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The European Groupings of Territorial Cooperation and the Single Market

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List of Abbreviations

| | |
|-------|--|
| CESCI | Central European Service for Cross Border Initiatives |
| CPR | Common Provision Regulation laying down common provisions for ERDF, ESF, Cohesion Fund, EAFRD and EMFF and laying down general provisions on these funds |
| CSR | Corporate Social Responsibility |
| EGTC | European Grouping of Territorial Cooperation |
| ESIF | European Structural and Investment Funds |
| IMI | Internal Market Information System |
| JTS | Joint Technical Secretariat |
| PP | Public procurement |
| PPP | Public-private partnership |
| PSO | Public service obligation |
| SGEI | Services of General Economic Interest |
| SMA | Single Market Act |
| SME | Small and Medium Sized Enterprises |
| SSGI | Social Services of General Interest |
| TEN | Trans European Networks |
| TFEU | Treaty on the Functioning of the European Union |

Introduction

Being cross-border players and European legal entities, the European Groupings of Territorial Cooperation (EGTCs) encounter specific challenges with regards to their character as vehicles of cooperation which, in accordance with their public status, have to be based on legal frameworks. The EGTC Regulation sets the cornerstones for the constitution, the general purposes and the range of partners involved, but it does and cannot regulate all issues considered important for the strategic orientation or the day-to-day business of the groupings. Therefore, important issues such as the rules governing employment or public procurement are – in accordance with the principle of subsidiarity – subject to national rules.

When implementing activities, EGTCs often encounter legal and administrative difficulties due to the fact that their actions are unprecedented in administrative terms. These ‘stumbling blocks’ related to action points are unresolved practical issues in national administrations: one example is the exchange of trainees across borders which becomes a challenging venture in administrative terms when all social and health insurance obligations have to be met¹.

Against this backdrop, EGTCs should be seen as pioneers in highlighting such difficulties and working on practical solutions. The experiences made by the EGTCs might therefore contribute to gaining new perspectives on such issues which are highly relevant for the Single Market as one of the key European projects.

According to the revised EGTC Regulation i.e. Regulation (EU) 1302/2013 [Art. 7(2.)] the policy rationale of EGTCs should– besides focusing on strengthening territorial cooperation and cohesion - also consider the contribution to overcoming internal market barriers.

The Single Market Act (SMA) can be considered as the overarching European project, being an objective as well as a policy-making process at the same time: It is not a single Act but a set of closely interlinked policy areas. The present study seeks to examine the actual and the potential relevance of key actions for EGTCs in the SMA. The analysis is understood as a comprehensive approach as it covers several dimensions:

¹Refers e.g. to the practical experience of the Eurodistrict Strasbourg-Ortenau.

- Starting from the legal implications which might influence the operative decisions in an EGTC's internal organisation and proceedings to
- the aspect of policy objectives - some of the key actions do reveal considerable potentials as part of current or future work focus for EGTCs.

EGTCs - together with European Economic Interest Groupings (EEIG) – are an option to set-up institutions for various purposes: in both cases the generation of the institutions is facilitated by EU legislation and in case of EGTC also strongly linked to the options under ETC. In addition to their cross-border nature, many EGTCs can be considered to be laboratories of multi-level governance: this is often a result of the differences in the political-administrative systems across the Member States (MS).² Thus, in addition to the number of various MS involved in the EGTCs, the groupings also often tie together several layers of administration within one MS which also opens new opportunities, provides new insights for the partners involved and offers options for new approaches to relevant policy areas such as the Services of General Economic Interest (SGEI) or e-governance. The key asset of EGTCs in this sense is their stable framework which is usually backed up by political will and longer-term commitment.

A final point is that ETC as such with its inherent dominance of public or semi-public actors, is the European objective in cohesion policy. It thereby helps to develop institutional cooperation across national borders. When having a closer look at the 12 key areas of the SMA, the importance of public actors is evident be it in the implementation of legal frameworks or directly as actors in Public Procurement (PP). The fact that EGTCs always include subnational actors, i.e. regional or local actors is a major opportunity for bringing the SMA – in its role of overarching policy – closer 'to the ground', i.e. closer to local and regional administrations which are frequently in direct contact with citizens.

Focusing on the key objective of the present study, namely the actual and potential role of EGTCs in the key areas of the SMA, it becomes quite clear that the actual and potential role and relevance strongly differs across the EGTCs. In accordance with the Central European Service for Cross-Border Initiatives (CESCI) classification, the most interesting types of EGTCs with regards to the SMA are:

- EGTCs governance (cooperation platforms aiming at creating shared strategies for the development of a functional area). E.g. the Eurometropole or the Eurodistricts or the EGTCs along the Spanish-French and the Portuguese-Spanish border;

² Recital No 7 in the preamble of the amendment EGTC Regulation points at this de-facto reality and explicitly opens EGTCs for national authorities.

- EGTCs projects (created to jointly manage a public infrastructure), e.g. the hospital of Cerdanya³ or the AECT/GECT Portalet/Pourtalet.

The practical examples cited for these two types of EGTCs can be seen as frontrunners since they have been set-up with clear-cut purposes and can develop their portfolio based on set frameworks and stable budgets. This is in sharp contrast to numerous EGTCs which have to explore possible options for ETC projects and compete for funding with other applicants.

Amendments to the EGTC Regulation - Regulation (EU) 1302/2013

The EGTC regulation foresees a clear hierarchy of laws starting from the EU Regulation, over to the convention and the national laws, as stipulated in the convention. Thus, the convention opens up an opportunity to define specific rules in various fields which are relevant to the SMA – some of these fields strongly relate to activities such as Trans European Networks (TEN) or e-governance; others point at options in internal organisation such as public procurement, e-invoicing or the legal conditions for staff.

Given the potential scope of action for EGTCs, the management of public services and infrastructure in particular, and the Services of General Economic Interest (SGEI)⁴ have been made more explicit. When acting in this field, the competency to set the terms and fees has also been made explicit in the amended Regulation.

The type of partners (institutions) which can be included has been broadened accordingly:

- also public undertakings according to Directive 2004/17/EC;
- undertakings entrusted with SGEI⁵ which in turn has a potential relevance for social businesses (as another policy focus in the SMA).

As a general rule, the amended EGTC Regulation emphasises the importance of a qualified partnership with a view to the tasks at hand. Recital 19 of the

³ Also called “Hospital Transfrontarar de la Cerdanya” located in Puigcerdà (www.hcerdanya.eu).

⁴ Recital No 8 of the amended EGTC Regulation states that it should be possible to use EGTCs in the future to jointly manage public services with particular focus on services of general economic interest (SGEI) or on infrastructure.

⁵ The Regulation provides the following indicative examples for fields of activity: education and training, medical care, social needs in relation to health care and long-term care, childcare, access to, and reintegration into, the labour market, social housing and the care and social inclusion of vulnerable groups.

amendend Regulation stipulates that: *In addition, every member in each of the Member States or third countries represented should be required to have each competence needed for the efficient functioning of an EGTC⁶ unless the Member State or third country approves the participation of a member established under its national law even where that member is not competent for all the tasks specified in the convention.* This might in some cases be a challenge since, strictly speaking, Territorial Cohesion involves a broad range of different sectoral policies and this might also be the fact when venturing into new prospective policy areas. However, it is a clear point which should be duly considered by the partners in the EGTC.

Contents of the Convention according to Reg. (EU) 1302/2013

Since the approval procedure by the Member States (MS) is limited to the Convention, the Convention will become the guiding legal framework of EGTCs. In accordance with this provision some elements which, based on Regulation (EC) 1082/2006 had been covered in the statute, will now be covered in the Convention. The statutes no longer have primacy over national law.

According to Article 8 of the EGTC Regulation, new relevant elements which have to be specified in the Convention are:

Firstly a clear notion of the law applicable – thus the Convention should stipulate the legal basis for three distinct elements:

- The applicable Union law and national law of the Member State where the EGTC has its registered office for the purposes of the interpretation and enforcement of the convention;
- The applicable Union law and national law of the Member State where the EGTC's organs act;
- The applicable Union and national law directly relevant to the EGTC's activities carried out under the tasks specified in the convention;

The amendment explicitly opens up the option for exceptions to the national law; this might allow for new governance approaches on issues such as public procurement; however it is evident that it is quite demanding to establish an exhaustive list of all rules which should be applied to the activities.

⁶Underlined by the author.

Secondly a clear focus on provisions related to staff management – key elements which previously were part of the statutes - should now be included in the Convention:

- the rules applicable to the EGTC's staff, as well as the principles governing the arrangements concerning personnel management and recruitment procedures

However the underlying provisions are very complex and require a distinction between persons hired under private or public law; in the latter case a distinction in the rule applicable can be made between the MS where the organs are located and the MS where the EGTC is registered; officials of the MS where the EGTC is located can be seconded to other offices and still their initial rules of public employment will apply whereas this does not apply to officials of the other participating state.

The rationale of the Single Market Act (SMA)

The Single Market Act is an initiative which gained momentum in 2010 in the wake of the economic crisis and the persistent economic and social problems in the crisis' aftermath. The overarching strategic aim is to make the Single Market a tangible reality for businesses and citizens.⁷

The SMA is not one single Act but a set of interlinked key policy areas. It is also an ongoing reform agenda: for many of these policy areas legislative proposals have been developed, negotiated and adopted. In some of the policy areas the Commission proposal meet serious concerns and negotiations are still ongoing, e.g. as such is the case in the railway sector.

The SMA II puts particular emphasis on sectors with significant growth potential, i.e. services and networks. The initiative also makes use of the European semester process which builds on peer pressure and lobbying for crucial actions to overcome obstacles.

⁷Cf. COM 2012 (573), Single Market Act II.

Communication on Single Market Act II

Based on the assessments of production benchmarking, economic importance, dynamic factors and single market factors, four major areas have been identified where improvements *could harness untapped potentials*⁸. The four drivers for new growth put forward in this Communication are:

1. Developing fully integrated networks in the Single Market;
2. Fostering mobility of citizens and businesses across borders;
3. Supporting the digital economy across Europe;
4. Strengthening social entrepreneurship, cohesion and consumer confidence.

⁸Cf. COM 2012 (259), p. 13.

1 Analysis of the role and the situation of the EGTCs in the Single Market

1.1 The major elements of the Single Market Act (SMA)

The first Act – in short SMA I - has set out a structure of 12 major elements; the SMA II has taken up the major elements but has subjected these elements to a regrouping thereby also making the interlinkages between the policy fields more visible and tangible.

The table on the following pages gives an overview on the 12 areas of the SMA and a tentative assessment of the relevance for EGTCs.

Table 1. Overview on the 12 elements of the SMA and assessment of potential relevance for EGTCs

| Element of the SMA | Key objective and issues | Tentative assessment of relevance for EGTCs |
|----------------------------|--|---|
| Access to finance for SMEs | <p>Fostering long-term investment in the real economy.</p> <p><i>Key:</i> Legislation facilitating access to venture capital.</p> <p><i>Issues involved:</i> EU financial instruments including ESIF (financial instruments), insolvency law, unitary patent regulation, standard VAT declarations.</p> <p>Commission Action Plan to improve access to finance for SMEs.</p> | <p>No direct influence on the main SMA policy levers but strengthening entrepreneurship is an objective of many EGTCs.</p> <p>EGTCs – with their know-how in ESIF and cross-border regions - could become active in developing financial instruments (investments to concepts resting on cross-border needs assessments ...).</p> |
| Citizens mobility | <p>Single labour market improving mobility of the workforce.</p> <p><i>Key:</i> simplification and modernisation of legislation for the recognition of professional qualifications (Directive 2005/36/EC as amended).</p> <p><i>Complementary aspects:</i> portability of basic social rights like pensions, EURES as tool.</p> | <p>Several EGTCs are active in trainee programmes (e.g. Eurodistricts in EU core area) and in recognition of vocational training titles (e.g. Galicia – Norte de Portugal).</p> <p>EGTCs should be encouraged to act as model employers, i.e. all procedures for recruitment as well as the working conditions should meet advanced requirements.</p> |

| Element of the SMA | Key objective and issues | Tentative assessment of relevance for EGTCs |
|-----------------------|--|---|
| Intellectual property | not part of the study | ---- |
| Consumers | <p><i>Key:</i> legislation on alternative dispute resolution.</p> <p><i>Issues involved:</i> Product Safety; environmental footprint of products, communication on passenger rights, consumer protection in financial markets, transparency of bank fees, <u>Action Plan on Market Surveillance</u>.</p> | Consumer protection has become a concern of citizens in particular in economically advanced regions; it could be one of the elements of e-governance in highly integrated cross-border areas. |
| Services | <p><i>Key:</i> revise legislation on European standardisation system.</p> <p><i>Complementary:</i> implementation of <u>Services Directive</u>, initiative to combat unfair trading practices.</p> | Impact on cross-border labour markets thus a framework which should be considered when proposing studies on labour market in the territory. |
| Networks | <p>Single markets in transport and other networks instead of fragmented national markets.</p> <p><i>Key:</i> legislation on TEN in Transport (including maritime transport between EU ports and Single European Sky), Energy, Telecom.</p> <p>Funding investment in crucial sectors such as energy and broadband [Connecting Europe Facility (CEF)]; transparency and markets in Public Service Obligations in transport (4th railway package, Blue Belt Initiative).</p> | <p>TEN are the centrepiece of European infrastructure policy – key element to be considered when setting up cross-regional plans related to cohesion policy; also a major element of macro-regional strategies.</p> <p>EGTCs as owners of <u>TEN infrastructure</u> is rather a far-fetched vision but their role as intermediaries in planning and in development of regional feeders to TEN could be crucial.</p> |
| Digital Single Market | <p>Digital economy that delivers sustainable economic and social benefits adequate and reliable tools to develop online activities.</p> <p><i>Key:</i> cost-efficient high-speed infrastructure, legislation on electronic signature, identification and authentication, e-invoicing.</p> <p>Standardisation of e-payment services across Europe.</p> <p>Digital Agenda for Europe, E-Commerce Action Plan.</p> | <p>E-governance and e-services for citizens as potential activity of EGTCs (venturing into areas which address citizens' concerns such as e-health or other issues closely related to SGEIs).</p> <p>EGTCs as basically public actors should apply e-invoicing.</p> |

| Element of the SMA | Key objective and issues | Tentative assessment of relevance for EGTCs |
|--------------------|---|---|
| Social businesses | <p>Promote socially responsible entrepreneurship, social businesses are key actors in social innovation; the social economy represents 6% of total employment.</p> <p><i>Key:</i> adopt legislation facilitating <u>European Social Entrepreneurship Fund</u> – Regulation (EU) 346/2013 – i.e. facilitating access of social enterprises to private funds.</p> <p><i>Complementary:</i> <u>Social Business Initiative</u> [COM 2011/682] promoting investment into such businesses, Programme for Social Change and Innovation, Communication on Corporate Social Responsibility (CSR); legislation on transparency of information provided by firms.</p> <p>Access to basic payment accounts for all citizens (basis for participation in economic life).</p> | <p>EGTCs could become active in specific policy fields linked to the Social Business Initiative in order to promote social entrepreneurship; an interesting aspect is for example fostering social services and enterprises in rural areas (to combat poverty).</p> |
| Taxation | <p>Make taxation more apt to support sustainable development (encouraging energy-saving).</p> <p><i>Key:</i> revise the Energy Tax Directive, Communication on VAT strategy.</p> <p><i>Issues touched:</i> Common Consolidated Corporate Tax Base (CCCTB), Communication on removing cross-border fiscal obstacles.</p> | <p>EGTCs have to act as models in this regard; VAT status of EGTCs could be tricky (distinction between entrepreneurial and non-entrepreneurial activity i.e. usually input VAT is not deductible in the latter case) – a distinction which is often quite tricky).</p> |
| Social cohesion | <p>Promote and facilitate service provision by businesses throughout the EU; recognition of Services of General Economic Interest (SGEIs) as key to social cohesion and as emerging European Market.</p> <p><i>Key:</i> legislation on the Posting of Workers Directive, on clarifying the exercise of freedom of establishment, <u>Communication on SGEL</u>, application of state aid rules to public service compensation.</p> | <p>Strengthening the involvement of EGTCs in the provision of SGEIs is clear intent of the amended EGTC Regulation.</p> |

| Element of the SMA | Key objective and issues | Tentative assessment of relevance for EGTCs |
|---------------------------------------|--|--|
| Regulatory environment for businesses | <p>Adopt legislation simplifying accounting directives.</p> <p><i>Key:</i> Directive to simplify financial reporting obligations for micro-entities, <u>European Private Company statute</u>, optional <u>European law contract instrument</u>, regulation to simplify cross-border recovery of debt</p> | <p>Important public governance issue but it is rather distant to the usual perception of territorial cohesion: policy-making in this area is not a task of the key players in currently known examples of EGTCs.</p> |
| Public Procurement | <p>Public procurement (PP) is an essential tool for the market representing about 18% of EU GDP; key points are transparency, new approaches to more socially responsible and environmentally friendly practices; reciprocal opening of PP markets.</p> <p><i>Key:</i> revision of the Directive on Public Procurement.</p> <p>Further on: amending directive on the award of concession contracts, legislation on procurement with third countries.</p> <p>Electronic invoicing as standard method in public procurement after award.</p> | <p>EGTCs should act as models in this regard.</p> <p>The revised PP Directive refers to EGTCs in Article 39.(5).</p> <p>The amended EGTC Regulation points out in the Preamble:</p> <p>(25) This Regulation should not cover problems linked to cross-border procurement encountered by EGTCs.</p> |

Source: COM 2012 (573), Single Market Act II, own considerations.

1.2 Internal Market Information System (IMI)

The Internal Market Information System (IMI) can be understood as the major e-governance tool for the Single Market which was started in 2009 and has been continuously expanded. It is a tool for administrative cooperation across the EU, i.e. between Commission Services and public authorities of MS but also for citizens. It can be used for mutual requests but also as repository of information. The major value added is that it is run in all EU languages. The key areas currently covered by IMI are: services (Services Directive), professional qualifications, patients' rights, SOLVIT (see below), cross-border transport of € in cash, posting of worker and e-commerce.

Some of the elements of IMI are:⁹

⁹See IMI Newsletter 2013.

- SOLVIT Centres in the EEA countries work together to informally solve problems raised by citizens and businesses concerning the misapplication of EU legislation by public authorities;
- IMI can be used to send notifications under the Service Directive: relevant national public authorities inform about changes in legislation regarding the provision of services;
- Cross-border health care: e.g. option for patients to submit a request to relevant public authority to check a care service professional's right to practice;
- E-commerce: e.g. request to another MS to stop online sale of prohibited goods etc.

EGTCs could support the dissemination of IMI as a tool for public administrations and citizens or at a later stage might even become active as cross-border public entities in order to facilitate the information exchange between public bodies in their territories. The IMI strategy¹⁰ seeks to position the system as a tool which is open for new thematic fields and even pilot projects.

1.3 Reflection on opportunities, challenges and bottlenecks

A first working hypothesis is that the more specific the purpose of the intended or existing EGTC, the higher its impact will be, assuming that wherever the EGTCs have been set up for a distinct purpose there is a concrete expectation from the partners or MS involved with regards to its role in policy delivery.

The major challenge when establishing an EGTC for a more specific purpose is to convince all partners involved that an EGTC is the better and more efficient solution. The time and effort required for negotiations and clarifications in the initial phases of the EGTC are considerable –an EGTC can be considered as a front-of pipe investment for more demanding policy tasks:

- The resulting opportunity is the option to establish a clear-cut framework which ensures efficient and effective steps at a later stage and thus in the end saves time and ensures better results, i.e. a significant contribution to the sustainability,
- The challenge is to convince all potential partners to make this initial investment which initially might seem to add to the complexity or even to result in a rigid structure which might not allow for reacting adequately to change.

¹⁰COM 2011 (75 final), pp. 8-9.

Bearing this in mind, the next step has been a more thorough examination of the 12 elements of the SMA taking into consideration the opportunities but also the underlying challenges for EGTCs.

The five areas which present the most promising options for activities among the 12 key levers of the SMA are the following ones:

- European (infrastructure) networks;
- Digital Single Market due to its relevance for e-government and e-governance;
- Social businesses;
- Social cohesion due to its relevance for SGEI;
- Citizens' mobility due to its double dimension, i.e. for citizens and the regional economies, and the potential role of EGTCs to act as intermediaries.

These are the policy fields of the SMA which offer opportunities in terms of becoming core activities for EGTCs.

Services, taxation, access for finance to SMEs and the regulatory environment for businesses – in these areas EGTCs could become regional ambassadors of the SMA: one aspect of the activities of EGTCs could be to translate the overarching ideas of the SMA to the regional and local level. At the same time EGTCs should use their position as European entities in order to underpin justified concerns with a consolidated voice and support participatory processes at local and regional level(e.g. in the field of cross-border e-governance).

Public Procurement (PP) has to be considered as a specific case. According to the CPR, Article 2 the expenditure of EGTCs is considered as public expenditure: EGTCs are public actors and thus the rules on PP apply to EGTCs. Thus many activities of EGTCs imply the application of PP from service contracts for studies to the construction of infrastructure. During the set-up of the EGTC it has to be decided which national PP rule should apply (further considerations can be found in the next section).

The table on the following pages provides an overview on the opportunities as well as the challenges and bottlenecks related to the five SMA areas which have been identified to be most promising for the core activities of EGTCs.

Table 2. Key areas of interest for activities of EGTCs

| Key areas of activity | Opportunities | Challenges& bottlenecks |
|--|---|---|
| <p><i>SMA networks</i></p> <p>European infrastructure as one of the backbones for the functioning of SMAs.</p> <p>Related to potential EGTCs activities.</p> <p>(EGTCs labelled as infrastructure projects according to the CESCO typology).</p> | <p>EGTCs implementing European infrastructure: the future role of EGTCs in infrastructure policy is an implicit intent of the amendments to the EGTC Regulation.</p> <p>Clarification is needed whether the EGTC is set up for planning and/or implementing as well as operation and maintenance or for just one or two of these steps.</p> <p>Arguments in favour of EGTCs are: framework with certain pre-defined rules; represents a longer-term commitment with the option to expand scope of action at a later stage.</p> <p>European approaches to governance and funding in TENs – new instrument is the Connecting Europe Facility (CEF) – the option is implicitly foreseen according to Article 9 of the CEF Regulation (proposals can be submitted by bodies established in MS).</p> <p>Examples of EGTCs with a focus on infrastructure:</p> <ul style="list-style-type: none"> ■ Hospital of Puigcerdà as infrastructure provider (though – with a view to SMA - it is obviously not a TEN it is still so far the outstanding example of provision of infrastructure by an EGTC), | <p>The scope of activities should be clearly set out in the Convention – each implementing step implies various tasks.</p> <p><i>Planning:</i> At the start most probably the EGTC acts as cross-border or transnational body to facilitate and manage the process – infrastructure specialists will be part of national administrations.</p> <p>Planning is the most intense phase of cross-border contacts, clarification of financing (evt. Public Private Partnership, cross-funding from several sources etc. – this has important implications for the subsequent steps) – but the planning phase is clearly limited and per se does not require the longer-term commitment an EGTC implies.</p> <p><i>Construction:</i> Procurement in case of planning services might be a challenge but the total volume will be most probably such that it is a European tender procedure – in any case the clear commitment to go for the most transparent procedure with the widest possible outreach is advisable from several perspectives.</p> <p>In case of e.g. border-crossing roads which are built as part of one contract the correct handling VAT is a noteworthy issue since VAT is due in the MS where the construction site is situated.</p> |

| Key areas of activity | Opportunities | Challenges & bottlenecks |
|---|---|--|
| | <ul style="list-style-type: none"> ■ AECT/GECT Portalet/Pourtalet (again not a TEN-T but a road of regional significance; however an example directly related to road infrastructure). | <p><i>Operation and maintenance:</i> Depending on the type of infrastructure a set of key questions might arise:</p> <ul style="list-style-type: none"> ■ These could be PPP models, public concessions, EEIGs as operators; ■ In case of roads this is comparatively easy since operation and maintenance will be most probably in hands of national undertakings or in case of particular sections of roads such as bridges or tunnels which can be seen as one technical element operation and maintenance could be in hands of one service provider and costs could be shared; ■ Depending on the level of specification of the infrastructure the arrangements for maintenance might become more sophisticated due to specifications, security standards etc. (e.g. when thinking of energy infrastructure). |
| <p><i>SMA Digital Single Market</i> Related to potential EGTCs activities. (EGTCs labelled as EGTCs governance acc. to CESCO typology)</p> | <p>EGTCs acting as pioneers for multilateral approaches to e-governance: EGTCs as basically public actors could establish a high credibility as information service provider for a lot of issues which rank among day-to-day issues of citizens in border regions (multi-lingual information and help desks on various issues).</p> <p>In its Communication on better governance for the Single Market¹¹ explicit reference is made to the use of online tools when administrations cooperate across</p> | <p>The EGTC could help to provide a visible high-quality information service, but it is obvious that it cannot be the sole activity of the EGTC;</p> <p>Looking at e-governance in more detail the most interesting issues for citizens in a cross-border context will be rather sensitive (such as questions concerning the legal frame for entrepreneurship or employment, social security etc.) and it might not be easy to ensure the sustained support and cooperation of the public actors which is needed in order to</p> |

¹¹Cf. COM 2012(259).

| Key areas of activity | Opportunities | Challenges& bottlenecks |
|---|--|---|
| | <p>borders: <i>e-government procedures should be available whenever businesses and citizens[...] make use of their Single Market rights</i>¹².</p> <p>The EGTCs could develop their profile in disseminating information about the Internal Market Information System (IMI) or even launch pilot projects in the framework of IMI.</p> | <p>provide reliable information and as a further step even to provide the option to facilitate administrative procedures.</p> |
| <p><i>SMA Social Businesses</i> Related to potential EGTCs activities (EGTCs labelled as EGTCs governance according to CESCO typology)</p> | <p>EGTCs could become active in developing new concepts for social services and entrepreneurship e.g. in rural areas in order to combat rural poverty and support social inclusion.</p> <p>Many of the EGTCs are active in territories where high and pertinent unemployment is as key challenge and where socially marginalised groups do encounter manifold social challenges (such as e.g. the Roma communities).</p> <p>Cross-Border cooperation in this area could e.g. lead to a critical mass in terms of target group in rural areas, or it could be crucial to set-up a market for the services provided by the social enterprise, or existing resources could be pooled in order to provide better services thus supporting economies of scale in service provision etc.</p> | <p>An important aspect is that the involvement into development of social entrepreneurship could be a point of departure for EGTCs to venture into cross-funding areas between ERDF and ESF.</p> <p>Under ESIF the ERDF Investment Priority 9c)¹³ explicitly foresees support for social enterprises. But e.g. also guidance to access programmes such as ERASMUS could be an aspect of fundraising via an EGTC.</p> <p>However for most EGTCs that would mean to liaise with a new set of actors and evidence of successful and smooth cross-funding is still rather scarce.</p> <p>It would be a real challenging venture but could lead definitely to profiling as specialised provider of know-how.</p> <p>First steps towards social enterprises have been done e.g. by the EGTC Pons Danubii in the frame of the project</p> |

¹²Cf. COM 2012(259), p. 7.

¹³The Investment Priority 9 (c) is anchored in the ERDF Regulation 1301/2013, Article 5 and in the ESF Regulation under Article 3 (b).

| Key areas of activity | Opportunities | Challenges& bottlenecks |
|---|--|---|
| | Social enterprises could in some cases also be the provider of SGEIs. | WORKMARKET. |
| <p><i>SMA social cohesion</i> SGEI</p> <p>Related to potential EGTC activities (EGTCs labelled as projects according to the CESCO typology)</p> | <p>Services of General Economic Interest (SGEI) is a broad concept which allows for a broad variety of activities which are governed by public actors since these are based on public service obligations – thus EGTCs could become actors in this field; the scope and organisation of SGEIs varies considerably among the MS but in general cost-efficient solutions must be found – making use of economies of scale and scope in larger, cross-border markets might be crucial in this regard.</p> <p>E.g. also the construction of infrastructure might qualify as SGEI, provided it is based on a PSO, this could apply even to broadband infrastructure in remote areas.</p> <p><i>Example:</i> EGTC Hospital of Puigcerdà as service provider.</p> | <p>The proper set-up of an SGEI requires legal expertise since state aid rules, PP and provisions governing concessions might have to be considered depending on the value of the service¹⁴.</p> <p>An obvious challenge for SGEIs is to ensure the longer-term financing of the services which requires thorough considerations at the start – ETC-funding can only be used to ensure initial assets needed and to finance a pilot period but cannot be the funding source for sustained operation:</p> <ul style="list-style-type: none"> ■ in case of the hospital Puigcerdà: cross-border agreement between health insurances; agreement on a five-years transition period in order to cover eventual operational losses (i.e. cost not covered by reimbursement from health insurances). |

¹⁴If the value is below application thresholds of PP Directives and concessions only the fundamental provisions of the TFEU apply (non-discrimination, equal treatment, transparency). Otherwise depending on the type of SGEI these aspects need to be duly considered (e.g. in case of emergency services PP might apply or not); a specific point is that also the cross-border (CB) relevance might be decisive for the application of PP – and one can assume that in case of an EGTC such CB-interest is given.

| Key areas of activity | Opportunities | Challenges& bottlenecks |
|--|---|--|
| <p><i>SMA Citizens Mobility and evt. Services</i></p> <p>Related to potential EGTCs activities (EGTCs labelled as EGTCs governance acc. to CESCO typology)</p> | <p>This is an area of growing importance in particular in densely populated and highly integrated territories but also in the border areas where historical disruptions went deeply and economic pathways differed significantly from the 50ies to the 90ies (and thus the differences in the system of professional qualifications are sometimes till significant). In such territories the role of EGTCs in education and qualification can bring into the position of intermediaries for citizens and the economy.</p> <p><i>Examples:</i></p> <p>The EGTC Galicia-Norte de Portugal has launched a project on Labour Mobility and recognition of professional qualifications in 2010.</p> <p>The EGTC Eurodistrict Strasbourg-Ortenau has established the option for trainees to absolve the practical part of their vocational training in the neighbouring region and acts also as contact point for these types of cross-border qualification.</p> | <p>Based on the Directive, contact points have been established in each MS and the IMI should serve respectively serves as information tool. The area is quite sophisticated since sectoral traditions have led to quite specific regimes in the MS and even exchange on basic features of qualifications is a quite demanding exercise.</p> <p>The relevant Directive (2005/36/EC) clearly foresees the cooperation of the public administrations¹⁵ involved – though the start might be difficult in the end a multi-lingual and multi-cultural team of an EGTC could become quite important as interlocutor between the administrations.</p> |

¹⁵See Article 8 of Directive 2005/36/EC).

1.4 Note on SGEIs

The amended EGTC Regulation emphasises SGEIs as a potential activity of EGTCs. The underlying legal considerations are quite complex and the European Commission has provided extensive guidance on it.¹⁶

SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention. A partially overlapping sub-group are the so-called Social Services of General Interest (SSGIs) which can be economic (thus being SGEIs) or non-economic in nature. Examples of services which have been regarded as economic are e.g. employment procurement activities by Public Employment Services or emergency transport services, land patient transport services or certain medical services provided in a hospital.¹⁷

In the initial legal analysis of the intended SGEI it needs to be clarified whether state aid applies to the public service compensation or not, whether it can be regarded as De-Minimis aid or whether it has to be subject to notified aid etc. In public transport PP or provisions on concessions might have to be applied: in short the development of an SGEI requires a substantial and comprehensive analysis of these aspects as part of the initial feasibility study.

1.5 Public Procurement

According to CPR, Article 2 the expenditure of EGTCs is considered as public expenditure: EGTCs are in principle public bodies and thus PP applies. This is also confirmed in the amended PP Directive which explicitly mentions EGTCs. The amended PP Directive (2014/24/EU), Article 39 (5) stipulates that EGTCs have to choose the national procurement law which they apply – this can be:

- either the law of the MS where the EGTC has its registered office,
- or the MS where the EGTC carries out its activities.

These provisions can apply for an unlimited or for a limited period of time, or for specific type of contracts etc. Thus, the amended PP Directive is quite flexible on that point. This flexibility could be considered when elaborating and negotiating the Convention of the EGTC.

¹⁶See EC 2013.

¹⁷See EC 2013, p.31.

A demarcation line has to be drawn to so-called cross-border procurement. Recital (25) in the preamble of the amended EGTC-Regulation stipulates that *this Regulation should not cover problems linked to cross-border procurement encountered by EGTCs.*

Article 39 of the amended PP Directive refers in principle to procurement involving contracting authorities from different MS. Cross-border procurement is regulated in Articles 1 to 4 and refers to the situation where:

- either several contracting authorities from different MS award a public contract, conclude a framework agreement or operate a dynamic purchasing system (but also in this case the key point is to come to an agreement in writing clarifying responsibilities, applicable national provisions, and detailed provisions on the proceedings),
- or e.g. contracting authority from one MS uses the centralised purchasing system of another MS.

In contrast to this the EGTC is seen as one public body and the applicable national provisions should be defined. The following considerations seem crucial when discussing PP in the framework of EGTCs:

1.6 Key considerations

- EGTCs should act as models in PP; in most cases PP expertise will not be available in-house thus EGTCs should rely on expert services in order to apply the proper procedure; here the challenge might start because in principle a PP expert who is aware of the national provisions of all MS represented in the EGTC would be best in order to see potential implications from a comprehensive perspective.
- EU-wide procedures do not need to be discussed: the thresholds are clear and proceedings have to follow clear-cut rules which ensure equal treatment of economic operators across the EU territory.
- The tricky cases might be in particular service contracts below the EU threshold; in particular this refers to all forms of procurement which according to national provisions would not necessitate a wider publication but could be done as restricted procedure. In such cases, the argument of administrative simplification might stand against the diplomatic code of conduct which would claim for a wider publication; one option would be to apply for contracts below the EU threshold the national provisions which foresee the procedures with a wider publication (however other aspects might have to be considered since e.g. frequent changes in PP rules in one MS might cause serious delays due to legal uncertainties etc.).

- E-invoicing should become the standard in PP after contract award¹⁸; in the end it might be challenging for EGTCs to meet the requirements according to two or more national provisions related to e-invoicing and to make it operational in practice but such pioneer work as intermediaries in administrative cooperation should be understood as one of the major practical contributions to e-governance.

1.7 Additional points related to model approaches in PP

- PP could contribute to innovation and EGTCs could act in this sense: recital (37) of the amended PP Directive states that buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.
- EGTCs could also be frontrunners in the consideration of social and environmental aspects in PP: the amended Directive encourages contracting authorities to integrate such considerations; the key point is that criteria such as requirements according to eco-labels or approaches to life-cycle-cost are described in a manner which allows for fair and transparent conditions for all potentially interested economic operators.
- Recital (42) of the amended PP Directive refers to an increased interest in procedures which provides for negotiations – such procedures are expected to contribute to an increase in cross-border trade (a hypothesis stemming from the observations of the outcomes of such procedures in the past): these are competitive procedures which involve negotiations or so-called competitive dialogues – foreseen for cases where the contracting authorities are unable *to define the means satisfying their needs or of assessing what the market can offer*. This could be the case for activities including design and innovative solutions (e.g. one could think of a tender for innovative e-governance solutions or intellectual services, for planning of major integrated transport infrastructure, etc. i.e. specific services) or in case when an open or restricted procedure resulted in irregular or unacceptable tenders; EGTCs could consider to venture into such innovative forms of PP.
- EGTCs should be aware of the contents of e-Certis which is the database for templates of national certificates that are used for cross-border public procurement – not that EGTCs apply cross-border PP but the knowledge on what has been included in the database from the MS which are represented in the EGTC could be valuable in order to ensure fair and transparent conditions.

¹⁸See COM 2012 (573 Final), Key action 10, p. 14.

Based on the potential activities of EGTCs it is important to note that the amendend Directive on PP duly establishes the demarcation line to SGEI, which has rather implications for competition (state aid) rules than for PP.

2 The Conventions as the key legal framework of EGTCs

According to the amended EGTC Regulation, the approval procedure by the Member States (MS) is limited to the Convention. As a result, the Convention will become the guiding legal framework for EGTCs. In accordance with this provision, some elements which had been covered in the statutes according to Regulation (EC)1082/2006 will now be covered by the Convention. The statutes no longer have primacy over national law.

According to Article 8 of the EGTC Regulation the relevant new elements which have to be specified in the Convention are:

2.1 Legal basis

- The applicable Union law and national law of the Member State where the EGTC has its registered office for the purposes of the interpretation and enforcement of the convention.
- The applicable Union law and national law of the Member State where the EGTC's organs act.
- The applicable Union and national law directly relevant to the EGTC's activities carried out under the tasks specified in the convention.

2.2 Staff

- The rules applicable to the EGTC's staff, as well as the principles governing the arrangements concerning personnel management and recruitment procedures.

Further important elements according to the recitals in the preamble to the amended EGTC Regulation are:

- Recital No (23) on third countries' participation: As a consequence of the opening up of EGTCs to members from third countries or OCTs, the convention should specify the arrangements for their involvement.
- Recitals No (22) and (24) on SGEI and public infrastructure: The convention should also list the applicable Union and national law directly relevant to the EGTC's activities carried out under the tasks specified in the convention, including where the EGTC is managing public services of

general interest or infrastructure.; ... an EGTC's assembly should be able to define, if the convention specifically so provides, and, in compliance with Union and national law, the terms and conditions of the use of an item of infrastructure the EGTC is managing, or the terms and conditions subject to which a service of general economic interest can be provided, including the fees to be paid by the users.

2.3 Review on examples of existing EGTCs

In order to get an impression which provisions successful EGTCs have anchored in their Conventions and/or statutes on sensitive points such as staff and PP, the documents of four examples have been examined. Two examples which stand for EGTCs related to Governance (Eurometropole and Eurodistrict Strassbourg-Ortenau) and two examples for EGTCs related to infrastructure (Hospital de Puigcerdà and Portalet/Purtalet).

The two examples of EGTCs which have the explicit objective to manage infrastructure have the following scope of action:

- Hospital of Puigcerdà: plan, build and operate a hospital with 64 beds;
- Portalet/Pourtalet: management of the border crossing in the Pyrenees – an existing mountain pass road with a length of about 56 km, in particular the maintenance of the road (quality of roads' conditions and in particular their maintenance during winter months).

The following table presents the most interesting clauses found in the conventions and statutes.

Table 3. Summary: Examples of clauses in the conventions and statutes

| Aspect | Examples of provisions in statutes and conventions of existing EGTCs |
|--------------------|---|
| Legal basis | <p><u>Hospital of Puigcerdà</u></p> <p>According to the <u>convention</u> the provisions of the Spanish national law as well as the provisions of the autonomous province but under inclusion of French provisions if deemed necessary due to the subject matter. A similar clause is part of the <u>statutes</u>.</p> |
| Activities | <p><u>Hospital of Puigcerdà</u></p> <p>The <u>convention</u> states as mission the construction, operation and management of the hospital. The functions of the EGTC during the construction phase, functions as part of operation and as part of management are duly described.</p> <p>The <u>statutes</u> go into much more detail when describing the ancillary competencies and activities of the EGTC in order to fulfill these functions.</p> <p><u>Portalet/Pourtalet</u></p> <p>In the <u>convention</u> there is a general introductory general note on the intent to implement CBC projects in order to strengthen territorial cohesion but also an explicit reference to the management of the CB road is made, further on to programmes, projects and actions in the fields of tourism, accessibility, cultural heritage and economic activities in joint interest</p> <p>The <u>statutes</u> include a more detailed (geographical) reference to the road.</p> |
| Public Procurement | <p><u>Eurodistrict Strasbourg-Ortenau</u></p> <p><u>statutes</u>: PP is done according to the French <i>Codes de marchés public</i> (provisions on PP) and the assembly should establish a PP commission in accordance with the <i>Code général des collectivités territoriales</i> (i.e. the common provisions on administrative territorial units); a similar clause is foreseen for that the EGTC takes over provision of SGEI or of a concession.</p> <p><u>Eurometropole</u></p> <p>Similar clause on PP in the <u>statutes</u> but a second clause stipulates that the PP commission should seek to ensure the widest possible publicity of the procurement procedure</p> <p><u>Hospital of Puigcerdà</u></p> <p>The <u>statutes</u> refer to the Spanish PP provision which seem to make explicit reference to EGTCs, stating that Community law prevails.</p> |

| Aspect | Examples of provisions in statutes and conventions of existing EGTCs |
|--------|---|
| Staff | <p data-bbox="379 282 786 315"><u>Eurodistrict Strabourg-Ortenau</u></p> <p data-bbox="379 353 1406 461">Article (L5721-1) of the common provisions on administrative territorial units is the basis for the employment of staff; the Assembly decides on budget and thus also on staffing numbers.</p> <p data-bbox="379 501 576 535"><u>Eurometropole</u></p> <p data-bbox="379 573 1406 752">The EGTC is entitled to have its own staff (based on legal title and contract) or through secondment; equal working conditions for the entire own staff have to be ensured regardless of legal status, nationality and place of residence; in case of secondments the agreement is settled between the EGTC and the concerned institution.</p> <p data-bbox="379 792 611 826"><u>Portalet/Pourtalet</u></p> <p data-bbox="379 864 1406 936">According to Spanish law based on general provision for public employment in Spain.</p> <p data-bbox="379 943 667 976"><u>Hospital of Puigcerdà</u></p> <p data-bbox="379 1014 1406 1153">Staff employed according to the law of the autonomous Spanish community; staff selection based on principles of transparency, wide publicity, capacity and skills following the <i>basic rules of public employment</i>; the staffing should be subject to regular evaluation (functions, efficiency and effectiveness)</p> |

Source: statutes and Conventions of the EGTCs

2.4 Note on Staff

The legal conditions regarding staffing in the EGTCs is one of the initial challenges encountered by most of the Groupings which have reached this stage. A thorough analysis of all legal aspects governing the staffing of EGTCs would exceed the scope of this study.

According to the amended EGTC Regulation (Article 8) the Conventions – having primacy over national law – should establish the the rules applicable to the EGTC's staff, as well as the principles governing the arrangements for personnel management and recruitment procedures. Recital (26) in the preamble of the Regulation provides further explanation to this point: *It should be possible for different options as to the choice of rules applicable to staff of EGTCs to be laid down in the convention. The specific arrangements concerning personnel management and recruitment procedures should be addressed in the statutes.*

Thus the Conventions should lay down the principles and the law applicable, while the statutes should cover the necessary operational specifications.

However the underlying provisions are very complex and require a distinction between persons hired under private (taking into account Reg. 593/2008 on the contractual relations) or public law. In case of persons employed under public law a distinction in the rule applicable can be made between the MS where the organs exercise their power and where the EGTC is registered. The essential point is that in some cases it must be possible for persons employed under public law to be seconded to other offices while still rules of origin of public employment still apply.

The situation for staff contracted by the EGTC is quite obvious: practical observations in the large number of Joint Technical Secretariats (JTS) which manage ETC programmes across the EU one can see that in the end the wage levels and the social security arrangements for staff tend to correspond to those that apply to the place of registration of the EGTC. In case of sharp wage gradients between the MS and an EGTC registered in the less wealthy MS specific conditions might have to be formulated in order to attract staff from the neighbouring country.

A further hint on the importance of the issue of EGTCs as frontrunners in terms of cross-border employers is provided in recital (27) in the Preamble: *Member States should further make use of the possibilities provided for under Regulation (EC) No 883/2004¹⁹ of the European Parliament and of the Council to allow by common agreement for exceptions with regard to the determination of the legislation applicable under that Regulation, in the interests of certain persons or categories of persons, and to consider the staff of EGTCs as being such a category of persons.*

These possibilities are anchored in Article 16 of Regulation (EC) 883/2004; the Article stipulates the option for exceptions from:

- Article 11 of the Regulation; the Article establishes the principle of territoriality (i.e. persons should be subject to the rules of one MS only);
- Article 15 which foresees the possibility that auxiliary staff of the EC may opt to be subject to the legislation of the MS where they are employed or their previous place of work or according to their nationality – this right to opt may be exercised once upon start of the employment.

¹⁹Regulation (EC) 883/2004 on the coordination of social security systems.

It is important to note that the application of such provisions is unprecedented in the sphere of EGTCs and it might definitely require legal expertise to be put into practice.

2.5 Convention and statutes – need for a clear-cut legal frame and a living document

It is important that there is a framework for the EGTC which is mutually understood as a ‘living document’, i.e. that it can be subject to change. This is important since a brief review of four examples of statutes and conventions of existing EGTCs shows that the focus at the initial stage is on different issues than in the subsequent development stages. At the start of an EGTC the focus is on:

- mission statement (objectives and tasks),
- organs and their procedures and capacities,
- decision-making processes,
- official and working languages,
- setting-up the budget,
- basis for the calculation of membership fees.

Depending on the specific development path of the EGTC, a need to clarify operational cornerstones will most probably emerge. Following the amended EGTC Regulation the statutes are more likely to become the living document since an amendment to the statutes will no longer require an approval from the member states involved. Thus the initial decision on the elements to be anchored in the Convention and those to be included in the statutes is also of strategic nature. The compulsory elements in the Convention might rather be kept open in order to allow for subsequent elaboration of more detailed provisions on operational points in the statutes.

Evaluating the statutes and the Convention in the mid-term (i.e. three to five years) could be useful to see whether there are adjustment needs to the statutes.

2.6 Summary: Reflection on clauses in the Convention

In general it can be assumed that:

- very sophisticated notions of the legal basis might impede the process of national approval of the Convention since it will tend to necessitate the involvement of several administrative units to assess the potential implications;
- the more specific the intended purpose of the EGTC, the more the applicable provisions need to be discussed ex-ante, i.e. during the negotiation and elaboration of the Convention

The following table is a synthesis of the reflections in the previous sections.

Table 4. Synthesis of the reflections in the previous sections

| Issue | Reflections on contents of future Conventions |
|-------------------|---|
| Tasks &Activities | <p>Reg. (EU) 1302/2013, Article 8:</p> <p>The Convention shall specify the applicable Union and national law directly relevant to the EGTC's activities carried out under the tasks specified in the convention.</p> <p>For <u>EGTCs with a broad focus</u>, i.e. which intend to work on projects and actions in the field of governance and territorial cohesion it might be challenging to specify the national laws directly relevant – strictly speaking it could be interpreted as the need to draw up a substantial list of national, regional and local provisions applicable of two or more MS plus the EU Regulations which apply in case of the implementation of ETC projects. In the end a long list most probably with a limited added value for the stakeholders of the EGTC and moreover the inherent risk including a stumbling block for the national approval procedure.</p> <p>Thus for such EGTCs it would be important to define tasks and potential activities on a more general and operational level detached from the broad scope of the objectives. It is clearly advisable to look on tasks from their practical side, i.e. which tasks might require PP, which tasks such as providing administrative information to citizens might touch tricky legal questions etc.</p> <p>A different situation is given in case of <u>EGTCs with a narrow focus</u> as centrepiece of future activities such as a specified SGEI or the construction and operation of infrastructure. In such cases the initial clarifications of the applicable provisions are essential.</p> |

| Issue | Reflections on contents of future Conventions |
|-------|---|
| PP | <p>The amended PP Directive (2014/24/EU), Article 39.(5) stipulates that EGTCs have to choose the national procurement law which they apply – this can be:</p> <ul style="list-style-type: none"> ■ either the law of the MS where the EGTC has its registered office, ■ or the MS where the EGTC carries out its activities. <p>Article 39 of the PP Directive opens the possibility that the provisions set in the Convention of the EGTC on PP can apply unlimited or for a limited period or for specific type of contracts etc. – thus the amended PP Directive is quite flexible on that point. This flexibility could be considered when elaborating and negotiating the Convention or the statutes of the EGTC.</p> <p>An important decision is whether the approach to PP is determined in the Convention or it is explicitly subject to more detailed provisions in the statutes. This will depend on the exact formulation in the Convention – whether PP is understood as part of the law for the enforcement of the Convention or the law relevant to the activities.</p> <p>The clear advice is that in particular for services with a value below the relevant thresholds for EU-wide procedures the procedure with the widest possible publication should be chosen (in particular with a view to non-standard services such as studies).</p> <p>According to the amended Directive on PP one could decide to take the national provisions requesting the procedures with the wider publication for such contracts.</p> |
| Staff | <p>Reg. (EU) 1302/2013, Article 8:</p> <p>The Convention shall specify the rules applicable to the EGTC's staff, as well as the principles governing the arrangements concerning personnel management and recruitment procedures.</p> <p>As regards the rules a more thorough examination of the underlying options and their legal implications would be required.</p> <p>So far the more advanced examples from existing EGTCs as regards <u>general principles on staffing</u> which could be introduced in the Conventions are:</p> <ul style="list-style-type: none"> ■ clarification on which basis the EGTC is entitled to have its own staff – e.g. based on legal title and contract or through secondment; ■ a clear reference to the principles of the TFEU, i.e. equal working conditions for the entire own staff have to be ensured regardless of legal status, nationality and place of residence; ■ principles in case of secondments of staff to the EGTC, e.g. that the agreement is settled between the EGTC and the concerned institution; <p>The more specific arrangements on staff management and recruitment procedures should be laid down in the statutes.</p> |

Source: own considerations.

3 References

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