

# THE PATH TOWARDS THE EUROPEAN UNIVERSITY IN THE CURRENT EU LEGAL FRAMEWORK: THE UNITA – UNIVERSITAS MONTIUM EXPERIENCE

BARBARA GAGLIARDI

UNIVERSITÀ DEGLI STUDI DI TORINO (ITALY)

ARNAUD LECOURT

UNIVERSITÉ DE PAU AND PAYS DE L'ADOUR (FRANCE)

IRINA MACSINGA

WEST UNIVERSITY OF TIMISOARA (ROMANIA)

MARCELLA COSTA

UNIVERSITÀ DEGLI STUDI DI TORINO (ITALY)

MARCO GIACOBINI

UNIVERSITÀ DEGLI STUDI DI TORINO (ITALY)

**Barbara Gagliardi** is Associate Professor in Administrative Law at the Department of Law of the University of Torino. She coordinates the taskforce in charge for the establishment of a legal entity within the European University UNITA – Universitas Montium. She is an expert of higher education law and public sector organization. <https://orcid.org/0000-0001-6072-4834>

**Arnaud Lecourt** is an Associate professor at the University of Pau and Pays de l'Adour, Director of the Institute of Judicial Studies, member of the UMR 6031 CNRS, specialist in business law and particularly in company law. Director of the Sociétés en général section of the Revue trimestrielle de droit commercial et de droit économique, he is also a member of the scientific council of the Revue Lamy de droit des affaires.

**Irina Macsinga** is Associate Professor at the Department of Psychology of the West University of Timisoara. Her research interests include personality psychology and cognitive psychology, as well as research methodology. She coordinates H2020 scientific projects in which she works with international interdisciplinary teams on the analysis of people's sustainable behavior. In the UNITA European universities alliance, she is responsible for the implementation of the project at the level of the Romanian partner.

**Marcella Costa** is Full Professor of German Linguistics at the University of Turin (Italy). She is currently Vicerector for International Education, Scientific coordinator of UNITA – Universitas montium and member of the Bureau of FOREU2. Her expertise revolves around internationalisation policies and innovation in education, with a particular focus on multilingual practices and linguistic diversity. <https://orcid.org/0000-0002-6401-1898>

**Mario Giacobini** is Professor at the Department of Veterinary Sciences of the University of Torino, where he leads the Data Analysis and Modeling Unit. He is Vice Rector for European Relations and coordinates the Work Package 1: Management and Coordination of the European University UNITA – Universitas Montium. <https://orcid.org/0000-0002-7647-5649>

**Corresponding author**

Barbara Gagliardi

[barbara.gagliardi@unito.it](mailto:barbara.gagliardi@unito.it)

CIRSDe - Centro Interdisciplinare di Ricerche e Studi delle Donne e di Genere

Lungo Dora Siena, 100, 10153

Torino (TO)

Italy

## Abstract

The development of university cooperation at the European level is closely related both to the needs of the single market and to those of an economic and social cohesion functional to a more effective protection of the rights of European citizens.

The recent launch of EU university alliances is part of this framework, although the absence of legal instruments explicitly conceived for institutionalised cooperation could undermine the success of the action of alliances.

The EU competence in higher education is limited to the support, coordination, and supplement of member state actions (art. 6TFEU). The absence of a harmonising competence circumscribes the possibilities of EU intervention and especially prevents the provision of EU degrees which could replace national diplomas.

However, the allocation of funding allows policies capable of effectively influencing the systems of member states (see for instance the EU experience in common agricultural policies sector).

In this context, the limits of the existing tools could be almost partially overpassed by the adoption of new regulations or directives, to allow an institutionalised cooperation between universities.

The existing solutions offered by the EU legal system are not fully satisfactory, nonetheless, some of them could be useful: among these, the European Economic Interest Grouping (EEIG) is especially interesting.

**Keywords:** *European University alliances; European University; European Grouping of Economic Interest; European Higher Education Area; Unita – Universitas Montium.*

## Interuniversity cooperation: a tool for strengthening European citizenship

Strengthening university cooperation at the European level is closely related both to the needs of the single market and to the objective of a more effective protection of human rights in Europe.

The extent to which the construction of the European Research Area (ERA) and the European Higher Education Area (EHEA) can contribute to the dynamism and competitiveness of the European economy, particularly in comparison with emerging economies<sup>1</sup>, has long been underlined. This process can encourage innovative scientific discoveries capable of bringing about sustainable and inclusive economic progress, thus transforming the European economy into the most competitive «knowledge and innovation-based economy» in the world.

The support offered by the European institutions to higher education promotes the circulation of ideas, with a positive impact on the professionalisation and “*capacity building*” of national and supranational enterprises and administrations (Art. 6 and 197, § 2 TFEU).

Alongside the attention to the economic dimension goes the recognition of the importance of higher education in enabling «full participation in society»<sup>2</sup> and strengthening European democracies, first and foremost against possible nationalist drifts (Post, 2012; Fink & Post, 2009).

The European legal system is primarily focused on the creation and development of the internal market; nevertheless, the European legal tradition is based on the primacy of the personalist principle and, even at the EU level, the search for useful tools to enable the fulfilment of individuals in a social

and political dimension completes the economic perspective. From this point of view, the enhancement of the European cultural space could be considered as an effective instrument for consolidating a European identity, based on the protection of individual rights.

It is known that the European citizen is primarily a “*market-bürger*”, who enjoys rights by being economically active (Ferrari, 2007). However, the supranational dimension of scientific research and of higher education fosters the rediscovery of common elements within European national cultures and traditions, including the culture of human rights, conceived as the root of both national and European legal systems.

Simultaneously, the strengthening of the European academic community is useful for better protecting the rights of its members, be it academic freedom or the right to education.

The former implies the right for teachers and researchers to conduct research and to disseminate its results through publications and teaching (Barendt, 2010; Beaud, 2010, 2021; Orsi Battaglini, 1990). On the other hand, academic freedom for students coincides with the right to access university teaching and to choose the content and inspiration of the received education (Karran, 2009).

This *right to choose* is a constitutive element of the right to (higher) education, which entails the right of access to any university, regardless of where it is situated in Europe, without suffering unreasonable discrimination. This is a minimal version of the right to education, which does not establish an obligation for national institutions to create universities, nor it is to be confused with the right to free access. On the contrary, the right of access to higher education is normally considered compatible with limits to access which may coincide

1 Commission Communication Europe 2020 A strategy for smart, sustainable and inclusive growth, COM/2010/2020 final, Bruxelles, 3.3.2010, 12-13.

2 Commission Recommendation (EU) 2017/761 of 26 April 2017 on the *European Pillar of Social Rights*.

with entry selections (*numerus clausus*), or with the provision of enrolment fees, taxes and other contributions of varying amounts in the various national experiences<sup>3</sup>.

Although strong and unconditional protection of the right of access to higher education is lacking, strengthening the supranational dimension of the academic community is helpful in overcoming its limitations.

Academic freedom can therefore be said to imply the mobility of "knowledge", by guaranteeing the right to a real or virtual circulation of students and teachers. This right is reinforced by the European Union's legal instruments and especially by the programmes it has implemented, starting with Erasmus, which has been regarded as «the fourth-best outcome of the European Union, after peace and the euro» (Van Der Wende, 2021, p. 123).

Corresponding to the international scientific community is the "university system", which takes the form of a "network" whose individual points maintain collaborative relations.

The EU legal system has adopted several initiatives to encourage the establishment of consortia and the conclusion of cooperation agreements between universities in the member states: most recently, standing out among these initiatives is the promotion of "university alliances"<sup>4</sup>. This suggests an alternative model to that of the "*Neoliberal Marketplace*" in which "*Corporate Universities*" compete according to market rules (Palfreyman & Tapper, 2014, p. 3; Musto, 2021, pp. 247-292).

Since the Middle Ages, the university has been a "*studium generalis*" open to students and "masters" from the various

"*nationes*" (Moulin, 1991, p. 119; Cobban, 1990, 2), who were protected from discrimination on the grounds of geographical origin. The "protection" offered by the supranational authorities of the time (papacy, empire) ensured the free movement of individuals and the "universal validity" of degrees, without contradicting the corporation-university autonomy (Verger, 1973, p. 47). It is this model that implicitly recalls the strengthening of interuniversity cooperation favoured by the European Union legal system.

### **The competence of the European Union in the field of scientific research and higher education**

The establishment of a truly "European university" is hindered by the limits of the existing options provided by the EU legal system, but it should also constitute an opportunity to reflect on the features of a new regulation which could be introduced in the future. The design of a new instrument and the improvement of the current models is a fascinating solution, but every proposal in this regard needs to take into consideration the (limited) powers of EU institutions in these fields.

The EU legal system contributes to "the development of quality education" by encouraging cooperation between the member states (Art. 165, § 1, TFEU) and by implementing the "European Higher Education Area" and the "European Research Area".

The progress of science and society is firstly stimulated by supporting free movement of researchers, knowledge and technologies (Art. 179, § 1, TFEU), as well as that of students. In particular, mobility enables the latter to have access to a

3 The principle of free higher education is at times stated in some national constitutions (e.g., Greece, Art. 16). The amount of enrolment fees varies significantly from one member country to another: OCDE, *Regards sur l'éducation 2016: les indicateurs de l'OCDE*, Editions OCDE, 2016, 244 e 256; European Commission, *National Student Fee and Support Systems in European Higher Education 2016/17*, Eurydice-Facts and Figure, Education, Audiovisual and Culture Executive Agency, 2016, 12.

4 Please refer to the two "*calls*" published in 2019 and in 2020 within the framework of the Erasmus+ programme ([https://ec.europa.eu/education/education-in-the-eu/european-education-area/european-universities-initiative\\_en](https://ec.europa.eu/education/education-in-the-eu/european-education-area/european-universities-initiative_en)).

higher education offer that effectively matches their individual aspirations, without suffering the limitation of regional or national borders.

On a more general note, the circulation of information and good practices has long been identified as a useful tool for capacity building of national administrations, also through specific programmes that carry out exchanges of officials (Art. 197, § 2, TFEU) (R. Cavallo Perin, & G.M. Racca, 2016).

At the same time, a certain “interoperability” of education systems is fostered by the principle of mutual recognition of diplomas and education segments and by the adherence to the so-called “Bologna process” (L.S. Terry, 2008; T. Karran, 2005; R. Keeling, 2006). The latter especially favoured European inter-university cooperation, leading to the dissemination of a common model articulated around three levels of higher education (Bachelor, Master and Doctorate)<sup>5</sup>. It is worth remembering, however, that this is not an articulation governed by European Union law, but rather a model adopted according to the inter-governmental method (S. Garben, 2010; S. Garben, 2012, p. 9).

In contrast, the recognition of the rights to academic freedom and education established by the Charter of Fundamental Rights of the European Union (Art. 13 and 14) does not extend the European competences in these matters. These rights can only be invoked against the institutions of the Union, or against member states when implementing EU law (Montaldo, 2013; Lazzerini, 2015). Therefore, to obtain protection before European courts, it is necessary to prove the existence of

a relationship between the national policies infringing these rights and the legal system of the Union (e.g. because a threat to academic freedom comes from rules restricting the movement of services and thus limiting the establishment of the internal market)<sup>6</sup>.

The protection of individual rights through the recognition of freedom of movement has historically played a crucial role in the Union's legal system (Gagliardi, 2012, p. 32), yet here it proves to be largely insufficient. Not only are economically active citizens (hence not students<sup>7</sup>) the sole beneficiary of a strong and unconditional protection, but, in any case, only a minority of those enrolled in universities ever moves between one state and another. An elitist conception of the European legal system derives from this approach, which is insufficient for the purposes of encouraging effective economic and social cohesion of its territories.

The protection of the right of movement - also through economic incentives - does not exhaust European action in the field of higher education: on the contrary, it benefits from a broader power of support, coordination and completion. More precisely, the Union holds a supplementary competence in the education sector, and a shared competence in the research sector: the latter specifically entails the power «to carry out activities, in particular to define and implement programmes», thus translating primarily into exercising a financing power. In any case, even here, the exercise of the EU competence “shall not result in member states being prevented from exercising theirs” (Art. 4, § 3, TFEU).

5 Initially, the Bologna Process identified only two levels of higher education: “undergraduate” e “graduate” (see *Towards the European Higher Education Area*, Communiqué of the meeting of European Ministers in charge of Higher Education in Prague on May 19<sup>th</sup>, 2001, in <http://www.ehea.info/>). The three-cycle articulation has existed since 2007 (see *Towards the European Higher Education Area: responding to challenges in a globalised world*, London Communiqué, 18 May 2007).

6 C. giust. (Grand Chamber), 6 October 2020, C-66/18, *European Commission v. Hungary*.

7 C. giust., 14 dicembre 2016, C-238/15, *Linares Verruga e a.*; C. giust., 2 giugno 2016, C-233/14, *Commissione c. Regno dei Paesi Bassi*; C. giust., 26 febbraio 2015, C-359/13, *Martens*; C. giust., 4 ottobre 2012, C-75/11, *Commissione c. Repubblica d'Austria*; C. giust., 18 novembre 2008, C-158/07, *Förster*; C. giust., grande sezione, 15 marzo 2005, C-209/03, *Bidar*; C. giust., 23 marzo 2004, C-138/02, *Collins*. Gagliardi, B. (2018). *La tutela amministrativa della libertà accademica*. Padova: CEDAM, 115.

The member states have therefore not relinquished portions of sovereignty over the organisation of higher education systems: the definition of the chosen model remains at full disposal of each national legal system, as does the identification of university curricula, such as the establishment or recognition of universities and other higher education institutions and the level of autonomy acknowledged to them.

It is also on account of the lack of a competence for harmonisation that the choice of the intergovernmental method seemed obligatory to pursue the results set by the Bologna Process.

Even in the absence of a competence to harmonise national systems, European funding policies are capable of exerting considerable influence on the recipients of the resources. It is here that requirements can be set as to the professionalism of researchers, the effectiveness of the services offered by universities, and the scientific quality of the projects. According to this model, European universities spontaneously comply with conditions established to access to UE resources, without losing any portion of their institutional autonomy. Nevertheless, these standards are gradually becoming a benchmark for the European academic community.

The model is precisely that of so-called "conditionality", which characterises many of the Union's interventions in the social sphere<sup>8</sup> (Iliopoulou-Penot, 2021; Costamagna, 2018; Taschini, 2019). The "coordination" thus achieved gives rise to a progressive harmonisation and convergence of the choices made by the member states over time, since it is difficult and greatly disadvantageous to forgo the possibilities of economic support offered by European institutions.

Finally, one should recall how the EU legal system affects higher education with disciplines that are an expression of further competences. Thus, for example, competition protection rules are applicable to universities in their capacity as "economic operators"<sup>9</sup> or contracting authorities. Even in this sphere, however, derogations are admissible on account of the general interest of the institutional missions exercised by them (e.g., in matters of state aid, public procurement, etc.; art. 106 TFEU) (Gideon, 2017, p. 47).

### **The Unita – Universitas Montium alliance**

In 2018, when the first call of the European Universities Initiative was launched, the European Commission could not imagine how, in less than three years, it would have become the most significant initiative of the last decades with regard to international cooperation as well as the main current academic concern of universities.

As Europe has been strongly shaken in recent years, this is also a test of cohesion, creative thinking, cooperative learning and, last but not least, a test of resilience for the higher education institutions involved. Originally built in order to increase the international attractiveness of European universities, these transnational alliances promote the European values and identity and inspire the transformation of higher education.

Moreover, in the current social and political context, alliances of European universities represent the way to recover from the crisis and build a resilient society.

8 Conditionality characterises financial assistance interventions that are an expression of solidarity between member states (art. 122, § 2, TFEU), on which the *Next EU Generation* (referred to in EU Reg. 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general system of conditionality for the protection of the Union's budget) is based.

9 Court of Justice, 19 December 2012, C-159/11, *Azienda sanitaria locale di Lecce*.

Based on a deep transnational cooperation and on an ambitious long-term vision and strategy, each alliance has proposed the creation of a participatory, open, inclusive and efficient European university that promotes high rates of international mobility, innovation in education and internationalized study paths, research and innovation for the local ecosystems and active European citizenship, by involving all social actors and for the benefit of society as a whole.

The European alliance UNITA Universitas Montium implements its strategy starting in 2020 with an alliance of six comprehensive research universities from five countries with different sizes, gathering together more than 160 000 students and 13 000 staff members: Universidade de Beira Interior (Portugal), Université de Pau et des Pays de l'Adour (France), Université Savoie Mont Blanc (France), Universitatea de Vest din Timisoara (Romania), Università di Torino (Italy), and Universidad de Zaragoza (Spain).

Just like the other alliances, this alliance aims to be the promoter of change in European higher education and shares with them the same universal values and ideals that define the mission of any university: to educate future generations, to conduct advanced scientific research and to transfer academic knowledge and contribute to communities and territories.

However, two particularities differentiate the UNITA alliance from the other consortia of European universities: all UNITA universities speak Romance languages, being committed to fostering linguistic diversity, and all UNITA universities target the development of rural and cross-border mountain areas in a European dimension.

As regards the first particularity, through the joint effort of specialists from universities and associated partners, the academic community benefits from trainings in the method of inter-comprehension, allowing its members to understand any of the Romance languages without following a long-term academic pathway.

Inter-comprehension skills thus represent a valuable and useful acquisition not only in preserving the cultural heritage, but also in increasing the quality of mobility and providing an internationally relevant experience to all students, researchers, teaching and administrative staff. These competencies are recognized by granting micro-credentials in inter-comprehension.

The universities composing the UNITA alliance have assumed a pivotal role in the delivery of targeted education interventions and research results designed to drive the economic and social development of their territories.

To contribute to the sustainable development of their territories, and in particular the cross-border mountain areas, UNITA universities, in close collaboration with their associated partners, implement rural mobility and internships that offer students a unique opportunity to connect in an original way with the grassroots of rural areas and to meet their needs through community projects and support actions.

All these initiatives involve the mobilization of considerable resources and require time, effort and support at the local, regional and national levels. Through their ambitious plans and innovative strategies, European universities alliances should, on the one hand, prove flexibility and adaptability to the dynamics of the current social context, as well as determination and consistency, while on the other hand, support the path of change. In this sense, it is expected that the alliances of European universities will embrace a new dimension and take transnational cooperation to a new level of intensity, by designing institutional cooperation tools that allow them to make common strategic decisions.

Exploring a possible legal status for alliances of European universities is a huge challenge because this endeavour involves striking a balance between university autonomy and sharing of capacity and resources and the pooling of staff. A careful analysis of the needs, benefits, risks and feasibility



is necessary to identify the most suitable solution for establishing a truly efficient, attractive, sustainable and competitive “European university”.

The academic world is beginning to understand more clearly that the European Universities Initiative goes beyond the duration of a three-year project, instead it represents the future in which we will live, and this future depends on the extent to which higher education institutions will embrace the belief that, despite the difficulties, acting as an international multi-campus can be the solution for a more efficient, attractive and competitive Europe. The process of co-creating solutions that take transnational cooperation to next level, with the support of national and international authorities, is a powerful tool to reaffirm European values and strengthen the sense of European belonging.

### **The instruments and models for institutionalised cooperation between universities in Europe: the options offered by national legal systems**

The search for institutionalised forms of cooperation aims at consolidating partnerships between universities and fostering the adoption of strategies capable of achieving «long-term structural, sustainable and systemic cooperation»<sup>10</sup>.

The establishment of an organisation having legal personality favours the governance of partnerships, since it primarily enables dedicated staff to be recruited and supply and service contracts to be concluded on behalf of the federated universities. Not only that, new forms of institutional governance, capable of strengthening and deepening relations between entities, can be envisaged in the drafting of statutes and constitutive contracts.

This development is also useful for organising joint activities, as it facilitates the shared management of funds available for projects and makes it easier to jointly participate in national and European competitions for access to further funding.

Finally, the development of initiatives under the aegis of an autonomous organisation gives greater visibility to the collaboration between universities from different member states, without overshadowing that of the individual federated entities. First of all, the latter often benefit from an identity consolidated over the centuries and strongly related to national specificities. In addition, the limits of European competence in the field of higher education make it difficult to imagine that such partnerships could in any way replace individual universities.

The institutionalised partnership between universities can, however, access a restricted legal toolkit. In fact, there is no legal form specifically designed for this purpose in the Union’s legal system, making it difficult to identify a precise type of legal entity that can be adapted to the needs of the universities involved. Indeed, the chosen legal form must not only be capable of interpreting and translating the needs of the universities and the academic communities that populate them (primarily researchers and students), but it must also be capable of bringing different legal systems into dialogue.

As it has been mentioned, education is left to national competence at all levels. As far as the university is concerned, it is not difficult to identify common European traditions and a unitary origin in the corporations and communities of medieval intellectuals and in the centuries-long development they experienced. Such factors favour dialogue and collaboration between entities but do not detract from national specificities, both on the organisational side and for the declination

<sup>10</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a European strategy for universities, Strasbourg, 18.1.2022, COM (2022) 16 final.

of scientific knowledge (especially in humanities and social sciences sectors).

For this reason, the legal forms of institutionalised cooperation provided by national legal systems for interuniversity cooperation - starting with university consortia under public law - seem ill-suited to the European dimension.

The establishment of legal persons under public law is generally considered unsuitable for the cooperation between entities belonging to different legal systems because it is too anchored to the national dimension and its underlying identity, therefore appearing poorly suited to embody diverse needs and visions.

University consortia or “communities”<sup>11</sup> with legal personality and purposely conceived to meet the specific needs of university cooperation are regulated in many national legal systems. However, they are mostly conceived as entities with mere national relevance: even though their capacity for international projection may be desired and supported, they are mainly (or exclusively) open to the adhesion of universities established in the state territory. Moreover, they are often subject to extensive powers of authorisation, supervision or control by national authorities and thus unsuitable for interpreting the needs of universities in other member states.

The use of national legal instruments that have a more “neutral” character and are to a lesser extent attributable to national identity choices is more facilitating (Fleischer, 2010, 1689). Hence, the choice may fall more readily on organisations under private law that have corresponding characteristics in the

individual legal systems, as the expression of *ius commune*, the roots of which go back to Roman law.

Furthermore, the toolkit of private law generally benefits from a “positivity bias” that has been widespread in European legal culture since the late 1980s, and which has largely induced so-called “retreat from administrative law” phenomena. It is indeed believed that private law can promote greater flexibility and simplification of the activities of public bodies, leading to the overcoming of bureaucratic constraints and controls.

This is an approach that is undeniably still widespread today and capable of exerting considerable influence on the choices of decision-makers within public bodies. Though it is impossible here to retrace and analyse this articulated debate, it is nonetheless important to point out how regulatory and institutional developments have often highlighted the limits of an uncritical preference for private law when regulating public organisations.

In drawing on models regulated by national private law, Universities alliances often prefer non-profit legal forms (associations, foundations) to those pursuing profit-making purposes. Occasionally, the legal systems of individual member states expressly exclude the establishment of corporations to pursue the institutional purposes of public universities, according to the so called “specialty principle”<sup>12</sup>.

In other cases, it is permitted but viewed with suspicion, and it comes with special precautions that circumscribe the possibilities of its use.

11 See in France the “communautés d’universités et établissements»: LOI n° 2013-660 du 22 juillet 2013 relative à l’enseignement supérieur et à la recherche, art. 62.

12 See TA Paris 29 octobre 2013, n° 1217449, which voids the creation of a private law company by the University Paris II Assas with an object correspondent to its institutional missions. See also CAA de Paris, conclusions du rapporteur public sur l’affaire n° 13PA04846 : «le principe de spécialité peut être vu comme impliquant que ces établissements (les universités) exercent leurs missions statutaires de façon directe, et non au moyen de sociétés filiales de droit privé, car cela remettrait en cause ce qui justifie leur propre existence, ce qui a présidé à leur création, c’est-à-dire le choix des procédés et règles du droit public et d’un régime de gouvernance et de contrôle exorbitant du droit commun».

At the same time, non-profit legal persons are often characterised by an apparently essential regulation and a reduced set of rules. This limited regulation - which is largely common in civil law countries - comforts university bodies. Indeed, they are generally unwilling to subject themselves to burdensome regulations from other member states whose contents they cannot easily control and whose interpretations they cannot adapt to their own interests.

However, it must be said that the limited regulation that mostly characterises associations and foundations risks resulting in a lack of protection for their members, especially in the absence of sufficiently precise constitutive contracts and statutes. Freedom of form and content is a double-edged sword: it allows for interesting personalisation, but it can also create dangerous protection gaps.

Lastly, special non-profit legal forms provided in some national legal systems have proven capable of particular attractiveness because they explicitly express an international "vocation". They are special types of associations that recall this dimension even from their name, as is the case in Belgium of the Association Internationale Sans But Lucratif (AISBL).

Nevertheless, they remain entirely regulated by national law and the concrete scope of the international dimension that characterises them is not immediately perceptible to the foreign reader. One can easily comprehend how they the preferred choice for alliances involving at least one university established in the system in which they were introduced; the same choice by universities in other member states would be less comprehensible.

### **The European legal toolkit: in particular, the European Economic Interest Grouping (EEIG)**

As previously mentioned, the legal system of the European Union lacks a legal form with legal capacity that is specifically conceived for the needs of interuniversity cooperation.

However, some of the existing grouping models - albeit conceived for other purposes - make it possible to draw up statutes that are at least partly capable of fostering the institutionalisation of partnerships, therefore constituting useful tools «to facilitate deeper cooperation by sharing human, technical, data, education, research and innovation capacities»<sup>13</sup>.

The choice of a legal form regulated by EU law has the obvious advantage of offering a common legal framework to the partner universities and thus guaranteeing a potential homogeneity when interpreting the relevant rules (Fleischer, 2010, 1690; Meiselles, 2015, 398). The various groupings are in fact regulated by European regulations, in other words, by acts which have general application and are "binding in their entirety and directly applicable in all member states" (Art. 288, § 2, TFEU).

In addition to being appropriate from a technical point of view, this is a choice with a symbolic value, which aims to confirm the European dimension as the natural cultural (and legal) dimension of institutional cooperation between universities (Chiu., 2011, 801; Jung, 2020, 500). This approach is consistent with the relevance of the institutionalisation of alliances in order to create the European higher education and research area, to strengthen the internal market and the European identity.

---

13 Council Recommendation of 5 April 2022 on building bridges for effective European higher education cooperation, 2022/C 160/01.

Among the legal forms envisaged by the Union are the European Grouping of Territorial Cooperation (EGTC) and the European Economic Interest Grouping (EEIG).

The European Research Infrastructure Consortium (ERIC) and the European Company (*Societas Europaea*, or SE) could also be mentioned, but they are of lesser interest. The latter is a public limited liability company<sup>14</sup>, subject to the same limits of use that apply to corporations regulated at the national level.

The ERIC is only seemingly relevant, being its purpose too circumscribed in relation to the needs of alliances. It is in fact set up for the main purpose to «establish and operate a research infrastructure». The European regulation itself defines a “research infrastructure” as the set of «facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields and covers major scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structures for scientific information; enabling Information and Communications Technology-based infrastructures such as Grid, computing, software and communication, or any other entity of a unique nature essential to achieve excellence in research»<sup>15</sup>.

It would therefore seem that teaching or innovation activities, which are nonetheless institutional activities of the universities involved in the alliance projects and which are at the heart of European policies on higher education cooperation<sup>16</sup>, could not be carried out within this framework.

Moreover, the procedure for establishing the ERIC is particularly complex, given that the request for its set up is subject to the approval of the European Commission, and must also be accompanied by a declaration by the host member state in order for the consortium to benefit from a number of privileges and fiscal exemptions.

The choice is thus limited to EGTC and EEIG.

The latter is particularly interesting because of a number of essential elements, including the flexibility of the organisation, the simplicity and limited formality of the establishment procedure (which neither requires the notary deed nor the approval of any national authority) and the breadth of the possible purpose.

All these elements may lead one to consider it a preferable option compared to the EGCT, which might initially appear to be the most appropriate grouping for cooperation between public universities. The EGCT is a grouping open exclusively to public bodies (member states, regional authorities, local authorities and bodies governed by public law) and set up to «facilitate and promote cross-border, transnational and/or interregional cooperation (...) with the exclusive aim of strengthening economic and social cohesion»<sup>17</sup>.

Despite this broad definition, most of the existing EGCTs have a cross-border character. This is the case for the few ones that, to this day, have been set up by universities, which are all located in the same Euroregions, and which aim to contribute to the development, not only of university cooperation, but also directly of the territories in which they are

14 Council Regulation (EC) No 2157/2001 of 8 October 2001, on the Statute for a European company (SE), art. 1.

15 Council Regulation (EC) No 723/2009 of 25 June 2009, on the Community legal framework for a European Research Infrastructure Consortium (ERIC), art. 2, lett. a), art. 3, § 1.

16 See for instance Council Recommendation of 5 April 2022 on building bridges for effective European higher education cooperation, 2022/C 160/01.

17 Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), art. 1, § 2.

located (e.g., EUCOR, or IACOBUS)<sup>18</sup>. This leads to uncertainty regarding its compatibility with university alliances located in different regions, which are often economically and socially inconsistent.

Moreover, EGCTs are characterised by a complex constitutive procedure that requires the intervention of the competent national authorities of all the entities involved, with the practically inevitable risk of delays and, in the worst cases, of negative measures that could call the entire constitutive procedure into question. Conversely, as mentioned above, between the main advantages of the EEIG it is possible to list the absence of heavy formalities for its establishment. All that is required is entry in a special national register - which is that of the member state where the grouping is based - and some limited publications in national and European gazettes and bulletins. No authorisation is required, neither at EU level nor at the level of the member states involved.

Simultaneously, the members benefit from a large degree of freedom in shaping the organisation of the grouping and also in defining its scope of action (Meiselles, 2015, p. 399).

From an organisational point of view, the European regulation prescribes as organs of the grouping «the members acting collectively» and «the manager or the managers». The statutes may add further bodies to these, defining their powers<sup>19</sup>. This enables a personalisation capable of allowing the participation of the various components of the academic

communities involved, providing the EEIG with technical and representative legitimacy.

The definition of the possible corporate purpose laid down in European regulations poses no problem. Even if it is conceived for the joint provision of “economic” services, the EEIG can be used by public entities to share some of their ancillary activities and to strengthen the cooperation related to their institutional mission.

To this extent it is essential to underline that in the EU legal system, the notion of economic services does not imply the for-profit nature of the activities<sup>20</sup>. Conversely, the activity performed is considered economic when it is even only abstractly capable of remunerating the factors of the production employed (Gallo, 2020, p. 571; van de Gronden, 2018, p. 199). Thus, with specific reference to higher education, it has been affirmed that «public education organised within the national educational system funded and supervised by the state may be considered as a noneconomic activity... but public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic»<sup>21</sup>.

While the EEIG may make profits, it is not normally regarded as a for-profit entity. More precisely, it is a “mutual entity”, established for the purpose of expanding the range of activities of its members (Alby, 1994, p. 2) and to enable them to mutually benefit from the cooperation. In this regard, the European

18 E.g., the European Campus EUCOR, established in the Upper Rhine region, which aims to make the cross-border mobility of students and researchers «an everyday experience», so as to make «their region a magnet for the best young scientists and international students». An EGCT

was also set up within the framework of the Iacobus Program, which was established to promote the cohesion of the Galicia-North Portugal Euroregion also at university level.

19 Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), art. 16.

20 Court of Justice, 10 January 2006, C-222/04, Cassa di Risparmio di Firenze SpA, par. 122-123; Court of Justice, 1 July 2008, C-49/07, MOTOE, par. 27-28.

21 Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02).

regulation clarifies that «the purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; *its purpose is not to make profits for itself*<sup>22</sup>.

Of course, the pursuit of such economically oriented activities may have consequences in terms of competition protection, as it may lead to the exclusion of the exemption regime provided for the «undertakings entrusted with the operation of services of general economic interest» (art. 106 TFEU), and especially with regard to the state aid prohibition (art. 107, TFEU).

It is important, however, to emphasise how the application of the prohibition of state aid does not prevent in any way the partner universities from carrying out their activities through the EEIG, even when public funding is used for this purpose. On the contrary, with respect to the latter, the EEIG acts as an in-house organisation, provided, of course, that its essential features are respected. That is, it must ensure that the universities exercise «a control which is similar to that which they exercise over their own departments» over the EEIG and that more than 80% of the activities performed by the EEIG is «carried out in the performance of tasks entrusted to it» by the universities<sup>23</sup>.

These undeniable advantages in terms of automatic recognition in the member states' legal systems, flexibility, adaptability and simplicity of the constitutive procedure find a limitation

in the absence of legal personality in the strict sense of the term for the EEIG.

Such an organisation undoubtedly has legal capacity: that is, it may employ staff in its own name (up to 500)<sup>24</sup>, it may participate in tenders and other competitive procedures for the allocation of funding<sup>25</sup>, and it may conclude contracts for the provision of goods and services (assets and liabilities). This capacity does not, however, correspond to full and perfect patrimonial autonomy since the members of the grouping are jointly and severally liable for the debts assumed by it<sup>26</sup>.

That unlimited joint and several liability, which remains even when a member ceases to belong to the grouping - for debts and other liabilities arising from the grouping's activities before they ceased to be a member<sup>27</sup> - compensates for the extremely easy establishment and the limited guarantee for third parties (Sterling Kerr, 1990, p. 1751). Furthermore, the establishment of the EEIG does not require any initial capital, thus allowing interested universities to adhere to it without significant investment. (Jakulevičienė, 2017, p. 216).

It is however clear that the absence of perfect patrimonial autonomy exposes the grouping's directors and the representatives of the universities serving in the bodies of the EEIG to important patrimonial liabilities, towards third parties and the EEIG bodies themselves, potentially discouraging their establishment.

22 Council Regulation (EEC) No 2137/85 of 25 July 1985, cit., art. 3.

23 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, art. 12, § 1, the in house organization should also fulfill the following condition: «there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person».

24 Council Regulation (EEC) No 2137/85 of 25 July 1985, cit., art. 3, § 2, lett. c.

25 Communication from the Commission on the participation of European Economic Interest Groupings (EEIGs) in public contracts and programmes financed by public funds (97/C 285/10).

26 Council Regulation (EEC) No 2137/85 of 25 July 1985, cit., art. 24.

27 Council Regulation (EEC) No 2137/85 of 25 July 1985, cit., art. 34.

## Concluding remarks

The path to the European University is still long and challenging.

The groupings provided by current regulations merely enable a circumscribed cooperation, which is limited to a few ancillary activities and cannot in any case lead to the collaborative performance of the most significant institutional activities. The national articulation of academic careers prevents the recruitment of university staff and the principle of state monopoly in the awarding of degrees excludes the admissibility of a genuinely European diploma that can replace national ones.

This inadequacy is rooted in the aforementioned limits of European competence in higher education, even more so than in the inherent characteristics of the groupings.

The latter, in any case, are evidently conceived for purposes other than those typical of academic cooperation, whether it be the EEIG, the EGTC, the ERIC or the Societas Europaea, and it is not without constraints that they can be adapted to the purposes of university alliances.

The exclusive aim «of strengthening economic and social cohesion» that characterises the EGCTs or the economic character of the EEIG's activities may be compatible with the institutional missions of the universities, but they are clearly insufficient to give substance to a cooperation that reflects the university's cultural and scientific vocation.

The establishment of such groupings for institutionalised interuniversity cooperation is a good solution in a medium-term perspective, to deepen ties and strengthen relations, but it cannot be a permanent solution.

Instead, the academic community needs a legal form that can grasp its intimate identity, which finds a perfect synthesis in the principle of academic freedom set out in the Charter of

Fundamental Rights of the European Union (art. 13). What is required is an organisation specifically designed to ensure the disinterested conduct of scientific activities, teaching and the dissemination of research results to society as a whole.

## References

Alby, E. (1994). G.E.I.E. (Gruppo Europeo di Interesse Economico). In *Digesto delle discipline privatistiche. Sezione commerciale. Vol. 11*. Torino: UTET.

Barendt, E. (2010). *Academic Freedom and the Law (a Comparative Study)*. Oxford and Portland, Oregon: Hart Publishing.

Beaud, O. (2010). *Les libertés universitaires à l'abandon?*. Paris: Dalloz.

Beaud, O. (2021). *Le savoir en danger. Menaces sur la liberté académique*. Paris: Presses Universitaires de France.

Cavallo Perin, R., & Racca, G.M. (2016). La cooperazione amministrativa europea nei contratti e servizi pubblici. *Rivista italiana diritto pubblico comunitario*, 6, 1457-1493.

Cobban, A.B. (1990). *Universities in the Middle Ages*. Liverpool: Liverpool University Press.

Costamagna, F. (2018). National social spaces as adjustment variables in the EMU: A critical legal appraisal. *European Law Journal*, 24(2-3), 163-190.

European Commission, & EACEA, & Eurydice (2016). *National Student Fee and Support Systems in European Higher Education - 2016/17. Eurydice-Facts and Figures*. Luxembourg: Publication Office of the European Union.

Ferrari, E. (2007). L'uguale libertà del cittadino europeo: linee di frattura della corrispondente concezione nazionale di uguale libertà. *Rivista trimestrale di diritto pubblico*, 4, 931-958.

Finkin, M.W., & Post, R. (2009). *For the Common Good: Principles of American Academic Freedom*. New Haven and London: Yale University Press.

Fleischer, H. (2010). Supranational corporate forms in the European Union: Prolegomena to a theory on supranational forms of association. *Common Market Law Review*, 47, 1671-1717.

Gagliardi, B. (2021). Le competenze dell'Unione europea in materia di istruzione superiore: un confronto con lo "spending power" degli Stati Uniti d'America, *Rivista italiana diritto pubblico comunitario*, 6-6, 675-721.

Gagliardi, B. (2018). *La tutela amministrativa della libertà accademica*. Padova: CEDAM.

Gagliardi, B. (2012). *La libera circolazione dei cittadini europei e il pubblico concorso*. Napoli, Jovene.

Gallo, D. (2020). Functional Approach and Economic Activity in EU Competition Law, *Today: The Case of Social Security and Healthcare*. *European Public Law*, 26(3), 569-586.

Garben, S. (2010). The Bologna Process: From a European Law Perspective. *European Law Journal*, 16(2), 186-210.

Garben, S. (2012). *The Future of Higher Education in Europe: The Case for a Stronger Base in EU Law*, LEQS Paper no. 50/2012.

Gaudemet, Y. (2008). Les bases constitutionnelles du droit universitaire. *Revue de droit public*, 124(3), 680-700.

Gideon, A. (2017). *Higher Education Institutions in the EU: Between Competition and Public Service*. The Hague: Springer.

Iliopoulou-Penot, A. (2021). L'instrument pour la relance Next-Generation EU: «Where there is a political will, there is a legal way»? *Revue trim. droit eur.*, 57(3), 527-543.

Jakulevičienė, L. (2017). Corporate Forms Facilitating Non-Profit Networking: Formalizing the Informal. *Baltic Journal of Law & Politics*, 10(2), 192-224.

Karran, T. (2009). Academic Freedom: in Justification of a Universal Ideal. *Studies in Higher Education*, 34(2), pp. 263-283.

Karran, T. (2005). Pan-European Grading Scales: Lessons from National Systems and the ECTS. *Higher Education in Europe*, 30(1), 5-22.

Keeling, R. (2006). The Bologna Process and the Lisbon Research Agenda: The European Commission's Expanding Role in Higher Education Discourse. *European Journal of Education*, 41(2), 203-223.

Lazzerini, N. (2015). The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice. In G. Palmisano (Ed.), *Making the Charter of Fundamental Rights a Living Instrument* (pp. 30-54). Brill: Nijhoff.

Meiselles, M. K. (2015). The European Economic Interest Grouping – A Chance for Multinationals?. *European business Law Review*, 26(3), 391-415.

Merloni, F. (1990). *Autonomie e libertà nel sistema della ricerca scientifica*. Milano: Giuffrè.

Montaldo, S. (2013). L'ambito di applicazione della Carta dei diritti fondamentali dell'Unione europea e il principio del *ne bis in idem*. *Dir. umani e dir. int.*, 7(2), 574-580.

Moulin, L. (1991). *La vie des étudiants au Moyen Age*. Paris: Albin Michel.



Musto, R.G. (2021). *The Attack on Higher Education. The Dissolution of the American University*. Cambridge-New York: Cambridge University Press.

OCDE (2016). *Regards sur l'éducation 2016: les indicateurs de l'OCDE*. Paris: Editions OCDE.

Orsi Battaglini, A. (1990). Libertà scientifica, Libertà accademica e valori costituzionali. In AA. VV. (Ed.), *Nuove dimensioni nei diritti di libertà. Scritti in onore di Paolo Barile* (pp. 89-108). Padova: Cedam.

Palfreyman, D., & Tapper, T. (2014). *Reshaping the University. The Rise of the Regulated Market in Higher Education*. Oxford: Oxford University Press.

Post, R. (2012). *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*. New Haven and London: Yale University Press.

Russell C. (1993). *Academic Freedom*. London: Routledge.

Sterling Kerr, P. (1990). An Entity for Community Cooperation: The European Economic Interest Grouping. *Brigham Young University Law Review*, 4, 1743-1758.

Taschini, L. (2019). *I diritti sociali al tempo della condizionalità*. Torino: Giappichelli.

Terry, L.S. (2008). The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes. *Vanderbilt Journal of Transnational Law*, 41, 107-228.

Van de Gronden, J.W. (2018). Services of General Economic Interest and the Concept of Undertaking: Does EU Competition Law Apply?. *World Competition*, 41(2), 197-224.

Van Der Wende, M. (2021). Neo-nationalism in the European Union and Universities. In J.A. Douglass (Ed.), *Neo-nationalism*

*and Universities. Populists, Autocrats, and the Future of Higher Education* (pp. 117-140). Baltimore, Maryland: Johns Hopkins University Press.

Verger, J. (1973). *Les universités au moyen âge*. Paris: PUF.