consent. Similarly, past experience of cooperation programmes with the Central and Eastern European Countries (PHARE CBC) and with the Mediterranean countries (MEDA), in the context of the Stability Pact for South-Eastern Europe or even within the framework of the Community development policy[316], have demonstrated the usefulness of neighbourhood cooperation as well as transnational or interregional cooperation, the latter allowing for an exchange of experiences and knowledge gained at local and regional level that is especially valuable in transition periods.

In addition, both in the framework of the EU's future Neighbourhood Policy and the continuation of the cooperation actions with the ACP countries under the Cotonou Agreement, this possible involvement of territorial authorities in achieving the Community's objective is examined and even at times considered to be a priority[317].

It should also be remembered that some non-EU European countries, notably Norway and Switzerland, have for a long time been involved in cross-border cooperation with their neighbours, and it is quite likely that these relations will continue, if not intensify. For example, there is a cross-border urban project around Geneva (thus between Switzerland and France) that inevitably generates closer cross-border cooperation links at this external border of the EU.

Finally, we must not forget that a number of very small European states (especially Andorra, Liechtenstein, Monaco and San Marino) are involved in cross-border cooperation that, taking into account their size, often accounts for a substantial share of their external relations. However, while all of them are members of the Council of Europe, only Liechtenstein has ratified its 1980 Outline Convention. This is because it is not so much the participation of their territorial authorities in cross-border relations with territorial authorities in neighbouring states that interests them as their participation in the neighbourhood relations with neighbouring local entities, in which they would participate as states. The structure of the laws on cross-border cooperation, which made a clear distinction between relations between territorial authorities and relations between states thus caused a lot of problems for them, and the possibility of being able to participate in a structure like the EGTC as

a member state could prove to be extremely interesting, both for them and for their neighbouring authorities[318].

Consequently, the use of an EGTC at the Union's external borders may prove useful for the territorial authorities situated near these external borders[319] or for the implementation of an external policy by the EU involving neighbourhood through cross-border (or transnational) cooperation or decentralised cooperation within the framework of interregional cooperation with third-country partners. Paragraph 16 of the recitals to Regulation (EC) No 1082/2006 states clearly, however, that 'the adoption of a Community measure allowing the creation of an EGTC should not, however, exclude the possibility of entities from third countries participating in an EGTC formed in accordance with this Regulation where the legislation of a third country or agreements between Member States and third countries so allow'. Although this provision does not have direct effect, it shows that the authors of the Regulation considered this scenario and did not wish to exclude it. In addition, agreements are currently in force – notably involving Norway and Switzerland, and between Italy and Croatia – that provide for cooperation that should not be affected by this Regulation (unless the cooperation partners wish to amend the legal framework of their relations in order to benefit from the opportunities offered by this Regulation). This provision could encourage neighbouring states to adapt their laws to enable them to take advantage of the benefits of the EGTC, especially the very small states mentioned above. The wording of Recital 16 is ambiguous in relation to these states since it refers to 'the possibility of entities from third countries', which seems to exclude the states themselves; however, this possibility should allow them to participate 'in an EGTC formed in accordance with this Regulation', Article 3 of which clearly authorises states to participate in an EGTC. Naturally, the text of the binding provision (Article 3 of the Regulation) will take precedence over an ambiguous phrase in the recitals.

D. POSSIBLE TASKS OF AN EGTC

According to Article 1(2) of Regulation (EC) No 1082/2006, 'the objective of an EGTC shall be to facilitate and promote cross-border, transnational and/or interregional cooperation, hereinafter referred to as "territorial cooperation", between its members [..]'. Its objective is therefore relatively broad and encompasses the areas that constitute the three strands of the Interreg III initiative for the period 2000-2006. Furthermore, the third subparagraph of Article 7(3) of the Regulation confirms that the tasks of an EGTC can in all cases include these three areas of external activities of the public authorities mentioned in Article 3, since it prohibits Member States from limiting the tasks that EGTCs may carry out within the framework of these three methods of cooperation, as defined in Article 6 of the ERDF Regulation of 5 July 2006[320]; we will come back to this in points 1 and 4 below.

The fact that a single legal instrument can be used for these three types of cooperation does not pose any problems from a legal standpoint. Over and above the fact that certain authors have campaigned for such a solution for over 10 years[321], it is also the solution proposed by the Council of Europe's multilateral legal framework: although this is implemented through two distinct legal instruments, Protocol No 2 to the Madrid Outline Convention[322] stipulates that the law applicable to interterritorial cooperation – which excludes cooperation between neighbouring territories, i.e. cross-border cooperation, and is more or less equivalent to interregional and transnational cooperation – shall be same as the law applicable to transfrontier cooperation.

However, one question that comes to mind is the use of EGTCs within the framework of the European Union's Neighbourhood Policy. The Commission obviously wishes to promote a cross-border cooperation dimension in the context of this ENP[323], yet its proposal for a regulation on this policy does not mention the EGTC as a possible tool for achieving this cross-border cooperation dimension under the ENP, and the objectives of the ENP are obviously not the same as the objectives of territorial cooperation, which is an internal policy of the Community[324]. However, given that the Commission and probably the Member States, too, want the European Neighbourhood Policy to develop with a cross-border cooperation dimension included in its remit, it is highly likely that use of the EGTC will soon extend beyond its stated objective in Article 1(2) of the Regulation via this method. If that were to happen, it would suggest, generally speaking, that the interpretation of its provisions would have to be relatively flexible. This could prove to be extremely useful in the light of the phrasing of certain provisions, especially Article 7(2) and Article 7(4).

Apart from a possible need to extend the substantive objective of the type of cooperation provided for by this tool, the phrasing of Article 1(2) is not ideal; once again, a flexible interpretation of the terms seems necessary. It states that 'the objective of an EGTC shall be to facilitate and promote […] "territorial cooperation"', not implement it. Given the nature of the EGTC – which is precisely a legal instrument that enables joint territorial cooperation operations to be carried out – this appears to be a poorly-worded phrase. Its origin can probably be traced back to Article 1 of the Council of Europe's Outline Convention, which states: 'Each Contracting Party undertakes to facilitate and foster transfrontier cooperation between territorial communities or authorities within its jurisdiction and territorial communities or authorities within the jurisdiction of other Contracting Parties'[325]. At the time, the first steps in cross-border cooperation were being taken, and cautious wording was a condition for the existence of a joint legal instrument between states in this area. As far as the substance of the Madrid Convention is concerned, precisely because of this convoluted and empty wording it does not impose any obligations on the signatory states …[326]. Fortunately, that is not the case with this Regulation, and this crucial provision – in terms of both the arrangement of the Regulation (it is its first article) and its function (the definition of an EGTC's objective determines its capacity to act in a given context, and thus the importance of using it) – should have been written in more precise and specific language. To put it clearly, an EGTC's objective must be to implement territorial cooperation, not just to facilitate and promote it.

We can at least hope that this will only involve the EGTC's members. The goal of an EGTC is precisely to be a tool that is capable of implementing activities within a cross-border, transnational or interregional framework, including with third parties. If not, why afford it the most extensive legal capacity accorded to legal persons and allow it to acquire or dispose of property and employ staff (Article 1(4))? Just to facilitate and promote cooperation among its members? That seems out of all proportion. In addition, Article 15 on jurisdiction refers specifically to the situations in which third parties could be wronged by the acts or omissions of an EGTC (Article 15(1)). It is difficult to imagine how an EGTC whose objective is limited to facilitating and promoting cooperation among its members might seriously infringe the rights of third parties. This aspect of the definition of an EGTC's objective does not correspond to the form this legal instrument will have to take in practice.

Indeed, for fear of reducing this potentially valuable tool to very little, an extremely flexible interpretation of this provision on its objective is required. Thankfully, the layout of the Regulation permits this since an entire article, more specific than this paragraph in Article 1, is devoted to the possible tasks of an EGTC, and we will examine it below.

We should also point out that although Article 7 of Regulation (EC) No 1082/2006 allows a framework for the activities of a given EGTC to be established, the tasks an EGTC will carry out are, pursuant to Articles 7(1) and (2), 'defined by the convention agreed by its members'[327], which must, pursuant to Article 8(2)(c), indicate 'the specific objective and tasks of the EGTC'[328]. Neither the Regulation nor the national laws specify the precise tasks to be assigned to a particular EGTC in any given case; it will be the members of the EGTC that will assign to it the tasks required to achieve the goal of their cooperation. Nonetheless, Article 7 seeks to define the perimeters beyond which the parties forming an EGTC will no longer by covered by the Regulation and, consequently, will no longer be authorised to use this instrument to establish their cooperation in law. (Indeed, the wording used demonstrates this clearly, e.g. Article 7(3), which begins as follows: 'Specifically, the tasks of an EGTC shall be limited primarily to […]'.)

1. Achieving the objective of 'European territorial cooperation'

Article 7(2) of the EGTC Regulation states: 'An EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion […]'. As we have just pointed out, this wording is restrictive. An EGTC's tasks must be limited to achieving territorial cooperation, which is one of the goals of the economic and social cohesion policy; thus, by definition, it seeks to strengthen this cohesion, as this provision states unnecessarily.

Territorial cooperation falls under the new Priority Objective 3 of the Structural Funds programming for the period 2007-2013, and is therefore defined in Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund. Article 3(2)(c) of this Regulation states that the objective of European territorial cooperation is 'aimed at strengthening cross-border cooperation through joint local and regional initiatives, strengthening transnational cooperation by means of actions conducive to integrated territorial development linked to the Community priorities, and strengthening interregional cooperation and exchange of experience at the appropriate territorial level'[329].

Three points may be made about this 'definition'.

Firstly, as demonstrated, too, in Article 1(2) of the EGTC Regulation, territorial cooperation consists of three elements: cross-border, transnational and interregional. These are distinct from one another and there is no single objective that is shared by these three forms of cooperation that would represent an 'added value' of territorial cooperation; this cooperation is simply the sum of the three methods mentioned above.

The priorities for each of these types of cooperation are laid down in Article 6 of the ERDF Regulation.

Thus for cross-border cooperation, the priorities for the period 2007-2013 relate to 'the development of cross-border economic, social and environmental activities through joint strategies for sustainable territorial development'[330]. This objective is to be achieved as follows:

- 'by encouraging entrepreneurship, in particular the development of SMEs, tourism, culture, and cross-border trade;

- by encouraging and improving the joint protection and management of natural and cultural resources, as well as the prevention of natural and technological risks;
- by supporting links between urban and rural areas;
- by reducing isolation through improved access to transport, information and communication networks and services, and cross-border water, waste and energy systems and facilities;
- by developing collaboration, capacity and joint use of infrastructures, in particular in sectors such as health, culture, tourism and education'[331].

In addition, priority may also be given to 'legal and administrative cooperation, the integration of cross-border labour markets, local employment initiatives, gender equality and equal opportunities, training and social inclusion, and sharing of human resources and facilities for R&TD'[332], where these actions are carried out in a cross-border context. The first of these additional elements, the development of legal and administrative cooperation, would allow ERDF support to be granted for the formation of a cross-border EGTC as a body in itself (pilot scheme), not just as a means (tool) for carrying out a given cooperation action.

As far as transnational cooperation is concerned[333], the Community priorities for 2007-2013 concern 'the financing of networks and of actions conducive to integrated territorial development'[334], concentrating primarily on the following priority areas:

- 'innovation: the creation and development of scientific and technological networks, and the enhancement of regional R&TD and innovation capacities, where these make a direct contribution to the balanced economic development of transnational areas. Actions may include: the establishment of networks between appropriate tertiary education and research institutions and SMEs; links to improve access to scientific knowledge and technology transfer between R&TD facilities and international centres of RTD excellence; twinning of technology transfer institutions; and development of joint financial engineering instruments directed at supporting R&TD in SMEs;
- environment: water management, energy efficiency, risk prevention and environmental protection activities with a clear transnational dimension. Actions may include: protection and management of river basins, coastal zones, marine resources, water services and wetlands; fire, drought and flood prevention; the promotion of maritime security and protection against natural and technological risks; and protection and enhancement of the natural heritage in support of socio-economic development and sustainable tourism;
- accessibility: activities to improve access to and quality of transport and telecommunications services where these have a clear transnational dimension. Actions may include: investments in cross-border sections of trans-European networks; improved local and regional access to national and transnational networks; enhanced interoperability of national and regional systems; and promotion of advanced information and communication technologies;
- sustainable urban development: strengthening polycentric development at transnational, national and regional level, with a clear transnational impact. Actions may include: the creation and improvement of urban networks and urban-rural links; strategies to tackle common urban-rural issues; preservation and promotion of the cultural heritage; and the strategic integration of development zones on a transnational basis'[335].

Interregional cooperation in the period 2007-2013 will focus on 'innovation and the knowledge economy and environment and risk prevention in the sense of Article 5(1) and (2)'[336], i.e. the priorities of Priority Objective 2 concerning regional competitiveness and employment.

It should be noted, however, that it is a little strange to use the priority criteria of the Structural Funds programming to determine the scope of the tasks the partners involved in territorial cooperation wish to give to their common tool, the EGTC. Indeed, if the logic of the Structural Funds programming initially appeared, in the definitions of the priority objectives and arrangements for allocating Community resources, to be a top-down process – justified by the need to focus Community financial support on a limited number of priority objectives, which must be defined at the higher level and supported through the programming process, notably in the preparation of OPs in accordance with the partnership principle – the creation of the EGTC appeared to be a bottom-up initiative. In our view, determining the possible scope of these initiatives by actors on the ground by referring to budgetary priorities established for other purposes raises some questions about coherence.

Secondly, as far as Community action is concerned, it is the cooperation itself, its establishment, its functioning and its development, that is the aim of this cooperation; not the implementation of concrete actions, whatever they may be. Of course, cooperation will take place in various different sectors, in relation to various different matters: Article 6 of the ERDF Regulation gives a number of examples that are priorities from the point of view of the financial support the Community is prepared to grant under its economic and social cohesion policy. However, what is a priority from a Community point of view, as the Court of Auditors has emphasised on several occasions in relation to the achievement of the priorities of the Interreg programme, is the cooperation process itself. In that respect, an EGTC is precisely a legal means of implementing that cooperation. We should remember that recourse to this instrument is optional: it is created at the initiative of its members, and nothing in the EGTC Regulation or in the Regulations on the Structural Funds for the 2007-2013 programming period obliges the prospective members of an EGTC to take that initiative. Nevertheless, if the main objective of cooperation in the sense of the Community policy is the actual implementation of cooperation actions, the legal tool that allows such actions to be carried out should certainly be successful.

Thirdly, if the objective of the EGTC is to implement territorial cooperation, the opposite is not true. The objective of territorial cooperation and the billions of euro allocated to it for the period 2007-2013[337] may of course be used to support the creation of an EGTC for cross-border, transnational or interregional cooperation. However, they can also be used to achieve the objectives laid down in the Regulations on the Structural Funds without any recourse to EGTCs. Neither the Commission nor the Member States are obliged to use an EGTC for the development of this new priority objective. It is the prospective partners who propose the establishment of such structures. Nevertheless, if these structures were envisaged and created, there is no doubt that they would respond to the first and primary objective of territorial cooperation, i.e. the cooperation itself, and that, consequently, they would receive financial support from the Community, in accordance with the deadlines and financing procedures concerned.

2. Other actions within the framework of Community policies

This scenario is expressly provided for in the second subparagraph of Article 7(3) of the EGTC Regulation. For example, it could allow partners such as those referred to in Article 1 to form an EGTC to carry out a joint project within the framework of a Community policy other than those relating to economic and social cohesion. We have three comments to make in this respect.

Firstly, by broadly incorporating in its programming the goals established in Lisbon in 2000[338], as reflected in the Commission's intentions in the Third Cohesion Report and Priority Objective 2 for the period 2007-2013, the economic and social cohesion policy is already open to many other areas of Community policies (e.g. research or the environment). Yet it is quite possible that in the field of social policy, education, culture or public health in particular (not excluding, of course, the environment and research and development even though they already seem to be covered by the priorities for territorial cooperation for 2007-2013), which are also all sectors in which cross-border cooperation actions exist at different European borders, the use of an EGTC might be envisaged in order to receive support from one of the existing Community programmes in these areas.

Secondly, the possibility of associating territorial authorities, in a multinational context, with Community policies over and above the economic and social cohesion policy is one of the key ideas in the White Paper on European Governance published by the Commission in 2001[339]. Consequently, in addition to being a necessary tool for territorial cooperation, the EGTC may also prove to be an interesting tool for European governance.

Finally, it should be noted that as regards extending the EGTC's areas of activity beyond territorial cooperation, the possibility of involving public law entities such as those referred to in Article 3(1)(d) of Regulation (EC) No 1082/2006 is a very interesting prospect. In this respect, public authorities such as hospitals or universities could participate in an EGTC, which in sectors such as health or research is not only advisable, but indispensable.

3. Actions without Community cofinancing

The second subparagraph of Article 7(3) states explicitly that, where appropriate, an EGTC may be formed to carry out specific actions with or without a financial contribution from the Community. This provision is welcome and it confirms the possible autonomy of the EGTC's legal form in relation to the Community's economic and social cohesion policy. Nevertheless, the same paragraph stipulates that 'the Member States may limit the tasks that EGTCs may carry out without a Community financial contribution. However, those tasks shall include at least the cooperation actions listed under Article 6 of Regulation (EC) No 1080/2006'. It is difficult to follow the logic of this provision.

We understand that safeguards have to be put in place to prevent the possibility of territorial authorities in several European states using EGTCs to carry out actions that are not approved by the states. Nonetheless, in our opinion, the limits of the competences under national law – referred to in Article 3(1) and, to excess, in Article 7(2) – and the approval procedure carried out prior to the formation of an EGTC, defined in Article 4, provide sufficient guarantees. It seems absurd that the competences of EGTCs not financed by Community funds must correspond at least to the priorities established for procedures involved in the Community process and benefiting from Community

support, which precisely in the case in point is not requested. As such, this also makes it possible to guarantee that the limits that the states may impose on EGTCs operating outside the scope of Community policies are not too strict, since Article 6 of the 2006 ERDF Regulation covers a relatively broad range of activities. It is important to note, nonetheless, that this means that Member States could exclude cooperation in fields covered by other Community policies (e.g. health or culture).

Since other adequate limits are laid down in other provisions of the Regulation, the experts consider that it is not necessary for the states to provide for restrictions concerning the fields in which the partners who wish to establish an EGTC can do so.

4. Excessive limit of Article 7(4)

Recital 13 of the EGTC Regulation states that ‘it should be specified that the powers exercised by regional and local authorities as public authorities, notably police and regulatory powers, cannot be the subject of a convention’. This would appear to be a reasonable requirement and is similar to the practices found in the bilateral conventions laying down the frameworks for cross-border cooperation[340]. However, the provision in Article 7(4) that ‘the tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law or of duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy’ is overly restrictive, if not inconsistent with the actual objective of the Regulation.

In fact, Article 3(1) of Regulation (EC) No 1082/2006 on the EGTC states that ‘an EGTC shall be made up of members, within the limits of their competences under national law, belonging to one or more of the following categories’. Naturally, the competences conferred on the public authorities – at regional, local or even national level – whose powers are granted to them through an electoral mandate, are conferred by public law in the European legal systems. In addition, a combined reading of Articles 3(1) and 7(4) will lead to the conclusion that no task may be given to an EGTC established in accordance with this Community Regulation. Contrary to the requirement in Recital 13, this conclusion, which is difficult to avoid from the point of view of interpretation of the Regulation, does not seem reasonable. The same applies in relation to the ‘duties whose object is to safeguard the general interests of the State or of other public authorities’. It is certainly legitimate to provide that territorial authorities must not encroach upon the task of safeguarding states’ general interests, which is the responsibility of the State authorities. As such, however, it is therefore not one of the competences of the territorial authorities and, in our opinion, the limits imposed by Article 3(1) (which lays down the principle of action limited to areas within their competences), Article 4(3) (which authorises prior controls) and Article 13 (which authorises intervention after the formation of an EGTC to prohibit activities of an EGTC that may be in contravention of the public interest) appear to be sufficient. It is hoped, however, that when the territorial authorities exercise their competences, they do so to benefit the general interest (or the public interest), not their own personal interests. This second limitation is also extremely regrettable.

On the other hand, the four specific limitations (police powers, regulatory powers, justice and foreign policy) are themselves legitimate, although in the case of regulatory or police powers, for example (especially administrative police), they may prove to be very restrictive and limit

considerably the interest in using an EGTC. Indeed, these four limitations alone would have been sufficient!

E. LAW APPLICABLE TO AN EGTC AND TO ITS ACTS

This question has been at the heart of cross-border issues for decades and most legal developments seek to resolve this matter, be it in the multilateral framework of the Council of Europe or through bilateral legal arrangements, which have the advantage of enabling the institutions of the legal systems concerned to adapt more precisely.

The creation of a legal person under Community law[341], with the most extensive legal capacity accorded to legal persons under the national laws of each Member State, as stipulated in Article 1(4) of this Regulation, should have helped to provide a clear and definitive solution. In fact, not only has Community law developed precise, operational criteria for its relations with the national legal systems, there is also a system of jurisdiction that allows the correct solution to be found in complex situations without different jurisdictions arriving at different solutions, as long as the applicable rules are clearly established and their content is clear and precise enough for them to be applied directly.

In this instance, Regulation (EC) No 1082/2006 contains an article entitled 'Applicable law', which lays down principles that appear to be clear. These principles are the following:

'1. An EGTC shall be governed by the following:

(a) this Regulation;

(b) where expressly authorised by this Regulation, the provisions of the convention and the statutes referred to in Articles 8 and 9;

(c) in the case of matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office.

Where it is necessary under Community or international private law to establish the choice of law which governs an EGTC's acts, an EGTC shall be treated as an entity of the Member State where it has its registered office.

2. Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned.'

However, this provision is misleading, as we will see in this section, in that the rules it lays down by no means resolve the issues concerning the applicable law. In particular, this simple ranking order, giving Community law precedence over national law, with an EGTC's statute between the two, is only valid for 'matters not, or only partly, regulated by this Regulation'; yet for the numerous cases in which it is the Regulation itself that refers to national law, the situation may be much more complex. We will examine the difficulties and challenges involved in implementing these rules in the following chapter; here we will confine ourselves to setting out the rules that are applicable, according to the Regulation, to the main legal relations it governs.

We should point out that Article 2 of the Regulation informs us of the law applicable to an EGTC, but not the law applicable to the establishment of an EGTC, which we will look at first and foremost (1). We will then examine the law applicable to the enforcement and interpretation of the convention

governing the EGTC (2). This leads on to an analysis of the law applicable to an EGTC according to the rules set out in Article 2(3). To our mind, in the light of certain provisions in the Regulation, the law applicable to the control of an EGTC's activities warrants special consideration (4). The law applicable to the relations between members is relatively simple to determine (5), while the law applicable to the relations with third parties is a complex matter (6). Finally, we will examine the rules concerning the liability of members (7) and that of states (8).

1. Law applicable to the establishment of an EGTC

The law applicable to the establishment of an EGTC is evidently that which appears in Regulation (EC) No 1082/2006. An EGTC is a legal person created by that Regulation, and it can only be constituted by applying the rules contained in the Regulation. Community law therefore applies in this respect, but the Community rules often refer to national rules.

First of all, let us look at the members and their capacity to form an EGTC. Articles 3 and 7 state clearly that it is 'their competences under national law'[342] that determine the actors capable of forming an EGTC, and that each actor will only be able to carry out tasks that 'all fall within the competence of every member under its national law'[343]; and it is the 'Member State' itself that shall, 'taking into account its constitutional structure[344], approve the prospective member's participation in the EGTC'[345]. The Regulation also tells us that 'in deciding on the prospective member's participation in the EGTC, Member States may apply the national rules'. This 'detail', far from clarifying the situation only makes it more complex. Naturally, when the Regulation refers to the rules under national law, it is, pursuant to a Community rule, a provision (or set of provisions) of national law that applies. In this case, pursuant to the principle of effectiveness[346], we might wonder which rules under national law, other than those relating to the competences conferred by this provision, are involved. In any event, it may well be up to each national legal system to decide this for itself, since the second subparagraph of Article 15(2) of the Regulation states that 'the competent courts for the resolution of disputes under Article 4(3) or (6) […] shall be the courts of the Member State whose decision is challenged'. Obviously, when applying Community law the national courts have every right to refer to the European Court with regard to matters concerning the interpretation of Community provisions (according to the preliminary ruling mechanism provided for in Article 234 of the EC Treaty), but in this context the European Court has always refused to monitor the content of national law. Although it is true that the interpretation of Community law often means that it is possible to deliver an opinion on the compatibility of national law with Community law, and thus monitor the content indirectly, that will not be the case here.

While recognising that the Member State authorities have a supervisory role as regards a member's participation in an EGTC, Article 3(3) enshrines the principle of the state's approval of participation, enabling the state to withhold approval if 'it considers that such participation is not in conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State'. The reasons for withholding approval can thus be divided into three categories.

The first is failure to comply with the Regulation, including the referrals in the Regulation to national law. According to Article 3(1), members may form an EGTC within the limits of their competences under national law; a prospective member that wishes to participate in an EGTC outside

its competences as defined in national law would be infringing Article 3(1) of Regulation (EC) No 1082/2006 on an EGTC, even if in so doing it would not necessarily be violating any national laws. What is more unfortunate is that this rule on competences is 'aggravated' in relation to the tasks, since an EGTC's tasks must 'all fall within the competence of every member under its national law' (Article 7(2); failure to comply with this provision would thus be a violation of the Regulation that would enable a Member State to prohibit its authorities from participating in an EGTC. Added to this, Article 7(4) states that the tasks given to an EGTC 'shall not concern the exercise of powers conferred by public law or of duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy'. As we saw above[347], this restriction is excessive.

The second category concerns failure to comply with national law, including the powers and duties of the prospective member. This is a matter for national law alone. In that respect, prospective members will find themselves in completely different situations, depending on whether their national laws and the practices of the authorities take a liberal or restrictive approach to their public authorities participating in cooperation structures with foreign entities. It is hard to imagine, of course, that the practices of the national authorities would be more restrictive as regards access to an EGTC than access to other forms of cross-border or territorial cooperation. In the states where this matter is governed by law or the constitution, it should therefore be possible to predict the circumstances in which participation would not be approved. As far as the other states are concerned, it does not appear that the authorities can impose restrictions that are not clearly enshrined in national law; thus the national authorities do not have any power of discretion. In addition, the scope of this power to withhold approval – be it justified on the basis of national legislation or, for example, an unwritten practice – may be appealed before the European Court.

The third category, the absence of any justification for reasons of public interest or public policy, will primarily be based on questions concerning appropriateness. In this case the national authorities' discretionary powers are very broad; however, it is Community law that grants them these powers and they may therefore by reviewed by the European Court, where requested.

Pursuant to the first subparagraph of Article 4(3), Member States must give a statement of reasons for withholding approval. This confirms that a state's power to withhold approval is not subject to its discretion and paves the way for possible appeals in the national courts (according to the second subparagraph of Article 15(2) of the Regulation). The national courts may, if appropriate, refer this matter to the European Court for a preliminary ruling, at least where approval is withheld in accordance with the first and third categories and, to a lesser extent, as we have just explained, with regard to the second category.

Article 5 goes on to lay down the conditions for acquisition of legal personality, which is subject to registration and/or publication in accordance with the applicable national law in the Member State where an EGTC has its registered office; hence another referral to national law. This provision in Article 5 is sufficiently precise to produce a direct effect, and the competent authorities of the state where an EGTC has its registered office will have to register, or publish, the statutes according to an appropriate national procedure. Of course, on the day of adoption of this Regulation, none of the Member States had specific procedures for the registration of an EGTC's statutes. The states will therefore have to move quickly in this area, either to adopt specific national rules on the registration of an EGTC's statutes or to determine which existing procedure can be used for their registration. It would appear that, insofar as the national procedure for the registration of an EGTC's statutes is not

discriminatory compared with a national procedure for the registration of a comparable cooperation structure – e.g. a public body for cooperation between local authorities – the referral to national law allows, where appropriate, national law to lay down pre-registration requirements.

2. Law applicable to the interpretation of the convention and the statutes governing an EGTC

This law is determined by the participants in an EGTC themselves. In fact, pursuant to Article (8)(2)(e), the convention must specify 'the law applicable to the interpretation and enforcement of the convention, which shall be the law of the Member State where the EGTC has its registered office'. Thus in choosing the state where the EGTC has its registered office, the parties are also choosing the law applicable to the interpretation and enforcement of the convention.

This rule naturally applies to the relations between the parties, although this is less certain in the case of relations with third parties. Indeed, Article 15(3) states that 'nothing in this Regulation shall deprive citizens from exercising their national constitutional rights of appeal against public bodies which are members of an EGTC in respect of: (a) administrative decisions in respect of activities which are being carried out by the EGTC…', in the knowledge that for such appeals 'the competent courts shall be those of the Member State under whose constitution the rights of appeal arise'[348]. It is quite possible that a court examining this matter may interpret the convention or statutes in such a way as to determine the extent to which a citizen's rights have been infringed. Whether it does so on the basis of the law of the Member State where the EGTC has its registered office – if that state is not the same as the state where the appeal was lodged – or on the basis of its own national law remains to be seen.

3. Law applicable to an EGTC in accordance with Article 2 of Regulation (EC) No 1082/2006

We have already outlined the contents of this article. They are relatively clear although they infer that an EGTC's convention and statutes take precedence over national law, which could prove to be problematic in some cases, especially as regards respect for the competences of the entities participating in an EGTC.

According to Article 2(1)(c), the national provisions applicable to an EGTC only concern matters not, or only partly, regulated by this Regulation (the second case evidently having the potential to be more problematic in practice), while the provisions of the statutes referred to in Article 2(1)(b) are those expressly authorised by the Regulation. It is thus possible that the respective fields of application of the provisions may mean that a conflict of rules is prevented, but this is by no means certain.

In this case, the provisions of the convention and the Regulation, even adopted by bodies of a lower rank – but certainly approved under Article 4(5) of the Regulation by the competent authorities of the Member State – could prevail over national law. In fact, courts examining this question would certainly not fail to notice, in particular, that in a relatively similar situation Council Regulation (EC) No 2157/2001 on the European Company and Council Regulation (EC) No 1435/2003 on the Statute of the European Cooperative Society provide, in Articles 9 and 8 respectively, a more detailed solution than that envisaged here, i.e. the Regulation, then the statutes where expressly authorised by the

Regulation, then, and this is where the major difference arises: ‘(c) in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

(i) the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs [SECs respectively];

(ii) the provisions of Member States’ laws which would apply to a public limited-liability company [or cooperative society] formed in accordance with the law of the Member State in which the SE [SEC] has its registered office;

(iii) the provisions of its statutes, in the same way as for a public limited-liability company [cooperative respectively] formed in accordance with the law of the Member State in which the SE [SEC] has its registered office’.

In this instance, therefore, the role of the statutes in the national legal order is expressly stipulated, which is not the case for the convention and statutes of an EGTC. The national courts could not fail to take account of the obvious silence of Regulation (EC) No 1082/2006 on this matter. In our view, this could lead to difficulties in the future.

4. Law applicable to the control of an EGTC’s activities

An EGTC’s activities may be subjected to controls at the very least of their legality and even, under Article 13 of Regulation (EC) No 1082/2006, their appropriateness. However, the Regulation does not envisage any standard procedure for administrative control of an EGTC’s acts, and it is doubtful that a state could introduce such controls. The Regulation does, however, contain provisions on financial control (4.1) and exceptional control to protect the public interest (4.2).

4.1 Rules applicable to the financial control of an EGTC

It is interesting to note that this is the primary specific control envisaged for an EGTC: this is undoubtedly due to the fact that this tool – although granted very broad scope for action in the final version of the Regulation – was designed with a view to management of the EU’s Structural Funds, which is why the control of management of Community funds is a crucial aspect of the Regulation. Although its format is questionable, Article 6 of the Regulation lays down a general principle and two distinct control procedures, depending on whether or not an EGTC is managing Community funds.

The general principle laid down in Article 6(3) is that all controls must be carried out according to internationally accepted audit standards. That does not seem to be overly problematic[349].

As regards actions cofinanced by the Commission, ‘the relevant legislation concerning the control of funds provided by the Community shall apply’[350], which refers, on the one hand, to the general rules applicable to the Community budget and, on the other, and more specifically, to the provisions of the Regulations on the Structural Funds, especially Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and above all Regulation (EC) No 1080/2006 on the ERDF. In fact, the cross-border nature of the operational programme in the area of territorial cooperation requires a number of adjustments to the rules on the control of expenditure – particularly in relation to the eligibility of expenditure in a

cross-border context, a subject that has caused a fair number of problems in the past – which are provided for in Articles 13 et seq. of the ERDF Regulation, reproduced in Annex 2.

Finally, as regards the control of management of non-Community funds by an EGTC, the authorities of the state where an EGTC has its registered office are primarily responsible for this (Article 6(1)). The Regulation provides for possible cooperation with the control authorities in the other Member States concerned in relation to activities carried out in their territory (Article 6(2)). The functioning of these procedures should be reviewed after a number of years; insofar as these procedures are the not the same as those that will be applied for the control of management of Community funds (under Article 6(4)), this review will unfortunately not be carried out by the EC's Court of Auditors. Perhaps the Committee of the Regions should look into this in a few years, particularly as Article 9(2)(e) states that the parties may specify in the statutes 'the applicable accounting and budgetary rules, including on financial issues, of each of the members of the EGTC with respect to it'. The freedom of the parties concerned to establish such rules will of course be limited by the public accounting rules that apply to each of them, but it would be desirable to identify examples of 'good practices' with a view to encouraging members of future EGTCs to regulate as far as possible at the outset the aspects concerning the adjustment of the national financial control provisions.

4.2 Extraordinary control aimed in particular at defending the public interest

Article 13 of the EGTC Regulation provides for extraordinary control to defend the public interest, which means that, where appropriate, a Member State may prohibit an EGTC's activity on its territory or may require the members formed under its law to withdraw from an EGTC. This measure to defend the public interest may be implemented 'where an EGTC carries out any activity in contravention of a Member State's provisions on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State'. The procedure for formulating this requirement and, in particular, ensuring that it is executed is not indicated in the Regulation. However, the second subparagraph of Article 15(2) states that the competent courts for the resolution of disputes under Article 13 will be the courts of the Member State whose decision is challenged. Otherwise a jurisdiction is designated for the settlement of the dispute.

According to the second subparagraph of Article 13, 'such prohibitions shall not constitute a means of arbitrary or disguised restriction on territorial cooperation between the EGTC's members. Review of the competent body's decision by a judicial authority shall be possible'. As we have seen, under Article 15(2) the competent courts will be the national courts. The applicable law is not specified.

5. Law applicable to the relations between members

The principle of such a grouping is that its members determine the social rules on which they wish to organise their cooperation. Broadly speaking, therefore, it will be the convention and the statutes – although, as highlighted at the beginning of this long chapter, it is difficult to understand why two separate documents are needed – that will govern the relations between the members, at least in

relation to the points expressly provided in Articles 8(2) and 9(2). The convention and the statutes must both be adopted unanimously by the members (Articles 8(1) and 9(1)), after the state has approved the participation of each authority in accordance with national rules (Article 4(3)), and the members must also ensure 'consistency with the approval of the Member States in accordance with paragraph 3 of this article' (Article 4(5)). As a result, the members of an EGTC to a large extent agree on the rules that will apply to their relations, in accordance with the provisions of the Regulation, as well as the national rules to which it refers. National legislation, in particular the legislation of the state where an EGTC has its registered office can also apply to the relations between the parties: either because it contains binding provisions that will apply to an EGTC and, consequently, to its members (e.g. as regards working relations with staff or their social rights), or because certain situations will not be regulated by the convention or the statutes. In that case, the rule in Article 2(1)(c) will apply, including to the relations between members.

In addition, Article 8(2)(e) provides that the law applicable to the interpretation and enforcement of the convention must be the law of the Member State where the EGTC has its registered office. The relations between members will therefore also be subject to this national law, where appropriate; and insofar as Articles 8 and 9 do not authorise the parties to the convention and the statutes to appoint a competent court themselves, the competent courts will be those of the state where the EGTC has its registered office, pursuant to the second sentence of Article 15(2) of Regulation (EC) No 1082/2006.

6. Law applicable to an EGTC's relations with third parties

An EGTC has legal personality and legal capacity under Article 1 of the Regulation, which means that this legal personality may have legal relations with third parties. Contractual relations are envisaged in particular, as Article 1(4) states that an EGTC 'may, in particular, acquire or dispose of movable and immovable property and employ staff', which will entail contractual relations. The law applicable to these relations will be determined in accordance with the rules of Community law or international private law, as stipulated in the second subparagraph of Article 2(1) of the Regulation. Insofar as the rules on applicability would take account of the personal situation of the contractors, this provision states that 'an EGTC shall be treated as an entity of the Member State where it has its registered office'.

As far as employment relations are concerned, an EGTC's statutes may lay down specific provisions, as provided for in Article 9(2)(d), which allow the parties to establish special rules 'concerning personnel management, recruitment procedures and the nature of personnel contracts'. In the light of the ranking order of provisions laid down in Article 2(1), the rules laid down by the statutes where expressly authorised by the Regulation could take precedence, and thus derogate from the applicable national laws. We recommend, however, that the parties should be aware that a number of legal provisions concerning working conditions will be those of the state where the EGTC has its registered office or the state where the worker is registered, and they should thus ensure that it is not overly difficult to integrate the rules specified in their statutes with the national provisions.

In addition to these contractual relations, an EGTC may have relations with third parties based on reciprocal liability. As far as an EGTC's liability as regards third parties is concerned, the Regulation states that an EGTC is liable for the acts of its director (Article (10)(1)(b)) and, more generally, that 'an EGTC shall be liable for the acts of its organs as regards third parties, even where such acts do not

fall within the tasks of the EGTC'. The confidence of third parties therefore takes priority over the protection of members' interests, particularly their financial interests. Indeed, the first subparagraph of Article 12(2) provides that 'an EGTC shall be liable for its debts whatever their nature'. This liability of an EGTC does not eliminate that of its members: according to the second subparagraph of the same article, 'to the extent that the assets of an EGTC are insufficient to meet its liabilities, its members shall be liable for the EGTC's debts whatever their nature'.

An EGTC can therefore maintain contractual and extra-contractual relations with third parties. In the case of the latter, an EGTC's liability does not replace that of its members, which may be required to assume secondary liability, particularly financial liability, for an EGTC's debts.

7. Liability of the authorities that are members of an EGTC

Members of an EGTC consequently have extensive liability. An EGTC's legal personality does not fill the traditional role of a social veil that most legal persons have as far as third parties are concerned, and the members of an EGTC are secondarily liable for relations with third parties too. This unlimited liability affects each member 'in proportion to its contribution'[351]. Although not stipulated in the Regulation, this obviously refers to its financial contribution. The second subparagraph of Article 12(2) states that 'the arrangements for contributions shall be fixed in the statutes', which refers partly to Article 9(2)(e), although this only mentions financial contributions. We can therefore deduce from this that in order to fix a member's share of liability for an EGTC's debts, non-financial contributions – e.g. a contribution in kind or provision of staff – will also have to be taken into account where appropriate. If the members decide that such liability is not unfeasible, they may even provide in the statutes that 'they will be liable, after they have ceased to be members of an EGTC, for obligations arising out of activities of the EGTC during their membership' (subparagraph 4 of Article 12(2)). This rule raises several interesting points.

First and foremost, this liability is not automatic; it may be stipulated in the statutes. In other words, in the absence of any specific provision to that effect, a member that has left an EGTC can no longer be held liable for the activities of that EGTC that were carried out when it was a member. Only those members that were members when liability was invoked will be liable. This means that the members should be careful when allowing a member to leave an EGTC (a procedure, we should point out, that is not envisaged in the Regulation). We then might wonder why the members of an EGTC would wish to extend their liability, which already appears to be quite broad. There are two responses to this. On the one hand, it helps to strengthen the credibility of an EGTC as regards third parties, which know that in addition to an EGTC's legal person, all of its members are liable for the activities it carries out. On the other hand, including such a provision in the statutes would also make it easier for a member to leave: there would be no further financial consequences for the other members if a cause of action for liability or unforeseen debts were to arise following a member's departure that dated back to the period when it was still a member. For this reason, such a provision should be included in the statutes if the liability of an EGTC's members cannot be limited.

On the other hand, it is possible to limit the liability of an EGTC's members 'if the liability of at least one member of an EGTC is limited as a result of the national law under which it is formed' (third subparagraph of Article 12(2)). In this case the other members can also limit their liability in the statutes, which would seem reasonable.

A limitation of liability such as this has two consequences as regards information, and thus, where necessary, protection for third parties. Firstly, the name of an EGTC with limited liability must indicate clearly this status of its members[352]. Moreover, ‘publication of the convention, statutes and accounts of an EGTC whose members have limited liability shall be at least equal to that required for other kinds of legal entity whose members have limited liability, formed under the laws of the Member State where that EGTC has its registered office’. It should be noted, however, that a Member State ‘may prohibit the registration on its territory of an EGTC whose members have limited liability’.

It is important to point out that there is the potential here for extremely diverse, or even contradictory, solutions. This is a reflection of the different traditions in the Member States in terms of the practices concerning cooperation between public entities, and it is extremely likely that similar solutions from a legal perspective will be concentrated in specific geographical areas, at least in relation to cross-border and transnational cooperation.

Furthermore, the authorities participating in an EGTC also have another form of liability in relation to an EGTC’s activities. The EGTC Regulation contains a guarantee that ‘nothing in this Regulation shall deprive citizens from exercising their national constitutional rights of appeal against public bodies which are members of an EGTC in respect of: (a) administrative decisions in respect of activities which are being carried out by the EGTC; (b) access to services in their own language; and (c) access to information’. This provision in Article 15(3) of the Regulation is very welcome and is rarely found in the agreements on cross-border cooperation. Although the rights and interests of the State with regard to the activities of public territorial entities that extend beyond national borders are frequently protected, the rights of citizens are less often a cause for concern. This may be due, too, to the fact that at the current stage of development of this type of activity, there are not yet any truly operational cross-border cooperation bodies whose activities might directly affect citizens’ rights.

That being the case, this provision implies that, for substantive and not just procedural content, irrespective of an EGTC’s forms of organisation and the rules applicable to its activities, each territorial authority must have complete liability as regards its citizens in relation to the three points mentioned above. Of course, that liability is limited with regard to the first point since Article 7(4) of the Regulation provides that ‘the tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law’.

8. Liability of the Member States

Three rules concerning the Member States’ liability may apply at the same time.

1. The first excludes their financial liability ‘in relation to an EGTC of which they are not a member’, or for (the debts of) an ECTC of which they are not a member. In fact, this is unfortunately the result of a poor French translation of the Regulation[353]. The issue is not the state’s liability in relation to an EGTC, but in relation to third parties, on behalf on an EGTC of which the state is not a member (but, for example, an authority formed under its law is). This is a rule that is found in many agreements on cross-border cooperation[354] and it makes sense.

2. The second is the ordinary rule in cases where a state is a member of an EGTC; in that respect, it would be liable for the debts, like the other members, in proportion to its contribution to the EGTC (second subparagraph of Article 12(2)).
3. Thirdly, if an EGTC has received Community funding, because of the general rules on the responsibility of states – which are clearly stipulated in Article 6(4) of this Regulation – the state is responsible to the EC for the correct use of the Community funds. In this respect, it may be liable.

9. *Law applicable to the dissolution of an EGTC*

Three cases are possible.

1. An EGTC may be wound up at the end of the period for which it was formed, as stipulated in the convention. In this case, it will be wound up in accordance with the provisions in the convention, as provided for in Article 2(1)(b) of the EGTC Regulation (a provision of the convention expressly authorised by the Regulation). Naturally, however, the rules on the liquidation of an EGTC are, under Article 12(1), those of the state where the EGTC has its registered office. This applies to the two other dissolution scenarios.
2. The second scenario is dissolution where the members of an EGTC express their desire (perhaps unanimously) that the EGTC be wound up, in accordance with the provisions contained in the convention. The legal rules are the same as those in the first case.
3. Finally, the third scenario consists of dissolution ordered by the competent court or authority of the Member State where the EGTC has its registered office, 'on an application by any competent authority with a legitimate interest', where the competent court or authority 'finds that the EGTC no longer complies with the requirements laid down in Articles 1(2) [i.e. concerning the objective of the cooperation] or 7 or, in particular, that the EGTC is acting outside the confines of the tasks laid down in Article 7[355]. The competent court or authority must 'inform all the Member States under whose law the members have been formed of any application to dissolve an EGTC'. It may also 'allow the EGTC time to rectify the situation' on the understanding that if there have been no positive developments at the end of this period it shall order it to be wound up. Faced with this extraordinary situation, the rights of appeal are not expressly indicated by the Regulation. However, insofar as the decision is to be made by the authorities of the Member State where the EGTC has its registered office, the general rule in the second sentence of Article 15(2) will apply.

F. DIFFERENT TYPES OF EGTCS

This long chapter demonstrates that in many cases the situation of an EGTC will differ according to the members participating in it, the activities it will carry out or the law applicable to it (as a result of the location of its registered office or its activities). The quantitative and substantive importance of the referrals to national law also means that an EGTC located on the territory of a Member State, and

thus subject under Article 2(1)(c) of the Regulation to the laws of that state, will have a different legal framework to that of the same EGTC that is composed of the same members, carries out the same tasks but is situated on the territory of the one of the other states concerned.

It is therefore vital to determine the law applicable on the basis of the location of an EGTC's registered office. Having consulted the experts and professionals in this field, we suggest below six criteria to enable members to differentiate between the distinct legal categories of EGTCs, with a view to identifying the potentially relevant rules under each national legal system[356] before choosing an applicable law through the location of the registered office.

Firstly, two criteria are linked to the members of an EGTC, which are defined in Article 3 and divided into five categories. This article tells us that an EGTC is composed of members 'belonging to one or more of these categories'; it is therefore important to distinguish between homogeneous EGTCs and heterogeneous EGTCs, i.e. between those that consist of members that belong to a single category, and those that have a diverse range of members. To that end, and in order to take account of the diversity of the organisational structures in the Member States, it would seem possible in most cases[357] to treat regional and local authorities as belonging to the same category, particularly as this very common distinction at European level[358] is not used in all the Member States. As far as the heterogeneous EGTCs are concerned, it is also interesting to distinguish between symmetric heterogeneous configurations, involving a number of partners in the same categories from both sides of the border, and asymmetric configurations, which are even more tricky to incorporate into a national legal system.

A second criterion for categorising EGTCs is the distinction between those that contain states and those that do not. There are major legal differences in this respect. First and foremost, if in all the states concerned a Member State is a member of the EGTC, it is worth examining whether this legal structure is appropriate or whether it might be more effective to create, between sovereign entities and in accordance with the rules of international law[359], an ad hoc cooperation structure, in which territorial public entities could easily be involved. If this is not the case, or in the event of asymmetric cooperation where not all the Member States concerned have a state as a future member of the EGTC, it would be wise to examine the extent to which the national public laws will be able to accommodate a foreign state and, on the other side of the coin, the extent to which a sovereign state will be able to comply, even to a lesser degree, with foreign public laws. It is possible in this instance that only a private law structure will be possible. Or, if a single state becomes a member, that could mean that for legal reasons the EGTC's registered office would have to be located on its territory.

Two further criteria relate to the applicable law.

Firstly, as we have just mentioned, it will be important to identify whether the cooperation envisaged requires a public law structure or a private law structure with regard to the legal system in the territory where the EGTC's registered office will be located. It is possible that a similar structure, bringing together the same members and carrying out the same activities, might from this point of view be described differently by the legal systems of different states. This, too, has major consequences as regards the applicable national law[360].

Secondly, and this distinction is provided for in Article 12(2) of the EGTC Regulation, it is important to distinguish between the EGTCs whose members have limited liability, and those whose members have unlimited liability. Some states may also prohibit the registration on their territory of EGTCs with limited liability.

Finally, two distinctions can be made concerning the activities to be carried out by the EGTC.

Firstly, and this is stipulated by several provisions in the Regulation, it is important to distinguish – as far as is possible in advance – between an EGTC that must manage Community funds (directly) – especially within the framework of the EC's economic and social cohesion policy – and an EGTC that does not receive Community funding. The Regulation lays down different substantive rules and procedures for these two situations.

Finally, a distinction must be made between an EGTC that carries out concrete actions itself on behalf of its members and an EGTC that merely facilitates or structures the cooperation among its members. In the first case, the rules on liability as regards third parties, especially the citizens, are crucial, while in the second, these matters can remain in the background.

The possible combinations of all these factors amount to 720 potentially different categories of EGTCs. If we multiply these 720 categories by the 25 Member States, we end up with around 18 000 possible legal categories. That will not happen of course. Past experience shows that the new legal structures envisaged for (primarily) cross-border cooperation activities are in general seldom utilised, at least in the initial stages [361]. Nevertheless, no legal instrument has ever had such a broad geographical scope, and as a result it is therefore statistically likely that the number of EGTCs formed will be higher. However, the aim of the categorisation proposed here is not to establish a random list but to make it possible to identify from the outset the combinations that can or must be avoided with a view to determining as early as possible the legal system on which to base the preparatory work on the convention and the statutes[362], and adapting them to the type of legal person and legal system chosen.

Consequently, in order to determine the type of legal structure to be formed by your EGTC, identify your situation according to the following parameters:

<table>
<tr><td>Criteria linked to the members</td><td colspan="2"></td></tr>
<tr><td>1. Homogeneous configuration</td><td colspan="2">Heterogeneous configuration</td></tr>
<tr><td></td><td>1.A. symmetric</td><td>asymmetric</td></tr>
<tr><td>2. With State participation</td><td colspan="2">Without State participation</td></tr>
<tr><td>Criteria linked to the applicable law</td><td colspan="2"></td></tr>
<tr><td>3. EGTC governed by public law</td><td colspan="2">EGTC governed by private law</td></tr>
<tr><td>4. Limited liability of members</td><td colspan="2">Unlimited liability of members</td></tr>
<tr><td>Criteria linked to the activities carried out</td><td colspan="2"></td></tr>
<tr><td>5. EGTC managing EC funds</td><td colspan="2">EGTC without EC financing</td></tr>
<tr><td>6. EGTC carrying out activities on behalf of its members</td><td colspan="2">EGTC coordinating cooperation among its members</td></tr>
</table>

G. CONTINUITY SOLUTIONS AND INNOVATIONS OF THE EGTC

The lengthy analysis above reveals a number of subtle advances that will be allowed by the implementation of this Regulation and the establishment of EGTCs at the borders of the EU Member States. It is possible, however, to highlight two major elements of continuity contained in the Regulation and two shifts that represent significant innovations.

1. Continuity solutions

1.1 Incorporation of the 'Interreg *acquis*'

The distinction between the three cooperation strands of the Interreg III programme is retained. The priorities for each one are very similar to the previous ones, allowing for continuity of the cooperation actions carried out.

The *acquis* as regards Community financing of cross-border programmes is retained (single OP without national breakdown, lead partner principle, etc.).

1.2 Referral to national law is for the most part retained

Although strictly speaking, from a legal perspective, the terms and conditions governing referral are different, the solution of a legal structure attached to a national legal system, even if less precise than with the existing legal instruments, is on the whole retained.

2. Innovations

2.1 Possibility of a public cross-border or transnational entity formed under Community law

As we have just highlighted with regard to the continuity of practices, from a legal standpoint the EGTC is a legal person governed by Community law. That should eventually have major implications, both for the development of territorial cooperation and for the probable role of territorial authorities in a process of horizontal integration in Europe.

2.2 Possible participation of states, alongside territorial authorities, in territorial cooperation entities with their own legal personality

This is a complete change in perspective with regard to the laws on cross-border cooperation, the forerunner to territorial cooperation. As long as it is utilised, it should make it possible to inject a dose of multi-level governance into the management of the areas along the EU's internal borders: this is an essential consolidation of the territorial dimension of the integration process.

CHAPTER 5: LEGAL IMPLICATIONS OF IMPLEMENTING THE EGTC REGULATION

The EGTC regulation contains numerous references to national law, which is unusual for a legal instrument of this type (it is rather directives that have to be implemented by national legal measures). On the basis of recent Court of Justice case law and a detailed analysis of the provisions of this legal act, the study nevertheless shows that the text meets the criteria defining a Community regulation (A).

Under Community law, regulations must have direct effect. In other words, those subject to the Community legal system derive their rights or obligations directly from regulations. Those rights can even be invoked against any conflicting national rule. In this case, however, the relationship with national law is complex because the provisions of the Regulation frequently refer to national law, and even make their own application subordinate to measures taken under national law.

Below we reiterate the principles by which the provisions of Community law must have direct effect in national legal systems (B.1.1.).

A discussion of the likely impact of general references to national law in Articles 2 and 16 of Regulation (EC) No 1082/2006 shows that the scope of such references in a Regulation will remain difficult to interpret and that they will therefore introduce an element of legal uncertainty (B.1.2.1).

Specific references to certain national rules are by definition clearer and easier to interpret. They are identified and enumerated, a distinction being made between cases in which the national rule complements a Community provision and those where the national rule alone applies (B.1.2.2).

Finally, the ex-ante controls which the Regulation allows the authorities to carry out under national legal provisions (in particular under the third paragraph of Article 4(3) of Regulation (EC) No 1082/2006) effectively permit the Member States to limit access to the facilities provided for by this Regulation on the basis of national law. However, insofar as this ex-ante control is based on Community law, the conditions under which it is practised could if necessary be referred to the Community courts (for a preliminary ruling) (B.1.2.3).

However, this point shows that the Regulation will by no means have a uniform effect across the whole territory of the Union. Under existing national law governing the participation of different types of public actors in cross-border, transnational or interregional cooperation arrangements, those actors in countries with a liberal approach will experience an increase in their scope for action, whereas those in countries with a restrictive approach are unlikely to gain many additional rights, if any, from this Regulation. On the other hand it should be noted that the restrictive practice of certain countries is related to the limited powers of their local authorities and that the possibility of their participating directly in an EGTC should enable them

to implement the provisions of the Regulation by other means (B.2.1).

Although the principle of primacy of Community law prevents the Member States from adopting laws that are incompatible with the Regulation on the EGTC after its entry into effect, it is more difficult to assess what will happen with laws adopted before this Regulation that would restrict access to an EGTC and which the Member State could invoke, for example under the third paragraph of Article 4(3) of the Regulation. Legally, the answer will depend on whether the provisions of the Regulation can be considered to have direct effect, in which case previous laws that conflict with it are no longer applicable. If this is not the case, then such laws may remain in effect (B.2.2).

The implication of this complex relationship between the provisions of this Community regulation and national law should be that national law is adapted so as to be compatible with this form of cooperation.

This should happen partly because it is in the Member States' direct interest, notably because they will then be able attract EGTCs if they have an appropriate national legal framework (B.3.1).

In addition, Article 16 of the EGTC Regulation requires that the Member States take the appropriate measures to ensure effective application of the regulation. This requirement will produce legislative or regulatory momentum in the Member States which should encourage the development of territorial cooperation and increase the legal certainty of its framework (B.3.2).

The third paragraph of Article 16 (1) requires the Member States to inform the Commission of national provisions adopted in application of this article; however, since these would not be measures to transpose a directive, there is no guarantee that the Commission will publicise them adequately (as it does for the transposition of Directives). In the interests of information and legal certainty, this study recommends that a record be kept of the different national laws applicable in this area (B.3.3).

Finally, it should be noted that this Regulation will have no direct legal effect on the validity or scope of other, international legal instruments relating to cross-border or transnational cooperation (C).

Although this is a Regulation within the meaning of TEC Article 249, i.e. "binding in its entirety and directly applicable in all Member States", in the particular instance of Regulation (EC) No 1082/2006 on the EGTC it will not be possible for a direct legal effect to be produced within a short time. Practitioners consulted in the course of drawing up this study all said that they were sceptical about the possibility of setting up an EGTC on the basis of this regulation alone. In addition to the many theoretical and practical issues affecting the relationship between Community and national law – the numerous references to national rules in accordance with the various terms and priorities of the Regulation help to maintain considerable confusion – those concerned believe that the minimum level of legal certainty which can reasonably be required before steps are taken to set up a EGTC has not been achieved as things now stand.

In this chapter we therefore try to understand the nature and implications of these legal issues with the aim of proposing ways of developing solutions that would make it possible to actually set up a EGTC with as little delay as possible.

Thus in Section A, which is unusual in terms of style and content, we note that Regulation (EC) No 1082/2006 still has to be regarded as a Community regulation in the sense of TEC Article 249, which means that it is likely not only to create obligations for the Member States, but also to have direct effect, to the benefit or cost of local authorities and their groupings. The analysis will compare the Regulation with similar types of instrument which are relatively rare under Community law, namely the Regulation establishing a European Economic Interest Grouping (EEIG)[363], the Regulation on the Statute for a European company[364] and the Regulation on the Statute for a European Cooperative Society[365].

Section B is more straightforward, looking at the relationship between national and Community law more generally. It goes without saying that the principle of primacy of Community law over national law is generally applied. However, this Regulation makes several specific references to national law (e.g. Art. 2(1)(c) or 3(1)). Similarly, in certain cases it allows national law to prevail (e.g. third paragraph of Article 4(3)). Finally, it makes a very general reference to national law - "Member States shall make such provisions as are appropriate to ensure the effective application of this Regulation" (Art. 16) - whose implications merit further discussion.

In a short final section (C) we will show that the there is no problem with this Community regulation existing alongside international laws that provide for other cooperation mechanisms, including other legal forms allowing a cross-border cooperative grouping to be set up.

A. THE EGTC REGULATION IN THE COMMUNITY LEGAL FRAMEWORK

As already noted, the creation of a cooperative grouping between local authorities under a Community regulation has very significant legal implications. This is because Community law offers a major advantage over national law (whose scope is limited to one country) and international law (whose legal effect is determined by the legal system of each individual state[366] according to specific arrangements, compliance being only rarely ensured by a common jurisdictional mechanism) because it guarantees direct applicability and uniform effect across the territory of the Union. Community law, on the other hand, has the means to ensure uniform effect of legislation enacted across the territory of the Union.

Not only are states not obliged to ratify treaties they have signed, but there is also the problem of reservations (see Chapter 2, section A.1). Furthermore, it is each national jurisdiction that determines the legal consequences, or legal scope, of international rules on its territory. But in the case of Community law, ever since the famous ECJ judgment of 5 February 1963, it is the Community courts that determine the effect of Community law in the legal system of each Member State, which guarantees the uniform effect of Community law. Thus if provisions of international law apply, each national judge is bound under the national legal system to give effect to them within the national legal system; but if the same legal provision is applied or interpreted differently in two different countries, there is no international legal mechanism under international law, as considered in Chapter 2, making it possible to harmonise the effect of those provisions. This presents a serious problem in cross-border or transnational situations. The contrast is even more pertinent in the case of a Community regulation,

which under TEC Article 249 "shall be binding in its entirety and directly applicable in all Member States". However, we shall see that the wording of Regulation (EC) No 1082/2006 on the EGTC is unorthodox, to say the least, to the extent that its nature as a Regulation may even be called into question.

It has long been clear from a theoretical perspective that Community law offers substantial advantages over national law (whose scope is limited to national territory) and international law (whose application and legal effects can vary significantly between national legal systems)[367], for example by virtue of the principle of uniform application. Thus the adoption in a Community regulation of practical rules on territorial cooperation structures and provisions applying to implementation in each national situation of the obligations entered into under cross-border or transnational cooperation agreements would effectively guarantee a uniform approach in Europe. This would reduce inequalities between the partners in such cooperative arrangements depending on the territory where the cooperative operations were put into effect, and would ultimately improve the effectiveness of this form of cooperation, which is currently too complex to produce very satisfactory outcomes[368].

Given this fact, although Community action here takes the form of a Regulation, it is one which contains only a few specific rules and mainly refers to national law, as well as requiring the Member States to adopt "such provisions as are appropriate to ensure the effective application of this Regulation" (Article 16 of Regulation 1082/2006). In fact, the complicated interaction produced by this Regulation between Community law, the rules governing an EGTC and national law seems to raise more questions in terms of legal certainty than it can resolve.

On the other hand, as in some other cases[369], Community law here establishes a new category of legal person, which despite the important role of reference to national jurisdictions should receive if not uniform, then at least similar, treatment in the different Member States based on the principle of the effectiveness of the provisions contained in Regulation (EC) No 1082/2006 and by virtue of the direct effect that the rules contained in the regulation will have within each national legal system.

As Article 249 TEC unambiguously states, "A Regulation […] shall be binding in its entirety and directly applicable in all Member States". In its case law, the Court of Justice has drawn the obvious conclusion that no national measure may undermine this direct effect intended by the Treaty, and in particular that "all methods of implementation are contrary to the treaty which would have the result of creating an obstacle to the direct effect of community regulations and of jeopardising their simultaneous and uniform application in the whole of the community"[370].

This prohibition against the adoption of national measures that might compromise the direct effect of legislation obviously does not apply if the actual text of the Regulation refers to national law or allows national law to prevail. In another judgment the Court likewise considered that "the fact that a regulation is directly applicable does not prevent the provisions of that regulation from empowering a community institution or a member state to take implementing measures"[371]. A reliable author writes that in this type of case direct effect will have different implications than in the case of regulations in general[372]. In the *Eridania* case, the Regulation required the Italian authorities only to fix quotas in relation to organisation of the market in sugar, which seems to be a much more precise and restricted reference to action by the national authorities than, for example, the reference to "matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office"[373]. And of course there is the requirement to "make such provisions as are appropriate to ensure the effective application of this Regulation" set out in Article 16(1), whose wording is very

reminiscent of a directive. We would therefore not consider the *Eridania* judgment to very relevant to the case under consideration.

However, it should be noted that for a number of years there have been references of this type in several Community regulations intended, like this one, to establish Community legal structures and which contain certain basic or practical provisions that also depend on national legal systems. Thus the Regulation on the Statute for a European Company (SE)[374] and the Regulation on the Statute for a European Cooperative Society (SCE)[375] provide (in Articles 68 and 78 respectively) that "Member States shall make such provision as is appropriate to ensure the effective application[376] of this Regulation". In the French versions this reads as an even broader reference to national law ("toute disposition appropriée", compared with "les dispositions appropriées" in Regulation No 1082/2006). As it happens, the European Parliament challenged the validity of Regulation (EC) No 1435/2003 on the grounds that it had been adopted under Article 308 TEC, which provides only for consultation of Parliament, whereas it argued (as did the Commission, which had provided accordingly in its initial proposal and backed the European Parliament in the annulment action) that the correct legal basis was Article 95 TEC[377]. This treaty article on approximation of legislation leads rather – given its aim – to the adoption of directives (without excluding the adoption of regulations), and the Commission and Parliament considered the regulation on the European Cooperative Society to be a covert directive (in view of the numerous references to national law) and not a regulation, which reinforced their conviction that the legal basis was actually Article 95 TEC.

We are not concerned here about the legal basis of the regulation but in order to respond to the above-mentioned arguments, the advocate general of the Court of Justice of the European Communities will have to consider the nature of the legislative act in terms of its content and the numerous references to national law. The advocate general noted in relation to the above case that "A possible argument in support of recourse to Article 95 EC as the legal basis might be that the regulation does not contain a complete legal framework or, as expressed by the Parliament, that an SCE can only exist in conjunction with national law"[378]. The advocate general's response to this argument was as follows:

"The regulation makes various references to national law and affords it application in wide areas relating to an SCE, as regards for instance the conditions on registration (Article 11), publication of documents (Article 12) and the provisions on mergers (Article 28). It is therefore true to say that the regulation provides for many aspects by reference to national law. However, it contains one express provision that clearly sets out the ranking order of the law applicable: Article 8 clearly accords priority to the regulation. Large parts of the regulation, certainly, contain genuinely new provisions. This applies primarily to the provisions governing the formation of an SCE, namely formation *ex nihilo*, that is to say the formation of a new structure without the merger or conversion of existing legal persons. The new legal form of an SCE was created by the regulation at issue. As the Council and the Parliament agree, the regulation therefore creates a Community structure in parallel with national structures"[379].

These various issues identified by the advocate general are obviously also applicable - perhaps *a fortiori* – to the case of EGTCs, because unlike a cooperative society, which is also an entity that exists in strictly national form and which will continue to exist concurrently with the SCE, an EGTC is a completely original and novel legal form[380].

But the argument serves above all, in the case concerning the Regulation establishing the SCE, to demonstrate that there can be no question of a harmonisation process (i.e. that the legal basis cannot be

Article 95 TEC). The case does not in itself prove that a regulation rather than directive was the appropriate choice. But following this line of reasoning does lead to a conclusion on this point too. In effect, since the Community act establishes a novel legal structure, certain provisions of the Regulation, including the one that introduces this Community legal form, must necessarily continue to exist alongside the prevailing national provisions. Court of Justice case law is quite clear as regards the direct application of directives in national legal systems. It is only where transposition is deficient (not completed by the transposition deadline or carried out inadequately), and provided that the provisions are unconditional, as well as sufficiently clear and precise, that those addressed by Community legislation (in our case above all local and regional authorities) may invoke the rights conferred by certain provisions, which may then have direct effect[381]. Thus even if only one provision of the Regulation remains directly applicable whatever the national measures adopted - e.g. under the requirements of Article 16 of Regulation 1082/2006 - to ensure effective application of the article alongside national law, we can certainly consider the legal act to be a Regulation[382]. Regulation (EC) No 1082/2006 does not in any way require that the Member States set up a legal entity called an EGTC under their legal system; on the contrary, Article 1(1) clearly states that "A European grouping of territorial cooperation, hereinafter referred to as "EGTC", may be established on Community territory under the conditions and subject to the arrangements provided for by this Regulation". Thus an EGTC can be set up by virtue and on the basis of Community law directly, not under a national provision. The direct applicability of a Community regulation under Article 249 TEC is fully effective here.

This lengthy analysis therefore leads to the conclusion that under the criteria identified by the Court of Justice, Regulation (EC) No 1082/2006 is definitely a Regulation in the sense of Article 249 TEC. This will have substantial implications on the one hand for the relationship with national legal systems (see point B below) and the type of legal personality of an EGTC (as we saw in the second paragraph of Chapter 4, point B).

B. THE REGULATION ON THE EGTC AND NATIONAL LEGAL SYSTEMS: FORESEEABLE PROBLEMS

By virtue of its structure and the wording of its provisions, Regulation (EC) No 1082/2006 on the EGTC introduces a complex interaction with national law. As well as referring specifically to national law, or even allowing national law to prevail (e.g. third paragraph of Article 3(3), according to which "In deciding on the prospective member's participation in the EGTC, Member States may apply the national rules"), the regulation also contains provisions that are clear and precise enough to produce direct effect. It is therefore useful to reiterate the principles of the relationship between Community and national law, in order to see how these apply in the particular case of this regulation (point B.1).

In point B.2 we will look at the connection between this Regulation since its entry into force and measures under national law that preceded its existence. Finally (point B.3), we will undertake a more prognostic exercise - but one that has become essential in view of the requirement in Article 16 of Regulation (EC) No 1082/2006 that "Member States shall make such provisions as are appropriate to ensure the effective application of this Regulation". How are national rules now likely to develop, given that this Regulation only came into effect on 1 August 2006 and that under the second paragraph of Article 18, "It shall apply by 1 August 2007, with the exception of Article 16, which shall apply from 1 August 2006"?

1. Principles of the relationship between Community and national law

It should not be supposed from the conclusion to the previous section that all the provisions of the Regulation will necessarily have direct effect. In its case law on the direct effect of Community law the ECJ underlines the importance and necessity of clarifying the formal definition of an act (Article 249 TEC identifies different legal effects for different types of Community act)[383]. The Court has invoked this distinction in order to establish that legal acts whose formal definition would not *a priori* allow them to be considered as having a direct effect could nevertheless - based on the background and wording of the provision – produce such an effect. It also seems possible to us, however, that in this particular case – even though to our knowledge the issue has not been addressed by the Court[384] – certain provisions of Regulation (EC) No 1082/2006 are, from their wording, just not capable of producing specific rights that can be invoked by local authorities, and that they therefore do not produce direct effect. As Joël Rideau rightly notes, a distinction must be drawn between the concept of direct effect of such regulations and the traditional meaning of direct effect, since some of the provisions contained in the text may not be sufficiently clear, precise or unconditional[385] to themselves produce legal effects directly vis-à-vis individuals.

Moreover, in the particular case of regulations, the Court has accepted that even if a provision is not necessarily unconditional and so allows a Member State if necessary to exercise discretionary powers – to introduce additional conditions that do not exceed what is authorised by the regulation or to not use the option provided by the text of the regulation – this does not mean that the act itself should not be considered a regulation or that it does not have direct effect. Although the principle of the Regulation having direct effect "precludes the application of any legislative measure, even one adopted subsequently, which is incompatible with the provisions of that regulation"[386], the Court draws the logical conclusion that "prohibition is, however, relaxed to the extent to which the regulation in question leaves it to the member states themselves to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation"[387]. The Court even recognises that direct effect is not breached by a Member State imposing additional conditions within the scope of this legislative or administrative competence granted by the regulation[388].

Thus the meaning of the concept of direct effect of a Community regulation such as the one we are analysing can at least be described as specific in nature, for instance in respect of the relationship between the provisions of the regulation and national rules.

We believe a distinction should be made between three particular situations:

1. cases where the provisions of the regulation can produce direct effect (B.1.1);
2. cases where the regulation refers to national rules (B.1.2);
3. and cases where the effect of the regulation is subordinated to the application of a rule, or even a decision, of a national authority (B.1.3).

1.1 Rules with direct application

The fact that certain provisions of Regulation (EC) No 1082/2006 refer to national law does not prevent the regulation from applying directly by its nature, and the rules contained in this regulation that do not refer to a provision of national law or do not give rights or discretion to the national authority will apply directly to an instance of territorial cooperation. Thus Article 2 of Regulation (EC) No 1082/2006 expressly stipulates that an EGTC is governed first by the Regulation (Article 2(1)(a)) and that only "in the case of matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office [shall apply]" (Article 2(1)(c)). There is therefore a clear order of priority between the Community regulation and national law, the former taking precedence over the latter, unless the Community regulation explicitly refers to national law (a case which has been addressed by the Community courts, as we have seen) or if it does not govern certain situations. Recital 5 of Regulation (EC) No 1082/2006 stipulates that where national rules exist that complement the provisions of the Regulation: "This instrument is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community"[389]. We would also draw attention to the fact that "where expressly authorised by this Regulation, the provisions of the convention and the statutes referred to in Articles 8 and 9" apply (Article 2(1)(b). Such provisions probably fall somewhere between the Regulation and national law, and would have primacy over national law because they are based on Community law. In the case of a provision drafted on the basis of an identical system and worded in similar terms, *mutatis mutandis*, to Regulation (EC) No 1435/2003 the advocate general of the Court of Justice considered that the provision[390] in question established a clear hierarchy.

Thus all the provisions contained in the Regulation that are sufficiently clear and precise to confer rights or impose obligations on those addressed by Community legislation will apply directly. In other words they will have primacy, in accordance with the principle of uniform application[391], over any existing or subsequent provision[392], of whatever rank[393]. From this perspective, the reference in recital 15 of the Regulation establishing the EGTC to the fact that "this Regulation does not go beyond what is necessary in order to achieve its objectives, recourse to an EGTC being optional, in accordance with the constitutional system of each Member State" obviously does not represent a limitation on the principle of uniform application of the provisions of the Regulation, but is a reference to the latitude allowed to the Member States to approve, in accordance with criteria based more or less on expediency, the possibility of one of their local authorities taking part in an EGTC. This falls within the scope of national law or a national decision, which we discuss in point 2.2.3 below, and does not affect the uniform application of provisions contained in the Regulation that are capable of producing direct effect.

Moreover, in this respect and in a very similar legal situation (Case 436/03), the advocate general considered that a regulation could still create a uniform law of direct application even when it referred to many national provisions[394]. This is why in Chapter 4 of the present study analysing the provisions of the Regulation establishing the EGTC we state for each provision whether it refers explicitly to national law or gives national actors discretion to subordinate the effect of the provision to national law, or if in our view it is capable of producing direct effects, and in which case what those effects are.

The situation is even more confusing in the case of the Member States themselves, which obviously enjoy directly applicable rights under Community law, but are also bound by obligations, likewise under Community law, which should not depend on national rules in the case of a regulation.

Some of the provisions in Regulation (EC) No 1082 treat all members of an EGTC in the same way without distinction.

1.2 Provisions referring to national law

Although it was unusual for the authors of the Regulation to decide to refer to national law on many issues governing the EGTC (since by convention – Article 249 TEC – the Regulation should apply directly), this is not incompatible with the general principles of Community law. Regulation (EC) No 1082/2006 contains two types of reference: two very general references, and a number of specific references. Within the second category, we would distinguish between references to particular national laws and specific cases, resulting from the novel structure of this act, in which the reference to national law allows the Member State if necessary to prevent the provisions of the Regulation from applying, a case which we discuss in point 2.2.3 below.

1.2.1 General references to national law

In two cases, both quite distinct, the Regulation makes a general reference to national law.

To begin with, Article 2 of the Regulation ("Applicable law") stipulates that an EGTC shall be governed "in the case of matters not, or only partly, regulated by this Regulation, [by] the laws of the Member State where the EGTC has its registered office". This reference is clear and relatively unproblematic. The assumption is that the Regulation is not intended to cover all legal issues relating to the EGTC – as indeed the fifth recital clearly states[395] – and that therefore wherever the Regulation does not cover, or not fully cover, a question, the national law of the country where the EGTC has its registered office will apply in its place. Thus national law complements and provides an alternative to Community law.

The question of interpretation which might arise will be how to establish whether a legal issue relating to the existence or life of an EGTC is fully dealt with or not by Regulation No (EC) 1082/2006. This question, which would be raised by the operator or if necessary the national court, can be presented to the Community court for a preliminary ruling (Article 234 TEC) for interpretation of the provision concerned. In practice, the management of questions that are only partly governed by the Regulation are likely to be complex. We would emphasise that determining the extent to which a matter is partly or fully governed by the EGTC regulation is a question of Community law, not national law.

The issue will be even more complex when it is not the Regulation itself dealing with a legal issue relating to the EGTC but the EGTC convention or statutes, to be drawn up under Articles 8 and 9 of the Regulation. In effect, the logic of Article 2(1)[396] indicates that the provisions of the convention and statutes adopted on the basis of this Regulation in accordance with its provisions will take precedence over national law. This could lead to a paradoxical situation in which rules adopted on the basis of the Regulation by local and regional authorities under the convention or statutes setting up an EGTC could have primacy over national law, which would present a very complex and problematic legal issue. The procedure for approval by the competent authorities of the Member States "under whose law it has been formed" of the public body which wishes to become a member of an EGTC, set out in

Article 4 of Regulation (EC) No 1082/2006, should allow such cases to be avoided, but we do not feel that this check provides an absolute guarantee.

This is because in cases where national law applies by virtue of the general reference provided for in Article 4, that law obviously may not contradict the provisions of the Regulation. It would be up to the Community courts if necessary to interpret the scope of the provisions of the Regulation in order to determine their effects in relation to provisions of national law. The national court would then have to follow this interpretation by the Community court. We would point out here that Community case law has consistently upheld the direct effect of Community legislation within national legal systems, at least in the case of the Treaties and regulations, and that this legislation therefore cannot, because of its particular character, be subject to national transposition or incorporation measures of which a national court would be aware[397]. This means that even if national law does not conflict with the provisions of the Regulation, or the EGTC convention or statutes, it must be discounted to the extent that the issue is settled by the Regulation itself, or by the convention or statutes setting up the EGTC[398].

Finally, the Regulation stipulates that this complementary national legislation may consist of national rules, or rules of applicable law, depending on the constitutional structure of each Member State, at the level of the territorial entities that can adopt such legal rules[399]. This means that in countries with federal systems such as Germany and Austria - the case of Belgium is different - it is mainly rules of regional law that are concerned.

We would emphasise that this subsidiary reference to national law may produce certain problems in connection with the principle of uniform application of Community law. The reason is that national legislation relating to territorial cooperation is very diverse owing to the different structures of the Member States, different traditions in terms of local and regional autonomy and development of particular rules relating to cross-border cooperation or cooperation between local authorities at national level[400]. Although references are also made to national law in the regulations on the European Economic Interest Grouping, the European Company and the European Cooperative Society, the implications are not quite the same as with the regulation under discussion.

In the case of the European Economic Interest Grouping, the regulation only includes provisions complementing national law, and the latter generally applies[401]. The references to national law in the SE and SEC regulations are largely analogous with those in the regulation under discussion. However, in both these cases the legislator justifies the reference to national law in a regulation by the fact that the national laws applying to public limited companies and cooperative societies have already been subject to numerous measures under Community law with a view to approximating legislation, so that it does not seem necessary for a new regulation to refer to specific national rules whose content is already largely determined by the mandatory transposition of harmonising directives. Thus recital 9 of the Regulation on the Statute for a European Company reads: "Since the Commission's submission in 1970 of a proposal for a Regulation on the Statute for a European public limited-liability company, amended in 1975, work on the approximation of national company law has made substantial progress, so that on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the Member State where it has its registered office"[402].

Recital 18 of the Regulation on the SCE states in almost identical terms: "Work on the approximation of national company law has made substantial progress so that certain provisions adopted by the Member State where the SCE has its registered office for the purpose of implementing

directives on companies may be referred to by analogy for the SCE in areas where the functioning of the cooperative does not require uniform Community rules, such provisions being appropriate to the arrangements governing the SCE, especially […]"[403].

As far as the EGTC is concerned, national legislation governing cooperation between territorial bodies has not been subject to any harmonisation measures, partly because there is no legal basis for Community action[404]. There is also a risk that this reference might require particular attention on the part of the Community courts, which would be unlikely to encourage legal confidence among the players concerned by the setting up of an EGTC.

A second distinct case of a general reference to national legal rules appears in Article 16 of the Regulation, which requires that "Member States shall make such provisions as are appropriate to ensure the effective application of this Regulation". However, this reference, which is also couched in general terms, is not intended to produce the same effects as the previous one. In this case national law is not an alternative to Community law (where rules are lacking in the Regulation or the legislation is incomplete), but complements it. However, we would emphasise that this type of reference, where it occurs in a Community regulation, does not impose an obligation on a Member State to transpose the measures of the Regulation, which is indeed prohibited[405]. The Court of Justice has even stipulated with respect to national arrangements for implementing Community rules with direct effect that "all methods of implementation are contrary to the treaty which would have the result of creating an obstacle to the direct effect of Community regulations and of jeopardising their simultaneous and uniform application in the whole of the Community"[406].

Although the Regulation apparently gives the Member States a year to adopt such provisions[407], if the authorities concerned do not adopt them this will not prevent the Regulation from applying. Again in its judgment of February 1973, the Court clearly stipulated "… practical difficulties which appear at the stage when a community measure has to be put into effect cannot permit a member state unilaterally to opt out of observing its obligations"[408]. Thus a Member State cannot invoke the absence of national measures in order to nullify the direct effect of this Regulation, e.g. in favour of its local authorities. On the contrary, adoption of this Regulation does not prohibit the Member States from adopting national measures relating to domestic regulation of regional cooperation.

Article 16 of the Regulation also lays down an obligation for each Member State to "inform the Commission and the other Member States accordingly of any provisions adopted under this Article". Although failure to adopt such provisions cannot be equated with absence of transposition measures by the deadline laid down in a Community directive – and therefore not applying this article in itself could not constitute grounds for an action against a country for failure to comply – concern about legal certainty will probably lead Member States to adopt specific legal provisions relating to the setting up (Article 4(3) provides for explicit reference to national law if necessary[409]) and the functioning of an EGTC under their national legal system. Two factors should prompt countries to take action.

On the one hand, concern about legal certainty and the risk that potential beneficiaries of the Regulation might appeal to the courts for recognition of direct effect should make many countries adopt legislation enabling them to accommodate EGTCs under national legal provisions. On the other hand, and this is perhaps the decisive factor, it should be recalled that law governing EGTCs other than the Regulation, and the convention and statutes to set them up, will be the national law of the registered office for all questions not governed by the Regulation. Cross-border cooperation as it is currently practised demonstrates the interest of national players – whether the national authorities' concern about the possibility of monitoring activities or local authorities' concern to practise

cooperation - in managing to attract partners under their national legal system. It is thus likely that "competition" will emerge between Member States for provision of a subsidiary national legal framework to cover EGTCs, with the objective of encouraging their own local authorities and the authorities with which they are cooperating to set up the registered office of the EGTC under their jurisdiction rather than that of another Member State. It therefore seems likely that the Member States will want to adopt such measures.

Clearly such measures cannot be likened to a procedure for harmonising national rules leading ultimately to uniform legislation on territorial cooperation, as noted by the Court in its recent judgment on the validity of the SEC regulation[410]. However, we would point out that the Court based its reasoning on the general subsidiary reference to national law provided for in Article 2 of this Regulation (which we discussed above and which in the SEC regulation was Article 9, to which the Court explicitly refers in its decision) and not on the general obligation to take the necessary measures, provided for in Article 78 of the Regulation on the Statute for a European Cooperative Society. This said, competitive pressure to adopt national legislation and the need for legal certainty could well lead to approximation of national legislation. Given the absence of other legal bases in the Community treaty, some interesting developments might ensue.

Finally, this provision, unlike Article 2, does not stipulate that the national provisions could if necessary take account of territorial entities' "own rules of applicable law" (Article 2(2) of the Regulation under discussion). The reason for this may be the different legal rationale on which the two types of reference are based. In the first case, the Regulation refers to existing national (or subnational) rules, which makes it necessary to mention the cases that might arise in order to avoid a restrictive interpretation of the reference. In the case of Article 16, it is up to each Member State to determine and select the national rules required to ensure effective application of the Regulation. If national devolution rules give local authorities the right to deal with questions relating to the implementation of this Regulation, no provision of Community law prohibits them from doing so. Moreover, in numerous national legal systems legislative powers on matters of cooperation between regional authorities are exclusively "regional" and do not fall within the remit of central government. But it is not for Community law to interfere in issues that are the preserve of individual national legal systems.

1.2.2 Specific references to national rules

The Regulation refers to rules of national law in a certain number of cases. This means the rules of each national legislation concerned that will apply: within the jurisdiction of the Member State the legal capacity of the EGTC must be equivalent to the most extensive legal capacity accorded to legal persons, allowing the entity in particular to acquire or dispose of movable and immovable property and employ staff and be a party to legal proceedings (Article 1(4)). It should be noted that, if there were no rules of national law authorising these four capacities listed in the Regulation (which is unlikely), this provision might be considered to produce a direct effect, and that a Member State would be required, even in the absence of a relevant national provision, to give effect under its legal system to a measure falling under one of these four categories.

National authorities can carry out checks before an EGTC is set up, applying national law to verify that a prospective member does not exceed its "powers and duties" under the national legal order

(Article 4(3): see point 2.2.3 below for the implications of this provision in the relationship between Community and national law).

Designation of the competent authorities to carry out the inspection formalities prior to creation of an EGTC (Article 4(4)) and control of management of public funds (Article 6(1)).

Determining the competence of legal persons becoming members of an EGTC (Article 7(2)).

The powers conferred by (national) public law on any legal person belonging to an EGTC, which may not be part of the EGTC's tasks (Article 7(4)).

The accounting and budget rules applying to the EGTC (Article 11(2)). The wording of this provision is not very satisfactory, because it does not establish a single source of law, but refers back to the general reference in Article 2(1)(c), which could result in different solutions being adopted by different Member States. We think it would have been preferable to refer only to the law of the country in which the EGTC has its registered office, with possible alternative arrangements provided for, as in the case of financial checks (Article 6(2)).

A rule on setting up an EGTC with limited financial liability (third paragraph of Article 12(2)) or, conversely, a rule prohibiting the registration on a Member State's territory of such an EGTC (seventh paragraph of Article 12(2)).

A procedure enabling a Member State to prohibit on its territory the activities of an EGTC carrying out "any activity in contravention of a Member State's provisions on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State" (Article 13(1), in conjunction with the third paragraph of Article 15(2)). The wording of Article 13 of the Regulation is not entirely clear, especially since concepts of public policy, security, health or morality are familiar in Community law and have been interpreted by the Community courts. However, Article 15(2) gives national courts jurisdiction for any dispute relating to this provision. Since Article 220 of the Treaty gives the European Court of Justice exclusive competence to monitor the interpretation and application of Community law, it seems logical to us to consider what rules of national law will be applied under this procedure. We would also point out that that any Member State can use this prohibition procedure on its own territory, but that the other countries involved with the EGTC are not necessarily obliged to do so (unless the decision is taken by the Member State in whose territory the registered office of the EGTC is located).

Citizens' (constitutional) right of appeal against administrative decisions relating to activities being carried out by an EGTC, and citizens' access to services in their own language and to information (Article 15(3)).

The following will be governed solely by the national rules of the legal system of the Member State in which the registered office of the EGCT is situated:

- Registration and/or publication of the EGTC's statutes (Article 5(1)).
- Rules on the control of management of non-Community public funds, which is governed solely by the law of the country in which the EGTC has its registered office (Article 6(1)). Arrangements may be made with the equivalent control authorities of other Member States where members of the EGTC are based, provided those authorities can also carry out the controls required under their national law (Article 6(2)).

- Interpretation and application of the convention and statutes (Article 8(2)(e) and 9(2)). These provisions do not seem very satisfactory to us, because they promote legal imbalances between members of an EGTC falling under different national jurisdictions (cf. our detailed comment in the second paragraph of Chapter 4, section D).
- Liquidation, insolvency, cessation of payments and similar procedures, unless otherwise provided by the specific rules set out in the paragraphs 2 and 3 of Article 12.

These references pose no problems in principle, since it is Community law itself that explicitly provides for them. If necessary a national court could request the opinion of the Community courts on their scope if one of the provisions raised a problem of interpretation.

1.2.3 Is access to an EGTC governed by national rules?

This would seem odd in view of the principles governing the relationship between national and Community law. The Regulation does not introduce any radical change: Community law still has primacy over national law, and the European Court of Justice can rule on the effect of that primacy. However, since recourse to an EGTC is never mandatory[411], a Member State may either not wish to set up such a structure itself or may refuse to authorise categories of prospective members (as defined in Article 3 of the Regulation) to participate in a given EGTC.

Thus Article 4 provides that each prospective member must notify "the Member State under whose law it has been formed of its intention to participate in an EGTC", and the proposed convention and statutes for setting up the grouping. On the basis of this notification "the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval." And in taking such a decision, "Member States may apply the national rules".

Thus it is not the effects of the Regulation as such that are limited by national law, but only the benefits of the Regulation for one or more prospective members of a given EGTC, i.e. in one particular case. Furthermore, this decision – even if it is not limited to checking legal conformity and can if necessary also be taken on grounds of the public interest or public policy – is still not a completely discretionary power accorded to the national government. In effect, the Member State wishing to apply this provision in order to prevent one or more prospective members under its jurisdiction from joining an EGTC must set out the reasons for its refusal, which may then be referred to the courts for a legal opinion. Although Article 4(3) does not contain any explicit provision on judicial review – unlike Article 13 of the Regulation, which allows the authorities of a Member State to prohibit the activity of an EGTC on its territory for reasons of public policy and which at the end explicitly states "Review of the competent body's decision by a judicial authority shall be possible" – but paragraph 2 of Article 15(2) stipulates that the national courts are competent for disputes relating to this article of the Regulation. This set of provisions in Article 4(3) and Article 15(2) leaves open the question of possible review by the Community courts of decisions based on Article 4(3). Without being able to give a categorical opinion on this issue, we would point out that the Court of Justice has always interpreted very broadly the question of its jurisdiction under Article 234 TEC (preliminary

rulings) and that it is therefore not inconceivable that despite the apparently clear wording of these provisions the Court may still find itself responsible for interpreting the scope of Article 4(3).

However, it must be noted that this reference to national law as the basis for the decision on participation in an EGTC will prevent any uniform application of the rule in question, which will effectively be applied by taking the particular features of each national legal system into account. The advantage of this solution for the local authorities of Member States that broadly accept the practice of cross-border cooperation - either by virtue of a flexible approach on the part of national authorities or because national (or subnational) law explicitly lays down conditions for cross-border (or transnational or interregional) cooperation projects – is that the Member States will not be able to develop a more restrictive practice than the one they currently apply under national law (or, if relevant, the country's international obligations). By way of example: it seems unlikely that the national authorities of a given Member State would consider that this provision allowed them to supervise on a discretionary basis the external activities of their local authorities, a right which national law does not accord them, or even denies them. Thus national situations that are already effective and efficient are maintained, and not affected in any way by the adoption of a Community law with direct application as regards access to the specific instrument of cross-border cooperation represented by an EGTC.

Furthermore, the EGTC will take its place alongside other instruments for cooperation, existing either under national law or, more often, on the basis of international agreements. Thus in some countries EGTCs will compete with legal instruments whose terms of access may be less restrictive. This means that it will be possible for the local authorities concerned to use those instruments at the expense of the EGTC. Countries will thus have to choose whether to prioritise the EGTC over other legal instruments. Conversely, for countries that do not have clearly established national rules or practices on territorial cooperation (or forms of territorial cooperation), the reference to national law in this particular case will act as a strong incentive to adopt legislation or at least rules allowing them to exercise under conditions of legal predictability and certainty, the right of ex-ante control which this article of the Regulation grants them. However, we would again point out that the absence of national legislation or legal basis for a national authority to exercise such control should not constitute a valid reason for refusing to grant permission for a legal person to take part in an EGTC, since they are authorised under Article 3 of the Regulation to belong to such a grouping. The principle of direct effect of the Regulation should be applied here, and the control which the Member State's authorities may exercise would then be limited to checking whether the proposed EGTC complies with the provisions of the Regulation.

2. *Relationship between the EGTC Regulation and existing national measures*

Again it should be noted that this is a regulation within the meaning of TEC Article 249, the provisions on the EGTC published in the *Official Journal of the European Union* on 31 July 2006 have been capable of producing direct effects within each national legal system since 1 August 2006. The prospective members of an EGTC within the meaning of Article 3 of Regulation (EC) No 1082/2006 may invoke these provisions if they plan to set up an EGTC. The provisions of the Regulation only have legal effect in relation to setting up or running an EGTC. The Regulation clearly states that an EGTC "may be established on Community territory under the conditions and subject to the arrangements provided for in this Regulation" (Article 1(1)), not that an EGTC must be set up on Community territory[412]. Moreover: "The decision to establish an EGTC shall be taken at the initiative

of its prospective members" (Article 4(1)). However, these provisions taken together demonstrate that the EGTC Regulation confers a right, derived directly from it[413], on the prospective members of an EGTC: namely – apart from the Member States – on regional authorities, local authorities, and bodies governed by public law in the meaning of the second paragraph of Article 1(9) of Directive (EC) No 18/2004, as well as associations formed by one or several of these categories. The provisions of the Regulation produce a legal effect only if this right is exercised by the prospective members.

However, the right conferred on prospective members of an EGTC will not necessarily have a uniform effect across the territory of the Community, owing to the diversity of national legal provisions to which the Regulation itself refers (see section 2.1 below). What is more, national legal provisions governing situations that do not fall within the scope of the Regulation, or governing in parallel with the Regulation cooperation arrangements between local authorities under different terms, do not in themselves pose a problem for Community law, even where they contradict the provisions of the Regulation (see 2.2 below). Nor will the absence of specific national measures prevent the provisions of the Regulation from being implemented (see 2.3 below). Finally, we shall see that the existence and durability of cross-border cooperation structures established before the Regulation came into effect, which rely on other legal arrangements to the EGTC, for instance setting up a cross-border cooperative body with legal personality other than that conferred on the EGTC by this Regulation, are in no way affected, in legal terms at least[414], by the entry into effect of the Regulation (see 2.4 below).

2.1 Potential diversity of national situations and rights

The principle of uniform effect, which was established very early on by Community case law[415], derives directly from the principle of direct effect of Community law. A right conferred directly by a Community act must produce the same effects in the whole territory of the Community. Conversely, a Community rule that does not confer a right or impose an obligation directly, but makes access to the right or compliance with the obligation subject to measures of national law, is not intended to be covered by the rule of uniform effect, but to allow different situations, including national situations, to be taken into account. In this case, Regulation (EC) No 1082/2006 clearly states in its recitals that it "is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community" (end of recital 5). Instead, it is designed to create "the conditions for territorial cooperation … in accordance with the subsidiarity principle", in other words respecting the diversity of legal situations and traditions prevailing in relation to cooperation in the Member States.

We would like to raise two points concerning the diversity of situations to which this approach may give rise. First, the categories referred to in Article 3(1)(a), (b) and (c) are far from uniform across the European Union. On the one hand, there are *de facto* variations, especially where the Member States are concerned. Because of their size, or their political and administration system, certain countries have not devolved enough power to their regions for the latter to be directly involved in most questions of territorial cooperation. This means that situations vary not only *de facto* but also *de jure*, which is the aspect that interests us, since even the Member States can only take part in an EGTC "within the limits of their competences under national law" (Article 3(1))[416]. Thus a Member State that has devolved powers relating to territorial cooperation to its local and regional authorities in a very clear and decentralised way will have little interest - in legal as opposed to practical terms - in

joining an EGTC, since its remit under national law gives it very little reason to do so. In contrast, a country with a very centralised system will probably have kept powers at the level of central government such that setting up an EGTC may concern it directly.

In this connection we again would criticise the over-restrictive wording of the last part of Article 7(2), which requires that all the tasks of an EGTC should fall within the competence of every Member State under its national law. In many countries, decentralisation in practice requires ongoing cooperation between the different levels of government (central, regional and local), where each level mobilises its own powers to produce joint policy measures. In such cases, even where cross-border issues are not involved, not all measures carried out as part of this joint effort fall within the remit of each of the public bodies involved. On the contrary, it is the pooling of separate but complementary remits within a single framework that allows public policy to be conducted. The wording of Article 7(2) of the EGTC Regulation regrettably precludes this solution of *multilevel governance*, although the Commission calls for such an approach in its *White Paper on European Governance*[417].

The situation of the Member States in respect of the powers given to them under national law may appear diverse, but there is even more variation where the situation of local and regional authorities is concerned. In their case, even the ability to exercise the right, conferred on them by the Regulation, to take part in an EGTC depends directly on the powers they have been given under national law. Thus the Regulation can on no account be interpreted in such as way as to conclude that national law should recognise the specific powers of one or other type of public body. On the contrary, Community case law has consistently shown that Community law takes no account of the organisational structure of the Member States and that its provisions do not interfere with that structure[418]. This means that the main differences that implementation of this Regulation will make apparent are those between the institutional structures of the Member States and the specific division of powers under each national legal system between the country's public authorities (central government, and regional and local authorities) under its institutional structure.

Furthermore, the diversity of national rules governing access to cooperation arrangements for subnational public bodies outside the national borders – which the third paragraph of Article 4(3) of the Regulation allows the Member States to apply "in deciding on the prospective member's participation in the EGTC" – will have a direct and significant impact on the effective ability of regional and local authorities to take part in a given EGTC. The national law of a Member State with liberal legislation in this area will prevent it from limiting access to an EGTC for local authorities under its jurisdiction, whereas a country whose legal framework strongly limits access to external ties for its local authorities will be able to invoke these provisions to restrict their access to an EGTC. However, we would stress in this connection that a country's ability to invoke its restrictive legislation is not unconditional, and that such legislation may not obstruct the right, set out in Article 1(1) of Regulation (EC) No 1082/2006 on the EGTC, of four categories of member, listed in Article 3 of the Regulation, to take part in an EGTC, "within the limits of their competences under national law". In other words, if local and regional authorities enjoy broad powers under national law, some of which relate to territorial cooperation, then they must have the right to take part in an EGTC. Consequently, any provisions of national law that would make it impossible to exercise that right would be in conflict with Community law and should therefore be discarded by any court, including a national court[419], that is competent under the second paragraph Article 15(2) of the EGTC Regulation.

Although the entry into effect of this Regulation does little to reduce the diversity of national rules, that diversity will be limited by the more restrictive approaches. But apart from this marginal

effect, the Community regulation under discussion, far from producing a uniform effect, is in fact likely to widen the disparities between the situations of local authorities with respect to territorial cooperation in the EU. Thus the entry into effect of the Regulation will simply provide a complementary form of cooperation for local authorities that already enjoy wide powers in national legal systems allowing them to maintain links with external partners that are capable of producing legal effects. But authorities that do not operate within a liberal legal framework will not be able to take advantage of the opportunities provided by this Regulation owing to the numerous references to provisions of national law.

2.2 Relationship between Regulation (EC) No 1082/2006 and existing national laws that are incompatible with it

It is necessary to distinguish between provisions of national law that are not compatible with this act, but whose continuing existence has no implications for the application of the EGTC Regulation, and measures that might hinder the application of its provisions that benefit those addressed by the rights and obligations it introduces, in particular legal persons falling under one of the categories listed in Article 3.

In the first case, such measures do not affect the application of the Regulation, even if for example they regulate an issue dealt with by the Regulation in a different way from the latter. Thus no problem is posed by provisions existing in certain national legal systems, under national law or an international agreement with neighbouring countries that provides for a territorial cooperation structure different from that of the EGTC; provided their activities are covered by the scope of the two potentially competing rules, the partners concerned can choose one or other legal framework to regulate their cooperation arrangements. Thus the entry into effect of the Regulation will have no legal implications for such rules.

On the other hand, a rule that for example prevented an EGTC from being registered under a national legal system[420], or which was intended to restrict the participation of a local authority in an EGTC in a way not provided for in the Regulation (e.g. the French legal provision introduced in an act adopted on 29 July 2004 which stipulates that no agreement, of whatever nature, may be concluded between a local authority or grouping and a foreign state[421]) could not prevent a local authority from exercising the right granted to it under Articles 3 and 8 of the Regulation to enter into an agreement with a foreign state in order set up an EGTC. The French government will of course be able to invoke provisions of its national law under the approval procedure provided for in Article 4(3) of the Regulation. The legal question arising in this case, and which to our knowledge has not been addressed by the Community courts, would involve determining if, notwithstanding the procedure for approving membership of an EGTC, the Regulation directly recognises a private right of prospective members of the EGTC as defined in Article 3 to set up such a grouping. If the answer is yes, does this private right apply to all types of EGTC, or can it be limited by national provisions prohibiting certain categories of potential members from belonging to certain categories of EGTC?

If direct effect is recognised with respect to the right to set up an EGTC, which seems absolutely defensible under Articles 3 and 8 of the Regulation and TEC Article 249 (the latter leaves no doubt as to the fact that a Regulation is intended to be "binding in its entirety and directly applicable in all Member States") we think it would be possible to consider that if a national rule withdraws the right of

authorities addressed by Article 3 to set up certain types of EGTC, that rule may not be applied by the Member State, for reasons of good faith (a Member State may not agree to be bound by a Community regulation if it is aware that certain national rules make it impossible to apply the Community act[422]), of the obligation on the Member States under Article 16 to make "such provisions as are appropriate to ensure the effective application of this Regulation"[423], and of the principle of loyal cooperation enshrined in TEC Article 10[424]. In the extreme situation where national law completely prevented authorities in the Member State from setting up or participating in an EGTC, the conclusion would probably be that the provisions of national law could not strip the Regulation of all effect, even though the Regulation specifically refers to national law, because this would conflict with the rule set out in TEC Article 249. Any other conclusion would result in Community law being deprived of its character as Community law and the legal basis of the Community itself being called into question[425], since regulations could lose any binding effect.

On the other hand, a less extreme situation might be envisaged in which Community law restricted the access of certain bodies listed in Article 3 to certain categories of EGTC, while generally authorising access to other types of EGTC. This would not have the same implications. The Court's conclusions in the *Costa* judgment, on which we base our argument, draw on all evidence previously examined by it, including the fact that "wherever the treaty grants the states the right to act unilaterally, it does this by clear and precise provisions"[426]. This is exactly the case here.

As we have seen, the issue is legally complex and it is not possible, given the unorthodox wording of the Regulation and current developments in case law, to provide a clear response. The question is that of direct effect: if it exists, then the rights derived from Community law must take precedence over the interests of the Member State's authority[427]; but if the production of legal effect is made conditional on respecting certain national rules, e.g. in relation to the approval procedure provided for in Article 4(3) of the EGTC Regulation, then a prohibition under national law may take precedence.

To conclude the discussion of this difficult issue, we would make two points. First, if national law does not clearly prohibit participation, this fact cannot be invoked by national authorities to withhold such approval[428]. Moreover, a country whose national law contained no provisions limiting access to certain categories of territorial cooperation organisation for its local authorities could no longer - under Article 16 of this Regulation, as well as TEC Article 10 (in particular its second paragraph) - adopt new, restrictive legislation that could then be invoked under the procedure mentioned in Article 4(3) of the EGTC Regulation. In such a case, the principles set out by the Court in the above-mentioned *Costa* and *Simmenthal* cases would apply in full.

Thus the situation is ambiguous as regards existing law, but absolutely clear in prohibiting the adoption of subsequent restrictive rules. Since many Member States do not have well-developed national legislation in this area, this is certainly one of the interesting positive effects of the Regulation.

2.3 Co-existence of other bodies with an EGTC

The final point of section 2 is intended to provide a response to a pressing concern of those involved in cooperation arrangements who were consulted in relation to the research on which this report is based. Their question is whether entry into effect of the EGTC Regulation will entail the disappearance or transformation of existing legal structures. Fortunately, the reply is extremely simple.

There is no legal problem at all, since use of the legal structure of the EGTC is optional. Thus the entry into effect of this Community regulation in itself will not bring about any change. The question of whether a cross-border cooperation arrangement might be converted into an EGTC is dealt with later, in Chapter 6. In view of the above, if there are no automatic legal implications it is possible – and this kind of phenomenon has already been observed with non-mandatory instruments provided by Community law – that events would ultimately lead to the EGTC legal form predominating over other cooperative arrangements, causing these to become obsolete and disappear.

3. Possible developments in national law

We think it likely that the entry into effect of Regulation (EC) No 1082/2006 on the EGTC will bring about positive changes in national law, which should then provide a legislative or regulatory framework allowing the bodies listed in Article 3(1) of the Regulation to make full use of the opportunities provided by EGTCs for developing territorial cooperation. Two factors are likely to influence this development.

3.1 Member States' interest in developing an attractive legal framework

Member States will have an interest in bodies being set up in accordance with their law – as provided for in Article 4(2) of Regulation (EC) No 1082/2006 – and in taking part in EGTCs situated on their territory. This will allow them to carry out the control tasks (under Articles 5, 6, 12, 13, 14 and 15 of the Regulation) and prevent their local authorities having to submit part of their activities to the law of another state. This interest can best be defended by ensuring that the prospective members of an EGTC decide to locate the body's registered office on the territory of the country in question.

One of the criteria determining the choice of the prospective members will be whether the legal framework to which they are subject is a liberal one, in respect of: registration of the EGTC under Article 5(1) of the Regulation; the financial control rules provided for in Article 6; the rules governing liquidation and dissolution (Articles 12 and 14); and the rules on protecting the public interest (Article 13), as well as the procedures relating to possible disputes (second paragraph of Article 15(2)). Thus there could be healthy competition between the Member States to adopt an attractive legislative and/or regulatory framework.

Apart from a liberal regulatory system, the partners wishing to set up an EGTC will prefer, at least if they have received good advice, legal certainty to a more flexible form of cooperation, a solution that could be adopted. The situations that territorial cooperation can be used to manage are already complex enough, given the differing interests of the players directly or indirectly involved (especially the Member States that are concerned to maintain control in some way over the activities of their local and regional authorities), and partners are therefore looking for a legal framework they can rely on. Clear written rules present an advantage from this perspective.

3.2 Obligation under Article 16 of the EGTC Regulation

Under Article 16 of the Regulation, the Member States are required to adapt their legislative or regulatory framework, or practices, in order to ensure effective application of the Regulation. The scope of this obligation is not entirely clear, since this type of provision is not commonly found in a regulation. It is directives, not regulations, that require national measures to implement Community provisions, and the legal scope of this type of provision is not clearly established[429]. In our view, the obligation contained in a directive to transpose legislation by a stipulated deadline does not apply here, and the Commission would probably not be able to regard the absence of national measures (within the meaning of TEC Article 226) as constituting failure to comply. In contrast to the situation with a directive, it will not be possible here to invoke the absence of national legislative or regulatory provisions in order to prevent the implementation within a national legal system of a measure provided for in the Regulation. For example, registration of an EGTC in a Member State is not a simple matter: the EGTC is not a legal form familiar in national legal systems, and the administrative authorities are likely to have difficulty, in the absence of relevant national provisions, deciding under what conditions they should process the registration required under Community law.

Since this provision in Article 5 of the Regulation is very likely to produce a direct effect, the competent authorities - in so far as a national authority feels itself to be competent - will have to implement the provision and register the EGTC. How will they proceed? By analogy with other legal structures for cooperation between local authorities? It is difficult to know. However, from the Member State's perspective, it seems far preferable to use a legislative or regulatory approach to the issue rather than leaving the authorities to decide on an ad hoc basis. This requirement to adopt measures also reflects the benefit to the Member States of providing a uniform framework for the action of national administrative (or judicial) authorities in relation to EGTCs.

However, such measures may take rather a long time to adopt, because in many countries this is quite a new area, where drafting and adopting rules is likely to be complicated. By way of example, consider that the Regulation on the European Company adopted in 2001 was supposed to enter into effect in October 2001 (Article 70)[430]; a corrigendum published in November 2003 changed the date of entry into effect to October 2004[431]. It is quite conceivable that the actual legal effects of such a regulation take some time to be felt. This is regrettable in view of the process for planning and using the Structural Funds, especially the ERDF in the context of priority objective 3 (territorial cooperation); for most of those involved, planning has reached an advanced stage, and the first EGTCs are still not ready to start operating.

3.3 Monitoring the development of national legal frameworks

It follows from the knock-on process that should be set in train with the need to adapt national legal systems to comply with the provisions of the Regulation that it would be a good idea to monitor national provisions adopted in relation to the Regulation. We see three advantages in collecting and publishing such information.

First, the information is crucial for helping prospective members of an EGTC to make an enlightened decision concerning the setting up of the EGTC's registered office. Experience has shown

that it is not easy for local and regional authorities to get access to national data in another country. Such information is often incomplete and is rarely up-to-date. Furthermore, the partners in the country from which the information originates often filter the data, mostly in good faith, but with the result that the recipients are reluctant to make commitments on the basis of information whose reliability is not guaranteed. Experience in this area comes mainly from cross-border activities, but the situation is more difficult in transnational or interregional contexts. In many cases language questions also arise.

Secondly, a set of national documentation identifying the best approaches would undoubtedly be a useful tool for administrative or legislative authorities in countries wishing to adapt their legal framework. The existence and use of such an aid would also have the valuable effect of encouraging convergence between national approaches. Although the Regulation is concerned not to "circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community"[432], it is clear that some convergence of the rules and procedures applying to EGTCs in the different Member States will make it easier to set up such arrangements. Members of an EGTC who agree to operate under a foreign legal framework that is similar to their own will have less difficulty accepting that the registered office not be located in their country.

Thirdly, Article 17 of Regulation (EC) No 1082/2006 states that the Commission shall present a report on the application of the Regulation and proposals for amendments, where appropriate, by 1 August 2011 at the latest. It will be essential to know about all national measures in order to draw up an informed report. If, as we assumed in the previous point, some convergence takes place in respect of the basic or procedural rules at national level, perhaps the proposals could, with a view to simplifying the over-complex relationship between the Regulation and national law, include Community provisions for a future version of the Regulation shaped by those national rules and practices.

For these three reasons, it would seem advisable to keep a readily accessible public register of these national legal acts and documents. The first paragraph of Article 16(3) requires each Member State to inform the Commission and the other Member States of any provisions adopted under that article. The information will therefore be available[433]. The Commission could also circulate information on measures adopted by the Member States based on this provision, as it does for directives. Alternatively, as we propose in Chapter 6, section B, the question could be addressed jointly with the Committee of the Regions.

D. SIMPLE RELATIONSHIP BETWEEN THE EGTC REGULATION AND INTERNATIONAL TERRITORIAL COOPERATION INSTRUMENTS

In contrast to the extremely complex relationship between the Regulation and national legal systems, the relationship with international legal instruments is extremely simple. Recital 5 of the Regulation explicitly refers to the "Council of Europe acquis"[434], noting that: "This instrument is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community". This means that the partners in a cooperation arrangement are free to continue with it, or to set up a new one, using the EGTC instrument, in which case the legal basis of their cooperation will be this Regulation (provided the terms of the cooperation fall within its scope), or using another legal basis, which could be Council of

Europe law or a bilateral basis[435]. These sets of rules must be treated as alternatives, and from a legal point of view there can be no interaction between rules emanating from different instruments, whose use is decided by the partners in a given cooperation project[436].

On the other hand, we would point out that because all these instruments refer to the rules of the various relevant national legal systems, and this Community regulation even requires all Member States to make the appropriate provisions to ensure its effective application (Article 16), the legal scope of provisions contained in bilateral agreements or Council of Europe conventions could in practice be changed as an indirect consequence of changes in national law. Obviously it is still too early to consider the implications of this eventuality, which could in the long term, owing to the said obligation in the Regulation, make the EGTC more effective than "competing" arrangements based on other international legal instruments.

CHAPTER 6: THE POSITION OF THE VARIOUS PLAYERS VIS-À-VIS THE NEW LEGAL INSTRUMENT FOR EUROPEAN TERRITORIAL COOPERATION

This last, brief chapter is concerned with the position of the various players in relation to the new situation created by territorial cooperation as defined by EC Regulation No 1082/2006 and the objectives for structural policy in the period 2007-2013.

Whatever the difficulties inherent in its interpretation and implementation, the Regulation will ensure that in practice territorial cooperation will not be uniform; on the contrary, it should help to preserve the diversity of circumstances and the acquis built up on the basis of past experience, particularly regarding cross-border cooperation (A.1). However, it should be stressed that the diversity of circumstances and experience in Europe in this area is vast, and consequently expectations concerning the implementation of the Regulation are far from being uniform (B.1).

This does not mean that the Regulation will not benefit from judicial review mechanisms guaranteeing the effective implementation of its stipulations, which should ensure enforcement (A.1) .But the possibility given to members to determine, in part, the arrangements for their cooperation through a convention and statutes should allow different forms of cooperation, in line with the diversity of the players involved and their expectations (A.3).

An EGTC is primarily designed to fulfil the following three objectives: to manage Structural Funds; to carry out strategic cooperation; and, where necessary, to serve as a tool for the practical implementation of a cooperation project (A.4). Moreover, these various functions are not restrictive and consequently there is likely to be an increase in the diversity of arrangements for implementing an EGTC.

The position of the Member States in relation to the development of EGTCs seems very complex, as they are assigned several roles simultaneously: thus they are negotiators of the Regulation on an EGTC (which could be amended at the proposal of the Commission in 2011); potential members of an EGTC (Article 3 of Regulation (EC) No 1082/2006); as lawmakers they are obliged to adopt provisions to ensure the effective application of the Regulation (Article 16); and they have been assigned supervisory functions(B.2). Each State should have a clear vision of the role it intends to play in the framework of territorial cooperation and make sure that the action it takes in the various capacities conferred on it by the Regulation are coherent, otherwise there is a risk that serious difficulties could arise in the implementation of the Regulation. The adoption of a national strategy on territorial cooperation would seem desirable (C.2).

The Commission has an interest here, both as the initiator of this new cooperation instrument and as the authority responsible for the execution of the Community

budget, particularly as regards the realisation of the territorial cooperation objective, but also because Articles 16 and 17 of the Regulation assign it the task of monitoring implementation, and, where necessary, drawing up proposals for amending the Regulation. In all these capacities, it has an interest in seeing the creation of a positive momentum in the implementation of EGTCs (B.3). However, in view of, inter alia, the numerous legal difficulties identified by the present study, the Commission would be advised to adopt a flexible approach in the implementation of the Regulation and objective 3 of Community structural policy (C.3.1), or run the risk of limited results.

As for the Committee of the Regions, it has a major interest and a potential role to play in the implementation of the Regulation, Article 5 of which designates the Committee as a recipient of the information submitted by members relating to the creation of an EGTC (convention and statutes). The chapter concludes by proposing a strategy for action for the Committee in this area (C.3.3).

In its opinion of 13 March 2002 the Committee of the Regions states unambiguously that: "Cross-border, inter-territorial and transnational cooperation is a top priority for the EU as it strives to achieve integration and to curb the economic and social fragmentation brought about by national frontiers"[437]. In view of this importance, the Committee of the Regions goes on to say that it attaches "considerable importance to the use of unambiguous definitions in respect of cross-border, transnational and inter-territorial cooperation and recommends the Commission, the Council and the European Parliament to use the definitions set out in this opinion as a starting point"[438], all forms of cooperation, taken together, being referred to as "trans-European cooperation"[439]. We already saw in Chapter 1 that the definition and name given to these activities has been the subject of debate for more than 30 years. Moreover, the terminology proposed by the Committee of the Regions in 2002 was not adopted; rather, the new name is "territorial cooperation ".

In itself, the new name is probably no more or less justified than any other. The practitioners consulted did not show any more enthusiasm for this name than they did for others[440]. Moreover, like the term trans-European cooperation proposed by the Committee of the Regions, it is actually only a common label for the three types of cooperation which it covers, namely cross-border, transnational and inter-territorial cooperation. But territorial cooperation is not just a new semantic definition. It corresponds – and this is the essential thing here – to an important new reality, adapted to the challenges which currently confront the territories of an enlarged European Union.

Thus territorial cooperation is:

1. Firstly, a key objective of economic and social cohesion policy, in other words one of the three objectives of Community policy and the most important in terms of budgetary resources. Economic and social cohesion policy accounts for almost 36% of the EU budget for the period 2007-2013, exceeding for the first time the budget share of the common agricultural policy. That represents more than EUR 308 billion[441]. Objective 3 accounts for fewer resources than the other two – only 2.52% of total structural policy funding is devoted to European territorial cooperation, which nonetheless amounts to more than EUR 7,750 million[442]. But in spite of this, it has been made a top priority of a key Community policy by the 25 Member States of

the European Union – at the urging, of course, of the European Commission and with the strong support of the Committee of the Regions. For an activity which initially was marginal and whose development was resisted by Member States[443], it is an achievement which it would be wrong to underestimate.

2. Secondly, an instrument in the form of a legal personality under Community law – a European grouping of territorial cooperation – which all local and regional authorities in the EU and associations of which can access, together with Member States and other public entities, for the purpose of furthering cooperation between them. Thus, territorial cooperation looks set to develop beyond being an objective of a specific policy and become embodied in new legal persons under European law, which could play an important role in the achievement of European territorial cohesion in the years to come. As Article 7 of Regulation (EC) No 1082/2006 on an EGTC makes clear, an EGTC can engage in activities which go beyond those laid down under Objective 3 of the coordination and programming of the Structural Funds for the period 2007-2013.

Consequently, these two elements, by endowing territorial cooperation with funding and a specific legal instrument, will ensure that it will, *nolens volens*, expand and grow in the years ahead.

The transformation of the INTERREG CIP into Objective 3, which in Community jargon is referred to as the *mainstreaming* of INTERREG, does not entail a major innovation, either in terms of available resources[444] or procedures – the INTERREG acquis is largely preserved by the Regulation on the ERDF (reproduced in Appendix 2 below), such as, for example, the principle of a single operational programme, the principle of lead partner, etc. The importance is essentially symbolic.

By contrast the Regulation on an EGTC represents a remarkable innovation and, as this study, shows has the capacity to bring about a transformation in the practices and direction of trans-European cooperation between local and regional authorities. The present chapter is concerned with presenting these new features (A), examining the expectations of the various players involved (B) and drawing up recommendations (C).

A. THE NEW OPPORTUNITIES OFFERED BY AN EGTC

In legal terms an EGTC constitutes a major advance for two main reasons. The first is the fact that an EGTC is a legal person under Community law, which in itself has important legal consequences (1). The second relates to the possible participation of States in this cooperation. This "reintegration" of States in the process of territorial cooperation also has the potential for important developments (2). Participation by States, which is possible but not compulsory, makes it possible to better respond to the diversity of institutional circumstances and operational needs in an enlarged Europe (3). Finally, although the theoretical exercise is somewhat artificial, an evaluation of the relevance of this instrument for different forms of cooperation will be sketched out (4).

1. Legal personality under Community law

The long Chapter 4 above showed that an EGTC does indeed represent a new type of legal personality, created and enshrined in Community law, even though the interactions with law of the State where an EGTC has its registered office are numerous. Without repeating the tedious – but necessary – legal analyses of Chapters 4 and 5 above, let us nevertheless emphasise the three principal elements of the Community character of the Regulation and the legal personality that it allows to be established.

Firstly, despite the difficulties raised in the previous chapter concerning the uniform effect of the Regulation, particularly as regards the prior authorisation procedure provided for in Article 4(3) of the Regulation and the use of national law which it allows, the Regulation established rules which are already applicable throughout Community territory. This fact alone is a remarkable and unprecedented result. It is worth recalling that even if the recitals of the Regulation refer to the "Council of Europe *acquis*" with regard to the legal framework for cooperation between local and regional authorities, the additional protocol to the Framework Convention, which, in terms of legal content, is the key instrument of Council of Europe law in this area, has only been ratified by 17 of the Council of Europe's member states, only 10 of which are members of the EU[445]. The rules incorporated in the Regulation therefore apply, unreservedly and without prevarication, to all twenty-seven Member States and relations between them. While, of course, establishing uniform conditions is not an aim in itself and diversity and the specific characteristics of territories and their institutional set-up must be taken into account and preserved[446], the possibility for all such cooperation to be linked to a single and universally applicable legal instrument is in itself a primary factor which should bring about a major extension of cooperation practices between local and regional authorities in Europe. As is clearly shown by the study on trans-European cooperation between territorial authorities carried out on behalf of the Committee of the Regions, the "Euroregions model"[447] has met with some success, which attests to the attractiveness of a common European solution for the players involved. Therefore, an EGTC should therefore have a certain attraction.

Secondly, the Community basis of the rules applicable to territorial cooperation ensures their effective application. Judicial and non-judicial mechanisms (control exercised by the Commission, or the European Parliament, or why not the Committee of the Regions?) guarantee the effective application of Community law, whereas the application of international law suffers from the lack of control mechanisms. In practice, cross-border, interregional and transnational cooperation often involve a mix of entrepreneurship and legal tinkering. The incorporation in a Community Regulation of rules on the legal framework is a guarantee that the principles relating to the application of Community law, which are well known, well established and effective, will be harnessed to smooth the way for successful cooperation between local and regional authorities, and where necessary with their respective Member States.

The third contribution, which is closely related to the preceding one, is the possibility, explicitly codified in Article 15 of the Regulation on an EGTC, to make the rules governing cooperation taking place under this legal instrument subject to judicial control. Experts take the view that this is a major step forward, which should quickly make it possible to establish the legal certainty necessary for territorial cooperation to be carried out in a standardised way. This is all the more so given that it will be possible for partners in a convention establishing an EGTC and third parties – in particular citizens, who, for some of their fundamental rights, are guaranteed access to their "lawful judge"[448] – to turn to

the national courts and for States or the Commission to refer matters to the Community courts, where necessary.

The experts conducting the study very were surprised in this connection at the reaction of practitioners to the provisions on legal jurisdiction. What from the point of view of lawyers represents an important advance, capable of bringing about the consolidation of innovative legal rules within national legal systems and at Community level, was perceived by practitioners as undermining the spirit of territorial cooperation, which, as they pointed out, is a cooperative rather than a contentious process. After much discussion, we analyse this reaction by drawing an analogy with the situation prevailing in States which, before the advent of the Community legal system and the ECHR, took the view that their mutual relations had to be based on rules, but that each State was the sole guarantor of the application of those rules. Essentially the same situation still applies today with regard to the international legal system. By contrast, by agreeing to launch the Community integration process, some European States agreed not only to fix the rules governing their relations but also that compliance with these rules would, where necessary, be checked by the courts. This explains why Community law, although deriving from international law, became a legal system in its own right. Local and regional authorities must see to it that this change in relation to the rule of law is achieved with respect to the rules governing cross-border cooperation. There are rules and, where necessary, they will be guaranteed by a court. This certainly marks a change in relation to current practices, but it seems to the experts that making this concession was more costly for European States at the time than it is likely to be today for local and regional authorities engaged in cooperative processes.

2. The possibility for States to take part in territorial cooperation

As was shown in the first two chapters, the law on cross-border cooperation is built on the premise, long irrefutable, according to which the State could not play a part in cross-border cooperation, since relations between local and regional authorities are of a different nature from those between States. Similarly, the possibility for States to participate alongside local and regional authorities (and if necessary other players[449]) in a single cooperation structure would have, until quite recently, been regarded as a legal aberration. However, this is the solution adopted in the Regulation; and this fundamental shift in the rules of the game as applied hitherto in cross-border cooperation, involving not just a change of name but also a change of nature, holds out highly interesting prospects.

First of all, the presence of the State alongside local and regional authorities often seems necessary, particularly from the point of view of cooperation which is of a strategic rather than just an operational nature[450]. This is all the more so as territorial cooperation in the Community context is primarily the product of a strategic vision, and not merely the response to local operational challenges as they exist in cross-border cooperation initiated by neighbouring local authorities (such as, for example, the joint management of a cross-border public service). In fact, the Community (initially and still very largely the Commission) defined and set pointers for cooperation for more than fifteen years through the priorities laid down within the framework of the INTERREG Community initiative, and now through the third objective of cohesion policy. In practical terms, these strategic guidelines, as well as the abovementioned document adopted by the Council on 5 October 2006, are very clearly stated in Article 6 of the ERDF Regulation (reproduced in Appendix 2), which lays down separate priorities for each of the three types of cooperation – cross-border, transnational and interregional.

This strategic dimension has also been highlighted by the Committee of the Regions, which calls on the EU to adopt "a longer and expansive view to develop all the border regions of the EU"[451]. This is also the rationale behind the idea of *multilevel governance* promoted by the European Commission[452]. It is moreover interesting to note in this context that the very concept of *multilevel governance* has arisen out of the observance of the principle of partnership and its implementation in EU structural policy since 1988[453]. Only cross-border cooperation escaped application of this principle in EU structural policy because of the specific structure of the law governing its activities. Form this point of view, there is also a very important "mainstreaming" of territorial cooperation now that Member States are again included among the players in this key dimension of EU territorial cohesion.

The possibility for States to be members of an EGTC makes it possible to take on board the diversity of situations existing across States in the enlarged European Union. States differ greatly in terms of their size and institutional set-up. Among the new Member States, six were sub-national entities fifteen years before their accession. Some were actively involved in cross-border cooperation processes and did not wish their new status as States to cut them off from old and tried partnerships. Thus, for example, Slovenia, which today is a Member State of the EU, had been a member of the ALPEN-ADRIA Working Community since 1978 as a Socialist Republic in the Federation of Yugoslavia and, after the declaration and recognition of its independence, wanted to continue to participate in this arrangement as a State. Thus this scope for heterogeneity in the composition of an EGTC makes it possible, for example, for large regions to cooperate with small States, which although from a legal point of view may seem complex, is quite logical from the viewpoint of economic and social realities[454]. In addition to size, differences in terms of the internal distribution of competences – and even in the institutional set-up within a country, some States, for example, having no regional tier of government – also mean that States where there is little devolvement of government are likely to become more quickly involved as direct partners in territorial cooperation because their powers will be brought into play. By contrast, to achieve the same objective in a highly devolved, regionalised or Federal State, only the powers of sub-national authorities would have to be deployed.

Thus direct involvement by States as players in territorial cooperation – and not simply in the supporting role assigned to them by Council of Europe law or bilateral framework agreements – meets several present-day needs. For this reason, and despite the legal reservations it raises, State participation should lead to important developments in practice.

3. More forms of cooperation

By providing for recourse to a single instrument, Regulation (EC) No 1082/2006 makes it possible to handle a wide variety of situations. This applies to both the subjects of cooperation[455] and the potential range of partners. It was shown at the end of Chapter 4 above that various types of EGTCs were likely to exist on the basis of the Regulation and that, in legal terms, these different categories would obviously entail different legal statuses.

This legal complexity, which although it should not be overlooked, must not be allowed to overshadow the fact that the possibility to resort to cooperation based on the heterogeneous – and where necessary asymmetrical – composition of an EGTC should open up a wide range of opportunities in the field of territorial cooperation and help to foster cooperation in quantitative and probably also qualitative terms. It will be possible to dispense with the – sometimes ridiculous – need

to search for the ideal of institutional symmetry across borders so that an action can be undertaken within the existing legal framework even though actual needs are not in line with the division of competences.

Of course, this complexity and diversity of situations comes at the cost of the relative imprecision of the legal provisions of the Regulation, as we showed in Chapters 4 and 5 above, and thus inadequate legal certainty. But it should not be forgotten that, when establishing an EGTC, the partners do not have to simply look for rules in the Regulation or national legislation which are applicable to the specific nature of their relationship. Rather, they have the option of drawing up a convention and statutes containing legal rules which will be binding on them and even take precedence over national rules in the light of Article 2(1) of Regulation (EC) No 1082/2006. Therefore underlying the Regulation is the rationale of "decentralised management" of legal complexity, whereby it is left to the partners of each EGTC to adapt and adopt, in the legal instruments giving rise to the EGTC, a legal framework specific to their respective situations and common needs.

4. Relevance of an EGTC for different forms of cooperation

As conceived in the present Regulation, an EGTC simultaneously fulfils three separate functions:

Firstly, it should be the management tool par excellence for a programme of territorial cooperation within the meaning of the third objective of structural policy for the period 2007-2013. It makes it possible to bring together, within a cross-border framework, all the relevant players in a common legal structure, under Community law, which is suitable for managing in a completely integrated way all Community funds granted to an operational programme drawn up as part of the objective of territorial cooperation, as defined in Article 12 of the ERDF Regulation[456]. Unfortunately, the adoption of the Regulation on an EGTC at the same time as the Regulations on the Structural Funds meant that it was not possible to establish an EGTC before or in tandem with the process of programming the Structural Funds. The time needed to prepare and negotiate the legal arrangements for setting up an EGTC will, in any event, be considerable – especially as the relevant national provisions still do not exist in most Member States. An EGTC is quite appropriate for carrying out such a function, but for reasons of timing this role regrettably could not be entrusted to an EGTC for the 2007-2013 programming period

Secondly, an EGTC should be capable of serving as the framework for the management of strategic territorial cooperation, bringing together the relevant players. Unfortunately, as the wording of Article 7(2) of the Regulation is extremely restrictive – it requires that all the tasks entrusted to an EGTC fall within the competence of every member – it would seem that an EGTC cannot fulfil this strategic task. Whilst this is regrettable, it is not disastrous, insofar as an activity such as this, involving the coordination of views and activities and exchange of information and practices, does not necessarily require a structure endowed with its own legal personality (even if the measure or strategic activity were supported by a Community programme, an EGTC would be a good instrument for ensuring joint management of this kind).

Thirdly, an EGTC could be an appropriate instrument for the joint operational management of a programme or an infrastructure involving several partners, particularly within the cross-border framework. Thus the legal personality of an EGTC allows it to act in the name and on the account of its members and to assume in its name the rights and obligations related to this activity. The effectiveness of using of an EGTC in this way will, however, depend to a large extent on the legal

provisions in the Member State where the EGTC has its registered office – and probably where it carries on its principal activity. It is not therefore possible to reach a general conclusion about the relevance of an EGTC which is more dependent than others on local legal conditions in the country of establishment – inter alia, as it would be obliged to conduct legal proceedings on behalf of its members, opening up a whole network of new legal relations.

B. THE DIVERSITY OF PLAYERS' EXPECTATIONS

While so far we have discussed in general terms the legal framework of territorial cooperation and the opportunities it offers, it should be borne in mind that not all the players potentially involved in these new forms of cooperation are in identical situations. Apart from the obvious diversity of the groups of players involved, expectations within each group differ mainly in terms of the experience gained in (mostly cross-border) cooperation.

Three groups of players are distinguished below: (1) the potential members of an EGTC; (2) States – which are clearly also potential members of an EGTC but as Member States, and in particular because of the numerous references that the Regulation makes to national law, their role cannot be limited to that of potential members of an EGTC, for which reason we treat then separately; and finally (3) the Community institutions, primarily the Commission – which, inter alia, implements the Community budget and is consequently responsible for Community cohesion policy, in partnership with the Member States – but also the European Parliament and, in particular, the Committee of the Regions, which is of particular interest to us as it commissioned this study.

1. The diversity of partners who can establish an EGTC

Section B of Chapter 4 above discusses at length the players who can become members of an EGTC, within the meaning of Regulation (EC) No 1082/2006 of 5 July 2006. The reader is therefore referred back to this chapter for the definition of members. However, a major division has quickly emerged among representatives of local and regional authorities and their associations. Players with experience of territorial cooperation (be it cross-border, transnational or interregional), and particularly those whose experience is based on a cooperation structure which is relatively operational, stress the complexity of implementing the Regulation. Uncertainties about the legal consequences of the Regulation in their own national legal system and the burdensome control procedures prior to participation are also factors which cause them to doubt whether they would be interested in structuring their cooperation around an EGTC, at least in the short run. By contrast, representatives of local and regional authorities who have little or no experience of such cooperation expect a great deal from the Regulation. Both views are probably exaggerated. As regards the former, the adoption of national measures relating to the Regulation and the provision of appropriate information should make it possible to overcome their apprehensions. As regards the latter, they must be made to realise that the Regulation *per se* does not have any direct legal effect. It offers players of different kinds the possibility to establish an EGTC, but without any initiative on the part of players on the ground (*bottom-up* process of establishment – Article 4(1) of the Regulation clearly confers the right and initiative to set up an EGTC on the prospective members). It should be possible to provide them with

appropriate expertise, in particular within the framework of European associations of territorial authorities, insofar as their national institutional and legal framework confers them with sufficiently specific and substantial powers to engage in cooperation.

In all cases, the prospective members should make a cost-benefit analysis before embarking on the relatively complex and time-consuming procedure[457] for establishing an EGTC. Indeed, the Regulation clearly States, in particular in its fifteenth recital, that recourse to an EGTC is in no way obligatory. Thus the main reasons for establishing an EGTC – access to a legal structure under Community law and, above all, acquisition of a legal personality for the cooperation structure – must correspond to a perceived need within the framework of planned cooperation. It is possible that for some cooperation projects the relatively cumbersome form of an EGTC may not prove necessary and that the maintenance, or development in the preliminary stage, of a form of cooperation which is less formal and more flexible in legal terms, is better suited to the immediate needs of the partners. By contrast, we would stress that, from an institutional and functional point of view, the setting up of a strong and sustainable legal structure would certainly help to strengthen cooperation in the long term. This factor should also be taken into account in weighing up the pros and cons.

2. Member States

As was already stressed in examining the opportunities offered by territorial cooperation, there is a wide diversity of situations in Member States as regards such cooperation. In the case of a small Member State, most of its territory will be in "border areas". Thus, regional partners in neighbouring States may seem to be appropriate potential partners, and as the institutional and territorial organisation of powers will probably not be highly devolved, the country's modest size would not make similar devolvement necessary. In contrast, a large, highly devolved Member State will not be in a comparable situation. Moreover, previous experience of cooperation will perhaps already have led to developments in or adjustments to the national legislative or administrative framework, which will, where necessary, have to be adapted to the requirements of the Regulation on an EGCT. By contrast, a State where local and regional authorities have little experience in foreign relations will probably find it necessary to create a new legal framework to manage these activities.

Moreover, Member States are in a particularly complex position with regard to the implementation of the Regulation. They are involved in many very different ways in implementation, and the difficulty for them will be to adopt a coherent approach in and between their various roles. Thus States are directly involved as potential members of an EGTC, which brings us back, *mutatis mutandis,* to the situation considered in the previous paragraph. But, as Member States, they were also involved in negotiating the multi-annual financial package ensuring the Community budget beyond the year 2013 and they will have to renegotiate it before 2013. So in this capacity they will be interested in the overall results of this strand of structural policy. But at the same time Community legislation imposes precise obligations on them, particularly with regard to the Regulation on an EGTC, which they will have to meet. One such obligation is the requirement of Article 16 of the Regulation "to make such provisions as are appropriate to ensure the effective application of this Regulation". Moreover, obligations under national and general international law require them to ensure a certain degree of consistency in the internal and external public action taken by the State in the broad sense[458], i.e. including what their local and regional authorities do. The Regulation certainly permits them to

exercise control ex ante (Article 4) or ex post (Articles 6, 13 and 14 mainly), but it seems to us that the Regulation cannot ignore the constraints and objectives by which states may be bound in their other roles. Accordingly, we believe that each State, or the Member States collectively, should consider the adoption of a detailed strategy for their role within the framework of territorial cooperation. The framework of the Operational Programmes could be used to indicate some key priorities, but it seems to us that this should be considered in a wider context, perhaps in cooperation with the Community Institutions.

Lastly, attention needs to be drawn to the special situation of Member States whose national border is an external border of the Union. The Community strategic guidelines on economic, social and territorial cohesion adopted on 5 October 2006 stipulate that: "Particular attention needs to be paid to the challenges and opportunities presented by the changing external borders of the Union following enlargement. Here, there is a need to promote coherent cross-border actions that encourage economic activity on both sides, and remove obstacles to development. To this end, cohesion policy and the new European Neighbourhood and Partnership Instrument and, where appropriate, the new Instrument for Pre-Accession, need to create a coherent framework for such actions". It should be stressed that currently this is not the case.

With regard to the legal instruments mentioned above, for the moment none of them make explicit reference to an EGTC, which, moreover, does not appear to be well-adapted to cross-border cooperation. As was noted above, the registered office of an EGTC must be located on the territory of a Member State (Article 8(2)(a)) but it must be made up of members " located on the territory of at least two Member States" (Article 3(2)(a)), in which case the participation of a third-country entity is possible, where the legislation of that country or agreements between Member States and third countries so allow. There are therefore many conditions and even if these conditions are met, bilateral cross-border cooperation may still not be possible since Article 3(2) requires the participation in an EGTC of members located on the territory of at least two Member States. Thus this type of cross-border cooperation – the importance of which is stressed by the Community strategic guidelines cited above and the draft Regulation on the European neighbourhood policy[459], and where, as the Regulation on an EGTC currently stands, the legal difficulties of including players from third countries seem less problematic – would appear to be all the more a priority for such States given that the "impact of borders" will be felt more heavily at the external frontiers of the EU. This is therefore an issue of particular concern for these States and should be given specific treatment at Community level.

3. Community players

The Commission has a particular interest in seeing that the EGTC instrument is properly used. On the one hand, this is because, as we saw in Chapter 1, the Commission has supported cross-border cooperation projects since 1975, and subsequently transnational and inter-territorial cooperation, considering them to be policy priorities of the integration process. Moreover, as the authority with the exclusive responsibility for implementing the Community budget[460], the Commission is interested in having at its disposal a tool for managing Community funds in the context of the priority of territorial cooperation laid down in the Regulations published in July 2006[461] in order not to incur the criticism of the Court of Auditors[462] or the wrath of the European Parliament during the budget discharge procedure. Furthermore, the Regulation on an EGTC and the possibility it offers to include under a

Community legal structure, in a cross-border or transnational context, Member States and local and regional authorities participating in programmes cofinanced by the Community budget is an exemplary example of the practical application of the principles of European governance set out by the Commission in its 2001 White Paper[463]. In addition, the Regulation confers on the Commission the responsibility for submitting "by 1 August 2011 […] a report on the application of this Regulation and proposals for amendments, where appropriate." Lastly, as guardian of the treaties, the Commission has the general task of ensuring respect for Community law, including the provisions on territorial cooperation.

The European Parliament has long supported the development of cross-border cooperation as part of the European integration process[464]. Moreover, it played an active part in the adoption of the Regulation. Of the 41 amendments that the Parliament tabled in first reading, 34 were included in the Commission's revised proposal for a Regulation, most of which were accepted by the Council. The European Parliament also exerted pressure on Member States to adopt the Regulation at the same time as the Regulations on the Structural Funds, which allowed the rapid adoption of this Regulation with its innovative provisions. The European Parliament plays only a limited role in Community structural policy, as only the Regulations on the ERDF and the European Social Fund are subject to the codecision procedure, these Regulations being subordinate to the Regulation laying down general provisions on the Structural Funds[465], for which the Parliament can only invoke the assent procedure. Consequently, the European Parliament has a particular interest in monitoring the application of this Regulation, having made a major contribution to paving the way for its adoption.

Finally, the Committee of the Regions is obviously the Community player with the most interest in monitoring and encouraging the proper application of the Regulation. From an institutional point of view, it is clear that the Committee of the Regions only has consultative power. But this power has a special importance as regards cross-border cooperation, since it is the only field which is expressly mentioned as falling within the Committee's consultative remit in the articles referring to it in the Treaty[466]. What is more, this is the only reference to cross-border cooperation in the Treaty, thus conferring on this field a specific and exclusive link to the Committee. Moreover, the Committee of the Regions is expressly mentioned in the Regulation on an EGTC, since Article 5(1) States that when an EGTC is registered its "members shall inform the Member States concerned and the Committee of the Regions of the convention and the registration and/or the publication of the statutes". This formulation is less precise and ambitious than that which the Committee of the Regions proposed in its opinion of 18 November 2004 on the Commission proposal on an EGTC, which stated that "the convention is notified to all its members, to the Member States, and to the Committee of the Regions. The Committee shall enter the convention in a public register of all conventions of trans-European cooperation"[467]. The EP takes up the idea in its position adopted in first reading, but also includes the Commission among the recipients and states: "The Commission shall enter the convention in a public register of all EGTC conventions"[468]. The Commission retained the idea of notification to the Committee of the Regions in its amended proposal, but not that of the register. The Committee of the Regions has, in these two roles, a very specific interest in working to promote the development of territorial cooperation, the idea of which it has supported from the very beginning[469].

For all these reasons, the Commission also has a major interest in ensuring the specific monitoring of the development of territorial cooperation.

C. RECOMMENDATIONS

On the strength of the findings of the present chapter and the detailed analysis of the Regulation on an EGTC and the legal challenges related to its implementation, we believe it is possible to put forward the following recommendations to ensure the necessary conditions to bring about the transformation of cooperation between public authorities within the Community framework and as a result of the opportunities offered by this new legal instrument.

1. For local and regional authorities

In the light of the information communicated to local and regional authorities by the participants in the two seminars held in Brussels in May and September 2006 and the seminar of the Assembly of European Regions on this topic and by territorial players in discussions in conjunction with the *Open Days* event held in Brussels in early October 2006, three major points emerge:

1) firstly, a lack of information regarding the key elements of an EGTC and its potential advantages;
2) secondly, fears concerning the legal uncertainties surrounding the implementation of the Regulation;
3) thirdly, a desire to focus efforts on practical cooperation projects, rather than legal studies and institutional arrangements.

From this it follows that there is a need:

- to disseminate information as widely as possible on an EGTC and its characteristics, and the related legal issues and consequences;
- to monitor the establishment of national legal frameworks and, as soon as they are operational, to draw up short vademecums on the procedures to be observed in setting up an EGTC.

In particular, these guides will have to advise prospective members of an EGTC to proceed as follows:

A - Assess needs and the subject of cooperation.

B - Identify the skills necessary for implementing the proposed cooperation.

C - Identify the partners with the necessary skills in each of the proposed territories (the concept of " territory" is not relevant for inter-regional cooperation).

D - Examine the existing national legal frameworks and identify that or those which would be the most appropriate for governing the joint cooperation arrangements, in a subsidiary manner, both as regards the subject of the cooperation and the nature of the partners (which will make it possible to determine the location of the registered office).

E - Check that the proposed solution is such that it can be authorised by the respective national authorities, within the meaning of Article 4(3) of the Regulation on an EGTC.

F - Taking into account the parameters listed above, make a cost-benefit analysis of establishing an EGTC in relation to carrying out the same cooperation in other ways (in as far as that is possible).

G - Undertake the negotiation and drafting of the convention and statutes with all the interested partners (and where necessary with the supervisory authorities within the meaning of Article 4(3) of the Regulation in order to avoid any later problems).

H - Once the contents of the convention and the statutes have been approved by the prospective members, initiate the authorisation application procedure within the meaning of Article 4(3) of the Regulation on an EGTC.

– to draw up a memorandum showing that the establishment of an EGTC can contribute fully to achieving the objective of territorial cooperation.

2. For Member States

Member States are required to comply with the Regulation on an EGTC and to take appropriate steps to guarantee the effective application of the Regulation.

In addition to the necessary legislative and/or regulatory work they should undertake[470], we believe the adoption of a national strategy on territorial cooperation within the Community framework (or even beyond that to include third-countries bordering on the EU) – as outlined in section B.2 of this chapter – would be an interesting and useful governance tool for all the players involved.

3. For the community institutions

3.1 The Commission

Given the legal and scheduling difficulties associated with ensuring effective implementation of an EGCT as part of the territorial cooperation objective for the period 2007-2013, the Commission should encourage recourse to such arrangements, where necessary agreeing to support pilot projects the primary purpose of which is the setting-up of an EGTC, with the aim of helping all players to gain useful experience of the workings of this new instrument. Moreover, it could prove necessary to provide technical assistance, as needed, particularly in the legal sphere.

In addition, on the basis of the information which will be communicated to it under the provisions of sub-paragraph 2 of Article 16(1) of the Regulation on an EGTC, the Commission should ensure that enforcement measures are published, at least to the same extent as for directives[471]. The Commission could carry out this information and monitoring work in collaboration with the Committee of the Regions (see below).

3.2 The European Parliament

The European Parliament could ensure annual monitoring of the implementation of this Regulation, through its Committee on Regional Development, if necessary in collaboration with the Committee of the Regions (see below).

3.3 The Committee of the Regions

In the light of its specific legitimacy in the field of territorial cooperation (as shown in section B.3 above), the specific role conferred on it by Article 5 of the Regulation on an EGTC and the findings of the present study, we suggest that the Committee of the Regions develop its activities in this field along two main lines: information and monitoring.

Given the complexity of the subject and of the developments to which it will give rise in connection with implementation[472], we suggest that, in addition to wide distribution of the present study:

1) The development by the Committee of the Regions of a specific tool for monitoring territorial cooperation undertaken in the form of an EGTC by establishing a public database on EGTCs in Europe. The database would contain information on existing EGTCs. In addition, it could, through an inter-institutional agreement with the Commission, include the relevant national measures for implementation of Regulation No 1082/2006.

   It is recommended that a project for establishing the database be carried out, coordinating both the structure for gathering data and putting it online and the IT architecture of the database.

2) The carrying out of a study, not before 1 August 2007 but ideally in 2008 or even 2009, comparing the national legal frameworks in which EGTCs are registered or could be registered. This could serve as a basis for drawing up the vademecums referred to above.

3) The appointment of a rapporteur, who would submit to the Committee a progress report on territorial cooperation, possibly on an annual basis, highlighting the achievements and problems. The report could be used to put forward proposals with a view to the adoption of a Committee opinion, given that under the Regulation the Commission will have to submit a report and propose possible amendments thereto. The Committee of the Regions would act in its capacity as the institution with a specific interest in this matter, as stipulated in Article 265 of the Treaty establishing the European Community. The rapporteur's work would be based on, inter alia, the planned database referred to in recommendation 1.

4) Consider the creation of a territorial cooperation observatory, either under the sole responsibility of the Committee or in partnership with other institutions (in which case the specific role of the Committee of the Regions should be clearly guaranteed in an inter-institutional agreement).

   This observatory could, if necessary, be set up in partnership with one or more interested associations of local and regional authorities or scientific associations.

   This observatory could, if necessary, be responsible for managing the database mentioned in recommendation 1.

5) Encourage and support the creation of a network of existing EGTCs. The network would, by agreement, be attached to the Committee, or alternatively be an independent body, in which case it could assume the legal status of an EGTC. The network could, if necessary, be managed by the observatory.

6) In line with Article 42 of the Regulation on the European Economic Interest Grouping (EEIG), propose the setting up of a contact committee composed of representatives of the relevant Community institutions and the Member States. The legal basis of this Committee of the Regions proposal should be the specific role which Article 265 of the TEC confers on the Committee in the field of cross-border cooperation.

   The contact committee could be linked to the observatory.

These recommendations are not necessarily applicable in their entirety or in the order set out above. The first recommendation seems to us to be a prerequisite, which would make it easier to implement the other recommendations. But the subsequent recommendations could also be implemented without the database.

Regarding recommendations 2 to 6, they are graduated in intensity, in terms of the investment, resources and political capital which the Committee of the Regions wishes to devote to monitoring developments in territorial cooperation. The proposed links between some of the recommendations are only possible ways forward. Each one could be implemented independently of the others.

APPENDICES

I. 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)

(*Official Journal* L 210, 31.7.2006 pp. 19 - 24)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the third subparagraph of Article 159 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) The third subparagraph of Article 159 of the Treaty provides for specific actions to be decided upon outside the Funds which are the subject of the first subparagraph of that Article, in order to achieve the objective of social and economic cohesion envisaged by the Treaty. The harmonious development of the entire Community territory and greater economic, social and territorial cohesion imply the strengthening of territorial cooperation. To this end it is appropriate to adopt the measures necessary to improve the implementation conditions for actions of territorial cooperation.

(2) Measures are necessary to reduce the significant difficulties encountered by Member States and, in particular, by regional and local authorities in implementing and managing actions of territorial cooperation within the framework of differing national laws and procedures.

(3) Taking into account notably the increase in the number of land and maritime borders in the Community following its enlargement, it is necessary to facilitate the reinforcement of territorial cooperation in the Community.

(4) The existing instruments, such as the European economic interest grouping, have proven ill-adapted to organising structured cooperation under the INTERREG initiative during the 2000-2006 programming period.

(5) The Council of Europe acquis provides different opportunities and frameworks within which regional and local authorities can cooperate across borders. This instrument is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community.

(6) Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund [4] increases the means in support of European territorial cooperation.

(7) It is likewise necessary to facilitate and follow up the implementation of territorial cooperation actions without a financial contribution from the Community.

(8) In order to overcome the obstacles hindering territorial cooperation, it is necessary to institute a cooperation instrument at Community level for the creation of cooperative groupings in Community territory, invested with legal personality, called "European groupings of territorial cooperation" (EGTC). Recourse to an EGTC should be optional.

(9) It is appropriate for an EGTC to be given the capacity to act on behalf of its members, and notably the regional and local authorities of which it is composed.

(10) The tasks and competencies of an EGTC are to be set out in a convention.

(11) An EGTC should be able to act, either for the purpose of implementing territorial cooperation programmes or projects co-financed by the Community, notably under the Structural Funds in conformity with Regulation (EC) No 1083/2006 and Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund [5], or for the purpose of carrying out actions of territorial cooperation which are at the sole initiative of the Member States and their regional and local authorities with or without a financial contribution from the Community.

(12) It should be specified that the financial responsibility of regional and local authorities, as well as that of Member States, with regard to the management of both Community funds and national funds, is not affected by the formation of an EGTC.

(13) It should be specified that the powers exercised by regional and local authorities as public authorities, notably police and regulatory powers, cannot be the subject of a convention.

(14) It is necessary for an EGTC to establish its statutes and equip itself with its own organs, as well as rules for its budget and for the exercise of its financial responsibility.

(15) The conditions for territorial cooperation should be created in accordance with the subsidiarity principle enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve its objectives, recourse to an EGTC being optional, in accordance with the constitutional system of each Member State.

(16) The third subparagraph of Article 159 of the Treaty does not allow the inclusion of entities from third countries in legislation based on that provision. The adoption of a Community measure allowing the creation of an EGTC should not, however, exclude the possibility of entities from third countries participating in an EGTC formed in accordance with this Regulation where the legislation of a third country or agreements between Member States and third countries so allow,

HAVE ADOPTED THIS REGULATION:

Article 1: Nature of an EGTC

(1) A European grouping of territorial cooperation, hereinafter referred to as "EGTC", may be established on Community territory under the conditions and subject to the arrangements provided for by this Regulation.

(2) The objective of an EGTC shall be to facilitate and promote cross-border, transnational and/or interregional cooperation, hereinafter referred to as "territorial cooperation", between its members as set out in Article 3(1), with the exclusive aim of strengthening economic and social cohesion.

(3) An EGTC shall have legal personality.

(4) An EGTC shall have in each Member State the most extensive legal capacity accorded to legal persons under that Member State's national law. It may, in particular, acquire or dispose of movable and immovable property and employ staff and may be a party to legal proceedings.

Article 2: Applicable law

1. An EGTC shall be governed by the following:

   a) this Regulation;

   b) where expressly authorised by this Regulation, the provisions of the convention and the statutes referred to in Articles 8 and 9;

   c) in the case of matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office.

   Where it is necessary under Community or international private law to establish the choice of law which governs an EGTC's acts, an EGTC shall be treated as an entity of the Member State where it has its registered office.

2. Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned.

Article 3: Composition of an EGTC

1. An EGTC shall be made up of members, within the limits of their competences under national law, belonging to one or more of the following categories:

   – Member States;

   – regional authorities;

   – local authorities;

- bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [6].

Associations consisting of bodies belonging to one or more of these categories may also be members.

2. An EGTC shall be made up of members located on the territory of at least two Member States.

Article 4: Establishment of an EGTC

1. The decision to establish an EGTC shall be taken at the initiative of its prospective members.
2. Each prospective member shall:
    1. notify the Member State under whose law it has been formed of its intention to participate in an EGTC; and
    2. send that Member State a copy of the proposed convention and statutes referred to in Articles 8 and 9.
3. Following notification under paragraph 2 by a prospective member, the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval.

   The Member State shall, as a general rule, reach its decision within a deadline of three months from the date of receipt of an admissible application in accordance with paragraph 2.

   In deciding on the prospective member's participation in the EGTC, Member States may apply the national rules.
4. Member States shall designate the competent authorities to receive the notifications and documents as set out in paragraph 2.
5. The members shall agree on the convention referred to in Article 8 and the statutes referred to in Article 9 ensuring consistency with the approval of the Member States in accordance with paragraph 3 of this Article.
6. Any amendment to the convention and any substantial amendment to the statutes shall be approved by the Member States according to the procedure set out in this Article. Substantial amendments to the statutes shall be those entailing, directly or indirectly, an amendment to the convention.

Article 5: Acquisition of legal personality and publication in the Official Journal

1. The statutes referred to in Article 9 and any subsequent amendments thereto shall be registered and/or published in accordance with the applicable national law in the Member State where the EGTC concerned has its registered office. The EGTC shall acquire legal personality on the day of registration or publication, whichever occurs first. The members shall inform the Member States concerned and the Committee of the Regions of the convention and the registration and/or publication of the statutes.
2. The EGTC shall ensure that, within 10 working days from registration and/or publication of the statutes, a request is sent to the Office for Official Publications of the European Communities for publication of a notice in the Official Journal of the European Union announcing the establishment of the EGTC, with details of its name, objectives, members and registered office.

Article 6: Control of management of public funds

1. Control of an EGTC's management of public funds shall be organised by the competent authorities of the Member State where the EGTC has its registered office. The Member State where the EGTC has its registered office shall designate the competent authority for this task before giving its approval to participation in the EGTC under Article 4.
2. Where required under the national legislation of the other Member States concerned, the authorities of the Member State where an EGTC has its registered office shall make arrangements for the appropriate authorities in the other Member States concerned to carry out controls on their territory for those acts of the EGTC which are performed in those Member States and to exchange all appropriate information.
3. All controls shall be carried out according to internationally accepted audit standards.
4. Notwithstanding paragraphs 1, 2 and 3, where the tasks of an EGTC mentioned under the first or second subparagraph of Article 7(3) include actions which are co-financed by the Community, the relevant legislation concerning the control of funds provided by the Community shall apply.
5. The Member State where an EGTC has its registered office shall inform the other Member States concerned of any difficulties encountered during the controls.

Article 7: Tasks

1. An EGTC shall carry out the tasks given to it by its members in accordance with this Regulation. Its tasks shall be defined by the convention agreed by its members, in conformity with Articles 4 and 8.
2. An EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion and be determined by its members on the basis that they all fall within the competence of every member under its national law.

3. Specifically, the tasks of an EGTC shall be limited primarily to the implementation of territorial cooperation programmes or projects co-financed by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund.
4. An EGTC may carry out other specific actions of territorial cooperation between its members in pursuit of the objective referred to in Article 1(2), with or without a financial contribution from the Community.
5. Member States may limit the tasks that EGTCs may carry out without a Community financial contribution. However, those tasks shall include at least the cooperation actions listed under Article 6 of Regulation (EC) No 1080/2006.
6. The tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law or of duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy.
7. The members of an EGTC may decide by unanimity to empower one of the members to execute its tasks.

Article 8: Convention

1. An EGTC shall be governed by a convention concluded unanimously by its members in accordance with Article 4.
2. The convention shall specify:
   - the name of the EGTC and its registered office, which shall be located in a Member State under whose laws at least one of the members is formed;
   - the extent of the territory in which the EGTC may execute its tasks;
   - the specific objective and tasks of the EGTC, its duration and the conditions governing its dissolution;
   - the list of the EGTC's members;
   - the law applicable to the interpretation and enforcement of the convention, which shall be the law of the Member State where the EGTC has its registered office;
   - the appropriate arrangements for mutual recognition, including for the purposes of financial control; and
   - the procedures for amending the convention, which shall comply with the obligations set out in Articles 4 and 5.

Article 9: Statutes

1. The statutes of an EGTC shall be adopted on the basis of the convention by its members acting unanimously.
2. The statutes of an EGTC shall contain, as a minimum, all the provisions of the convention together with the following:

- the operating provisions of the EGTC's organs and their competencies, as well as the number of representatives of the members in the relevant organs;
- the decision-making procedures of the EGTC;
- the working language or languages;
- the arrangements for its functioning, notably concerning personnel management, recruitment procedures and the nature of personnel contracts;
- the arrangements for the members' financial contributions and the applicable accounting and budgetary rules, including on financial issues, of each of the members of the EGTC with respect to it;
- the arrangements for members' liability in accordance with Article 12(2);
- the authorities responsible for the designation of independent external auditors; and
- the procedures for amending the statutes, which shall comply with the obligations set out in Articles 4 and 5.

Article 10: Organisation of an EGTC

1. An EGTC shall have at least the following organs:
   - an assembly, which is made up of representatives of its members;
   - a director, who represents the EGTC and acts on its behalf.
2. The statutes may provide for additional organs with clearly defined powers.
3. An EGTC shall be liable for the acts of its organs as regards third parties, even where such acts do not fall within the tasks of the EGTC.

Article 11: Budget

1. An EGTC shall establish an annual budget which shall be adopted by the assembly, containing, in particular, a component on running costs and, if necessary, an operational component.
2. The preparation of its accounts including, where required, the accompanying annual report, and the auditing and publication of those accounts, shall be governed as provided for by Article 2(1)(c).

Article 12: Liquidation, insolvency, cessation of payments and liability

1. As regards liquidation, insolvency, cessation of payments and similar procedures, an EGTC shall be governed by the laws of the Member State where it has its registered office, unless otherwise provided in paragraphs 2 and 3.
2. An EGTC shall be liable for its debts whatever their nature.

To the extent that the assets of an EGTC are insufficient to meet its liabilities, its members shall be liable for the EGTC's debts whatever their nature, each member's share being fixed in proportion to its contribution, unless the national law under which a member is formed excludes or limits the liability of that member. The arrangements for contributions shall be fixed in the statutes.

If the liability of at least one member of an EGTC is limited as a result of the national law under which it is formed, the other members may also limit their liability in the statutes.

The members may provide in the statutes that they will be liable, after they have ceased to be members of an EGTC, for obligations arising out of activities of the EGTC during their membership.

The name of an EGTC whose members have limited liability shall include the word "limited".

Publication of the convention, statutes and accounts of an EGTC whose members have limited liability shall be at least equal to that required for other kinds of legal entity whose members have limited liability, formed under the laws of the Member State where that EGTC has its registered office.

A Member State may prohibit the registration on its territory of an EGTC whose members have limited liability.

3. Without prejudice to the financial responsibility of Member States in relation to any funding from the Structural and/or Cohesion Funds provided to an EGTC, no financial liability shall arise for Member States on account of this Regulation in relation to an EGTC of which they are not a member.

Article 13: Public interest

Where an EGTC carries out any activity in contravention of a Member State's provisions on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State, a competent body of that Member State may prohibit that activity on its territory or require those members which have been formed under its law to withdraw from the EGTC unless the EGTC ceases the activity in question.

Such prohibitions shall not constitute a means of arbitrary or disguised restriction on territorial cooperation between the EGTC's members. Review of the competent body's decision by a judicial authority shall be possible.

Article 14: Dissolution

1. Notwithstanding the provisions on dissolution contained in the convention, on an application by any competent authority with a legitimate interest, the competent court or authority of the Member State where an EGTC has its registered office shall order the EGTC to be wound up if it finds that the EGTC no longer complies with the requirements laid down in Articles 1(2) or 7 or, in particular, that the EGTC is acting outside the confines of the tasks laid down in Article 7. The competent court or authority shall inform all the Member States under whose law the members have been formed of any application to dissolve an EGTC.

2. The competent court or authority may allow the EGTC time to rectify the situation. If the EGTC fails to do so within the time allowed, the competent court or authority shall order it to be wound up.

Article 15: Jurisdiction

1. Third parties who consider themselves wronged by the acts or omissions of an EGTC shall be entitled to pursue their claims by judicial process.
2. Except where otherwise provided for in this Regulation, Community legislation on jurisdiction shall apply to disputes involving an EGTC. In any case which is not provided for in such Community legislation, the competent courts for the resolution of disputes shall be the courts of the Member State where the EGTC has its registered office.

   The competent courts for the resolution of disputes under Article 4(3) or (6) or under Article 13 shall be the courts of the Member State whose decision is challenged.
3. Nothing in this Regulation shall deprive citizens from exercising their national constitutional rights of appeal against public bodies which are members of an EGTC in respect of:
   - administrative decisions in respect of activities which are being carried out by the EGTC;
   - access to services in their own language; and
   - access to information.

   In these cases the competent courts shall be those of the Member State under whose constitution the rights of appeal arise.

Article 16: Final provisions

1. Member States shall make such provisions as are appropriate to ensure the effective application of this Regulation.
2. Where required under the terms of that Member State's national law, a Member State may establish a comprehensive list of the tasks which the members of an EGTC within the meaning of Article 3(1) formed under its laws already have, as far as territorial cooperation within that Member State is concerned.

   The Member State shall inform the Commission and the other Member States accordingly of any provisions adopted under this Article.
3. Member States may provide for the payment of fees in connection with the registration of the convention and statutes. Those fees may not, however, exceed the administrative cost thereof.

Article 17: Report and review clause

By 1 August 2011, the Commission shall forward to the European Parliament and the Council a report on the application of this Regulation and proposals for amendments, where appropriate.

Article 18: Entry into force

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

It shall apply by 1 August 2007, with the exception of Article 16, which shall apply from 1 August 2006.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament

The President

J. Borrell Fontelles

For the Council

The President

P. Lehtomäki

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[1] OJ C 255, 14.10.2005, p. 76.

[2] OJ C 71, 22.3.2005, p. 46.

[3] Opinion of the European Parliament of 6 July 2005 (not yet published in the Official Journal), Council Common Position of 12 June 2006 (not yet published in the Official Journal) and Position of the European Parliament of 4 July 2006 (not yet published in the Official Journal).

[4] See page 25 of this Official Journal.

[5] See page 1 of this Official Journal.

[6] OJ L 134, 30.4.2004, p. 114. Directive as last amended by Commission Regulation (EC) No 2083/2005 (OJ L 333, 20.12.2005, p. 28).

II. REGULATION (EC) NO 1080/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 5 JULY 2006 ON THE EUROPEAN REGIONAL DEVELOPMENT FUND AND REPEALING REGULATION (EC) NO 1783/1999

(*Official Journal* L 210, 31.7.2006 pp. 1 – 11)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the first paragraph of Article 162 and the second subparagraph of Article 299(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) Article 160 of the Treaty provides that the European Regional Development Fund (ERDF) is intended to help to redress the main regional imbalances in the Community. The ERDF therefore contributes to reducing the gap between the levels of development of the various regions and the extent to which the least favoured regions, including rural and urban areas, declining industrial regions, areas with a geographical or natural handicap, such as islands, mountainous areas, sparsely populated areas and border regions, are lagging behind.

(2) The provisions common to the Structural Funds and the Cohesion Fund are set out in Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund [4]. Specific provisions concerning the type of activities which may be financed by the ERDF under the objectives defined in that Regulation should be laid down.

(3) The ERDF should provide assistance within the framework of an overall strategy for cohesion policy which ensures greater concentration of assistance on the priorities of the Community.

(4) Regulation (EC) No 1083/2006 provides that rules on eligibility of expenditure are to be established at national level, with certain exceptions for which it is necessary to lay down specific provisions. Specific provisions should therefore be laid down for the exceptions related to the ERDF.

(5) Within the framework of an integrated urban development operation, it is considered necessary to support limited actions to renovate housing in areas experiencing or threatened by physical deterioration and social exclusion in the Member States that acceded to the European Union on or after 1 May 2004.

(6) It is necessary to establish that the contribution from the ERDF to housing expenditure should concern the provision of good quality accommodation for lower income groups, including recently privatised housing stock, as well as accommodation for vulnerable social groups.

(7) Efficient and effective implementation of actions supported by the ERDF depends on good governance and partnership among all the relevant territorial and socio-economic partners, and in particular regional and local authorities, as well as any other appropriate body during the various stages of implementation of the operational programmes co-financed by the ERDF.

(8) The Member States and the Commission should ensure that there is no discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the operational programmes co-financed by the ERDF.

(9) Building on the experience and strengths of the URBAN Community initiative provided for in Article 20(1)(b) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds [5], sustainable urban development should be reinforced by fully integrating measures in that field into the operational programmes co-financed by the ERDF, paying particular attention to local development and employment initiatives and their potential for innovation.

(10) Particular attention should be paid to ensuring complementarity and consistency with other Community policies, and in particular with the Seventh Framework Programme for research, technological development and demonstration activities and the Competitiveness and Innovation Framework Programme. Furthermore, there should be synergy between support granted from the ERDF, on the one hand, and that granted from the European Social Fund pursuant to Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund [6], the Cohesion Fund pursuant to Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund [7], the European Agricultural Fund for Rural Development pursuant to Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [8] and a European Fisheries Fund, on the other hand.

(11) It is necessary to ensure that actions supported by the ERDF in favour of small and medium-sized enterprises take into account and support the implementation of the European Charter for Small Enterprises adopted at the Santa Maria da Feira European Council of 19 and 20 June 2000.

(12) Specific attention should be paid to the outermost regions, namely by extending, on an exceptional basis, the scope of the ERDF to the financing of operating aid linked to the offsetting of the additional costs resulting from their specific economic and social situation, which is compounded by their remoteness, insularity, small size, difficult topography and climate and their economic dependence on a few products, the permanence and combination of which severely restrain their development. Such specific measures require the use of Article 299(2) of the Treaty as a legal basis.

(13) The ERDF should address the problems of accessibility to and remoteness from large markets confronting areas with an extremely low population density, as referred to in Protocol No 6 on special provisions for Objective 6 in the framework of the Structural Funds in Finland and

Sweden to the 1994 Act of Accession. The ERDF should also address the specific difficulties encountered by certain islands, mountainous areas, border regions and sparsely populated areas whose geographical situation slows down their development with a view to supporting their sustainable development.

(14) It is necessary to lay down specific provisions concerning the programming, management, monitoring and control of operational programmes under the European territorial cooperation objective.

(15) It is necessary to support effective cross-border, transnational and interregional cooperation with the Community's neighbouring countries where this is necessary to ensure that the regions of the Member States which border third countries can be effectively assisted in their development. Accordingly, it is appropriate to authorise on an exceptional basis the financing of assistance from the ERDF for projects located on the territory of third countries where they are for the benefit of the regions of the Community.

(16) In the interest of clarity, Regulation (EC) No 1783/1999 of the European Parliament and the Council of 12 July 1999 on the European Regional Development Fund [9] should therefore be repealed,

HAVE ADOPTED THIS REGULATION:

CHAPTER I – GENERAL PROVISIONS

Article 1: Subject matter

1. This Regulation establishes the tasks of the European Regional Development Fund (ERDF), the scope of its assistance with regard to the Convergence, Regional competitiveness and employment and European territorial cooperation objectives as defined in Article 3(2) of Regulation (EC) No 1083/2006, and the rules on eligibility for assistance.
2. The ERDF is governed by Regulation (EC) No 1083/2006 and by this Regulation.

Article 2: Purpose

Pursuant to Article 160 of the Treaty and Regulation (EC) No 1083/2006, the ERDF shall contribute to the financing of assistance which aims to reinforce economic and social cohesion by redressing the main regional imbalances through support for the development and structural adjustment of regional economies, including the conversion of declining industrial regions and regions lagging behind, and support for cross-border, transnational and interregional cooperation.

In so doing, the ERDF shall give effect to the priorities of the Community, and in particular the need to strengthen competitiveness and innovation, create and safeguard sustainable jobs, and ensure sustainable development.

Article 3: Scope of assistance

1. The ERDF shall focus its assistance on thematic priorities. The type and range of actions to be financed within each priority shall reflect the different nature of the Convergence, Regional competitiveness and employment and European territorial cooperation objectives in accordance with Articles 4, 5 and 6.

2. The ERDF shall contribute towards the financing of:

   a) productive investment which contributes to creating and safeguarding sustainable jobs, primarily through direct aid to investment primarily in small and medium-sized enterprises (SMEs);

   b) investment in infrastructure;

   c) development of endogenous potential by measures which support regional and local development. These measures include support for and services to enterprises, in particular SMEs, creation and development of financing instruments such as venture capital, loan and guarantee funds, local development funds, interest subsidies, networking, cooperation and exchange of experience between regions, towns, and relevant social, economic and environmental actors;

   d) technical assistance as referred to in Articles 45 and 46 of Regulation (EC) No 1083/2006.

   The range of investments and measures listed above under points (a) to (d) shall be available to implement the thematic priorities in accordance with Articles 4, 5 and 6.

Article 4: Convergence

Under the Convergence objective, the ERDF shall focus its assistance on supporting sustainable integrated regional and local economic development and employment by mobilising and strengthening endogenous capacity through operational programmes aimed at the modernisation and diversification of economic structures and at the creation and safeguarding of sustainable jobs. This shall be achieved primarily through the following priorities, the precise policy mix depending on the specificities of each Member State:

a) research and technological development (R&TD), innovation and entrepreneurship, including strengthening research and technological development capacities, and their integration into the European Research Area, including infrastructures; aid to R&TD, notably in SMEs, and to technology transfer; improvement of links between SMEs, tertiary education institutions, research institutions and research and technology centres; development of business networks; public-private partnerships and clusters; support for the provision of business and technology services to groups of SMEs; and fostering of entrepreneurship and innovation funding for SMEs through financial engineering instruments;

b) information society, including development of electronic communications infrastructure, local content, services and applications, improvement of secure access to and development of on-line public services; aid and services to SMEs to adopt and effectively use information and communication technologies (ICTs) or to exploit new ideas;

c) local development initiatives and aid for structures providing neighbourhood services to create new jobs, where such actions are outside the scope of Regulation (EC) No 1081/2006;

d) environment, including investments connected with water supply and water and waste management; waste-water treatment and air quality; prevention, control and fight against

desertification; integrated pollution prevention and control; aid to mitigate the effects of climate change; rehabilitation of the physical environment, including contaminated sites and land and brownfield redevelopment; promotion of biodiversity and nature protection, including investments in NATURA 2000 sites; aid to SMEs to promote sustainable production patterns through the introduction of cost-effective environmental management systems and the adoption and use of pollution-prevention technologies;

e) prevention of risks, including development and implementation of plans to prevent and cope with natural and technological risks;

f) tourism, including promotion of natural assets as potential for the development of sustainable tourism; protection and enhancement of natural heritage in support of socio-economic development; aid to improve the supply of tourism services through new higher added-value services and to encourage new, more sustainable patterns of tourism;

g) investments in culture, including protection, promotion and preservation of cultural heritage; development of cultural infrastructure in support of socio-economic development, sustainable tourism and improved regional attractiveness; and aid to improve the supply of cultural services through new higher added-value services;

h) transport investments, including improvement of trans-European networks and links to the TEN-T network; integrated strategies for clean transport which contribute to improving the access to and quality of passenger and goods services, to achieving a more balanced modal split, to promoting intermodal systems and to reducing environmental impacts;

i) energy investments, including in improvements to trans-European networks which contribute to improving security of supply, the integration of environmental considerations, the improvement of energy efficiency and the development of renewable energies;

j) education investments, including in vocational training, which contribute to increasing attractiveness and quality of life;

k) investments in health and social infrastructure which contribute to regional and local development and increasing the quality of life.

Article 5: Regional competitiveness and employment

Under the Regional competitiveness and employment objective, the ERDF shall focus its assistance in the context of sustainable development strategies, while promoting employment, primarily on the following three priorities:

1) innovation and the knowledge economy, including through the creation and strengthening of efficient regional innovation economies, systemic relations between the private and public sectors, universities and technology centres which take into account local needs, and in particular:

   – enhancing regional R&TD and innovation capacities directly linked to regional economic development objectives by supporting industry or technology-specific competence centres, promoting industrial R&TD, SMEs and technology transfer, developing technology forecasting and international benchmarking of policies to promote innovation and supporting inter-firm collaboration and joint R&TD and innovation policies;

   – stimulating innovation and entrepreneurship in all sectors of the regional and local economy by supporting the introduction of new or improved products, processes and services onto the market by SMEs, supporting business networks and clusters, improving

access to finance by SMEs, promoting cooperation networks between enterprises and appropriate tertiary education and research institutions, facilitating SMEs' access to business support services and supporting the integration of cleaner and innovative technologies in SMEs;

- promoting entrepreneurship, in particular by facilitating the economic exploitation of new ideas and fostering the creation of new firms by appropriate tertiary education and research institutions and existing firms;
- creating financial engineering instruments and incubation facilities that are conducive to the research and technological development capacity of SMEs and to encouraging entrepreneurship and the formation of new businesses, especially knowledge-intensive SMEs;

2) environment and risk prevention, and in particular:
   - stimulating investment for the rehabilitation of the physical environment, including contaminated, desertified and brownfield sites and land;
   - promoting the development of infrastructure linked to biodiversity and investments in NATURA 2000 sites, where this contributes to sustainable economic development and/or diversification of rural areas;
   - stimulating energy efficiency and renewable energy production and the development of efficient energy management systems;
   - promoting clean and sustainable public transport, particularly in urban areas;
   - developing plans and measures to prevent and cope with natural risks (e.g. desertification, droughts, fires and floods) and technological risks;
   - protection and enhancement of the natural and cultural heritage in support of socio-economic development and the promotion of natural and cultural assets as potential for the development of sustainable tourism;
3) access to transport and telecommunication services of general economic interest, and in particular:
   - strengthening secondary transport networks by improving links to TEN-T networks, regional railway hubs, airports and ports or multimodal platforms, providing radial links to main railway lines and promoting regional and local inland waterways and short-sea shipping;
   - promoting access to, take up, and efficient use of ICTs by SMEs by supporting access to networks, the establishment of public Internet access points, equipment, and the development of services and applications, including, in particular, the development of action plans for very small and craft enterprises.

In addition, for operational programmes supported by the ERDF in the regions eligible for the specific and transitional financing referred to in Article 8(2) of Regulation (EC) No 1083/2006, the Member States and the Commission may decide to extend support to the priorities referred to in Article 4 of this Regulation.

Article 6: European territorial cooperation

Under the European territorial cooperation objective, the ERDF shall focus its assistance on the following priorities:

- the development of cross-border economic, social and environmental activities through joint strategies for sustainable territorial development, and primarily:
- by encouraging entrepreneurship, in particular the development of SMEs, tourism, culture, and cross-border trade;
- by encouraging and improving the joint protection and management of natural and cultural resources, as well as the prevention of natural and technological risks;
- by supporting links between urban and rural areas;
- by reducing isolation through improved access to transport, information and communication networks and services, and cross-border water, waste and energy systems and facilities;
- by developing collaboration, capacity and joint use of infrastructures, in particular in sectors such as health, culture, tourism and education.

In addition, the ERDF may contribute to promoting legal and administrative cooperation, the integration of cross-border labour markets, local employment initiatives, gender equality and equal opportunities, training and social inclusion, and sharing of human resources and facilities for R&TD.

As regards the PEACE Programme between Northern Ireland and the border counties of Ireland as envisaged under paragraph 22 of Annex II to Regulation (EC) No 1083/2006, the ERDF shall in addition to the abovementioned actions contribute to promote social and economic stability in the regions concerned, notably by actions to promote cohesion between communities;

1) the establishment and development of transnational cooperation, including bilateral cooperation between maritime regions not covered under point 1, through the financing of networks and of actions conducive to integrated territorial development, concentrating primarily on the following priority areas:
    - innovation: the creation and development of scientific and technological networks, and the enhancement of regional R&TD and innovation capacities, where these make a direct contribution to the balanced economic development of transnational areas. Actions may include: the establishment of networks between appropriate tertiary education and research institutions and SMEs; links to improve access to scientific knowledge and technology transfer between R&TD facilities and international centres of RTD excellence; twinning of technology transfer institutions; and development of joint financial engineering instruments directed at supporting R&TD in SMEs;
    - environment: water management, energy efficiency, risk prevention and environmental protection activities with a clear transnational dimension. Actions may include: protection and management of river basins, coastal zones, marine resources, water services and wetlands; fire, drought and flood prevention; the promotion of maritime security and protection against natural and technological risks; and protection and enhancement of the natural heritage in support of socio-economic development and sustainable tourism;
    - accessibility: activities to improve access to and quality of transport and telecommunications services where these have a clear transnational dimension. Actions may include: investments in cross-border sections of trans-European networks; improved

local and regional access to national and transnational networks; enhanced interoperability of national and regional systems; and promotion of advanced information and communication technologies;

- sustainable urban development: strengthening polycentric development at transnational, national and regional level, with a clear transnational impact. Actions may include: the creation and improvement of urban networks and urban-rural links; strategies to tackle common urban-rural issues; preservation and promotion of the cultural heritage, and the strategic integration of development zones on a transnational basis;
- assistance to bilateral cooperation between maritime regions may be extended to the priorities referred to in point 1;

2) reinforcement of the effectiveness of regional policy by promoting:
   - interregional cooperation focusing on innovation and the knowledge economy and environment and risk prevention in the sense of Article 5(1) and (2);
   - exchanges of experience concerning the identification, transfer and dissemination of best practice including on sustainable urban development as referred to in Article 8; and
   - actions involving studies, data collection, and the observation and analysis of development trends in the Community.

Article 7: Eligibility of expenditure

1) The following expenditure shall not be eligible for a contribution from the ERDF:
   - interest on debt;
   - the purchase of land for an amount exceeding 10 % of the total eligible expenditure for the operation concerned. In exceptional and duly justified cases, a higher percentage may be permitted by the managing authority for operations concerning environmental conservation;
   - decommissioning of nuclear power stations;
   - recoverable value added tax.
2) Expenditure on housing shall be eligible only for those Member States that acceded to the European Union on or after 1 May 2004 and in the following circumstances:
   - expenditure shall be programmed within the framework of an integrated urban development operation or priority axis for areas experiencing or threatened by physical deterioration and social exclusion;
   - the allocation to housing expenditure shall be either a maximum of 3 % of the ERDF allocation to the operational programmes concerned or 2 % of the total ERDF allocation;
   - expenditure shall be limited to:
   - multi-family housing, or
   - buildings owned by public authorities or non-profit operators for use as housing designated for low-income households or people with special needs.

   The Commission shall adopt the list of criteria needed for determining the areas referred to under point (a) and the list of eligible interventions in accordance with the procedure referred to in Article 103(3) of Regulation (EC) No 1083/2006.

3) The eligibility rules set out in Article 11 of Regulation (EC) No 1081/2006 shall apply to actions co-financed by the ERDF falling within the scope of Article 3 of that Regulation.

CHAPTER II - SPECIFIC PROVISIONS ON THE TREATMENT OF PARTICULAR TERRITORIAL FEATURES

Article 8: Sustainable urban development

In addition to the activities listed in Articles 4 and 5 of this Regulation, in the case of action involving sustainable urban development as referred to in Article 37(4)(a) of Regulation (EC) No 1083/2006, the ERDF may, where appropriate, support the development of participative, integrated and sustainable strategies to tackle the high concentration of economic, environmental and social problems affecting urban areas.

These strategies shall promote sustainable urban development through activities such as: strengthening economic growth, the rehabilitation of the physical environment, brownfield redevelopment, the preservation and development of natural and cultural heritage, the promotion of entrepreneurship, local employment and community development, and the provision of services to the population taking account of changing demographic structures.

By way of derogation from Article 34(2) of Regulation (EC) No 1083/2006, and where these activities are implemented through a specific operational programme or priority axis within an operational programme, the ERDF funding of measures under the Regional competitiveness and employment objective falling within the scope of Regulation (EC) No 1081/2006 may be raised to 15% of the programme or priority axis concerned.

Article 9: Coordination with the EAFRD and the EFF

Where an operational programme supported by the ERDF targets operations also eligible under another Community support instrument, including Axis 3 of the EAFRD and the sustainable development of coastal fishing areas under the EFF, Member States shall set out in each operational programme the demarcation criteria for the operations supported by the ERDF and those supported by the other Community support instruments.

Article 10: Areas with geographical and natural handicaps

Regional programmes co-financed by the ERDF covering areas facing geographical and natural handicaps as referred to in point (f) of Article 52 of Regulation (EC) No 1083/2006 shall pay particular attention to addressing the specific difficulties of those areas.

Without prejudice to Articles 4 and 5, the ERDF may in particular contribute towards the financing of investments aimed at improving accessibility, promoting and developing economic activities related to cultural and natural heritage, promoting the sustainable use of natural resources, and encouraging sustainable tourism.

Article 11: Outermost regions

1) The specific additional allocation referred to in paragraph 20 of Annex II to Regulation (EC) No 1083/2006 shall be used to offset the additional costs, linked to the handicaps defined in Article 299(2) of the Treaty, incurred in the outermost regions in supporting::
   - the priorities referred to in Articles 4 and/or 5 as appropriate;
   - freight transport services and start up aid for transport services;
   - operations linked to storage constraints, the excessive size and maintenance of production tools, and lack of human capital in the local market.
2) Within the scope of Article 3, the specific additional allocation may finance investment costs. In addition, the specific additional allocation shall be used to a minimum of 50 % to help finance operating aid and expenditure covering public service obligations and contracts in the outermost regions.
3) The amount to which the rate of co-financing applies shall be proportional to the additional costs as mentioned in paragraph 1 incurred by the beneficiary in the case of operating aid and expenditure covering public service obligations and contracts only, and may cover the total eligible costs in the case of expenditure for investment.
4) Financing under this Article may not be used to support:
   - operations involving products falling within Annex I to the Treaty;
   - aids to transport of persons authorised under Article 87(2)(a) of the Treaty;
   - tax exemptions and exemption of social charges.

CHAPTER III - SPECIFIC PROVISIONS ON THE EUROPEAN TERRITORIAL COOPERATION OBJECTIVE

SECTION 1 – Operational programmes

Article 12: Content

Each operational programme under the European territorial cooperation objective shall contain the following information:

1) an analysis of the situation of the cooperation area in terms of strengths and weaknesses and the strategy chosen in response;
2) a list of the eligible areas within the programme area including, as regards programmes for cross-border cooperation, the flexibility areas as referred to in Article 21(1);
3) a justification of the priorities chosen having regard to the Community strategic guidelines on cohesion, the national strategic reference framework where the Member State has chosen to include actions financed under the European territorial cooperation objective within it, and the results of the ex ante evaluation referred to in Article 48(2) of Regulation (EC) No 1083/2006;
4) information on the priority axes and their specific targets. Those targets shall be quantified using a limited number of indicators for output and results, taking into account the principle of

proportionality. The indicators shall make it possible to measure the progress in relation to the baseline situation and the achievement of the targets of the priority axis;

5) for information purposes only, an indicative breakdown by category of the programmed use of the contribution from the ERDF to the operational programme in accordance with the implementing rules adopted by the Commission in accordance with the procedure referred to in Article 103(3) of Regulation (EC) No 1083/2006;

6) a single financing plan, with no breakdown by Member State, comprising two tables:

   - a table breaking down for each year, in accordance with Articles 52, 53 and 54 of Regulation (EC) No 1083/2006, the amount of the total financial appropriation envisaged for the contribution from the ERDF. The total ERDF contribution provided for annually shall be compatible with the applicable financial framework;

   - a table specifying, for the whole programming period, for the operational programme and for each priority axis, the amount of the total financial appropriation of the Community contribution and the national counterparts, and the rate of the ERDF contribution. Where, in accordance with Article 53 of Regulation (EC) No 1083/2006, the national counterpart is made up of public and private expenditure, the table shall give the indicative breakdown between the public and the private component. Where, in accordance with that Article, the national counterpart is made up of public expenditure, the table shall indicate the amount of the national public contribution;

7) information on complementarity with measures financed by the EAFRD and those financed by the EFF, where relevant;

8) the implementing provisions for the operational programme, including:

   - designation by the Member States of all the authorities referred to in Article 14;

   - a description of the monitoring and evaluation systems;

   - information about the competent body for receiving the payments made by the Commission and the body or bodies responsible for making payments to the beneficiaries;

   - a definition of the procedures for the mobilisation and circulation of financial flows in order to ensure their transparency;

   - the elements aimed at ensuring the publicity and the information of the operational programme as referred to in Article 69 of Regulation (EC) No 1083/2006;

   - a description of the procedures agreed between the Commission and Member States for the exchange of computerised data to meet the payment, monitoring and evaluation requirements laid down by Regulation (EC) No 1083/2006;

9) an indicative list of major projects within the meaning of Article 39 of Regulation (EC) No 1083/2006 expected to be submitted during the programming period for Commission approval.

SECTION 2 – Eligibility

Article 13: Rules on eligibility of expenditure

The relevant national rules agreed by the participating Member States in an operational programme under the European territorial cooperation objective shall apply to determine the eligibility of expenditure except where Community rules are laid down.

The Commission shall lay down, in accordance with Article 56(4) of Regulation (EC) No 1083/2006 and without prejudice to Article 7 of this Regulation, common rules on the eligibility of expenditure in accordance with the procedure referred to in Article 103(3) of Regulation (EC) No 1083/2006.

Where Article 7 provides for different rules of eligibility of expenditure in different Member States participating in an operational programme under the European territorial cooperation objective, the most extensive eligibility rules shall apply throughout the programme area.

SECTION 3 – Management, monitoring and control

Article 14: Designation of authorities

1) Member States participating in an operational programme shall appoint a single managing authority, a single certifying authority and a single audit authority, the latter being situated in the Member State of the managing authority. The certifying authority shall receive the payments made by the Commission and, as a general rule, shall make the payments to the lead beneficiary.

   The managing authority, after consultation with the Member States represented in the programme area, shall set up a joint technical secretariat. The latter shall assist the managing authority and the monitoring committee, and, where appropriate, the audit authority, in carrying out their respective duties.

2) The audit authority for the operational programme shall be assisted by a group of auditors comprising a representative of each Member State participating in the operational programme and carrying out the duties provided for in Article 62 of Regulation (EC) No 1083/2006. The group of auditors shall be set up at the latest within three months of the decision approving the operational programme. It shall draw up its own rules of procedure. It shall be chaired by the audit authority for the operational programme.

   The participating Member States may decide by unanimity that the audit authority is authorised to carry out directly the duties provided for in Article 62 of Regulation (EC) No 1083/2006 in the whole of the territory covered by the programme without the need for a group of auditors as defined in the first subparagraph.

   The auditors shall be independent of the control system referred to in Article 16(1).

3) Each Member State participating in the operational programme shall appoint representatives to sit on the monitoring committee referred to in Article 63 of Regulation (EC) No 1083/2006.

Article 15: Function of the managing authority

1) The managing authority shall perform the duties provided for in Article 60 of Regulation (EC) No 1083/2006, with the exception of those concerning the regularity of operations and expenditure in relation to national and Community rules, as set out under point (b) of that Article. In this connection, it shall satisfy itself that the expenditure of each beneficiary participating in an operation has been validated by the controller referred to in Article 16(1) of this Regulation.

2) The managing authority shall lay down the implementing arrangements for each operation, where appropriate in agreement with the lead beneficiary.

Article 16: Control system

1) In order to validate the expenditure, each Member State shall set up a control system making it possible to verify the delivery of the products and services co-financed, the soundness of the expenditure declared for operations or parts of operations implemented on its territory, and the compliance of such expenditure and of related operations, or parts of those operations, with Community rules and its national rules.

   For this purpose each Member State shall designate the controllers responsible for verifying the legality and regularity of the expenditure declared by each beneficiary participating in the operation. Member States may decide to designate a single controller for the whole programme area.

   Where the delivery of the products and services co-financed can be verified only in respect of the entire operation, the verification shall be performed by the controller of the Member State where the lead beneficiary is located or by the managing authority.

2) Each Member State shall ensure that the expenditure can be validated by the controllers within a period of three months.

Article 17: Financial management

1) The ERDF contribution shall be paid into a single account with no national sub-accounts.

2) Without prejudice to the Member States' responsibility for detecting and correcting irregularities and for recovering amounts unduly paid, the certifying authority shall ensure that any amount paid as a result of an irregularity is recovered from the lead beneficiary. The beneficiaries shall repay the lead beneficiary any amounts unduly paid in accordance with the agreement existing between them.

3) If the lead beneficiary does not succeed in securing repayment from a beneficiary, the Member State on whose territory the beneficiary concerned is located shall reimburse the certifying authority for the amount unduly paid to that beneficiary.

Article 18: European grouping of territorial cooperation

Member States participating in an operational programme under the European territorial cooperation objective may make use of the European grouping of territorial cooperation under 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) [10] with a view to making that grouping responsible for managing the operational programme by conferring on it the responsibilities of the

managing authority and of the joint technical secretariat. In this context, each Member State shall continue to assume financial responsibility.

SECTION 4 – Operations

Article 19: Selection of operations

1) Operations selected for operational programmes aimed at developing cross-border activities as referred to in Article 6(1) and at establishing and developing transnational cooperation as referred to in Article 6(2) shall include beneficiaries from at least two countries, of which at least one shall be a Member State, which shall cooperate in at least two of the following ways for each operation: joint development, joint implementation, joint staffing and joint financing.

   The selected operations fulfilling the abovementioned conditions may be implemented in a single country provided that they have been presented by entities belonging to at least two countries.

   The abovementioned conditions shall not apply to those actions under the PEACE Programme referred to in the third subparagraph of Article 6(1).

2) Operations selected for operational programmes involving interregional cooperation, as referred to in Article 6(3)(a), shall include beneficiaries, at regional or local level, from at least:
   - three Member States, or
   - three countries, of which at least two must be Member States, where a beneficiary from a third country is involved.

3) Operations selected for operational programmes as referred to in Article 6(3)(b) shall, whenever possible according to the type of the operation, apply the conditions set out in the first subparagraph of this paragraph.

4) The beneficiaries shall cooperate in the following ways for each operation: joint development, joint implementation, joint staffing and joint financing.

5) In addition to the tasks referred to in Article 65 of Regulation (EC) No 1083/2006, the monitoring committee or a steering committee reporting to it shall be responsible for selecting operations.

Article 20: Responsibilities of the lead beneficiary and the other beneficiaries

1) For each operation, a lead beneficiary shall be appointed by the beneficiaries among themselves. The lead beneficiary shall assume the following responsibilities:
   - it shall lay down the arrangements for its relations with the beneficiaries participating in the operation in an agreement comprising, inter alia, provisions guaranteeing the sound financial management of the funds allocated to the operation, including the arrangements for recovering amounts unduly paid;
   - it shall be responsible for ensuring the implementation of the entire operation;
   - it shall ensure that the expenditure presented by the beneficiaries participating in the operation has been incurred for the purpose of implementing the operation and corresponds to the activities agreed between those beneficiaries;

- it shall verify that the expenditure presented by the beneficiaries participating in the operation has been validated by the controllers;
- it shall be responsible for transferring the ERDF contribution to the beneficiaries participating in the operation.

2) Each beneficiary participating in the operation shall:
   - assume responsibility in the event of any irregularity in the expenditure which it has declared;
   - inform the Member State in which it is located about its participation in an operation in the case that this Member State as such is not participating in the operational programme concerned.

Article 21: Special conditions governing the location of operations

1) In the context of cross-border cooperation and in duly justified cases, the ERDF may finance expenditure incurred in implementing operations or parts of operations up to a limit of 20 % of the amount of its contribution to the operational programme concerned in NUTS level 3 areas adjacent to the eligible areas for the programme referred to in Article 7(1) of Regulation (EC) No 1083/2006 or surrounded by such adjacent areas. In exceptional cases as agreed between the Commission and Member States, this flexibility may be extended to the NUTS level 2 areas in which the areas referred to in Article 7(1) of Regulation (EC) No 1083/2006 are located.

   At project level, expenditure incurred by partners located outside the programme area as defined in the first subparagraph may be eligible, if the project would have difficulty in achieving its objectives without that partner's participation.

2) In the context of transnational cooperation and in duly justified cases, the ERDF may finance expenditure incurred by partners located outside the area participating in operations up to a limit of 20 % of the amount of its contribution to the operational programme concerned, where such expenditure is for the benefit of the regions in the cooperation objective area.

3) In the context of cross-border, transnational and interregional cooperation, the ERDF may finance expenditure incurred in implementing operations or parts of operations on the territory of countries outside the European Community up to a limit of 10 % of the amount of its contribution to the operational programme concerned, where they are for the benefit of the regions of the Community.

4) Member States shall ensure the legality and regularity of these expenditures. The managing authority shall confirm the selection of operations outside the eligible areas as referred to under paragraphs 1, 2 and 3.

CHAPTER IV - FINAL PROVISIONS

Article 22: Transitional provisions

1) This Regulation shall not affect either the continuation or modification, including the total or partial cancellation, of assistance approved by the Commission on the basis of Regulation (EC) No 1783/1999 or any other legislation applying to that assistance on 31 December 2006, which shall consequently apply thereafter to that assistance or the projects concerned until their closure.

2) Applications made under Regulation (EC) No 1783/1999 shall remain valid.

Article 23: Repeal

1) Without prejudice to the provisions laid down in Article 22 of this Regulation, Regulation (EC) No 1783/1999 is hereby repealed with effect from 1 January 2007.

2) References to the repealed Regulation shall be construed as references to this Regulation.

Article 24: Review clause

The European Parliament and the Council shall review this Regulation by 31 December 2013 in accordance with the procedure laid down in Article 162 of the Treaty.

Article 25: Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament

The President, J. Borrell Fontelles

For the Council

The President, P. Lehtomäki

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[1] OJ C 255, 14.10.2005, p. 91.

[2] OJ C 231, 20.9.2005, p. 19.

[3] Opinion of the European Parliament of 6 July 2005 (not yet published in the Official Journal), Council Common Position of 12 June 2006 (not yet published in the Official Journal) and Position of the European Parliament of 4 July 2006 (not yet published in the Official Journal).

[4] See page 25 of this Official Journal.

[5] OJ L 161, 26.6. 1999, p. 1. Regulation as last amended by Regulation (EC) No 173/2005 (OJ L 29, 2.2.2005, p. 3).

[6] See page 12 of this Official Journal.

[7] See page 79 of this Official Journal.

[8] OJ L 277, 21.10. 2005, p. 1.

[9] OJ L 213, 13.8.1999, p. 1.

[10]See page 19 of this Official Journal.

III. LIST OF BODIES GOVERNED BY PUBLIC LAW AS REFERRED TO IN ARTICLE 3(1)(D) OF REGULATION (EC) NO 1082/2006: (ARTICLE 9(1)(D) OF DIRECTIVE 2004/18/EC ON THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS, PUBLIC SUPPLY CONTRACTS AND PUBLIC SERVICE CONTRACTS AND ANNEX III TO THAT DIRECTIVE)

(Official Journal L 134, 30.4.2004, p. 114)

A "body governed by public law" means any body:

a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

b) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law;

c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.

IV. LIST OF CONTRIBUTORS TO THIS STUDY

Experts

- Professor Paolo Caretti, University of Florence;
- Professor Carlos Fernandez de Casadevante, Rey Juan Carlos University (Madrid);
- Professor Michal Kulesza, Warsaw University;
- Professor Henri Labayle, University of Pau-Bayonne;
- Professor Nicolas Levrat, University of Geneva, academic coordinator for the study;
- Dr Maïténa Poelemans, University of Pau-Bayonne.

Practitioners

- Mr Eugenio Ambrosi, Director (International Relations and European Integration), Autonomous Region of Friuli-Venezia Giulia;
- Ms Elise Blais, Interact project, Euregio Meuse-Rhine;
- Dr Ewald Eisenberg, Director of the Kehl Euro-Institute;
- Mr Niclas Forsling, Head of the Interreg III Northern Periphery Secretariat;
- Mr Simon Jodogne, Director of International Relations, Lille Metropolis Urban Community;
- Dr Hermann Hansy, Euregio Weinviertel;
- Mr Patrice Harster, Director of Local Groupings and Cross-border Cooperation, Regio Pamina;
- Mr Menelaos Hatziapostolidis, administrator, Delta-Rhodopi Euroregion;
- Mr Rafael Huesco Vicent, Secretary-General, Pyrenees Working Community;
- Mr Michel Lamblin, Programme Manager, INTERREG IIIC West;
- Ms Ilona Laszlo-Kovacs, President of the Commission of Executive Officers, Alps Adriatic Working Community;
- Ms Elisabetta Reja, Autonomous Region of Friuli-Venezia Giulia;
- Dr Hannes Schaffer, Mecca Consulting (Vienna);
- Mr Andras Szilagyi, Alps Adriatic Working Community (Baranya office);
- Mr Peter Tasnadi, Vice-President, Baranya County;
- Mr Xavier Tiana Casablancas, Secretary-General, Latin Arc.

CoR officials

- Mr Gianluca Spinaci – coordinator/administrator, Unit for Policy Analysis, Studies and Interinstitutional and Legislative Planning
- Ms Lucia Cannellini, seconded national expert, Unit for Policy Analysis, Studies and Interinstitutional and Legislative Planning
- Ms Brigitte Gendebien, secretary, Unit for Policy Analysis, Studies and Interinstitutional and Legislative Planning
- Mr Jean-Marc Joachim, seconded national expert, Unit for Policy Analysis, Studies and Interinstitutional and Legislative Planning
- Ms Frédérique Lambert, assistant, Unit for Policy Analysis, Studies and Interinstitutional and Legislative Planning
- Mr Damian Lluna Taberner, administrator, COTER Commission
- Mr Jaroslaw Lotarski, administrator, Unit for Policy Analysis, Studies and Interinstitutional and Legislative Planning
- Mr Serafino Nardi, administrator, Secretary-General's private office
- Mr Frédéric Reisgen, secretary, Unit for Policy Analysis, Studies and Interinstitutional and Legislative Planning

TEPSA members

- Professor Marianne Dony, Université libre de Bruxelles;
- Ms Nadège Ricaud, administrative coordinator for the study;
- Professor Jacques Vandamme, TESPA Honorary Chairman;
- Professor Laurent Vandepoele, TEPSA Chairman.

V. QUESTIONNAIRES SENT TO PRACTITIONERS FOR THE WORKSHOPS OF THE WORKING GROUP ON THE FUTURE STEPS FOR DEVELOPING THE LEGAL FRAMEWORK FOR EUROPEAN TERRITORIAL COOPERATION

Questionnaire No. 1:

(sent in preparation for the workshop on 18-19 May 2006)

I. Knowledge of the draft EGTC Regulation

1. Before being contacted for the purpose of the present survey, were you in any way aware that a draft regulation on the European Grouping for Cross-border Cooperation (original wording) or on the European Grouping for Territorial Cooperation (latest denomination) was being prepared?

1.1. *If your answer is positive,* on which occasion did you hear about it? (i.e. information meeting on the future of European structural funds, by a Member of the Committee of the Regions, through an association of local or regional governments, through your national government, by a press release or article, …)

1.2. *In such occasion,* the opinions you got about the draft Regulation were they:

- positives?
- puzzled?
- confusing?
- negatives?
- others (please specify)?

1.3. *As far as you are concerned,* your first impression about this future Regulation was:

- positive?
- puzzled?
- confused?
- negative?
- other (please specify)?

II. Expectations

2. What would you expect to be the main improvement brought by such an EC Regulation, as regard concrete implication for your ongoing or future cooperation projects?
(please answer as regard your needs as practitioner, and not from a theoretical perspective)

3. Do you consider such EC Regulation as an appropriate tool to answer your expectations?

3.1 If your answer to the above question is negative, what type of instrument, action or programme would you consider more appropriate (please elaborate)?

3.2 If your answer to question 3 is positive, do you consider that such EC Regulation will prove sufficient to substantially improve the framework for territorial (or cross-border) cooperation, or do you think additional EC action would be needed (if Yes, could you indicate which one(s))?

4. The legal framework for cross-border (transfrontier, interterritorial or territorial) cooperation is presently extremely complex and in permanent evolution. Do you think this EGTC Regulation has the potential to stabilise the legal framework and lead to an harmonisation at the European level of such legal framework ? (could you please bring some arguments to support your answer)

III. Content of the "EGTC Regulation"

5. The draft EC Regulation establishing an EGTC aims at facilitating the establishment of cross-border (transfrontier, interterritorial or territorial) legal structure, for the purpose among other things to manage EC funding (i.e. INTERREG). Do you consider the setting-up of such a legal transfrontier structure to manage EC funding (i.e. INTERREG) as a necessary step?

6. Are you presently involved with such a transfrontier cooperation legal structure? (If your involvement concerns several cooperation organisation, please specify as appropriate and either provide specific answers for each organisation, or specify to which experience you refer in the following answers).

If YES:

6.1 What is your position and role in such cooperation structure?

6.2 Which are the members of the cooperation structure?

6.3 Does this cooperation organisation constitute an appropriate setting for the implementation of cross-border (or interterritorial) projects?

6.4. Has this organisation a legal personality of its own?

6.5 What is its legal status?

6.6. Does the legal status of the cooperation structure sometimes constitute a limitation for the implementation of concrete projects?

7. *The draft EGTC Regulation envisage that EGTC could be established either by members States, or regional or local authorities (or any combination of the three type of actors).*

Do cooperation structures associating States and local and/or regional government correspond to your experience of cross-border (interterritorial) cooperation?

- If NO, do you think that the setting-up of such organisations with mixed participation (local and/or regional governments as well as States) would meet with obstacles?

- legal problems?
- political problems?
- practical difficulties?
- others?

8. *The draft EC Regulation establishing an EGTC refers to "the law of Member States governing national groupings of a similar nature and purpose in the Member State where the EGTC has its seat."*

8.1 Does such legislation exist in your State?
- If YES, could you please specify?

8.2. Such legislation could, according to you, be applicable to a territorial (or cross-border) cooperation structure including a foreign State?

9. As far as you are concerned, does it matters whether "in the case of matters not, or only partly, regulated by the Regulation" the law of the Member State that would apply to the EGTC is the law of your State (your national legislation) or the law of a neighbouring State?
(please specify why)

9.1 The cooperation structure to which you participate:

- Is it registered in you national legal order?
- Is it registered in the legal order of a neighbouring State?
- Is it registered both in your national and the neighbouring State legal orders simultaneously?
- Is it without specified legal status?

10. *Article 3 § 3 of the draft EGTC Regulation specifies: "The formation of an EGTC does not affect the financial responsibility of its members or of the Member States, neither for community funds nor for national funds."*

10.1. Does a similar principle apply to the cross-border (or territorial) cooperation structure in which you presently participate?

10.2. Does this principle seems to you consistent with the statement according to which the EGTC "shall have in each Member State the most extensive legal capacity to act accorded to legal persons in their law" (art. 1 § 3 R EGTC)?

10.3. Do you envisage how such rules will be combined with the requirement that the statutes of the EGTC shall include a provision on "the liabilities on financial issues, of each of the members of EGTC with respect to it, as well as the division of liabilities of the members with respect to acts attributable to the EGTC" (art. 5 § 2.e R EGTC)?

11. Nowhere in the draft Regulation is it indicated that EGTC decisions are compulsory for the members of the EGTC.
Does that seems to you as the source of potential difficulties or shortcomings?

11.1 As regard the cooperation structure to which you participate, does it include any rule on this matter?

12. Article 3 § 3 (revised) limits the tasks of future EGTC to economic or social action. Would that constitute a limitation as regard your needs for cross-border (territorial) cooperation?

12.1. Would the current cooperation structure to which you participate fit within these fields (economic or social)?

IV. Feasibility

13. Would you consider modifying your present cooperation organisation or structure to transform it into an EGTC?

13.1 If YES, why?

13.2 If NO, why?

14. Do you think that this new legal framework will encourage you (or some of your partners in cooperation projects) to establish one (or several) new cooperation structure in the form of EGTC?

14.1 If Yes, how do you envisage the articulation with existing cooperation structures (sharing of tasks, coordination, EGTC gradually replacing existing structure, …)?

Questionnaire No. 2

(sent in preparation for the workshop on 21-22 September 2006)

I. The Regulation (EC) n° 1082/2006 and its implementation

1. Do you consider this definitive version better (or less clear) than the version we examined in May? Will it be easier to implement than we first envisaged?
Please justify your answer.

2. If you had to mention only one major contribution to territorial cooperation brought by this new Regulation, which one would it be?

3. If you had to quote the main difficulty you can foresee for using this Regulation in your activities of cooperation, which one would it be?

4. According to art. 16 of the Regulation (CE)1082/2006, Member States have to make such provisions as are appropriate to ensure the effective application of this Regulation.

4.1 Do you think, in the situation you are familiar with, that such provisions shall be:

- of an administrative nature
- of legislative nature?
- a combination of both legislative and administrative measures
- or that there is no need for specific measures as the Regulation is directly applicable as it stands?

4.2 If you answered Yes to A, B or C, how long do you think it will take to have such provisions into force?

4.3 Are there any institutional platform or consultative channel you have access to, in order to network with other interested territorial actors with a chance to have some input on, or at least to make your opinion known to, national authorities during this process?
If YES, please briefly describe.

5. "The Committee of the Regions attaches considerable importance to the use of unambiguous definitions in respect of cross-border, transnational and inter-territorial cooperation" (Opinion 181/2000, § 18). Priority objective n°3 of the 2007-2013 Regulation for EC structural funds and art. 2 § 2 of the Regulation on the EGTC gather the three types of above-mentioned cooperations under the name of "territorial cooperation".

5.1 Do you consider the concern for clarification expressed by the Committee of the Regions to be thus satisfied?

5.2.1 Do you consider this new name adequate?

5.2.2 Do you intend to make use of it to qualify your relations with your current partners?

5.3 Do you think this grouping under a unique name will facilitate the transfer of experiences and practices between cross-border, transnational and inter-regional cooperations?

5.4 Do you think this grouping under a unique name will bring to a dwindling the distinction between these different types of cooperation?
If YES, how?

6. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », the CoR considers that "the European Union must also stimulate the adaptation of national legislation [to the necessities of territorial cooperation] ». Do you consider that this regulation on the EGTC plays such a role?
If YES, why?
If NOT, why?

II. Potentialities of the EGTC for the development of territorial cooperation

7. Would you consider appropriate a priority given, within the priority Objective n° 3 for 2007-2013, to encourage the constitution of EGTC, or would you rather see the focus to be mainly put on concrete achievements?
Please justify your answer.

8. The EGTC will have a legal personality which will derive both from EC and national law. Would the recourse to such a structure, with a legal personality, have concrete consequences on the cooperation(s) in which you are involved?
If YES, which ones?

9. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », the Committee of the Regions underlines "the growing need for the regional and local authorities to enter new, broad, structured forms of cooperation, with enlargement in mind."

Do you consider that the Regulation on the EGTC and the new Objective 3 for the structural funds will allow meeting this objective?

10. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », the Committee of the Regions states: " Lasting cooperation therefore has a chance of success only if it has a popular basis and if cooperation takes place between all the parties involved."

10.1 Do you think the structure of the EGTC will allow for a better participation of all the institutional and private partners, as well as citizens?

10.2 Your answer to 11.1. would be the same for all types of cooperation (cross-border, transnational or inter-territorial)?
If YES, why?
If NO, why?

11. In your opinion, would the structure of EGTC be adequate for the constitution of a managing authority?
If yes, what would be its composition (Member States, public authorities, other?)

12. In your opinion, would the structure of EGTC be adequate for the constitution of a joint technical Secretariat?
If yes, what would be its composition (Member States, public authorities, other?)

13. In your opinion, could an EGTC constitute an appropriate "project leader"? If yes, what would be its composition (Member States, public authorities, other?)

14. Could a single EGTC fulfil simultaneously several of these functions?
If YES, which ones?
Would this have consequences on the composition of the EGTC?
If YES, which one?

Regarding the interterritorial cooperation

15. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », the Committee of the Regions considers that one of the factors impeding interterritorial cooperation is "the absence of a general legal instrument".

In your opinion, could the EGTC Regulation constitute such a general legal instrument?

Regarding transnational cooperation

16. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », regarding transnational cooperation, the Committee of the Regions considers that one of the factors which would favour it would be "cooperation in a well-run common structure at a strategic level."
Would you consider that EGTC would be suited to become a well-run common operational structure?

17. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », regarding transnational cooperation, the CoR considers that a major impeding factor is the "low level of involvement of local and regional authorities in this form of cooperation ."

Do you consider that the legal form of EGTC will allow the better involvement of the territorial authority in transnational cooperation?

18. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », regarding transnational cooperation, the CoR considers that one of the impeding factors is the "lack of strong transnational partnerships in respect of programmes and projects."

    Do you consider that the legal form of EGTC could be used for developing such transnational partnerships?

19. In its Opinion 181/2000 adopted on 14 March 2002 on the "Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future », regarding transnational cooperation, the CoR considers that one of the impeding factors is "conflicting or excessively complex administrative requirements emanating from the EU."

19.1 Does, according to you, the new Regulations on structural funds (and especially regarding the new priority objective n°3) offer a perspective for improvement?

19.2 Could the EGTC Regulation contribute to this improvement? (justify your answer)

III. Setting-up an EGTC

20. In the context of the preparation of future Programmes under Objective 3,have you had already any reflection / discussion with your cooperation partners with regards to the possible setting up of one or more EGTC in your cooperation areas?
    If yes, which was the outcome of the discussion and which next steps do you eventually envisage?

21. If you would like to set-up an EGTC, who would you turn to in the first place to start preparation:

21.1 In a transfrontier framework:

- partner territorial authorities located on the other side of the border
- partner territorial authorities located in the same State than you
- relevant State' authorities from your own State
- the European Commission
- the Committee of the Regions
- external expertise (if yes, which one: AER, AEBR, CEMR, other organisation of territorial authorities (please precise which one),
- private consulting)

- several of these actors at the same time (please precise which ones)

21.2 In the transnational or interterritorial framework:

- Partner territorial authorities located in other Member States
- Partner territorial authorities located in the same State than you
- Relevant State' authorities from your own State
- The European commission
- The Committee of the Regions
- External expertise (if yes, which one: AER, AEBR, CEMR, other organisation of territorial authorities (please precise which one),
- private consulting)
- several of these actors at the same time (please precise which ones)

22. Article 3 § 1 d) of the Regulation 1082/2006 foresees that other public bodies, in addition to territorial authorities, can become members of future EGTC. Is there any such public body in your cooperation area which has already shown a serious willingness and/or developed concrete initiative in order to be institutionally involved in as a member of an EGTC? If YES, please specify.

23. EGTC might also be used for cooperation initiatives which are not co-funded by EU regional policy. Do you have any such initiative in mind or in progress, within your cooperation area/network, for which EGTC would prove relevant?

23.1 If YES, would it be programmes/projects co-funded by EU policies other than cohesion policy (e.g.: RTD, environment, training, etc.)? (Please specify).

23.2 If YES, would it be to programmes/projects co-funded only at national or regional level? (Please specify).

23.3 If YES, would it be projects only financed by the participating territorial authorities?

24. Financial modelling, organisation, management and control will be major issues when setting-up and running an EGTC. Which are, according to you, the main challenges that you will face in this regard?

- Difficulties with the constitution and sharing of a common fund among EGTC members?
- Agreeing on financial procedures which are in line with the hosting national legislation and are acceptable by all EGTC partners?
- Gaps and lack of clarity in regulations or procedures applicable to financial control of EGTC?
- The risk of a lack of liquidity to run programmes/projects whose co-financing is only marginally front-loaded?
- other (Please specify)?

25. What do you expect from your own State authorities as regard the implementation of Regulation 1082/2006?

- to "make such provisions as are appropriate to ensure the effective application of this Regulation" (art. 16 § 1 of Regulation n° 1082/2006) and nothing more?
- to associate with you in order to prepare an operational programme within the framework of the 3rd priority objective (without link with the constitution of an EGTC)?
- to associate with you and foreign partners in the framework of an EGTC?
- to validate your participation to an EGTC of which your State would not be part?

26. Do you expect a specific support from EC institutions in order to be able to establish (or to participate in) an EGTC?

26.1 If yes, from which institution? (several answers are possible)

26.2 If yes, which kind of support? (several answers are possible)

27. According to art. 5 of Regulation 1082/2006, the Committee of the Regions will have the specific function at EU level of collecting all future EGTCs Conventions and Statutes. Do you expect, or wish, any specific service from the Committee of the Regions acting in that capacity?

If YES,

- would it be related to registration of statutes/conventions facilities (Please specify)?
- would it relate to the building and networking of an EGTCs community across Europe?
- would it be in the form of an open data-base (providing models of existing experiences) or even as a platform for research, analysis and exchange of experience on issues related to EGTC setting-up and management? (Please specify).

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1 See OJ L 210, 31.7.2006, p. 19.

2 Article 1(2) of Regulation (EC) No 1082/2006, OJ L 210, 31.7.2006, p. 20.

3 This included the said principle in Article III-220. For a description of the Committee of the Regions' role in promoting this principle, see Levrat, N., *L'Europe et ses collectivités territoriales. Réflexions sur l'organisation et l'exercice du pouvoir territorial dans un monde globalisé*, Brussels, 2005, in particular pp 285-288. See also Opinion 388/2002 of the Committee of the Regions on *Territorial cohesion*, adopted on 10 April 2003, OJ C 244, 10.4.2003, p. 23.

4 *White Paper on European governance* (COM(2001) 428 final, 25 July 2001, OJ C 278, 12.10.2001, p. 1.

5 See opinion 62/2004 of the Committee of the Regions of 18 November 2004 on the Proposal for a Regulation of the European Parliament and of the Council establishing an EGCC, OJ C 71, 22.3.2005, p. 46.

6 The Commission's initial proposal dates from 14 July 2004 (COM (2004) 496 final); the research programme for this study was based on this. However, the Committee of the Regions and the European Parliament proposed many significant amendments, which the Commission and the Council agreed to take into account in their *Amended proposal for a Regulation of the European Parliament and of the Council establishing a European grouping of territorial cooperation (EGTC)* (COM(2006) 94 final, 7 March 2006). Accordingly, the Regulation adopted on 5 July 2006 differs substantially in certain areas from the Commission's initial proposal.

7 Whilst the Regulation entered into force on 1 August 2006, Article 18 (2) thereof states that it shall apply by 1 August 2007, with the exception of Article 16, which shall apply from 1 August 2006. (OJ L 210, 31.7.2006, p. 24).

8 A list of experts and practitioners consulted can be found in Appendix IV of this study.

9 Regulation (EC) no. 1082/2006, Article 16(1), OJ L 210, 31.7.2006, p. 24.

10 Whilst the adoption could be considered late from the point of view of the expectations of stakeholders in territorial projects, it in fact happened without undue delay, as it took place at the same time as that of the other Regulations relating to the Structural Funds for the period 2007-2013 (see Chapter 4 below). However, during the negotiations at the Council, several Member States wanted to decouple the adoption of this Regulation from that of other Regulations, which absolutely had to be adopted in time for the conditions for granting Community funding to be established by 1 January 2007. Thus, the "lateness" of this adoption very much needs to be put into perspective.

11 OJ L 210, 31.7.2006, p. 20. This optional nature of recourse to the EGTC as a legal entity is justified inter alia by referring to the proportionality principle (Article 5 TEC), which states that Community action shall not go beyond what is necessary in order to achieve the objectives [of this regulation]. The mandatory recourse to the EGTC would clearly have violated this requirement that applies to Community action.

12 Fifth recital, OJ L 210, 31.7.2006, p. 19.

13 Article 16(1), first indent of Regulation (EC) No 1082/2006 on the EGTC, OJ L 210, 31.7.2006, p. 24.

14 Under Article 18(2) of the same Regulation. *Ibid.*

15 Clearly, since 1975, there has been reference to the "frontier" nature of investment (Article 5 of the Regulation establishing the ERDF) as a priority for financial support from this regional development fund. However this and all subsequent regulations, particularly those adopted in the context of the coordination of the Structural Funds in relation to the INTERREG CIP (OJ C 215, 30.8.1990, p. 4) since 1990, concern the conditions for Community funding of

cooperation initiatives. Until Regulation (EC) No 1082/2006, none aimed to set a legal framework for cooperation actions themselves.

16 The first recorded modern example (historians have shown the importance of cooperation in the Pyrenees since the 17th century; see "La coopération transfrontalière régionale et locale", Bernad y Alvarez de Eulate, *RCADI* vol. 243, 1993, pp. 293 *et seq.*) appears to be the Central Alsace-Breisgau Community of Economic Interests which has been active since 1956, but did not adopt a legal form until 1965. For a presentation of these early developments, see "La coopération régionale transfrontalière et le droit international", P.-M. Dupuy, *Annuaire français de droit international* 1977, pp. 837-860); *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit*, U. Beyerlin, Berlin, Springer Verlag, 1988 and *Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatiques*, N. Levrat, Paris, PUF, 1994.

17 Council Regulation (EEC) No 724/75 of 18 March 1975 establishing a European Regional Development Fund, OJ L 73, 21.3.1975, p. 1.

18 Creation by the Commission of INTERREG II C "concerning transnational cooperation on spatial planning". Communication from the Commission to the Member States, OJ C 200, 10.7.1996, p. 23.

19 Opinion 388/2002 of the Committee of the Regions on Territorial cohesion, adopted on 10 April 2003, OJ C 244, 10.10.2003, p. 23.

20 The Commission's initial proposal (see COM(2004) final of 14 July 2004) concerned an instrument intended for cross-border cooperation only. After requests by the Committee of the Regions and the European Parliament, "cross-border" was extended to "territorial".

21 According to recital 5 of Regulation (EC) No 1082/2006, "The Council of Europe acquis provides different opportunities and frameworks within which regional and local authorities can cooperate across borders. This instrument is not intended to circumvent those frameworks […]". OJ L 210, 31.7.2006, p. 19.

22 Opened for signature in Madrid on 21 May 1980, CETS No 106.

23 Opened for signature in Strasbourg on 9 November 1995, CETS No 159.

24 OJ C 215, 30.8.1990, p. 4.

25 OJ C 180, 1.7.1994,p. 60.

26 OJ C 143, 23.5.2000, p. 6.

27 Opened for signature in Strasbourg on 5 May 98, CETS No 169.

28 OJ C 200, 10.7.1996, p. 23.

29 OJ C 143, 23.5.2000, p. 9.

30 OJ C 143, 23.5.2000, p. 10.

31 OJ L 210, 31.7.2006, p. 20.

32 In accordance with the specifications for this study set down by the Committee of the Regions, a representative group of experts (the members of which are listed in Appendix IV hereto) were consulted and met on 18-19 May and 21-22 September 2006 in Brussels, at the Committee of the Regions. The explanations and answers to specific questions given by the experts in the course of the study were extremely useful in the drafting of this text. Although the decision was made not to put names to the comments made by particular members of the group, the writers would like to thank them for their constructive and helpful participation.

33 Report by Denis de Rougemont, first European Conference of Border Regions, Strasbourg, 29 June – 1 July 1972.

34 This is expressly acknowledged in recital 3 of the Regulation on an EGTC: "Taking into account notably the increase in the number of land and maritime borders in the Community following its enlargement, it is necessary to facilitate the reinforcement of territorial cooperation in the Community." (OJ L 210, 31.7.2006, p. 19).

35 Insofar as the powers enabling such common responses have been recognised in the Community; however, that is a debate which goes far beyond the scope of this study.

36 For a comprehensive study of this situation and the challenges posed by the different options, see *Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatiques*, N. Levrat, Paris, PUF, 1994.

37 This is the solution provided by the Council of Europe's additional protocol and a certain number of bilateral instruments. Alternatively, these rights and obligations may be dependent on a national legal system, chosen either by the parties (e.g. Article 4(6) of the Karlsruhe agreement) or in accordance with a dedicated rule (e.g. Article 8(2) of the Regulation on an EGTC)).

[38] Judgment of the Court of Justice of the European Communities of 5 February 1963, *Van Gend & Loos v. Netherlands Inland Revenue Administration*. Case 26/62, ECR 23.

[39] For a detailed analysis of this situation, see *L'Europe et ses collectivités territoriales. Réflexions sur l'organisation et l'exercice du pouvoir territorial dans un monde globalisé*, N. Levrat, Brussels, PIE – P. Lang, 2005, especially pp. 109-171.

[40] It should be noted that Community action is subject both to the principle of legality (included in the TEC since the outset, currently under Article 220) and to the principle of conferral, set down in Maastricht under Article 3B TEC (currently Article 5 TEC), which is simply a reminder, and corresponds to the speciality principle which applies to international organisations (see the International Court of Justice ruling of 8 July 1996 in the case "Legality of the Use by a State of Nuclear Weapons in Armed Conflicts", *ICJ Reports*, 1996, p. 66.)

[41] It is evident that the vast majority of Community projects relate to a cross-border area in the broadest sense; here, we refer to the cross-border dimension as determined in particular by the Outline Convention of Madrid, i.e. to relations between regional authorities in different States.

[42] This European Regional Development Fund (ERDF) was set up by Council Regulation (EEC) No 724/75 of 18 March 1975, OJ L 73, 21.3.1975, p. 1.

[43] OJ L 73, 21.3.1975, p. 2.

[44] See, for example "La Commission européenne et les fonds structurels: vers un nouveau modèle d'action", A. Smith, *Revue française de science politique*, vol. 46 (1996), No 3, pp, 474-495; *La Cohésion économique et sociale. Une finalité de l'Union européenne*, G. Guillermin., Paris, La Documentation française, 2001; or *L'Europe et les régions: quinze ans de cohésion économique et sociale*, S. Leclerc (Ed.), Brussels, Bruylant, 2003).

[45] Communication C(90) 1562/3, OJ C 215, 30.8.1990, p. 4.

[46] Council Regulation (EC) No 2052/88 of 30 June 1988, OJ L 185, 15.7.1988.

[47] C(90)1562/3 of 25.07.1990.

[48] Ibid.

[49] When awarding border aid under the present initiative, the Commission shall give priority to proposals […] which include the creation or development of shared institutional or administrative structures designed to broaden and deepen cooperation between public institutions, private organisations and voluntary bodies. (See OJ C 180, 1.7.1994, p. 61).

[50] Also entitled REGEN (see OJ C 200, 10.7.1996, p. 23).

[51] OJ C 200, 10.7.1996, p. 23.

[52] Ibid.

[53] Ibid. Paragraph 11, p. 24.

[54] However, transnational groups no longer concerned "at least three States", but rather "large groupings of European regions" (Communication from the Commission to the Member States laying down guidelines for INTERREG III, OJ C 143, 23.5.2000, p. 9).

[55] OJ C 143, 23.5.2000, p. 10, paragraph 17.

[56] Ibid. Paragraph 19. These aspects were subsequently specified in a Commission Communication dated 7 May 2001, OJ C 141, 15.5.2001, p. 2.

[57] Political scientists have referred to such relations as "para-diplomacy" (the phrase was coined by I. Duchacek in "Perforated Sovereignties: towards a Typology of New Actors in International Relations", in *Federalism and International Relations – the Role of Subnational Units,* Michelman & Soldatos (Eds), Oxford, Clarendon Press, 1990, pp. 1-33. For a recent study of this paradigm, see *Paradiplomatie et relations internationales*, S. Paquin, Brussels, PIE – P . Lang, 2004.

[58] *Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatiques*, N. Levrat, Paris, PUF, 1994.

[59] Fifteen European States have ratified this protocol to date. For a more detailed description of the protocol and its ratification, see Chapter 2, Section A, point 1.5, below.

[60] Article 1 of Protocol No. 2 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning inter-territorial cooperation , CETS No 169.

[61] Currently Article 158(2) TEC; the reference to islands was added by the Treaty of Amsterdam.

[62] Article 161(1) *in fine* TEC.

[63] Practice established following the agreement reached on 12 February 1988 at the Brussels European Council on the reform of Community funding. This terminology is included in Article I-55 Constitutional Treaty.

[64] This attack on the Community's structural policy was led by a group of economic advisers to the President of the European Commission, headed by Prof. André Sapir. Known as the Sapir Report (*An agenda for a Growing Europe – The Sapir Report*, Oxford University Press, 2004), this document proposed no less than the abolition of the Community's structural policy as developed since 1988.

[65] In this regard, see the Commission's Third progress report on cohesion of 17 May 2005 (COM(2005) 192 final).

[66] The scope of national initiative programmes was limited until then to a single State. However, the rules for the allocation of resources to NIPs as set down by Council Regulation (EC) No 1083/2006 laying down general provisions on the Structural Funds (OJ L 210, 31.7.2006, p. 25) do not apply to priority objective 3, which by its very nature cannot be national (it is therefore the provisions of the ERDF, reproduced in Annex II, which apply to this particular objective).

[67] See the Article 3 of the Commission's proposal for a Regulation laying down general provisions on the Structural Funds (COM(2004) 492 final of 14 July 2004), which reduces the priority objectives for the Structural Funds to three (objective 1 = convergence; objective 2 = regional competitiveness and employment; objective 3 = European territorial cooperation).

[68] Article III-220 Constitutional Treaty.

[69] Commission strategy paper of 12 May 2004 (COM(2004) 373 final).

[70] As expressly mentioned by Article 2 of the Madrid Outline Convention (1980), or as called for by certain authors of doctrine (e.g. Maximiliano Bernad y Alvarez de Eulate, "La coopération transfrontalière régionale et locale", *RCADI* vol. 243, 1993, pp. 293 *et seq*.).

[71] *Third report on economic and social cohesion – A new partnership for cohesion, convergence, competitiveness, cooperation*, Luxembourg, Office for Official Publications of the European Communities, 2004, p. 77.

[72] See the published work edited by H. LABAYLE, Vers un droit commun de la coopération transfrontalière, Bruxelles, Bruylant 2006.

[73] The Brussels Benelux convention of 12 September 1986 makes provision for, where appropriate, a political mechanism (a special commission) responsible for examining disputes and cases that arise with a view to settling them through conciliation or by referring them to the Committee of Ministers (Art. 6 (2) (c)).

[74] CETS No. 106. For the complete text, reservations and progress on ratifications, see the site of the Council of Europe Treaty Office, depository of all the treaties of the Council of Europe Treaty Series, which keeps up-to-date information on these treaties. The Internet address is: http://conventions.coe.int/Treaty/FR/v3DefaultFRE.asp .

[75] Parliamentary Assembly of the Council of Europe, Order No 227, 1964.

[76] See in particular Order No 288 of 1970 adopted by the Parliamentary Assembly of the Council of Europe, the tone of which is particularly hostile. (http://assembly.coe.int/ASP/Doc/ATListing_E.asp)

[77] For a detailed description of this process and the issues as seen at the time, see the excellent article by Emmanuel Decaux, "La Convention-cadre européenne sur la coopération transfrontalière des collectivités ou des autorités locales", in the *Revue générale de droit international public*, vol. 88/3, 1984, pp. 538-620.

[78] Parliamentary Assembly Opinion No 96 (1979). See http://assembly.coe.int/ASP/Doc/ATListing_E.asp.

[79] But in paragraph 2 the explanatory report points out that, "The text of the explanatory report, prepared on the basis of the committee's discussions and submitted to the Committee of Ministers of the Council of Europe, does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions."

[80] Explanatory Report on the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, (http://conventions.coe.int/Treaty/en/Reports/Html/106.htm), para. 15.

[81] At the time of deposit of the instrument ratifying this Convention, Italy even stipulated that this notion of neighbourhood was limited, as far as its territory was concerned, to an area 25 kilometres in width. See

http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=106&CM=8&DF=10/3/2006&CL=ENG&VL=0.

[82] These outlines and models are as follows:

1. Model inter-state agreements

1.1 Model inter-state agreement for the promotion of transfrontier cooperation;

1.2 Model inter-state agreement on transfrontier regional consultation;

1.3 Model inter-state agreement on local transfrontier consultation;

1.4 Model inter-state agreement on contractual transfrontier cooperation between local authorities;

1.5 Model inter-state agreement on organs of transfrontier cooperation between local authorities;

1.6 Model agreement on interregional and/or intermunicipal economic and social cooperation;

1.7 Model agreement on intergovernmental cooperation in the field of spatial planning;

1.8 Model agreement on interregional and/or intermunicipal transfrontier cooperation in the field of spatial planning;

1.9 Model agreement on the creation and management of transfrontier parks;

1.10 Model agreement on the creation and management of transfrontier rural parks;

1.11 Model inter-state agreement on transfrontier cooperation in matters concerning lifelong training, information, employment and working conditions;

1.12 Model inter-state agreement for the promotion of transfrontier or transnational school cooperation;

1.13 Model agreement on transfrontier or interterritorial cooperation concerning land use along transfrontier rivers;

1.14 Model inter-state agreement (bilateral or multilateral) on transfrontier cooperation groupings having legal personality.

2. Outline agreements, statutes and contracts between local authorities

2.1 Outline agreement on the setting up of a consultation group between local authorities;

2.2 Outline agreement on co-ordination in the management of transfrontier local public affairs;

2.3 Outline agreement on the setting up of private law transfrontier associations;

2.4 Outline contract for the provision of supplies or services between local authorities in frontier areas ("private law" type);

2.5 Outline contract for the provision of supplies or services between local authorities in frontier areas ("public-law" type);

2.6 Outline agreement on the setting up of organs of transfrontier cooperation between local authorities;

2.7 Model agreement on interregional and/or intermunicipal economic and social cooperation;

2.8 Model agreement on interregional and/or intermunicipal transfrontier cooperation in the field of spatial planning;

2.9 Model agreement on the creation and management of transfrontier parks;

2.10 Model agreement on the creation and management of transfrontier rural parks;

2.11 Model agreement on the creation and management of transfrontier parks between private law associations;

2.12 Model agreement between local and regional authorities on the development of transfrontier cooperation in civil protection and mutual aid in the event of disasters occurring in frontier areas;

2.13 Model agreement on transnational cooperation between schools and local communities;

2.14 Model agreement on the institution of a transfrontier school curriculum;

2.15 Model agreement on transfrontier or interterritorial cooperation concerning land use along transfrontier rivers;

2.16 Model agreement on transfrontier cooperation establishing the statutes of a transfrontier cooperation grouping having legal personality.

For the full text of all these models and outlines, see:

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=106&CM=8&DF=10/3/2006&CL=ENG

[83] Explanatory report, mentioned above, para. 12.

[84] *Ibid.*, para. 32.

[85] Writing in more explicit terms, DECAUX says that given the accumulation of legal and practical limits mentioned above, the role of the Outline Convention seems to be reduced to a simple declaration of intent. (*loc. cit.*, p. 597).

[86] The main ones are the Benelux convention on cross-border cooperation concluded on 12 September 1986 in Brussels and the agreement between Germany and the Netherlands, concluded in Isselburg-Anholt on 25 June 1991. The other bilateral agreements referred to earlier were all concluded after the adoption of the Additional Protocol to the Outline Convention.

[87] For general assessments of the scope of the convention see in particular A. GALETTE, "The draft European Charter of Local Self-government submitted by the Conference of Local and Regional Authorities of Europe", *German Yearbook of International Law*, 1982, pp. 309-345, or N. LEVRAT, "L'importance de la Charte européenne de l'autonomie locale en Europe", in *L'avenir des communes et provinces dans la Belgique fédérale*, Brussels, Editions Bruylant, 1997, pp. 107-136.

[88] This is apparent if you compare this wording with the first paragraph of this article, which states that, "Local authorities shall be entitled, in exercising their powers, to cooperate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest."; or paragraph 2, "The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State."; or else the wording of Article 1 of the Additional Protocol to the Outline Convention (far more detailed in this paragraph).

[89] *Explanatory report of the European Charter of Local Self-Government (CETS No 122)*, http://conventions.coe.int/Treaty/en/Reports/Html/122.htm.

[90] Ibid.

[91] This study was based on a questionnaire sent to Member States which had ratified the Outline Convention. The questionnaire and the responses of 11 States can be found in document LR-R-CT (90) 6, presented by the Secretariat of the Council of Europe to the group of intergovernmental experts on transfrontier cooperation.

[92] CETS No 159.

See http://conventions.coe.int/Treaty/Commun/QueVoulezVous. asp?NT=159&CM=8&DF=10/3/2006&CL=ENG.

[93] Albania, Germany, Armenia, Austria, Azerbaijan, Bulgaria, France, Latvia, Lithuania, Luxembourg, Moldova, the Netherlands, Slovakia, Slovenia, Sweden, Switzerland, Ukraine.

[94] Belgium, Bosnia and Herzegovina, Georgia, Iceland, Italy, Portugal, Romania.

[95] The idea of referring to the competences of authorities to determine their capacity to act was not entirely new since the Outline Convention of 1980 states in Article 2 that, "Transfrontier cooperation shall take place in the framework of territorial communities' or authorities' powers as defined in domestic law. The scope and nature of such powers shall not be altered by this Convention."

[96] This solution does not appear for the first time in the protocol, it can also be found in Article 2 of the Brussels Benelux convention (1986) and Article 2 of the Isselbourg-Anholt agreement (1993), cited.

[97] Explanatory Report on the Additional Protocol to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, para. 17. http://convention.coe.int/Treaty/en/reports/html/159.htm

[98] Article 6 of the Treaty of Valencia of 3 October 2002 attempts to distinguish between the laws applicable to each obligation. The attempt is interesting in terms of ensuring equality between partners, but the implementation is complex, with the risk of disputes over the definition of a particular obligation.

[99] Article 4 of the Treaty of Bayonne of 10 March 1995; Article 4 (6) of the Karlsruhe Agreement of 23 January 1996; Article 4 (5) of the Brussels Agreement of 16 September 2002.

[100] Article 6 (5) of the Isselburg-Anholt Agreement.

[101] Albania, Germany, Armenia, Austria, Azerbaijan, Bulgaria, Lithuania, Luxembourg, Moldova, the Netherlands, Slovakia, Slovenia, Sweden, Switzerland, Ukraine.

[102] Belgium, Bosnia and Herzegovina, France, Georgia, Iceland, Portugal, Romania.

[103] For initial comments on this subject see, U. BEYERLIN, Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit, Berlin, Springer Verlag, 1988 and N. LEVRAT, Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatiques, Paris, PUF, 1994.

[104] See M. DUNFORD and G. KAFKALAS, Cities and Regions in the new Europe: Global-Local Interplay and Spatial Development Strategies, London, Behaven Press, 1992, and N. LEVRAT, Public actors and the mechanisms of transfrontier cooperation in Europe, Geneva, Euryopa 6-1997.

[105] See N. LEVRAT, *Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatiques*, Paris, PUF, 1994, for a discussion of the issues linked to the choice of these different terms.

[106] Explanatory memorandum for draft Protocol No 3 on the establishment of Euroregional cooperation groupings, *Doc LR-CT (2004)* 15 of 12 July 2004, p. 4. We would draw the reader's attention to the fact that this date coincides with that of the Commission proposal for a Regulation establishing the EGTC (14 July 2004).

[107] Ibid.

[108] *Ibid.*, p. 5.

[109] The goal of the draft protocol on Euroregions should be to produce a completely uniform law applicable to such relations, regardless of the territory and the legal system in which they would be required to have effect. Ibid., p. 6.

[110] *Ibid.*, p. 5.

[111] As the previous quotation shows, this draft applies only to neighbourly relations and not transnational or interregional cooperation.

[112] Summer 2005 (*Doc LR-CT (2005)) 13* of 10 August 2005. The final version of this preliminary draft convention dates from 27 April 2006, entitled "Revised preliminary draft of the European Convention containing a Uniform Law on Groupings of Territorial Cooperation (GTC)", *DOC CDLR (2006) 17*.

[113] Denmark, the Federal Republic of Germany and Sweden have come out against a new draft Convention; Switzerland would like a shorter and more general text; Spain a return to the idea of an additional protocol to the Madrid Convention. Slovakia's position is unclear, and only Austria (which at the same time was a strong advocate of the adoption of the Regulation on the EGTC in its role as EU president) has expressed clear support for the draft of the new Convention. See the draft meeting report of the Committee of Experts on transfrontier cooperation of the Council of Europe LR-CT (2006) 12 of 29 March 2006.

[114] In line with the case-law that the Court of Justice has established on these matters since 1963.

[115] These are Germany, France, Luxembourg and Switzerland. With the exception of Luxembourg, this agreement applies only to specific parts of the national territories of the participating States (cf. Article 2).

[116] For example, new Member States of the Council of Europe, such as Russia and Ukraine, are in the process of drawing up, with the help of Council of Europe experts, national legislation aimed at providing a specific legal framework for transfrontier cooperation between their sub-national bodies.

[117] For analysis of this issue and information, see J. POLAKIEWICZ, *Treaty making in the Council of Europe*, Strasbourg, Council of Europe Publishing, 1999. See also N. LEVRAT, "De quelques particularités du mode d'élaboration des normes conventionnelles, et de leur influence sur la nature des Traités conclu au sein du Conseil de l'Europe", *Revue de droit de l'ULB*, vol. 22, 2000-2, Brussels, Bruylant, pp. 19-58.

[118] All Community procedures which lead to the adoption of a general act by the European Community can only be undertaken on the basis of a European Commission proposal (Articles 250-252 TEC).

[119] Whereas in the Council of Europe, with the exception of defence-related issues, which are explicitly excluded, (Article 1(d) of the Statute (CETS No 1)), Member States can agree to work on any issue related to Europe. On the other hand, the outcome of their work does not necessarily have binding legal effect as it would in Community law.

[120] See chapter 3.B.(2), below, on how the sensitive issue of the basis for Community power to adopt Regulation (EC) No 1082/2006 was resolved.

[121] Article 308 TEC (former Article 235 TEC).

[122] See, in particular, the principles highlighted by the Court in its judgment of 12 June 1990: Federal Republic of Germany v Commission of the European Communities, Case C-8/88, ECR I-2321.

[123] Although the term "*transfrontière*" [used in the French version of the Treaty] might suggest a wider context than purely a neighbourhood relationship with a cross-border element (see N. LEVRAT (1994), *op. cit.* for the different concepts conveyed by different terms), the English version refers to "*cross-border cooperation*", the German version "*grenzüberschreitende Zusammenarbeit*", the Spanish version "*cooperacion transfonteriza*" and the Italian version "*cooperazione transfrontaliera*", all terms which, unlike the French version, refer to a pure neighbourhood relationship.

[124] Article 265 TEC. Italics applied by the author to the text added at Amsterdam.

[125] Article 5 of Regulation (EEC) No 724/75 of 18 March 1975 establishing a European Regional Development Fund (ERDF), OJ L 73, 21.3.1975, p. 2.

[126] Notice [from the Commission] C(90) 1562/3 to the Member States laying down guidelines for operational programmes which Member States are invited to establish in the framework of a Community initiative concerning border areas (Interreg), OJ C 215, 30.8.1990, p. 4.

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[127] Notice [from the Commission] to the Member States laying down guidelines for operational programmes which Member States are invited to establish in the framework of a Community initiative concerning border development, cross-border cooperation and selected energy networks, (Interreg II) (94/C 180/13), OJ C 180, 1.7.1994, p. 60.

[128] In particular the 1994 Annual Report (OJ C 303, 14.11.1995, sections 4.61-4.72) and Special Report No 4/2004 on the programming of the Community Initiative concerning trans-European cooperation – Interreg III (OJ C 303, 7.12.2004, p. 1). For a more detailed analysis of these reports, see chapter 3, section B(2), below.

[129] The Commission's initial proposal provided for a European Cooperation Grouping (see COM(1973) 2046 final of 21 December 1973).

[130] Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1.

[131] It should be pointed out in this regard, in relation to another context, of course, but one that is not without relevance, that the Court of First Instance makes a clear distinction between the situation of a subnational authority which is concerned on its own account when it is exercising its powers, and the situation of an authority which is only concerned with the socio-economic impact within its boundaries – as would be the case of a subnational authority setting up cross-border cooperation to enhance economic development within its boundaries (CFI, judgment of 15 June 1999, *Regione autonoma Friuli-Venezia Giulia v Commission of the European Communities*, Case T-288/97, *ECR* II-1871).

[132] As Article 3 of Regulation No 2137/85 states clearly: "The purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself. Its activity shall be related to the economic activities of its members and must not be more than ancillary to those activities." OJ L 199, 25.7.1985, p. 2.

[133] Article 1 of Regulation No 2137/85 certainly states: "The grouping so formed shall … have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued." (Article 1(2)), but specifies: "The Member States shall determine whether or not groupings registered at their registries … have legal personality.".

[134] Recital 4 of Regulation (EC) No 1082/2006. Similarly, the Court of Auditors stresses in its *Special Report No 4/2004 on the programming of the Community Initiative concerning trans-European cooperation – Interreg III*: "The [Commission's] guidelines provide for the establishment of European Economic Interest Groupings (EEIGs …) in order to ensure that the bodies implementing cooperation are genuinely shared. However, some Member States drew attention to a number of legal problems that the Commission had insufficient time to address in detail." (OJ C 303, 7.12.2004, p. 8). Later on, it observes: "Attempts to establish EEIGs as agents for the implementation of Interreg programmes were unsuccessful (Alps and northwest Europe), despite Commission encouragement." (*Ibid.* point 44, p. 12).

[135] For classification of the different legal types of EGTC which this study proposes to discuss, see chapter 4, section F, below.

[136] See chapter 1, section B, above, on the basic legal principles of cross-border cooperation.

[137] For a detailed analysis of this development and its political and legal implications, see, in particular, H. COMTE and N. LEVRAT, "Perspectives transfrontalières", in *Aux coutures de l'Europe (op. cit.)*, pp. 353-361.

[138] On this development and its importance, see N. LEVRAT, *l'Europe et ses collectivités territoriales (op. cit.)*, pp. 257-271.

[139] See the White Paper on European Governance (COM(2001) 428 final of 25 July 2001), OJ C 287, 12.10.2001, p. 1.

[140] See chapter 4, below. N.B. Regulation (EC) No 1082/2006 states that the EGTC "may be established" (Article 1(1)) "at the initiative of its prospective members" (Article 4(1)), and recital 15 specifies that "this Regulation does not go beyond what is necessary in order to achieve its objectives, recourse to an EGTC being optional".

[141] Article 2, on the other hand (moreover, one of the most unfortunate, curious statements), specifies: "Decisions taken jointly under a transfrontier cooperation agreement shall be implemented by territorial communities or authorities within their national legal system, in conformity with their national law." See point 1.3 of this chapter, above, for a legal analysis of this situation.

[142] Article 1(2).

[143] Article 2(2) of the Brussels agreement of 12 September 1986.

[144] Article 6 of the Isselburg-Anholt agreement of 25 June 1991.

[145] Article 6(1) of the Isselburg-Anholt agreement of 25 June 1991.

[146] Article 6(4) of the Isselburg-Anholt agreement of 25 June 1991.

[147] Article 6(3) of the Isselburg-Anholt agreement of 25 June 1991.

[148] Article 6(5) of the Isselburg-Anholt agreement of 25 June 1991.

[149] Article 3(2) of the Bayonne Treaty of 10 March 1995.

[150] Article 3(4) of the Bayonne Treaty of 10 March 1995.

[151] Article 3(6) of the Bayonne Treaty of 10 March 1995.

[152] Article 4(1) *in fine* of the Bayonne Treaty of 10 March 1995.

[153] Article 4(3) of the Karlsruhe agreement of 26 January 1996.

[154] Article 4(4) of the Karlsruhe agreement of 26 January 1996.

[155] Article 5 of the Valencia Treaty of 3 October 2002.

[156] Article 7(4).

[157] Article 3(1) of the Brussels agreement of 12 September 1986.

[158] Which reads as follows: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.".

[159] We will come back to this question in chapter 3, section D(4) below.

[160] Article 6 of the Isselburg-Anholt agreement of 25 June 1991.

[161] Article 5 of the Karlsruhe agreement of 23 January 1996. The Brussels agreement (signed by Belgium and France) of 16 September 2002 incorporates exactly the same solution.

[162] This is the same wording as that used in Article 6 of the Isselburg-Anholt agreement.

[163] See point A.2.2. of this chapter, above.

[164] Article 3 of which lays down the following principle: "A transfrontier cooperation agreement concluded by territorial communities or authorities may set up a transfrontier cooperation body, which may or may not have legal personality."

[165] Article 8(1) of the Karlsruhe agreement of 23 January 1996, and Article 8(1) of the Brussels agreement of 16 September 2002.

[166] Quite clearly, the situation varies from one legal system to another, and in some countries the cash requirements of public bodies, even those with legal personality in their own right, are met exclusively by the national Treasury, which is far removed from this issue. However, in many countries – and this seems to be particularly appropriate in a cross-border framework where "foreign" contributions will of necessity be involved – public bodies are able to manage funds directly.

[167] Article 1(2) of Regulation (EEC) No 2137/85 of 25 July 1985 (OJ L 199, 31.7.1985, p. 1).

[168] Some subscribed to the theory that, by analogy with the situation of countries pursuing international relations which are free to conduct these relations with private partners, according to the rules of private law (e.g. where countries contract with foreign businesses, in particular for the use of natural resources located on their soil), that subnational public authorities should have the same freedom of choice (see e.g. P.-M. DUPUY, "La coopération régionale transfrontalière et le droit international", *Annuaire français de droit international* 1977, pp. 837-860). However, a distinction must be made between the situation of a sovereign State, which by nature does not have to be bound by national legal constraints in its external relations, and that of non-sovereign entities, which are bound, even in relations which go beyond the national framework, to observe the public law applying to them and which are not sovereign for precisely this reason. (For this discussion and its practical implications see N. LEVRAT (1994), pp. 315-322.)

[169] This applies to Article 10 of the Karlsruhe and Brussels (2002) agreements, which do not distinguish between private and public law structures in this context.

[170] Which in some countries, where some specific types are concerned, can also be governed by public law.

[171] For example, Portuguese law provides for an "*Empresa Intermunicipal*", which can be used under the Valencia Treaty of 3 October 2002 (Articles 9(3) and 11).

[172] This solution is particularly favoured in France and Italy.

[173] See in particular Articles L-1115-4 and L- of the *Code général des collectivités territoriales* (Local Government Act).

[174] *Zweckverband* in German law, the legal structure referred to in Articles 3-5 of the Isselburg-Anholt agreement. *Syndicat de communes* (voluntary municipal consortium) in French law (or *syndicat mixte* (mixed consortium), i.e. open not only to municipalities but also to higher-level bodies (e.g. regions)).

[175] *Consorcio* in Spanish law (Article 5 of the Bayonne Treaty and Articles 9 and 11 of the Valencia Treaty), *Associaçoes de Direito Publico* in Portuguese law (Articles 9 and 11 of the Valencia Treaty).

[176] Legal form in French law to which the Bayonne Treaty, in particular, permits referral (Article 5).

[177] Article 10 of the Karlsruhe agreement and the Brussels Treaty. Paragraph 2 of the latter lays down the particular structures envisaged in each country. Thus, Belgium provides for both public law structures (inter-municipality) and private law structures (non-profit associations, foundations, international associations and European Economic Interest Groupings), while France only provides for public law structures. Thus, clearly, the legal definitions established by each national legal system, even in a bilateral relationship, can differ considerably.

[178] See Article 2 of the Karlsruhe agreement and Article 2 of the Brussels agreement (of 16 September 2002), which include among prospective partner authorities French regions and departments. Moreover, where the Karlsruhe agreement is concerned, the Swiss cantons are both parties to the agreement (by virtue of their national constitutional powers) and potential beneficiaries of the cooperation mechanisms set up by the agreement (Article 2(2) of the Karlsruhe agreement). This is similar *mutatis mutandis* to the situation of Member States in the context of the EGTC.

[179] Article L-1115-4-1 of the *Code général des collectivités territoriales* (Local Government Act), introduced by Law No 2004-809 of 17 August 2004 lays down this solution and designates these cooperation structures "*district europeen"* (European districts) in French law.

[180] Although the parties to transfrontier cooperation based on this agreement can adopt detailed statutes (Article 11(7) of the Valencia Agreement of 3 October 2002), the legal form of their transfrontier cooperation body must nevertheless correspond to a legal structure which already exists under national law: the *Associação de Direito Público* or *Empresa Intermunicipal* in Portugal, or the *consorcio* in Spain. Thus, the provisions of the statute of the body with legal personality, which must be appended to the convention setting up the body, must be subject to the provisions applicable to each type of body in the parties' domestic law (Article 11(7)).

[181] Regarding the fact that this systematic list does indeed constitute a hierarchy of applicable rules, see paragraph 41 of the Court judgment of 2 May 2006 (European Parliament v Council of the European Union, C-436/03), which discusses Article 8 of Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society, whose wording is very similar to that of Article 2 of the Regulation on an EGTC.

[182] On the other hand, contrary to the provisions of the Karlsruhe, Brussels and Valencia agreements, Member States have considerable discretion to prohibit one of their regional or local authorities from having access to an EGTC (Article 4(3) of the Regulation on an EGTC). See chapter 4, section D, below, for a detailed analysis of these issues.

[183] Articles 3(1), 4(3), 6(2), 7(2) and (4), 12, 13 and 14(1) of Regulation (EC) No 1082/2006 of 5 July 2006 on an EGTC refer to national provisions relating to this category.

[184] Article 15 of Regulation (EC) No 1082/2006 of 5 July 2006 on an EGTC, in particular, refers explicitly to these provisions.

[185] Under which each country that has ratified them "shall recognise and respect the right of territorial communities or authorities under its jurisdiction … to conclude transfrontier cooperation agreements with territorial communities or authorities of other States".

[186] In the declaration made when the ratification instrument was lodged, on 29 March 1985, the Italian government, referring to Article 3(2) of the Convention, declared that it made the application of this clause subject to the signing of inter-state agreements.

[187] Italian Constitutional Court, Judgment No 258/2004 of 8 July 2004, published in the *Official Gazette of the Italian Republic* of 22 July 2004.

[188] The Proposal for a Protocol [No. 3] to the European Outline Convention […] concerning the establishment of Euroregional cooperation groupings (ECG), Doc LR-CT (2004) 15 of 12 July 2004, paragraphs 14 and 15, p. 6, stated the reasons why it deemed this proposal not to be desirable.

[189] Ninth recital of the Revised preliminary draft European Convention containing a Uniform Law on Groupings of Territorial Cooperation (GTC), DOC CDLR (2006) 17 of 27 April 2006. The aim to which the consultant refers is "to facilitate cooperation between territorial communities or authorities belonging to different States in keeping with States‘ political and administrative structures and international commitments." (second recital).

[190] Under Article 16(1)(2), each Member State "shall inform the Commission and the other Member States accordingly of any provisions adopted under this Article".

[191] Introduced to the Treaty of Rome by an amendment adopted in Luxembourg in 1987 (the Single European Act), the chapter on economic and social cohesion (which was originally Articles 130(a) - (e), but has now been renumbered as Articles 158-162) is the legal base for this redistributory policy.

[192] Community structural policy is based on the Structural Funds regulations, which are renegotiated for each multi-annual period. On each occasion (in 1988, 1994, 1999 and most recently in 2006), the fundamental principles underpinning this Community policy were inserted in the new regulations and submitted for approval by the Council, i.e. the Member States.

[193] For example, in formulating and implementing the partnership principle, which has existed since the first regulation on coordination of the Structural Funds (Regulation (EEC) No 2052/88, Article 4, Official Journal of 18 July 1988).

[194] Given that it was adopted on 5 July 2006, the same date as the ERDF Regulation.

[195] European Commission, Third progress report on economic and social cohesion, op. cit., p. 156.

[196] For a more in-depth and theoretical discussion of this point, see chapter 3 of the second part of *L'Europe et ses collectivités territoriales, op. cit*., by N. Levrat, entitled "Les collectivités territoriales vecteurs d'une intégration horizontale via la coopération transfrontalière ?", pp. 257-271.

[197] OJ C 215, 30.8.90, p. 4.

[198] "In granting border aid under the present initiative, the Commission will give priority to proposals […] concerning the creation and development of shared institutional or administrative structures aimed at broadening and deepening cooperation between public institutions, private organisations and voluntary organisations" (OJ C 180, 1.7.1994, p. 61).

[199] Court of Auditors, Annual report concerning the financial year 1994, OJ C 303, 14.11.1995, p. 116.

[200] Ibid.

[201] See the Communication from the Commission to the Member States of 28 April 2000, OJ C 143, 23.5,2000, p. 6, which no longer specifies requirements for the institutional structures of cross-border cooperation, but stipulates that "cross-border cooperation between neighbouring authorities is intended to develop cross-border economic and social centres through joint strategies for sustainable territorial development" and in terms of developing institutional structures sets the modest objective of "developing cooperation in the legal and administrative spheres to promote economic development and social cohesion".

[202] Special report No 4/2004, OJ C 303, 7.12.2004, p. 6.

[203] *Ibid.* para. 44, p. 12. The complete quote and the question of establishing European Economic Interest Groupings in this context has been discussed in Chapter 2, section A.2 above.

[204] *Ibid.*, para. 98 lit. i), p. 18.

[205] Third Report on cohesion, op. cit., p. 156.

[206] With the exception of innovative activities undertaken at the specific request of the Commission, which can be financed exclusively from the Community budget. However, in quantitative terms these activities are only marginal.

[207] Working paper: *Cross-border Financial Management*, 62 p. Available from the AEBR website, http://www.aebr.net/

[208] Article 274 TEC.

[209] Under Article 276(1) TEC, Parliament gives a discharge to the Commission in respect of the implementation of the budget, on a recommendation from the Council acting by a qualified majority.

[210] Articles 246 and 248 TEC.

[211] For the 2007-2013 period of interest to us, the principle of shared management is established by Article 14 of Council Regulation (EC) No 1083/2006 (OJ L 210, 31.7.2006, p. 39). However, Article 70(2) of the same regulation clearly assigns a large share of the responsibility to the Member State, which must carry out initial controls and is itself subject to the supervision by the Commission with regard to implementation of the agreed programmes.

[212] Regulation (EC) No 1080/2006 of the European Parliament and the Council on the ERDF, OJ L 210, 31.7.2006, p. 8.

[213] Article 6(4) is worded as follows: "notwithstanding paragraphs 1, 2 and 3, where the tasks of an EGTC […] include actions which are co-financed by the Community, the relevant legislation concerning the control of funds provided by the Community shall apply".

[214] According to legal theory, this principle is enshrined in the wording of Article 220 TEC: "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed". The principle of the rule of law is thus enshrined in the TEC, together with a body and mechanisms to ensure it is complied with. On this point, see Rideau, *op. cit*, and the references to legal theory on this question mentioned by him.

[215] Article 230, second para. TEC.

[216] Article 5, first para. TEC.

[217] Text added by the Treaty of Amsterdam is in italics.

[218] The Committee of the Regions was established by the Treaty of Maastricht introducing Articles 198(a), (b) and (c), thus laying down the organisation and the role of this new body, following the institutional model of the European Economic and Social Committee. The Committee did not hold its first meeting until 1994. For a discussion of the origins of the Committee, see J. Bourrinet, *Le Comité des régions de l'Union européenne*, Pais, Economica, 1997, or N. Levrat, *L'Europe et ses collectivités territoriales, op. cit.,* pp. 203-206 and 221-234.

[219] Community institutions created by the Treaties are only competent to act within the framework of the Treaties, but not to revise them, as this remains the sole prerogative of Member States at intergovernmental conferences. The procedure for revising the Treaties is set out in Article 48 TEU.

[220] Opinion 136/95 adopted on 21 April 1995, OJ C 100, 2.4.1996, p. 1.

[221] Together with a dozen other specific demands.

[222] See the final chapter, below.

[223] Opinion 62/2004 adopted on 18 November 2004, OJ C 71, 22.3.2005, p. 46.

[224] COM(2006) 94 final, 07.03.06.

[225] Admittedly, in several cases, the Court has declined to rule that acts adopted on the basis of Article 235 are invalid, when another legal base exists in parallel, on the grounds that the unanimity requirement for a decision under Article 235 is sufficient to preserve the rights of the Member States (Judgment of 12 July 1973, *Hauptzollamt Bremerhaven v. Massey-Ferguson*, Case 8/73, *ECR.* 897).

[226] Failure by the Council to consult the European Parliament when the Treaty imposes such an obligation is an infringement of substantive forms, even if the opinion issued by the Parliament (or other institution) is not binding, and constitutes grounds for annulment of the adopted act (ECJ, Judgment of 29 October 1980, *Roquette Frères v. Council*, Case 138/79, *ECR* 3333).

[227] The other main reason is introduction of the subsidiarity principle which, despite having no legal connection to this provision – in terms of scope, there is no overlap – has created unfavourable political conditions for creative use of the powers conferred on the European institutions by the Treaty (in particular, see Protocol No 30 to the Treaty of Amsterdam on application of the subsidiarity and proportionality principles).

[228] A recent example is the action for annulment of the Regulation on the Statute for a European Cooperative Society introduced by the European Parliament against the Council, which is based precisely on the fact that the Council's decision to base Regulation No 1435/2003 of 22 July 2003 on Article 308 (against the Commission's advice, which in this particular case supported the Parliament's action) did not enable appropriate consultation of the European Parliament (Case 436/03).

[229] Formerly Article 100(a). There are in fact two separate provisions. The first, which is currently Article 94 (formerly Article 100), requires unanimity in the Council, whereas Article 100(a), by way of derogation to the preceding article, allows for a procedure which does not require unanimity, with co-decision by the European Parliament (Article 251 TEC; this was not the case in 1987, as the co-decision procedure did not yet exist).

[230] Although, as we saw earlier, these rules were incorporated in the form of a regulation, a stipulation is included that Member States adopt provisions to make provisions to ensure effective application (Article 16), which could result in a certain degree of convergence between national legislative frameworks.

[231] In particular, in its opinion 388/2002 of 10 April 2002 on territorial cohesion (OJ C 244, 10.10.2003, p. 23).

[232] The Commission played a very substantial role in preparing amendments to the Treaties embodied in Part III of the Treaty establishing a Constitution for Europe.

[233] This is reflected in the title of Section 3 of Chapter III of Part III of the Constitutional Treaty: economic, social and territorial cohesion. In the recitals of its opinion of November 2004 (adopted soon after the signing of the Constitutional Treaty and before the process came to a halt in early June 2005), the Committee of the Regions refers to Article III-220 of the Constitutional Treaty (OJ C 71, 22.3.2005, p. 46).

[234] Trans-European Cooperation between Territorial Authorities , op. cit., p. 217.

[235] Presentation of the proposal on 14 July 2004, and adoption on 5 July 2006. However, it should be emphasised that there have been repeated calls to create a structure of this type in Community law, for example in the reports of the Court of Auditors and the Commission's replies to them.

[236] One of the experts who contributed to the drafting of this text was fairly critical of the weakness of this proposal (see N. Levrat, "Commentaire de la proposition de Règlement communautaire relatif à l'institution d'un groupement européen de coopération territoriale dans la perspective de l'émergence d'un droit commun", in H. Labalye, *Vers un droit commun de la coopération transfrontalière*, edited by H. Labalye, Brussels, Bruylant, 2006, pp. 147-178.

[237] Recommendation No 5 of opinion 62/2004 on the Proposal for a Regulation of the European Parliament and of the Council establishing an EGCC, OJ C 71, 22.3.2005, p. 50. The Parliament submitted a very similar proposal (see OJ C 157 E, 6.7.2006, p. 310).

[238] Recommendation 1 of Opinion 62/2004, OJ C 71, 22.3.2005, p. 49. The term "trans-European cooperation" is consistent with the terminology used in the study carried out in 2001 by the Assembly of European Border Regions on behalf of the Committee of the Regions (which this study quotes from).

[239] The Committee of the Regions should keep a register of existing EGTCs so that the European institutions, the Member States, regional and local authorities and any European citizen can quickly call up specific data about any EGTC. This register could also play a valuable role in disseminating best practice across Europe (OJ C 71, 22.3.2005, p. 48).

[240] COM(2006) 96 p. 8, Art. 3(3), which stipulates that the Committee of the Regions be informed of the establishment of an EGTC.

[241] All these regulations were published in OJ L 210 on 31 July 2006.

[242] Article 24 of Reg. (EC) No 1080/2006, OJ L 210, 31.7.2007, p. 10, Article 14 of Reg. (EC) No 1081/2006, OJ L 210, 31.7.2007, p. 18, Article 106 of Reg. (EC) No 1083/2006, OJ L 210, 31.7.2007, p. 68, Article 7 of Reg. (EC) No 1084/2006, OJ L 210, 31.7.2007, p. 80, Article 28 of Reg. (EC) No 1085/2006, OJ L 210, 31.7.2007, p. 91; in the latter regulation, there is no compulsory review clause, but a fixed expiry date.

[243] See COM(2004) 496 final.

[244] See OJ C 210, 31.7.2006, p. 41.

[245] Articles 12-21 of Regulation (EC) 1080/2006 (see Appendix II for the complete text).

[246] Which was the scope initially envisaged by the European Commission proposal; see the title and content of the initial draft (COM(2004)496, which had only 9 articles).

[247] Recommendation 1 of Opinion 62/2004, OJ C 71, p. 49.

[248] Position adopted at first reading on 6 July 2005, Olbrycht report, OJ C 157 E, 6.7.2006, p. 309.

[249] Regulation (EC) No 1083/2006, OJ L 210, 31.7.2006.

[250] Regulation (EC) No 1080/2006, OJ L 210, 31.7.2006, reproduced in Annex 2 below.

[251] COM(2004) 496 of 14 July 2004.

[252] As indicated by the title of the draft Regulation (the ‘C’ of EGCC corresponding to ‘cross-border’ before being replaced by ‘territorial’). The objective of this grouping was to ‘facilitate and promote cross-border cooperation between Member States, as well as regional and local authorities, with the aim of reinforcing economic, social and territorial cohesion’ (Article 1(3)); however, in the same aim, it could equally ‘have the objective of facilitating and promoting transnational and inter-regional cooperation’. This cross-border aspect was therefore not just a reference to neighbourhood relations.

[253] See the Opinion of 18 November 2004, which proposes in paragraph 2 that the name of this tool be changed in order to replace ‘cross-border cooperation’ with ‘trans-European cooperation’ (OJ C 71, 22.3.2005, p. 47.).

[254] Article 1(2) of Regulation (EC) No 1082/2006, which stipulates: ‘The objective of an EGTC shall be to facilitate and promote cross-border, transnational and/or interregional cooperation, hereinafter referred to as “territorial cooperation” […]’.

[255] Recital 1 of Regulation (EC) 1082/2006 and Article III-220 of the Constitutional Treaty, to which the Committee of the Regions explicitly refers in its Opinion on the proposal for a regulation on an EGTC.

[256] Through the establishment of specific financial instruments (notably the PHARE CBC programmes) or within the framework of a future European Neighbourhood Policy, which makes cooperation based on proximity one of the two priorities of this future Community policy (see Commission communication of 12 May 2004 entitled ‘European Neighbourhood Policy – Strategy Paper’ (COM(2004) 373 final)).

[257] It is important to remember that this was the legal basis that was chosen by the Commission for the draft Regulation and subsequently accepted.

[258] However, if the priority objectives of the European Neighbourhood Policy are confirmed in an implementing phase after 2007, it is possible that this rule in Article 3(2) of Regulation (EC) No 1082/2006 might be relaxed. It may be possible to introduce formulas that, without directly providing for the right of entities from third countries to participate in an EGTC – which Article 159 probably does not permit – do not require the presence of partners from at least two Member States.

[259] Recital 8 of Regulation (EC) No 1082/2006.

[260] See Chapter 2 for a detailed discussion of this distinction and its importance in the development of cross-border legislation and practices.

[261] The Additional Protocol to the Madrid Outline Convention stipulates in Article 3 that if the transfrontier cooperation body has legal personality, ‘the agreement shall specify whether the body, regard being had to the responsibilities assigned to it and to the provisions of national law, is to be considered a public or private law entity within the national legal systems to which the territorial communities or authorities concluding the agreement belong’. According to the 1986 Brussels Agreement (Benelux Convention), cooperation founded on private law is possible without any specific regulations. The model agreements annexed to the Outline Convention also distinguish between private law and public law structures (see Chapter 2 above for a detailed analysis of these questions).

[262] Article 1(4); the wording is identical to that of Article 282 of the EC Treaty, which relates to the European Community’s legal capacity in the Member States. We will come back to this question in point 3 below.

[263] Article 5(1) of Regulation (EC) No 1082/2006 on an EGTC.

[264] For example, in accordance with Articles 4(3), 6(1), 7(2), 12(1) and (2), 13, 14 and 15.

[265] Paragraph 82 of the conclusions presented by the Advocate-General on 12 July 2005 in Case C-436/03, not yet published.

[266] Ibid., paragraph 73.

[267] Ibid., paragraph 75.

[268] Ibid.

[269] Recital 14 of Regulation (EC) No 1435/2003 on the Statute for an SCE, OJ L 207, 18.8.2003, p. 2, mentioned by the Advocate-General in paragraph 79 of the conclusions presented on 12 July 2005 in Case C-436/03, not yet published.

[270] Recital 12 of Regulation (EC) No 1435/2003 on the Statute for an SCE, OJ L 207, 18.8.2003, p. 2, mentioned by the Advocate-General in paragraph 80 of the conclusions presented on 12 July 2005 in Case C-436/03, not yet published.

[271] Ibid., paragraph 84.

[272] Ibid., paragraph 86.

[273] Ibid., paragraph 87.

[274] See Chapter 2, section B, point 2.2.3.4 above. The wording used in the Valencia Agreement makes explicit reference to pre-existing legal forms in each of the national legal systems concerned.

[275] OJ L 210, 31.7.2006, p. 19.

[276] Document of 21 December 2005 prepared by the British Presidency, Ref. 15943/05, p. 7.

[277] Article 3 of the Additional Protocol of 9 November 1995 to the Madrid Outline Convention; Article 2 of the Brussels Convention of 12 September 1986.

[278] Annex III to Directive 2004/18/EC of 31 March 2004 (OJ L 134, 30.4.2004, p. 114), which establishes the list for each Member State of the bodies covered by this provision, includes for several states a number of bodies governed by private law (see Annex 3 below).

[279] In several Member States, the national association of local authorities is a private law entity, as are the international associations of territorial authorities (AEBR, ARE, CCRE, etc.). These private law associations, composed of members that are public law entities, are authorised to participate in an EGTC under the terms of Article 3 of Regulation (EC) No 1082/2006.

[280] For an analysis of the overly restrictive nature of this limitation, see paragraph D.5 of this Chapter.

[281] For the use of the distinction between *jure gestionis* and *jure imperii* activities as a condition for accessing cross-border cooperation and choosing the applicable rules, see in particular N. Levrat (1994), *Op. cit.* pp.229-233.

[282] Article 8(2)(e): ‘the law applicable to the interpretation and enforcement of the convention, which shall be the law of the Member State where the EGTC has its registered office’.

[283] At first reading the EP proposed the following in Article 4(5) of its amended text: ‘The EGTC shall be subject to the law governing the way in which associations operate of the state designated by its members’. This wording (overly restrictive according to the experts) was rejected.

[284] Article 1(4) of Regulation (EC) No 1082/2006.

[285] Which reads as follows: 'In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings'. The main differences relate to the fact that there is a single European Community that must be accorded the same legal capacity in all the Member States, while each EGTC will have its own legal personality and legal capacity. Furthermore, as regards the capacity to employ staff, this matter is dealt with for the Community in Article 283 of the EC Treaty, which enshrines in Community law the Staff Regulations of officials of the European Communities. As far as the EGTCs are concerned, the rules on employing staff – legal framework of employment contracts, working conditions and rates of pay, etc. – will be those of the state where an EGTC has its registered office (since Regulation (EC) No 1082/2006 does not make any mention of them and thus refers back to national law in Article 2(1)(c)). Finally, we do not believe that the inversion of the terms 'movable property' and 'immovable property' is of any particular significance [this does not apply to the English version].

[286] With the exception of the state that, under international law at least, is a sovereign legal person. A state's sovereignty at national level, particularly in relation to its citizens, is a complex issue that we will not discuss here.

[287] For an analysis of this issue, see section D below.

[288] For example, Article 1(2) of Regulation (EEC) No 2137/85 on the European Economic Interest Grouping states that 'a grouping so formed shall […] have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued', which represents substantial legal capacity. Yet at the same time, paragraph 3 of the same article states that 'the Member States shall determine whether or not groupings registered at their registries, pursuant to Article 6, have legal personality'. This decision on the part of the Member States, even if negative, would not have any impact on the grouping's legal capacity.

[289] Article 8(1) for the convention, which will then be concluded; Article 9(1) for the statutes, which will then be adopted. The unanimous rule is necessary for the initial adoption of these documents and the parties may, for both the convention (Article 8(2)(g)) and the statutes (Article 9(2)(h)), agree on other rules for the amendment of either document.

[290] Article 9(1).

[291] Article 4(4).

[292] Article 4(3)(2).

[293] Which is authorised by Articles 8(2)(g) and 9(2)(h).

[294] Article 12(2)(3) of the Karlsruhe Agreement; Article 12(2)(3) of the Brussels Agreement (2002); Article 11(7)(b) of the Valencia Agreement. These three legal instruments refer more cautiously to the 'geographical area concerned' and do not necessarily restrict the activities of the cross-border cooperation bodies they provide for into that area, as Regulation (EC) No 1082/2006 does somewhat incautiously for the EGTC.

[295] It is quite likely that in order to execute its tasks, an EGTC may have to carry out actions outside the specific territory. For example, can an EGTC whose activities are successful authorise its director (pursuant to Article 10(1)(b)) to attend a conference organised by the Committee of the Regions or the European Commission on the subject outside the territory specified in accordance with this provision, if its statutes have not expressly provided for this? Or should he attend it but stipulate that he is not there as a representative of the EGTC? Or that this activity is not part of the EGTC's tasks? But then why invite him in the latter two cases?

[296] Article 3 of the Commission's original proposal (COM(2004) 496 final) was entitled 'Competence' and mentioned 'the tasks' assigned to an EGCC. The final wording removed the reference to competences and tasks from the Regulation; however, the wording of the recital was not changed. In our opinion, there is therefore little point in attaching special significance to these terms.

[297] Court of Auditors, Special Report No 4/2004, OJ C 303, 7.12.2004, p. 8. This desire to ensure the possible permanence of the structures established on the basis of this Regulation was also invoked by the European Commission so as not to impose any temporal restrictions on the legal effects of this Regulation.

[298] Article 10(2).

[299] Article 10(1)(a).

[300] In this respect, see Article 13(3) of the Karlsruhe Agreement for example, which states: 'The assembly's decisions shall govern the matters relating to the object of the grouping […]'.

[301] See, in particular, the Court's judgment of 2 May 2006 in *Parliament v Council*, Case C-436/03, paragraph 41 (not yet published), for an interpretation in this sense of a similar provision.

[302] As stipulated in the Karlsruhe, Brussels and Valencia Agreements; see Chapter 2 above.

[303] While, in contrast, it is stipulated explicitly for a European Company (SE): Article 8 of Regulation (EC) No 2157/2001 on the Statute for a European Company is expressly devoted to this scenario and stipulates that 'the registered office of an SE may be transferred to another Member State […]. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person'. The same applies to the European Cooperative Society (SEC), pursuant to Article 7 of Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society, OJ L 207, 18.8.2003, p. 6. However, provision is not made for this as regards the European Economic Interest Grouping (EEIG).

[304] Article 3(1) of Regulation (EC) No 1082/2006 of 5 July 2006, reproduced in Annex 1.

[305] The most sensitive situation concerning the regional level. Certain states do not have any 'regional authorities' as a result of their size (Luxembourg, Malta, Cyprus, which is an unusual case from a legal perspective, but which in any event does not currently have any regional authorities).

[306] This question is not as critical in the area of transnational or interregional cooperation since the intensity of the activities carried out (for the most part limited to exchanges of information or policy coordination) do not require the parties to have the same competences. For a consideration of these differences, see section E below.

[307] For a good general presentation of this theory and its implications, see L. Hooghe and G. Marks, *Multi-Level Governance and European Integration*, Lanham (MD), Rowman & Littlefield, 2001.

[308] COM(2001) 428 final of 25 July 2001, OJ C 287, 12.10.2001, p. 1.

[309] Since this requirement of the Member State does not confer on it any new competence to act in an area where national law provided for regulation by federal entities, where appropriate. Thus Article 2(2) states clearly that 'where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned'. In our view, this provision should take precedence over Article 2(1)(c) and should also apply, where appropriate, in the case of the referral provided for in Article 16 of the Regulation.

[310] The legal set-up is quite complex; in this case the partners are: the Land of Baden-Württemberg, the Alsace Region, the Bas-Rhin Department, Ortenaukreis, the Urban Community of Strasbourg, the Town of Kehl, the French State, Université Robert Schuman and the Kehl Fachochschule. This grouping clearly illustrates the extent to which a cross-border cooperation body can have a heterogeneous configuration.

[311] See in this respect the established case-law of the European Court, initiated by the Order of the Court of 21 March 1997 in Case C-95/97, *Région wallonne v Commission*, (ECR. I-1787), taken over by the Court in numerous cases and recently confirmed by the Court in its judgment of 2 May 2006 in the appeal by the Regione Siciliana against the Commission (Case C-417/04 P) (not yet published).

[312] Certain decentralised administrations could, however, be implied as belonging to the list provided by states of the entities referred to in paragraph (d) of this article.

[313] This is, in particular, the argument put forward recently by Professor H. Comte at a conference held in September 2006 in Madrid on the role of states in cross-border cooperation. His argument is based notably on the Explanatory Report to the 1980 Madrid Outline Convention, which states: 'Here, the criterion of the Convention's applicability is the concept of regional or local function. "Territorial communities or authorities" was chosen as a term for covering the various potential cases without having too close a connection with the existing law of any one Member State. The term "territorial" has a geographical connotation, denoting powers covering a smaller area than those of the State. It should not be interpreted as referring only to "territorial authorities", a precise concept in the law of some Member states which is too narrow for the Convention's purposes. It is intended to embrace the diversity of systems of administrative organisation at local and regional level in the states concerned' (paragraph 24 of the Explanatory Report to the Madrid Outline Convention, Strasbourg, Council of Europe Publishing, 1980). This does seem to be a possible interpretation, but it is clearly not the scenario covered by Regulation (EC) No 1082/2006.

[314] See, for example, J. Loughlin, *Subnational Democracy in the European Union. Challenges and Opportunities*, Oxford University Press, 2001.

[315] See the list for the 15 old Member States, which appears in Annex 3 below (consolidated version of 1 January 2006).

[316] Decentralised cooperation was included in the objectives of the Lomé IV Convention during the review carried out in Mauritius (1995).

[317] See the Commission communication on the European Neighbourhood Policy (COM(2004)628 final of 29 September 2004) or the provisions of the Cotonou Agreement.

[318] For example, around Monaco a number of issues relating to town planning, waste management and public transport, which are traditionally better dealt with on the basis of a proximity – and thus cross-border – policy rather than the usual international relations ('high politics'), are pending because it is impossible from a legal perspective for French territorial authorities to cooperate with a foreign state.

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[319] Which are particularly affected by the 'border effect' we discussed in our first chapter. Opportunities to open up and refocus a cross-border region are important for these territories and their elected representatives.

[320] OJ L 210, 31.7.2006, p. 5; also reproduced in Annex 2 below.

[321] Notably Levrat (1994); against, Bernad (1993).

[322] Protocol No 2 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning interterritorial cooperation, CTES No 169 (1998). For a summary of this instrument, see Chapter 2, section A.1 above.

[323] See the 'Proposal for a regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument' (COM(2004)628 final of 29 September 2004, especially Article 2(2)(u)).

[324] That is also the reason why, as we saw above, the third subparagraph of Article 159 of the EC Treaty cannot form an adequate legal basis for an external action of the EU.

[325] CTES No 106, open for signature in Madrid on 20 May 1980. See Chapter 2, section A.1 above for a presentation of this instrument and its limitations.

[326] See Chapter 2, section A.1.1 above for these criticisms. For more specific and scathing analysis, see also E. Decaux or N. Levrat (1994), listed in the bibliography.

[327] Article 7(1) of Regulation (EC) No 1082/2006 of 5 July 2006.

[328] See section B.5 of this chapter for further details on this aspect of the convention.

[329] Article 3(2)(c) of Council Regulation (EC) No 1083/2006 of 11 July 2006, OJ L 210, 31.7.2006, p. 37.

[330] Article 6 of Council Regulation (EC) No 1080/2006 of 5 July 2006 on the ERDF (OJ L 210, 31.7.2006; p. 5, also reproduced in Annex 2).

[331] Ibid.

[332] Ibid.

[333] According to Article 6 of the ERDF Regulation, transnational cooperation includes bilateral cooperation between maritime regions not included in the category of cross-border cooperation, as defined in Article 7(1) of Regulation (EC) No 1083/2006 (OJ L 210, 31.7.2006, p. 38), which provides that cross-border cooperation encompasses cooperation between maritime regions 'separated, as a general rule, by a maximum of 150 kilometres […] taking into account potential adjustments needed to ensure the coherence and continuity of the cooperation action'.

[334] Article 6 of Council Regulation (EC) No 1080/2006 of 5 July 2006 on the ERDF (OJ L 210, 31.7.2006, p. 5; also reproduced in Annex 2).

[335] Ibid.

[336] Ibid.

[337] EUR 7 750 081 461, according to Article 21(1) of Regulation (EC) No 1083/2006, OJ L 210, 31.7.2006, p. 41.

[338] Supplemented at the 2001 Gothenburg summit with an environmental dimension.

[339] Adopted by the Commission on 25 July 2001, this White Paper is published in OJ C 287, 12.10.2001, p. 1.

[340] For example, Article 4(3) of the Karlsruhe Agreement states that a transfrontier cooperation convention cannot concern the powers a local authority exercises as an agent of the State, police powers or regulatory powers.

[341] See point B.2.2.1 of this chapter.

[342] Article 3(1).

[343] Article 7(2).

[344] This reference to the state's constitutional structure does not concern the substantive rules that would enable it to approve or reject prospective members' participation in an EGTC so much as the State's internal organisational rules, which may mean that competence for supervising the cooperation – particularly cross-border cooperation – does not lie with the authorities of the central State, but with entities that are components of the state, as is the case in certain federal states. This reference is therefore the counterpart in procedural terms of the rule laid down in Article 2(2): 'Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned'.

[345] First subparagraph of Article 4(3).

[346] This is a principle of legal interpretation, frequently used by the ECJ, according to which a provision of a text must be included for the purpose of producing a legal effect; consequently, it must have independent legal effect, which is not already produced by another provision.

[347] See point D.4 above.

[348] Article 15(3).

[349] Without analysing the law applicable to the audit standards and procedures, it is very interesting to note that as far as the control of management of Community funds is concerned, paragraph 4 of the same article provides for a derogation from this principle of compliance with internationally accepted audit standards…

[350] Article 6(4) of Regulation (EC) No 1082/2006, which states clearly that this procedure will, if necessary, derogate from the procedures laid down in paragraphs 1, 2 and 3 of this article.

[351] Second subparagraph of Article 12(2).

[352] The fifth subparagraph of Article 12(2) states: 'The name of an EGTC whose members have limited liability shall include the word "limited"'.

[353] The English version states: 'No financial liability shall arise for Member States on account of this Regulation in relation to an EGTC of which they are not a member'. The German states: '… in Bezug auf einen EVTZ, dem sie nicht als Mitglied angehören'; and the Spanish states '… no tendran responsabilidad financiera […] respecto de una AECT de la que no sean miembros'. The Italian gives rise to the same confusion over the meaning as the French version.

[354] See, for example, Article 7(1) of the Karlsruhe Agreement (quoted).

[355] Article 14(1).

[356] This work was begun by the experts but the consultations held after July 2006 – i.e. following adoption of the Regulation – revealed that most states planned to adopt rules on the basis of Article 16 of the Regulation (which invites the Member State to 'make such provisions as are appropriate to ensure the effective application of this Regulation'), and that the establishment of a catalogue of rules at this stage would be at best pointless and at worst misleading since most of the national legal frameworks were about to change. See our proposals for the Committee of the Regions in the last chapter below.

[357] But not all. In particular, in federal states the federal entities that have a power of control over the local authorities, especially in Germany, fall under a different category to the local authorities in that country.

[358] See on this matter J. Loughlin, *Subnational Democracy in the European Union. Challenges and Opportunities*, Oxford University Press, 2001, or N. Levrat (2005), pp. 63-108.

[359] Under present Community law, this is in no case prohibited by a question of Community competence. The Regulation changes nothing in this regard.

[360] Think of the rules on the employment of staff on behalf of this EGTC, or the applicability of administrative rules under national law.

[361] Thus the 1996 Karlsruhe Agreement, which provides an entirely reliable structure for cross-border cooperation that is, relatively speaking, comparable to the EGTC, had only been utilised on four occasions by 2004. Its twelfth implementation was just about to be completed in 2006…

[362] See Chapter 6, section A.1. below.

[363] Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1.

[364] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p.1.

[365] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1.

[366] Judgment of the Court of Justice of the European Communities of 5 February 1963, *Van Gend & Loos v. Netherlands Inland Revenue Administration*. Case 26/62, *ECR 1*.

[367] Thus as early as 1994 one of the experts responsible for drawing up this study wrote: "We should first recognise that from a purely practical point of view, this is an impressive solution, probably the best developed and most desirable. However, it is attributable to an institutional set-up that must now be considered very unusual" (Levrat, 1994, *op. cit.*, p. 314).

[368] See introduction to the study *Aux coutures de l'Europe*, which reports on the persistent legal problems and weak use of existing legal frameworks (*op. cit.*, pp. 23-25).

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[369] The EEIG (European Economic Interest Grouping), SE (European Company) and SEC (European Cooperative Society). See below for a comparative analysis of the instruments setting up these different legal entities.

[370] Judgment of the Court of Justice of the European Communities of 7 February 1973*, Commission of the European Communities v Italian Republic*. Case 39/72, *ECR 101.*

[371] Judgment of the Court of Justice of the European Communities of 27 September 1979, *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali. Case 230/78, ECR 2749.*

[372] Joël Rideau, "Droit institutionnel de l'Union et des communautés européennes", Paris, LGDJ, 1999 (3rd ed.), p. 823.

[373] Article 2(1)(c) of EC Regulation 1082/2006 of 5 July 2006 (OJ L 210, 31.7.2006).

[374] Council Regulation (EC) No 2157/2001 of 8 October 2001, OJ L 294, 10.11.2001, p. 1.

[375] Council Regulation (EC) No 1435/2003 of 22 July 2003, OJ L 207, 18.8.2003, p. 1.

[376] The French text of Article 78 of Regulation 1435/2003 uses the phrase "mise en application" rather than "mise en oeuvre".

[377] For the EP's appeal (Case 436/03), see OJ C 289, 29.11.2003, p. 16.

[378] Paragraph 82 of the Opinion of the Advocate General of the Court of Justice of the European Communities on Case C-436/03, heard on 12 July 2005 not yet published.

[379] *Ibid* paras. 84-87.

[380] It is also different from familiar cooperation structures (e.g. transfrontier cooperation groupings based on the additional protocol to the Madrid Convention, cooperative arrangements under national law or local transfrontier cooperation groupings in the sense of the Karlsruhe Agreement - see Chapter 2 above), since the composition of an EGTC, which brings together both national states and their local authorities and other public law bodies (Article 3 of Regulation 1082/2006) in a unique territorial cooperation arrangement, is a completely new legal entity.

[381] The Court thus states: "The effect of the third paragraph of Article 189 of the EEC Treaty [now Article 249 TEC] is that Community Directives must be implemented by appropriate implementing measures carried out by the Member States. Only in specific circumstances, in particular where a member state has failed to take the implementing measures required or has adopted measures which do not conform to a Directive, has the Court of Justice recognised the right of persons affected thereby to rely in law on a Directive as against a defaulting Member State." (Judgment of 6 May 1980, *Commission of the European Communities v Kingdom of Belgium*, Case 102/79, *ECR* 1473).

[382] In her conclusions on Case 436/03, the advocate general noted: "The provisions of the regulation therefore apply in addition to those of national law. This means that, despite occasional references to national law, an SCE is to be considered a genuinely new creation […]."

[383] The ECJ set out this principle in a judgment of 6 October 1970 (*Franz Grad v Finanzamt Traunstein*, Case 9/70, *ECR* 825), in which it states: "Therefore [i.e. whatever the formal nature of the act in question], in each particular case, it must be ascertained whether the nature, background and wording of the provision in question, are capable of producing direct effects in the legal relationships between the addressee of the act and third parties".

[384] We would note, however, that in its judgment of 6 October 1970 the Court considers that "by virtue of article 189, regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, […]". What is interesting about the wording here is that the Court considers the provisions contained in the Regulation not necessarily to produce direct effects, but only to be capable of doing so. Conversely, those provisions are also capable of not producing direct effects.

[385] These were the criteria identified by the Court to determine the scope of a rule contained in a legal act whose direct effect does not derive from Article 249 TEC (e.g. a Treaty article or provision of a directive); cf. *Van Gend & Loos* and *Franz Grad* cases cited above.

[386] Judgment of the Court of Justice of the European Communities of 30 November 1978, *Francesco Bussone v Ministro dell'aricoltura e foreste*. Case 31/78, *ECR 2429.*

[387] Ibid.

[388] In the case just cited, the Italian state had entrusted exclusively to the public authorities the production of labels provided for in the Regulation and made the issue of labels "conditional on payment of a pecuniary consideration, on condition that the consideration is not disproportionate", which did not undermine the principle of direct effect of the Regulation.

[389] OJ L 210, 31.7.2006, p. 19.

[390] Paragraph 19 of the conclusions presented on 12 July 2005 in Case 436/05 (not yet published).

[391] Principle established by the ECJ in its case law (judgment of 15 July 1964, *Costa v ENEL*, Case 6/64, *ECR 585*) and upheld on numerous subsequent occasions.

[392] Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA.*, Case 106/77, *ECR 629*.

[393] Including constitutional provisions; see ECJ order of 22 June 1965, *Acciaierie San Michele SpA v High Authority of the ECSC*, 9/65, *ECR 27* and in particular ECJ judgment of 17 December 1970, *Internationale Handelsgesellschaft*, Case 11/70, *ECR* 1125.

[394] "In this particular case the reason for choosing the form of a regulation was that a directive would first have had to be transposed into national law. This would have led in turn to a large number of implementing provisions, which would each have applied only in the territory of the particular Member State concerned. Hence, the advantages that a regulation offers would not nearly have been achieved because a regulation can create uniform law of direct application." (Paragraph 54 of the opinion of the advocate general of the Court of Justice of the European Communities, delivered on 12 July 2005 on Case 436/03.)

[395] "This instrument is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community".

[396] See interpretation of the advocate general in her conclusions on Case 436/2003 concerning Article 8 of Regulation (EC) No 1435/2003, framed in a similar way to Article 2 of Regulation (EC) No 1082/2006 (paragraph 85 of the conclusions).

[397] For details of relevant case law and the development of this principle, see J. Rideau, *op.cit.*, pp. 813 et seq.

[398] For more information on developments relating to this complex legal situation, see section D of Chapter 4 below, in particular point D.2.

[399] Article 2(2) of the Regulation states: "Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned".

[400] See Chapter 2, C. above.

[401] Article 2(1) of Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) states: "Subject to the provisions of this Regulation, the law applicable, on the one hand, to the contract for the formation of a grouping, except as regards matters relating to the status or capacity of natural persons and to the capacity of legal persons and, on the other hand, to the internal organisation of a grouping shall be the internal law of the State in which the official address is situated, as laid down in the contract for the formation of the grouping" (OJ L 199, 31.7.1985, p. 2).

[402] OJ L 294, 10.11.2001, p. 2.

[403] OJ L 207, 8.8.2003, p. 3.

[404] Since the 1980s associations of local and regional authorities (such as CEMR and AER) have called for a provision to be included in the Treaty allowing the Community to act in direct response to their needs if necessary, or for action to be restricted by a Community legal rule if their autonomy might be jeopardised by secondary Community legislation. Article I-5 of the Treaty establishing a Constitution for Europe states the following with regard to relations between the Union and the Member States: "The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." Although it seems fairly certain that the new Treaty will not come into force in its present form, this provision demonstrates that there is a consensus to remove from Community competence such questions relating to regional institutional structures, without preventing the possible development of Community action in this area.

[405] "The nature of Community law is such that it cannot be converted or incorporated into national legal systems, which would be incompatible with the autonomy of the Community legal system [...]. As established by Community case law, this feature precludes any national measure that would appear to be an incorporating measure or was likely to conceal from those subject to the law its nature as a Community law and the effects resulting from it." J. Rideau (1999), *op. cit.*, p. 813.

[406] Judgment of the Court of Justice of the European Communities of 7 February 1973, *Commission of the European Communities v Italian Republic. Case 39/72, ECR 101.*

[407] Article 18(2) of the Regulation states: "It shall apply by 1 August 2007, with the exception of Article 16, which shall apply from 1 August 2006".

[408] Judgment of the Court of Justice of the European Communities of 7 February 1973, *Commission of the European Communities v Italian Republic*. Case 39/72, *ECR 101.*

[409] Article 4(3), third paragraph: "In deciding on the prospective member's participation in the EGTC, Member States may apply the national rules".

[410] Thus, in its judgment of 2 May 2006, the Court stated with regard to the SCE that: "… the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms. That finding is not affected by the fact that the contested regulation does not lay down exhaustively all of the rules applicable to European cooperative societies and that, for certain matters, it refers to the law of the Member State in the territory of which the European cooperative society has its registered office, since, as pointed out above, that referral is of a subsidiary nature" (Judgment of 2 May 2006, *European Parliament v Council of the European Union*, Case 436/03, points 44 and 45).

[411] Recital 15 stipulates: "… recourse to an EGTC being optional, in accordance with the constitutional system of each Member State". And the first paragraph of Article 1 notes: "A European grouping of territorial cooperation, hereinafter referred to as "EGTC", *may* be established on Community territory […]" (our italics). Establishing an EGTC on the territory of a Member State is not an obligation imposed by them by Community law. It is merely a possibility deriving from the introduction by Community law of a new legal entity, the EGTC.

[412] Recital 15 of the Regulation states: "… this Regulation does not go beyond what is necessary in order to achieve its objectives [i.e. creating the conditions for territorial cooperation], recourse to an EGTC being optional, in accordance with the constitutional system of each Member State".

[413] In its precedent-setting judgment of 5 February 1963, the Court of Justice of the European Communities stated that "Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage" *(Van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26/62, *ECR* 1. What applies for individuals also applies for local authorities, which are legal persons under public law, as explicitly recognised by the Community courts (see for instance the judgment of 11 July 1984, *Municipality of Differdange and Others v Commission of the European Communities*, Case 222/83, *ECR* 2889; the point is also confirmed very clearly in the CFI judgment of 15 June 1999, *Regione Autonoma Friuli Venezia Giulia v Commission of the European Communities*, Case T-288/97, *ECR* II-1871).

[414] It is impossible for us to predict the potential snowball effect that the EGTC could have, or on how those involved in regional cooperation will assess the relative efficacy of the arrangements proposed by the Regulation compared with other legal solutions that they can use to manage and develop their cooperation.

[415] Judgment of 15 July 1964*, Costa v Enel*. Case 6/64, *ECR* 585.

[416] This point is further developed in Chapter 4, section C.

[417] For a discussion of this issue, see the conclusions of the paper by H. Comte and N. Levrat, op.cit.

[418] This principle, known in legal theory as "institutional autonomy", was defined very clearly by the Court in its judgment of 12 June 1990 (*Federal Republic of Germany v Commission of the European Communities*, Case C-8/88, *ECR* I-2321) and has since been consistently referred to. According to this doctrine, it is not for Community law to rule on "the division of competences by the institutional rules proper to each Member State, or on the obligations which, in a State having a federal structure, may be imposed on the federal authorities and on the authorities of the federated States respectively". The same principle will apply here, adapted as required to each national situation.

[419] In its landmark judgment of 9 March 1978, the ECJ established the following principle: "A national court which is called upon, within the limits of its jurisdiction, to apply provisions of community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means" (*Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, *ECR* 629). This could not be put more clearly.

[420] Except under the exception provided for in the seventh paragraph of Article 12(2), which allows a Member State to "prohibit the registration on its territory of an EGTC whose members have limited liability".

[421] Article L1115-5 of the "Code général des collectivités territoriales" (Local Government Act).

[422] This reasoning is similar to that of the court in the *Costa* case, where it stated that "the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions". Case 6/64, *ECR* 585.

[423] This obligation on the Member States in a Community regulation produces a direct effect and obligation on them. If the absence of appropriate provisions means that this Regulation can no longer be effectively applied, it could be concluded that the Member State should amend its national legislation to allow the effective application of the private right to set up an EGTC conferred on the legal entities mentioned in Article 3(1).

[424] According to which "the Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community".

[425] See the conclusions of the Court in the above-mentioned *Costa* judgment of 15 July 1964, *ECR* 585.

[426] Above-mentioned judgment of 15 July 1964, *ECR* 585.

[427] This line of reasoning was used by the Court in its judgment of 22 June 1989 (*Fratelli Costanzo SpA v Comune di Milano*, Case 103/88, *ECR* 1839), in which it stated: "It is important to note that the reason for which an individual may, in the circumstances described above, rely on the [directly applicable] provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States. It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above [i.e. are directly applicable] in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the [directly applicable] provisions of the directive and refrain from applying provisions of national law which conflict with them." But the sense is unchanged.

[428] Regrettably, though, they can still invoke the "public interest" to withhold approval, a criterion which is not easily amenable to close judicial review.

[429] Regulation (EC) No 2157/2001 on the Statute for a European Company and Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society contain similar provisions, but to our knowledge the Community courts have not taken any decision on their legal scope.

[430] OJ L 294, 10.10.2001, p. 18.

[431] OJ L 302, 20.11.2003, p. 40.

[432] End of recital 5.

[433] This is not the situation with regard to national measures relating to the SE and the SEC. These two regulations require Member States to make such provision as is appropriate to ensure their effective application, but there is no specific requirement to transmit that information. In this respect, Regulation No 1082/2006 is better conceived and worded than the two earlier regulations.

[434] OJ L 210, 31.7.2006, p. 19. See Chapter 2, section A for the content and legal scope of this acquis.

[435] See Chapter 2, section B for a description of these mechanisms.

[436] It should be noted that neither the EGTC Regulation nor the regulations on the Structural Funds require partners to use an EGTC to manage the funds. It is therefore perfectly feasible to combine the provisions of a Council of Europe convention or bilateral agreement establishing a specific cross-border cooperation structure with the rules contained in the Structural Fund regulations.

[437] Opinion of the Committee of the Regions on "Strategies for promoting cross-border and inter-regional cooperation in an enlarged European Union - a basic document setting out guidelines for the future", adopted on 13 March 2002, OJ C 192, 12.8.2002, p. 37.

[438] *Ibid.*, p. 40.

[439] *Ibid.*, p. 38. The term "trans-European cooperation" corresponds to that proposed by, the Association of European Border Regions, the Committee of the Regions' consultants, in the study on *Trans-European Cooperation between Territorial Authorities* published in 2001, op.cit.

[440] All of them stated that they intended to continue using the name currently used to define their cooperation and did not intend changing it.

[441] Article 18 of Regulation (EC) No 1083/2006, OJ L 210, 31.7.2006, p. 40.

[442] Article 21 of Regulation (EC) N° 1083/2006, OJ L 210, 31.7.2006,) p. 41.

[443] See Chapter 1 for a summary of the initial difficulties experienced with this cooperation.

[444] Article 20 of Council Regulation (EC) No 1260/1999 laying down general provisions on the Structural Funds stipulates that "At least 2.5% of the Structural Funds commitment appropriations referred to in Article 7(1) shall be allocated to Interreg" (OJ L 161, 26.5.1999, p. 20), which corresponds very closely to the proportion allocated to Objective 3 for the period 2007-2013.

[445] See Chapter 2 for details of the ratifications of each Council of Europe instrument.

[446] Thus the *Community strategic guidelines on economic, social and territorial cohesion* [note that the name envisaged by the TECE is retained here] adopted by the Council of the EU on 5 October 2006 (not yet published) state that "Generally applicable recommendations for future cross-border cooperation are not always relevant owing to the large diversity of situations".

[447] See *Trans-European Cooperation between Territorial Authorities*, op. cit. pp. 87-88.

[448] The concept of "lawful judge" is codified and takes different forms in national legal systems, largely according to historical circumstances and legal traditions. But this concept is inseparable from that of the rule of law, which is recognised and respected by all EU Member States, as stated in Article 6(1) of the TEU.

[449] See Chapter 4, section B, above.

[450] For this distinction, the reasons underlying it and the legal consequences resulting from it, see H. COMTE "Les acteurs et la légitimité des projets stratégiques transfrontaliers ", in H. COMTE and N. LEVRAT, *Aux coutures de l'Europe*, op. cit. pp. 185-208. For the relevance of this distinction, see point 4 of this section below.

[451] Opinion of 13 March 2002, OJ L 192, p. 40 op.cit.

[452] In particular by its *White Paper on European governance*, OJ C 287, 12.10.2001, p. 1.

[453] This concept was first used by G. MARKS in 1992 in his contribution in "Structural Policy in the European Community", in A. SBRAGIA, *Euro-politics: Institutions and Policymaking in the "New" European Community*, Washington, The Brookings institutions, 1992.

[454] Thus, when Eurostat's statisticians divided the Community up for the purposes of the Nomenclature of Territorial Units for Statistics (NUTS), they did not concern themselves with legal considerations; for example, they considered that Luxembourg, just like Cyprus now, corresponded to NUTS level III, along with Estonia, Latvia, Lithuania, Malta (which does not have a very large population, but whose territory comprises two islands, each one belonging to NUTS level III) and Slovenia (the last-mentioned by Regulation (EC) No 1059/2003 on the establishment of a common classification for territorial units for statistics (OJ L 154, 21.6.2003, p. 1)).

[455] Article 1(2) of the Regulation states that, although from now on the same legal framework will apply to an instrument suitable for structuring cooperation of the cross-border, transnational or interregional type, such cooperation is already extensive. But Article 7(3) of the same Regulation, whilst drafted in a restrictive and cautious manner, potentially opens the door to any other cooperative activity, in as far as it is linked to economic and social cohesion (Article 7(2)), which is broad in scope.

[456] OJ L 210, 31.7.2006, p. 7.

[457] The practitioners consulted who have well-functioning operational cooperation structures expressed the fear that the establishment of an EGTC would take up much of their time so that the time spent on structural and legal questions could not be devoted to addressing the fundamental questions for which cooperation was initiated.

[458] Obviously, the situation varies from one State to another, depending on the structure of the State and the existing mechanisms under national law allowing States to exercise such control. In some federal States, including Belgium, the central authorities no longer possess the administrative means to ensure such control over the country's regional entities.

[459] Proposal for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument (COM(2004) 628 of 29 September 2004).

[460] Article 274 of the TEC.

[461] OJ L 210, 31.7.2006.

[462] As we saw above in Chapter 3, Section A.2.

[463] See OJ C 287, 12.10.2001, p. 1.

[464] Since 1976 the "Gerlach Report" has focused on regions located at the Community's internal borders (OJ C 293, 13.12.1976).

[465] For the period 2007-2013, Regulation No 1080/2006 for the ERDF, Regulation No 1081/2006 for the European Social Fund and Regulation No 1083/2006 laying down general provisions, all published in OJ L 210, 31.7.2006.

[466] Cross-border cooperation has been mentioned in Article 265 TEC since the Amsterdam revision (see Chapter 3 above).

[467] OJ C 71, 22.3.2005, p. 52.

[468] OJ C 157 E, 6.7.2006, p. 311.

[469] See, in particular, the requests made by the Committee in its own-initiative opinion on the revision of the Maastricht Treaty (opinion 136/95, OJ C 100, 2.4.1996, p. 1).

[470] We explained above in Chapter 5, Section B.3, why it is in the interest of Member States to make their national legislative frameworks attractive to EGTCs.

[471] Although no obligation to transpose exists in this regard.

[472] It should be recalled that we showed in the conclusions to Chapter 5 that some 18 000 different legal forms of an EGTC could exist in theory.