



Work Package 6 “Legislation”

THE EUROPEAN GROUPING OF TERRITORIAL COOPERATION (EGTC)

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1 The international legal framework of transborder cooperation

The Council of Europe set up a framework for transborder cooperation with the **European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities** (also called Madrid Convention) which was opened to signature the 21 of May 1980. This text has an important political value because it recognizes the importance of transborder cooperation and is also the basis of the legitimacy for the local entities to develop such actions which go beyond the national territory and legal order. The Outline Convention provides also in the first paragraph of its second article the definition of the notion of „transborder cooperation” as *„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”*. The limit to the transborder cooperation is the sharing of competences in each State as specified in the same paragraph: *„Transfrontier co-operation 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”*. The notion of „territorial communities and authorities” is also defined in the second paragraph of the second article as *„communities, authorities or bodies exercising local and regional functions and regarded as such under the domestic law of each State”*.

Two protocols to the Outline Convention were concluded and a third Protocol is still in project: the **Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities** and the **Protocol N°2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation**. The first additional protocol was opened to the signature in November 1995 and entered into force in December 1998. It recognized a subjective right to the territorial entities to develop crossborder relations in the limits of the field of competences. The second additional protocol was opened to the signature in May 1998 and entered into force in February 2001.

Until the adoption of the **Regulation (EC) N°1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC)**, the cooperation happened principally with agreements between territorial entities adopted on the basis of the bilateral- international law or within the framework of conventions of the Council of Europe. The regulation set up common regulations and incentives for a cooperation between territorial entities in the implementation of the structural policies.

The Preamble of the EGTC Regulation specifies the **link between the international law on transborder cooperation and this instrument**. It specifies that *„[the] Council of Europe acquis provides different opportunities and frameworks within which regional and local authorities can coop-*

erate across borders” and 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”.

The legal framework created by the Council of Europe is important because it has set up the conditions for the territorial cooperation, which was initially crossborder cooperation. However the results are limited and it is probably because of the weight of the States in this proceeding. Furthermore we have to add that not all the Alpine States ratified the legal instruments adopted by the Council of Europe. All the Alpine States ratified the Framework Convention. Concerning the two Protocols, Italy and Liechtenstein did not ratify them. That is why the paragraph 5 of the Preamble of the Regulation specifies that „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”.

2 The Regulation (EC) n°1082/2006 on a European Grouping of Territorial Cooperation

According to **Article 249, paragraph 2, of the TUE**, „[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”. However the Regulation (EC) No. 1082/2006 determines in its **Article 16** that Member States have to adopt the necessary regulations within their respective legislation to ensure effective application. It could be surprising that a regulation which is directly applicable (unlike to the directive which need to be transposed in national law¹) foresee the adoption of national regulation for the application of the regulation but it is not the first time that such a procedure is required. We will study in the second part of the study the provisions adopted in the different Alpine EU-Members in order to implement the Regulation (EC) No. 1082/2006.

2.1 The aim of the Regulation n°1082/2006

Regulation (EC) N°1082/2006, of the European Parliament and Council, of 5 July 2006, establishes the juridical figure of the **European Grouping of Territorial Cooperation (EGTC)**. It is a new juridical instrument for territorial cooperation within the framework of the European Union, permitting the establishment of public entities with a juridical personality with the aim of facilitating and promoting territorial cooperation among its Members with a view to strengthening economic and social cohesion.

Article 1, paragraph 2, of the regulation: „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”.

Three different realities are inherent in the notion of territorial cooperation referred to in the above mentioned Community Regulation: **crossborder cooperation, transnational cooperation, and inter-regional cooperation**. The EGTC is a juridical figure that is particularly suited for the execution of cooperation actions or projects involving established partners in different Member States, namely those with access to European Union cofinancing through structural funds.

¹ Article 249, paragraph 3, of the TUE : “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

Territorial cooperation for improving the territorial cohesion is a new objective of the EU. A title of the future Treaty (*Lisbon Treaty*) is dedicated to the „*economic, social and territorial cohesion*”. The Protocol n°28 is also dedicated to this concept. According to **Article 3, paragraph 3**, of this Treaty, „*[the Union] shall promote economic, social and territorial cohesion, and solidarity among Member States*”². This concept of territorial cooperation was not present in the former Treaties.

The use of an EGTC³

It is primarily a tool to be used for the management of EU Structural Funds, but different functions can be envisaged for an EGTC:

- In charge of the implementation of a Territorial Cooperation programme (upon delegation by the Member State to the EGTC);
- Lead partner or partner in an Territorial Cooperation project;
- Other cooperation actions with EU-funding;
- Other cooperation actions without EU-funding (yet actions outside EU funding can be restricted by Member States to ERDF-like actions (Art.7 (3))).

The potentialities of the EGTC for the management of INTERREG Programmes⁴

Territorial cooperation still exists through Europe and is particularly supported with the INTERREG programmes. As mentioned in the Operational programme Alpine Space for the period 2007-2013, „*[the] Alpine Space offers a tradition in transnational cooperation over several decades, starting from political and administrative cooperation on national or regional level to cooperation on smaller scale between local authorities and private institutions, partly within the frame of European Community Initiatives and Programmes (CIP)*”⁵. There is a specific programme dedicated to the Alps, the INTERREG Alpine Space programme). The transnational cooperation in the Alps happened within „*working communities (...)* or further initiatives and networks of relevant actors were established such as “ARGE Alpenstädte” (network of small and medium-sized Alpine towns), „Alliance in the Alps” (network of communities aiming at implementing the Alpine Convention locally), „Alpine Network of Protected Areas”, the “REGIONALP” platform of the Pilot Action Programme „Eastern Alps”

² See also the article 174 of this text (ex Article 158 TEC): „*In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.*

Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions”.

³ Online on www under URL: www.interact-eu.net/the_egtc_regulation/68 (26 May 2009).

⁴ Online on www under URL: www.interact-eu.net/egtc_and_interreg/67 (26 May 2009).

⁵ *European Territorial Cooperation 2007 – 2013, Operational Programme Alpine Space*, p. 9.

and numerous cooperation between private, public bodies and NGOs”⁶. The importance of the Alpine Convention in this cooperation is also underlined in the Operational Programme.

However **the existing cooperation needs a juridical statute** and it is added in the European regulation on the EGTC that „[the] existing instruments, such as the European economic interest group, have proven ill-adapted to organising structured cooperation during the 2000-2006 programming period”. Currently, as example, only 6% of the INTERREG IIIA programmes are managed by a cross-border structure, acting as Managing Authority, Paying Authority and/or Joint Technical Secretariat. Most programmes are actually managed by local, regional or national authorities. Several cases can be encountered:

- „**Concentrated**” management: a single authority is in charge of managing the programme, acting on behalf of the other partners, on the basis of a convention signed by all partners.
- „**Decentralised**” management: the functions of MA, PA and JTS are ensured by several authorities (on one side or on all sides of the border), or the authority in charge of these functions uses intermediate bodies to implement part of these functions in the other country.

Probably one of the main challenges that joint structures have to face is connected with their legal personality. This has implications e.g. on the power to hire international staff or to be bound to a national legal framework. The EGTC should be a tool to step over these difficulties as well.

2.2 The „legal nature” of the EGTC

2.2.1 Legal personality of the EGTC

According to **Article 1, paragraph 3**, of the regulation, „[an] EGTC shall have legal personality”. It is specified in the next paragraph 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. It may, in particular, acquire or dispose of movable and immovable property and employ staff and may be a party to legal proceedings”. According to **Article 5** legal personality is acquired on the day of the registration and/or publication of its statutes.

2.2.2 Scope of the EGTC

According to **Article 1**, the geographical scope of the EGTC regulation is the cross-border, territorial and interregional cooperation. The thematic scope is strengthening economic and social cohesion (**Art.1**)⁷.

⁶ European Territorial Cooperation 2007 – 2013, Operational Programme Alpine Space, p. 10.

⁷ Online on www under URL: www.interact-eu.net/the_egtc_regulation/68 (26 May 2009).

Article 1, paragraph 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”.

Article 7, paragraphs 2 and 3: „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.

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”.

The limit to the scope of the regulation is to exercise **actions within the limits of the members’ competences under national law (Article 3, paragraph 1:** „An EGTC shall be made up of members, within the limits of their competences under national law [...]”).

Another limit is set up in **Article 13: the public interest.** It means the public interest of a Member State. Under the concept of public interest are included „public policy, public security, public health or public morality, or public interest” of a Member State. The Member authorities appreciate themselves the existence of such a contravention. But the **second paragraph of Article 13** is like a “**safeguard clause**” towards a possible unjustified position of these authorities:

„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”.

2.2.3 Composition of the EGTC

Article 3 of the regulation deals with the composition of the 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:

- (a) **Member States;**
- (b) **regional authorities;**
- (c) **local authorities;**

(d) **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.

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**".

According to the Directive 2004/18/EC, „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) having legal personality; and

(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”.

2.2.4 Creation of the EGTC

Article 4 of the regulation deals with the **establishment** of an EGTC and defines a specific procedure with an important role devoted to the State. In fact, according to the **paragraph 3** of this article, „the Member State concerned shall [...] 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”.

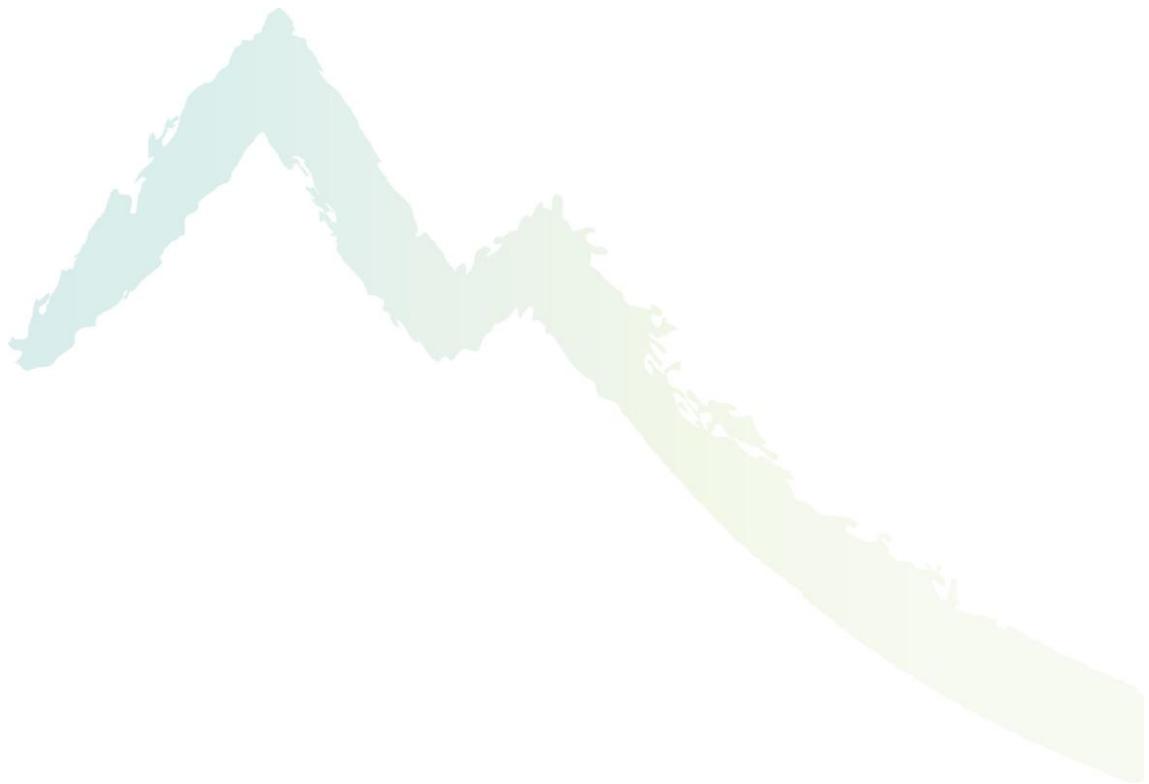
2.2.5 Basis of the EGTC: the Convention and the Statute (Articles 8 and 9)

An EGTC is founded by a convention and a statute, both adopted unanimously. Prior to foundation, the convention and the statute have to be transmitted to the central authorities of the national states for approval. **Article 8** of the regulation specifies the minimal requirements of the convention like for instance the specific objective and task of the EGTC, its duration and the conditions governing its dissolution, the list of the EGTC’s members. This whole minimal requirement and also others provisions have to be contained in the statute of the EGTC according to **Article 9** of the regulation.

2.2.6 Dissolution of the EGTC/Shelf life of the EGTC

The (ordinary) conditions of the dissolution of the EGTC have to be specified in the convention. According to **Article 8, paragraph 2**, „[the] convention shall specify [...] the specific objective and tasks of the EGTC, its duration and the conditions governing its dissolution”.

An extraordinary procedure is foreseen in **Article 14**. This case does not concerns the provisions specified in the convention of the EGTC: it is an extraordinary procedure. Such dissolution can be decided in case 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 can be an administrative or a judicial procedure.



3 The European Grouping of Territorial Cooperation in the Law of the Alpine States

According to **Article 18**, the regulation entered into force (except for **Article 16**) the 1st August 2007.

Article 18 of the regulation: „*This Regulation [...] shall apply by 1 August 2007, with the exception of Article 16, which shall apply from 1 August 2006*”.

Article 16, which requires the adoption of national provisions in order to ensure the effective application of the regulation, entered into force the 1st August 2006.

Article 16, paragraph 1, of the regulation: „*Member States shall make such provisions as are appropriate to ensure the effective application of this Regulation*”.

There were difficulties through the Alps for the adoption of national provisions for the implementation of the regulation. These difficulties deal with the effects of the regulation in the national orders (competencies of territorial entities in the field of transborder cooperation). It deals also then with the sharing of competences within the Alpine States.

3.1 The European Grouping of Territorial Cooperation in Austrian Law

3.1.1 The national and regional provisions

There is/was a debate in Austria in order to clarify if who (*Länder* or *Bund*) is competent to adopt the legislation for the EGTC. In the beginning of the transposition's proceedings, it was defined as a *Länderkompetenz*. Now it is clear that it is both competence of the *Bund* and the *Länder*: it will depend on the fields covered by the EGTC. It is an application of the so-called „**Generalklausel**” integrated in the **article 15 of the Austrian Basic Law/Constitution**. **Article 15** is about the (about the sharing of competences between the *Bund* and the *Länder*). There will be 9 + 1 laws on the EGTC: 9 laws adopted on the regional (*Länder*) level and 1 adopted on the federal level.

At the beginning of summer 2008, a **bill**⁸ was proposed on the federal level [*Entwurf: „Bundesgesetz über Europäische Verbände für territoriale Zusammenarbeit (EVTZ Bundesgesetz – EVTZ-BG)*”] and each *Länder* had to give his its opinion about the bill during the summer. There were different opinions according to the *Länder* on this topic⁹. This Bill was sent by the National Council (*National-*

⁸ This text is under adoption at the date of the redaction of the text (End of March 2009): there will be changes in the next days.

⁹ On line on URL: www.parlament.gv.at/PG/DE/XXIII/ME/ME_00210/pmh.shtml (10 March 2009)

rat) to the Constitutional Assembly (*Verfassungsausschuss*) during its 22. Session, the 19th May 2009.

The first paragraph of this bill laid down the scope/area of application of the text. According to this first paragraph this law will be applied in case of the participation of the Bund in an EGTC and as far as the fields concerned by the EGTC do not fall in the exclusive competence of the *Länder*. Nature protection fall for instance in the exclusive competence of the *Länder*.

Article 1: „Dieses Bundesgesetz gilt [...]

1. für die Teilnahme [...] des Bundes sowie [...] von Einrichtungen gemäß Art. 3 Abs. 1 lit. d der Verordnung (EG) Nr. 1082/2006 über den Europäischen Verbund für territoriale Zusammenarbeit (EVTZ), ABl. Nr. L 210 vom 5. Juli 2006 S. 19, (im Folgenden EVTZ-Verordnung) und von aus solchen Einrichtungen gebildeten Verbänden an einem Europäischen Verbund für territoriale Zusammenarbeit (im Folgenden: EVTZ), soweit die genannten Einrichtungen und Verbände nicht in den selbständigen Wirkungsbereich der Länder fallen, sowie
2. für die Anzeige, Registrierung, Finanzkontrolle und Auflösung von EVTZ mit Sitz im Inland, all dies soweit die EVTZ-Verordnung keine Regelung enthält oder ausdrücklich auf ausführende Rechtsvorschriften der Mitgliedstaaten Bezug nimmt“.

On the regional level, laws were adopted and are under adoption in order to implement the European regulation:

- Laws on EGTC were already adopted in the *Länder* of Vorarlberg¹⁰ and Carinthia¹¹.
- There are Bills in different *Länder*: in Styria¹², in Salzburg¹³, in Wien¹⁴.

The first paragraph of the Vorarlberg Law on the EGTC precises also that the law applies if the EGTC is concluded in domains where the *Land* is competent to legislate: „Dieses Gesetz regelt die Maßnahmen, die für die Anwendung der Verordnung (EG) Nr. 1082/2006 über den Europäischen Verbund für territoriale Zusammenarbeit (EVTZ) erforderlich sind und in die Gesetzgebungskompetenz des Landes fallen“. A similar precision is also given in the first paragraph of the Bills of the *Länder* Styria and Salzburg.

However there are contradictions between the bill of the Federal Law (*Bundesgesetz*) and the laws adopted by the *Länder* (or the bill elaborated by the *Länder*). Indeed according the bill of the Fed-

¹⁰ Gesetz über den Europäischen Verbund für territoriale Zusammenarbeit (EVTZ-Gesetz), Beilage 131/2008.

¹¹ Gesetz vom 18. Dezember 2008 über den Europäischen Verbund für territoriale Zusammenarbeit (Kärntner EVTZ-Gesetz – K-EVTZG), StF: LGBl Nr 20/2009.

¹² Entwurf- Gesetz [...] über die Anwendung der Verordnung des Europäischen Parlaments und des Rates über den Europäischen Verbund für territoriale Zusammenarbeit (Steiermärkisches EVTZ-Anwendungsgesetz – StEVTZG).

¹³ Entwurf- Gesetz [...] betreffend die Anwendung der Verordnung des Europäischen Parlaments und des Rates vom 5. Juli 2006 über den Europäischen Verbund für territoriale Zusammenarbeit (EVTZ-Anwendungsgesetz – EVTZ-G).

¹⁴ Gesetz betreffend den Rahmen für die Anwendung der Verordnung (EG) Nr. 1082/2006 über den Europäischen Verbund für territoriale Zusammenarbeit (W-EVTZG).

eral Law (*Bundesgesetz*), the communication to the Bund and the registration are tasks of the governor (*Landeshauptmann*); these actions are tasks of the Land Government (*Landesregierung*) in the laws or bills of the Länder above mentioned: see for instance the Law on EGTC of the Vorarlberg.

3.1.2 Inputs of the EGTC:

The EGTC is an interesting instrument for transborder cooperation on Austrian level. In fact some remarks could be made on the current Austrian legal framework¹⁵:

- A clear legal basis for public groupings in general (exemption: for the local level within one Land) is missing in the Federal Constitution
- There is not any legal basis for public groupings beyond borders in the Federal Constitution. Indeed Austria made a reservation by the ratification of the First Additional Protocol to the Madrid Convention¹⁶)
- The Federal Constitution offers only a complex procedure for intergovernmental treaties of Länder (no treaties has been concluded on this basis until today) (Article 16).
- As regarding cooperation beyond borders, the Federal Constitution is totally blind and neglecting the status of European Integration.

3.2 The European Grouping of Territorial Cooperation in French law

3.2.1 The Law n°2008-352

The ***Code général des collectivités territoriales (CGCT) (Territorial Community Code)***¹⁷ was modified by the Law n° 2008-352¹⁸. This law adapted the French law to the provisions of the European regulation on the EGTC. It allows the French local entities, within the limit of their competences and the respect of the international engagements of France, to create such a grouping with territorial collectivities, statutory bodies of the EU Member States, like with Member States. The law authorizes also the creation of an EGTC with Border States Members of the Council of Europe.

¹⁵ These critics were developed by J. Maier the 15 May 2009, in the framework of a Workshop held in the European Academy of Bolzano (Italy); see also by Johannes Maier, "Rechtliche Hindernisse für die Implementierung des EVTZ-Instrumentes in die föderale Verfassungsstruktur Österreichs", in *Jahrbuch des Föderalismus 2009, Föderalismus, Subsidiarität und Regionen in Europa*, Europäisches Zentrum für Föderalismus-Forschung Tübingen (Hrsg.), 2009, pp.455-470.

¹⁶ Declaration contained in the full powers handed at the time of signature on 28 February 2001 - Or. Fr.- and confirmed in the instrument of ratification deposited on 17 March 2004. "The Government of the Republic of Austria, in accordance with Article 8 of the Additional Protocol, declares that it will apply the provisions of Article 4 only". [The preceding statement concerns Article(s) : 8].

¹⁷ It is not an official translation.

¹⁸ Loi n° 2008-352 du 16 avril 2008 visant à renforcer la coopération transfrontalière, transnationale et interrégionale par la mise en conformité du code général des collectivités territoriales avec le règlement communautaire relatif à un groupement européen de coopération territoriale (JORF n°0093 du 19 avril 2008 pp. 6562 et s.).

3.2.2 The main changes of the *Code général des collectivités territoriales* are:

- Modification of the article L. 1115-4 of the *Code général des collectivités territoriales* in order to authorize the adhesion of territorial entities to foreign organizations.
- Modification of the article L. 1115-5 of the *Code général des collectivités territoriales*. The previous article prevented the territorial entities (collectivités territoriales) to conclude agreements with foreign states. According to the new law it is now possible but just for the creation of an EGTC19: it will be possible with a Member State of the European Union or with a Member State of the Council of Europe.
- A new article L. 1115-4-2 was also introduced in the *Code général des collectivités territoriales* in order to fix the legal provisions relating to the EGTC.

The new opportunities offered by the article L.115-5 of the CGCT are limited to the creation of an EGTC. Indeed the general interdiction for the territorial collectivities to conclude agreements with foreign states remain. This general interdiction generates problems for the collaboration between France and „micro-States” like Luxembourg or Monaco. This interdiction is based on constitutional considerations as it was explained in a study of the French Council of State (*Conseil d’Etat*) published in 2007²⁰.

3.3 The European Grouping of Territorial Cooperation in German Law

In Germany, the Bund considers the rules implemented by having nominated the component authorities for all *Länder* (regions). According to the authorities, the federal and/or regional laws contain already the necessary regulations for the implementation of the EGCT. No special provisions are foreseen for questions relating to the limitation of liability, registration/publication and task delimitation. But if necessary, further regulations could be adopted for the practical implementation of the regulation on EGTC. For the Land Bavaria the component authority is the “*Regierung der Oberpfalz*” and for the Land Baden Württemberg it is the „*Regierungspräsidium Freiburg*”. In Bavaria, this possibility is underlined in **Article 13 of the Bavarian Law on the competencies for the exe-**

¹⁹ „Aucune convention de quelque nature que ce soit, ne peut être passée entre une collectivité territoriale ou un groupement de collectivité territoriale et un Etat étranger, sauf si elle a vocation à permettre la création d’un groupement européen de coopération territoriale”.

²⁰ See Decocq Christian, *Rapport sur la proposition de loi n°2624, adoptée par le Sénat, relative à l’action extérieure des collectivités territoriales et de leurs groupements*, Rapport de l’Assemblée nationale n°3610, p.12 ; Conseil d’Etat, *Le cadre juridique de l’action extérieure des collectivités territoriales*, Les études du Conseil d’Etat, Paris, La documentation française, 2006.

cution of economic regulations (*Gesetzes über die Zuständigkeiten zum Vollzug wirtschaftsrechtlicher Vorschriften-ZustWiG²¹*):

„[...] Zuständig für den Vollzug der Verordnung (EG) Nr. 1082/2006 des Europäischen Parlaments und des Rates vom 5. Juli 2006 über den Europäischen Verbund für territoriale Zusammenarbeit - EVTZ - (ABl EU Nr. L 210 S. 19) ist die Regierung der Oberpfalz. Das Staatsministerium für Wirtschaft, Infrastruktur, Verkehr und Technologie wird ermächtigt, das Nähere zur Anwendung dieser Verordnung durch Rechtsverordnung zu regeln“.

An ordinance could be adopted by the Bavarian Ministry on Economy, Infrastructure, Transport and Technology in order to clarify the modalities for the implementation of the regulation.

3.4 The European Grouping of Territorial Cooperation in Italian Law

3.4.1 The national provisions

The provisions for the implementation of the European regulation on the EGTC are integrated in the Community Law 2008 (***Legge Comunitaria 2008***) adopted in July 2009. The **Chapter III** of this text is about the EGTC.

Article 46 is relating to the **creation and the legal nature of the EGTC**.

According to the **paragraph 2**, the **GECT whose bench is in Italia have the legal personality governed by public law** („*personalità giuridica di diritto pubblico*“). The regulation refers to the notion of body governed by public law defined in the Directive 2004/18/CE²² (Article 9, paragraph 9²³), but the Community Law 2008 (*Legge Comunitaria 2008*) does not quote this directive.

According to the **third paragraph**, the regional authorities and local authorities designed in Article 3 of the Regulation N.1082/2006 are respectively the regions and the autonomous Provinces of Trento and Bolzano and also the local entities designed in the “*article 2, paragraph 1, of the legislative decree n.267/2000(decreto legislativo 18 agosto 2000, n. 267)*”

²¹ Gesetz über die Zuständigkeiten zum Vollzug wirtschaftsrechtlicher Vorschriften (ZustWiG) in der Fassung der Bekanntmachung vom 24. Januar 2005 (GVBl S. 17, BayRS 700-2-W), zuletzt geändert durch § 1 des Gesetzes vom 20. Dezember 2007 (GVBl S. 964).

²² 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, (OJ L 134, 30.4.2004, p. 114–240).

²³ 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) having legal personality; and
- (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“.

(„Ai fini del presente testo unico si intendono per enti locali i comuni, le province, le città metropolitane, le comunità montane, le comunità isolate e le unioni di comuni”).

According to the **fourth paragraph**, the object and the duties of the EGTC have to be laid down in a statute. It can be noticed that the minimal requirements to be laid down in the statute are more in the Italian text as in the European Regulation.

„Gli organi di un GECT avente sede in Italia, nonché le modalità di funzionamento, le rispettive competenze e il numero di rappresentanti dei membri in detti organi, sono stabiliti nello statuto. Le finalità specifiche del GECT ed i compiti ad esse connessi sono definiti dai membri del GECT nella convenzione istitutiva”.

- **Article 47** is relating to the **authorization for the creation of an EGTC**.

Different authorizations have to be given for the creation of an EGTC. There is a broad control of the State on the creation of an EGTC. The agreement of all the interested administrations has to be given for the creation of an EGTC (*„necessaria ‘conformità’ dei pareri”*). This complex procedure could be an obstacle for the creation of an EGTC.

- **Article 48** is relating to the **financial provisions concerning the EGTC**.

The Region of Lombardy adopted a regional Law before the adoption of the Community Law 2008 (*Legge comunitaria 2008*). But the President of the Council of Ministers (*Presidente del Consiglio dei ministri*) lodged a **complaint by Italian Constitutional Court** in order to be verified the constitutionality of this law²⁴. That is why the Valle d’Aosta and the Piedmont waited before adopting their law on the EGTC (there are already bills).

3.4.2 Inputs of the EGTC

The Madrid Convention on Transfrontier Cooperation among Territorial Communities, signed within the Council of Europe and which came into force on 22nd December 1981, was undersigned by Italy on the very same day of its opening, and then ratified by the **National Law n. 948/ 1984**. The first Additional Protocol to the Madrid Convention was signed by Italy on 5th December 2000; the second Additional Protocol was not signed by Italy for the time. These two instruments are then not into force in Italy. The provisions introduced by the Ratification Law n°948/1984, particularly **Articles 3 and 5**, determine that the possibility for the Regions and Local Authorities to stipulate agreements with corresponding bodies of other States is dependent upon the conclusion of bilateral agreements between States (the so-called “coverage agreement”), aiming at identifying the subjects which are eligible for such international agreements (see Article 3, paragraph 1); the agree-

²⁴Ricorso per legittimità costituzionale del 5 maggio 2009, n.30, Ricorso per questione di legittimità costituzionale depositato in cancelleria il 5 maggio 2009 (del Presidente del consiglio dei ministri).

ments stipulated by the Regions and Local Authorities are subject to preliminary approval from the State (see **Article 5**).

The possibility to take advantage of an instrument such as the EGTC is clear and leads to several benefits as compared to alternative route outlined by the Madrid Convention. First of all, the incorporation procedure was strongly simplified and, since it belongs to the field of community relations, Regions are directly charged with the task of enforcing it. In the second place, community regulations allow the participation of States in addition to regions and local authorities. Finally, one further positive aspect is the possibility to involve Third Countries (and their relevant local authorities), thus allowing to involve also other territories in the co-operation institution until their adhesion to EU.

3.5 The European Grouping of Territorial Cooperation in Slovene Law

For the implementation of the Regulation, Slovenia adopted rules on 20 March 2008: Decree on establishment of European Grouping of Territorial Cooperation (*Uredba o ustanavljanju evropskega združenja za teritorialno sodelovanje*, Ur.l. RS, št. 31/2008).

The question of the participation of third countries under the Regulation is taken into account in a particular manner in Slovenia.

3.6 The European Grouping of Territorial Cooperation in Swiss Law

Switzerland could take part in a GECT. According to the **paragraph 16 of the preamble of the Regulation n°1082/2006 on a European grouping of territorial cooperation (EGTC)**:

„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”. But we have also to highlight that there is another limit for the participation of Switzerland in an EGTC. In fact according to article 3, paragraph 2, *„[an] EGTC shall be made up of members located on the territory of at least two Member States”*: the underlined provision does not enable to create an EGTC between only 2 States including Switzerland.

4 SWOT Analysis: the EGTC and transborder cooperation between protected areas

We will make in this paragraph a **SWOT Analysis** concerning the use of the **EGTC for improving transborder cooperation between (Alpine) protected areas**. It means that we will answer to the fourth following questions:

- What could be the advantage of such an instrument (EGTC) for the transborder cooperation between two Parks (**Strengths**)?
- What are the characteristics of this instrument which could be harmful to achieve this objective (the objective of better transborder cooperation between two parks)? (**Weakness**)
- What are the external conditions that are helpful to achieving the objective (**Opportunities**)?
- What are the external conditions which could prevent to reach this objective (**Trends**)?

The more advanced example of transborder cooperation between protected areas in the Alps is probably the one between the *Parc du Mercantour* and the *Parco Alpi Maritimi*. Indeed cooperation exists since more than 20 years. But it was several times highlighted that this cooperation needs to be institutionalized.

4.1 STRENGTHS

The regulation on the EGTC provides a **homogenous legal basis which combines community law** (for the creation and the main modalities for the creation of the EGTC) **and national law**. It creates a common **legal framework** through the Alpine EU Member States and some provisions could also be adopted in other non-EU Member States like Switzerland. The different legal instruments at the disposal of the protected areas for cooperation were an obstacle: it was for instance the case between the *Parc du Mercantour* and the *Parco Alpi Maritimi*²⁵.

The thematic scope of the EGTC is broad:

Article 1, paragraph 2, of the regulation : „*The objective of an EGTC shall be to facilitate and promote cross-border, transnational and/or interregional cooperation, hereinafter referred to as ‘terri-*

²⁵ Fodella A. (coord.), „Creazione di nuove forme di cooperazione transfrontaliera a livello sub-statale per lo sviluppo sostenibile del territorio”, in *Strumenti giuridici della cooperazione per lo sviluppo sostenibile di un’area montana transfrontaliera, Atti del convegno del 1°giugno 2005*, Eurac-Research (Ed.), pp. 69-125.

torial cooperation', between its members as set out in Article 3(1), **with the exclusive aim of strengthening economic and social cohesion**".

Article 7, paragraph 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”.

The EGTC may also carry out other specific actions of territorial cooperation between its members in pursuit of the objective referred to in **Article 1, paragraph 2**, with or without a financial contribution from the Community. But it has to pursue always the aim of strengthening economic and social cohesion. See also Paragraph 11 of the Preamble of the Regulation: „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, **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**”.

It is specified in Article 7, paragraph 3, that “[the] Member States may limit the tasks that EGTCs may carry out without a Community financial contribution. These tasks shall include at least the cooperation actions listed under Article 6 of Regulation (EC) No 1080/2006” (joint protection of natural resources and natural heritage is one of these listed tasks).

The common structure (EGTC) will have a **legal personality** and according to **Article 4, paragraph 4**, of the Regulation, „[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”. Specific staff could be employed for achieving the tasks/objectives of this structure. And if necessary this structure could be party to legal proceeding and then defend common interests of the EGTC-Members. The common structure will then able to take common decisions and also common decisions as regards budget.

Through this instrument could be created a **broad partnership**: in such a partnership could be included not only regional authorities and local authorities but also bodies governed by public law and also States (see Article 3 of the Regulation)

It will be possible to institutionalize the transfrontier activities initiated through INTERREG Projects. It is very important because in the field of nature protection, the transborder cooperation goes especially through INTERREG Projects. In the Alps the Alpine Space Programmation²⁶ is impor-

²⁶ 2001-2006: „2001-2006 INTERREG IIIB Alpine Space Programme”.

2007-2013: „The Alpine Space Programme 2007-2013”. It is a part of the "European Territorial Cooperation" (Objective 3 of the Regional Policy 2007-2013).

tant but also others EU-cofounded bilateral programmes. For instance different INTERREG Projects run between the French and Italian Parks, Mercantour and Alpi Maritimi.

Concerning the cooperation between protected areas in general, we could also mention a European Project which dealt with the problematic of cooperation between protected areas: the project SISTEMaPARC (Spatial Information Systems for Transnational Environmental Management of Protected Areas and Regions in CADSES – SISTEMaPARC)²⁷. It launched between 2004 and 2006 and aimed to sustain the cooperation between protected areas. The overall, long-term objectives of the project SISTEMaPARC were:

- foster the coordinated transnational development of cross-border protected regions by improving or establishing spatial data base networks and spatial information systems, and initiate the transnational exchange of experiences and know-how,
- support transnational strategies of monitoring, planning and management of cross-border protected areas and respective regions by integration and application of spatial information systems with special regard to European initiatives of protecting natural heritage and transnational planning strategies (Natura 2000, European biodiversity corridors), etc.

4.2 WEAKNESS

The tasks of the EGTC have to remain in the competences of the entities of the EGTC. According to **Article 3, paragraph 1**, of the regulation: “An EGTC shall be made up of members, within the limits of their competences under national law [...]”.

One potential limit to the creation of an EGTC for cooperation between two parks is the taking part of this grouping to the regulations adopted in the protected areas. According to **Article 7, paragraph 3**, of the Regulation: „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”. It means that a potential EGTC created for the cooperation between two Parks cannot have the competence to adopt regulations for the parks (for instance the provisions concerning the surveillance of the parks). This grouping will probably not be able to employ specific staff for the surveillance of the park although it could have been interesting for transborder activities. And this grouping cannot adopt common regulations concerning the exercise of specific activities in the park. The different regulations concerning the permitted activities in the core of the park or near the park could be problematic. Or these activities could have an impact on the other side of the border (for instance the regulation on the heliskiing in France and in Italy).

²⁷ For more information, see online on www under URL: www.tu-dresden.de/sistemaparc/project.html (17.08.2009).

The elaboration of a common management plan or others types of plans could be interesting for the cooperation between two Parks. But we have to notice that the elaboration of management plan is often regulated differently between two members States. The procedures are different. The differences could be for instance in matter of participation. The provisions as regards the elaboration of management plans are often integrated in the nature protection laws and a future EGTC will not be able to modify these provisions (if there are adopted by laws or regulations). But it is not always provisions adopted by laws or regulations. It depends on the States or on the regions.

See also Article 7, paragraph 3: *„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”*.

Furthermore we have to notice that according to **Article 3, paragraph 2**, *„[an] EGTC shall be made up of members located on the territory of at least two Member States”*: the underlined provision does not enable to create an EGTC between only 2 States including a non EU-Member State, like for instance Switzerland. According to these provisions, an EGTC could not be created between Italy and Switzerland or between France and Switzerland for instance. See also **Paragraph 16 of the Preamble of the Regulation**: *„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”*. But this instrument could be used for cooperation between Switzerland and two EU-Member States and in fact this possibility is taking into account by the grouping called “Espace Mont Blanc”²⁸.

Another limit is the need of an **agreement of the State** for the creation of an EGTC according to the procedure described in **Article 4** of the regulation on the EGTC: *„[...]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”*.

Questions linked to **labour Law** have to be clarified: indeed some persons coming from a given State of the Grouping could have to work in one other State of the Grouping and especially the State where the Grouping has its registered office (headquarter). According to **Article 2** of the regulation, *„[an] EGTC shall be governed by the following:*

(a) this Regulation;

²⁸ Online on www under URL: www.espace-mont-blanc.com/it/struttura-giuridica.aspx, (11 August 2009).

(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”.

One questioning could be for instance in France the assignment of a public official (“*fonctionnaire*”) in a foreign State. In fact there are specific rules concerning the work of a public official.

4.3 OPPORTUNITIES

The creation of a European Grouping for Territorial Cooperation in order to **support the transborder cooperation** between two parks **could also be a provisory measure**. The grouping can be created in order to enhance the cooperation between the two Parks and after disappear: it will then be a provisory structure.

The preservation of the biodiversity in the Alps needs transborder cooperation between the Alpine States. This is also underlined in the Alpine Convention and in the Protocol Conservation of Nature and the Countryside to the Alpine Convention. It was specified in the Alpine Convention that “[*the Contracting Parties are*] aware of the substantial differences existing between national legal systems [...]” and after in Article 12 of this Protocol that „*the] Contracting Parties shall undertake to harmonise the objectives and measures with the cross-border protected areas*”. The same need exists on the European level. The European States have to cooperate for a more efficient preservation of biodiversity and the transfrontier threats to the European biodiversity justify an action of the European Union: „*whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them*”²⁹.

4.4 TRENDS

The external conditions which could prevent efficient transborder cooperation between protected areas through the creation of a EGTC could be the adoption of complex national procedures by the Member States/States in order to implement the regulation n°1082/2006. Indeed the national procedure adopted by Italy with the Community Law 2008 (*Legge Comunitaria 2008*) seems to be

²⁹ Preamble of the Habitats Directive; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, pp. 7–50).

complicated because the creation of an EGTC requires the agreement of several different bodies (see Article 47 of the *Legge Communitaria 2008*).

Interpretation of the notion of „general interests of the State or of other public authorities“: a broader interpretation of this notion by a State or another public authority could be problematic for the authorization concerning the creation of an EGTC

Strengths	Weakness	Opportunities	Trends
Broad thematic of the GECT	Restrictions posed by the regulation (Article 7)	Possibility to create a provisory structure	Complex implementation procedure on national level
(Broad) legal personality	At least 2 EU-Member States in an EGTC	Necessity of transborder cooperation for the preservation of biodiversity	Interpretation of the notion of “general interests of the State or of other public authorities”
Common legal framework on transborder cooperation	Agreement of the State is necessary		Repartition of the competences of the EGTC Members under national law
Broader partnership			
Institutionalization of the activities initiated with the INTERREG programmes			

Summary of the above developed points.

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