Project: 101114602 — EGAI — ERASMUS-EDU-2022-POL-EXP-HE

Task 2.3

Proposal for a new regulatory framework

Funded by the European Union

Co-funded by the Erasmus+ Programme of the European Union

Project Acronym	EGAI
Project Title	UNITA AS A MODEL FOR INSTITUTIONALIZED UNIVERSITY COOPERATION: FROM THE EUROPEAN GROUPING OF ECONOMIC INTEREST TO THE EUROPEAN GROUPING OF ACADEMIC INTEREST
Document Author	UNIVERSITE SAVOIE MONT BLANC
Project Coordinator	Barbara Gagliardi
Project Duration	12 Months
Deliverable No.	D2.3
Dissemination level *	PU
Work Package	WP 2
Task	2.3
Lead beneficiary	UNIVERSITE SAVOIE MONT BLANC
Due date of deliverable	February 2024
Actual submission date	29th February 2024
Document version	1.0

* PU = Public; PP = Restricted to other programme (including the Commission Services); RE = Restricted to a group specified by the consortium (including the Commission Services); CO = Confidential, only for members of the consortium (including the Agency Services)

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union and of the European Education and Culture Executive Agency (EACEA). Neither the European Union nor the granting authority can be held responsible for them

Abstract

This document describes the possible new regulatory framework that could be established for the operation of a legal entity for academic cooperation purposes. In that view, this document explores the need for a legal entity and the advantages and disadvantages of the current legal tools available. It also delves into the competences of the Union to adopt a new regulation before proposing a new regulatory framework.

Summary

1. The Purpose for the creation of a Legal Status for European Universities Alliances

1.1. The purpose of European Universities Alliances

The General purpose of European Universities Alliances (EUAs) can be found on the European Commission's website[1].

The long-term objective of EUAs is twofold. First it is to "improve the international competitiveness of higher education institutions in Europe". Second, it must "promote European values and identity".

To achieve this long-term goal, the Commission details operative purposes of EUAs. By pooling resources (i.e. HR, Data, Finances, Infrastructure, etc.), members of EUAs could increase mobility, offer joint curricula or learning opportunities, etc. The development of these activities has been supported through funding but, to strengthen this ambition in the long run, the creation of a Legal Entity might be needed.

1.2. The purpose of the creation of a Legal Entity

Several activities that could be entrusted to European University Alliances could be best secured by the creation of a Legal Entity. To better assess the need for a legal entity and the content of a proposed regulation, it is therefore necessary to identify the activities that would be better achieved through the creation of a legal entity. It should also be noted that, when drafting a new legal status of EUAs, the prospective activities taken into account should not only be activities that might be entrusted to EUAs in a short-term perspective but also activities that they might one day have in charge, thus creating a legal tool that might be adapted to the future evolution of EUAs.

For example, the creation of a legal entity is essential to put together common online teaching activities. The creation of a legal entity would allow to share a common online platform, hire the staff to maintain the platform and allow its use by all the member universities.

The same would be true for infrastructure. Infrastructure could be pooled or acquired directly by the legal entity, allowing its shared use and its joint maintenance. Moreover, it would allow the common legal entity to adopt the rules for using this infrastructure and to ensure that it can be accessed by all those who need it in the different universities.

It would mainly allow to allocate resources and the possibility to sign contracts and ensure every purchase necessary for the operation of such infrastructure without having to resort to a complex web of contracts between the different universities.

Other activities ensured to such a legal structure cover:

- Receiving funding and applying for calls for proposals

[1] https://education.ec.europa.eu/education-levels/higher-education/european-universities-initiative/about, accessed February 13th, 2024.

- Enlisting students and teaching
- Hiring staff for common activities
- Awarding degrees and micro certifications
- Adopting common rules for joint activities
- Signing contracts with public and private entities.
- Adopting common administrative decisions

2. The Current Legal instruments available at EU Level

For the time being, two main legal instruments exist at the EU level to create a legal structure for EUAs[2]. There are advantages and disadvantages with both instruments, i.e. the European Economic Interest Grouping (EEIG)[3] and the European Grouping of Territorial Cooperation (EGTC)[4].

2.1. The EEIG

2.1.1. The advantages

The main advantages that justified the choice of an EEIG by the partners in UNITA is the ease with which it can be set up, without a long and complex procedure, allowing a quick and proper development of a legal structure with the legal personality. Indeed, the EEIG "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"[5].

2.1.2. The disadvantages

The main limiting factor to the use of an EEIG for academic purposes is that it can only be entrusted with economic activities. If the meaning of an Economic activity is unclear, it certainly excludes some activities that are at the core of academic cooperation.

First, the Court of Justice has judged that teaching activities, when they are mainly funded through public funds, are not economic activities[6]. Teaching activities can only be entrusted to an EEIG if they are mainly funded by the students or by a third party. The same goes for public research activities.

Second, the very meaning of what can be deemed an economic activity puts the activities of an EEIG in a precarious legal situation.

[2] See B. Gagliardi e.a., « The path towards the European University in the current EU legal framework: the UNITA – Universitas Montium experience », *International Journal of film and media arts*, 2022, vol. 7, n°3, pp. 10-26.
[3] Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), *OJ* L 199 of 31st July 1985, p. 1.
[4] 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), *OJ* L 210 of 31st July 2006, p. 1.
[5] See B. Gagliardi e.a., « The path towards the European University in the current EU legal framework: the UNITA – Universitas Montium experience », *op.cit.*, at p. 21.
[6] CJEC, GC, 11 September 2007, *Herbert Schwarz et Marga oojes-Schwarz c/ Finanzamt Bergisch Gladbach*, Case C-76/05, *Rec.* p. I-6849, Points 40-41.

In that sense, it should be noted that, in France, a specific grouping, the grouping of public interest, has been created for research and teaching purposes in lieu of the Economic Interest Grouping (EIG)[7]. This choice illustrates the ill-adaptation of the EIG, which inspired the EEIG, for academic purposes. For example, the EEIG is an entity ruled mainly by private law with no power to adopt administrative acts or decisions.

Furthermore, not only the activities of the EEIG must be economic, but they must also be "ancillary" to those carried out by the members. This raises some doubts about the possibility of attributing to this grouping the activities institutionally exercised by universities (e.g. the organisation of a course of study).

Moreover, members of an EEIG must have their activity in the territory of the European Union. In the long run, this might constitute a limitation if alliances were to open to universities outside the EU. In the case of UNITA, two universities from third countries are associated members. The EEIG status precludes them to become full members.

Another limitation of the EEIG is the shared liability of its members towards the EEIG.

2.2. The EGTC

2.2.1. The advantages

An EGTC is an entity that is specifically crafted for transnational cooperation between public entities. Therefore, it appears as the most adapted legal solution for European Universities. However, it has the main drawback of requiring a very demanding creation procedure. Moreover, if this structure is well-suited for territorial cooperation among public persons from different Member States, it is not perfectly suited for academic cooperation.

2.2.2. The disadvantages

2.2.2.1. The uncertain possibility for a private entity to become a member of an EGTC

One of the main limitations of the EGTC for academic cooperation is the definition of its possible members. It can consist of Member States, national, regional and local authorities as well as public undertakings within the meaning of point (b) of Article 2(1) of Directive 2004/17/EC of the European Parliament and of the Council or 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 contract[8]. For private undertakings, only those in charge of a Service of General Economic Interest[9] can become members.

[7] See the website of the direction for legal affairs of the French Ministry of Economic Affairs : https://www.economie.gouv.fr/daj/gip#:~:text=Le%20Groupement%20d%27int%C3%A9r%C3%AAt%20public,de%20missions%20d%27int%C3%A9r%C3%AAt%20g%C3%A9n%C3%A9ral.

[8] For an application in the field of Higher education, see CJEC, 3rd October 2000, *University of Cambridge*, Case C-380/98, *Reports* p. I-08035.

[9] 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), *OJ* L 210 of 31st July 2006, Article 3 (1) (e).

This could prove an issue as an important part of HER institutions are private in several Member States. Moreover, the definition of an SGEI is ill-suited for its purpose under the EGTC regulation. Indeed, this concept has been created for a very different purpose: an exception to Article 106 TFEU. The Member States have an important leeway in determining what constitutes an SGEI as its definition is not clearly defined under EU Law[10].

Depending on the different Member States, Private HER institutions will be considered to operate an SGEI or not. The Commission states that "It transpires from Article 106(2) of the Treaty that undertakings entrusted with the operation of SGEIs are undertakings entrusted with 'a particular task'. Generally speaking, the entrustment of a 'particular public service task' implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions. Applying a general interest criterion, Member States or the Union may attach specific obligations to such services."[11]

For example, in France, different kinds of private HER institutions exist, with different links to the state. Some are recognized by the state for their "useful contribution to the Public Service of HER". Some have the right to deliver diplomas with the same value as national diplomas, etc. This begs the question of knowing if the mere recognition, by the State, that an institution contributes to public service can be deemed an SGEI.

The many different national setups for HER services might pose a difficulty in this regard. For example, can private universities in Italy, which are on an equal standing with public universities[12], be considered SGEIs?

2.2.2.2. The uncertain scope of the missions of EGTCs

According to Regulation 1082/2006, "[a]n EGTC shall act within the confines of the tasks given to it, namely the facilitation and promotion of territorial cooperation to strengthen Union economic, social and territorial cohesion, and the overcoming of internal market barriers."

Therefore, it is unclear whether academic activities, such as providing classes or granting diplomas can be conducted by an EGTC. If it were to be agreed upon by national authorities when an EGTC is created, it would be admissible to entrust such activities to an EGTC.

2.2.2.3. The uncertain power of EGTCs to adopt by-laws

Article 7, paragraph 4, of Regulation No 1082/2006 provides that:

« The tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law or of duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy.

[10] On this definition and its link to Higher Education Institutions, see A. GIDEON, *Higher Education Institutions in the EU: Between Competition and Public Services*, Springer, Dordrecht, 2017, 272 p., at p. 54-69.
[11] 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, *OJ* C 8 of January 11th, 2012, p. 4, at para. 47.
[12] Article 33 of the Italian Constitution.

However, in compliance with applicable Union and national law, the assembly of an EGTC, referred to in point (a) of Article 10(1), may define the terms and conditions of the use of an item of infrastructure the EGTC is managing, or the terms and conditions subject to which a service of general economic interest is provided, including the tariffs and fees to be paid by the users. »

This article precludes an EGTC to exercise any regulatory power except for the management of an item of infrastructure. The question might be raised on the possibility to adopt regulations about the examinations or the requirements for diplomas that would be directly managed by an EGTC. Indeed, it would be neither a SGEI nor an item of infrastructure per se. Moreover, the adoption of this kind of regulations could amount to the use of « regulatory powers ». Therefore, this article might need to be rewritten to allow the definition of the terms and conditions of diplomas or other curricula of which the EGTC is directly in charge or to adopt common rules among members. The same would be true for the adoption of common rules for the recognition of diplomas and credits from one member University to another.

2.2.2.4. Are jurisdiction selection rules adapted to Academic Activities?

Article 15 of the EGTC regulation sets the rules applicable to the determination of the competent court in the event of a dispute.

Following these rules, in the event of a dispute between a student directly enrolled in a course provided by the EGTC and the EGTC would have to be introduced before the courts of the Member State where the EGTC has been incorporated. This might prove cumbersome for a Romanian student to introduce a dispute before Italian courts, for example. Therefore, article 15 should be adapted to academic purposes by establishing the jurisdiction of the courts of the country of residence of the student.

3. Towards a Specific Legal Entity under EU Law

3.1. The EU's limited competence to create a new legal entity

The European Union is subjected to the principle of conferral. Indeed, Article 5 TEU, paragraph 2, provides that "under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

Therefore, the creation of a legal entity suitable for European University Alliances requires that the proper competence has been granted to the EU. To assess the existence of such a competence, one must foresee the content of the putative act of the EU. Indeed, "[i]t is settled case-law that the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure"[13].

[13] CJEC, Plenary Assembly, 6th Decembre 2001, *Carthagena Protocol on biosafety*, Opinion 2/00, *Reports* p. I-9713, at Point 22.

Hence, the content and objective of the regulation creating an EGAI status will indicate the convenient legal basis. The main objective pursued by the creation of an EGAI status is to allow for the cooperation between Higher Education and Research institutions from different member states. The final and indirect objective of this initiative is to foster mobility of students and academic staff, distant learning, and European curriculums. Thus, it is essential to search which legal bases are available to attain these objectives and determine what content of the regulation they would allow. It should be recalled, following established case-law, that "[i]f examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component"[14]. If one of the two components cannot be deemed predominant, two legal bases can be used simultaneously except if the two procedures for the adoption of acts are incompatible - for instance if one legal basis provides for unanimity and the other for qualified majority[15]. To assess the proper legal basis for the adoption of an EGAI entity, it must thus be considered whether the creation of an EGAI pursues the objectives of one or several of the EU's policies, if one of these purposes is predominant or not and, eventually, if the different procedures are compatible with each other.

The main EU competence in that sense would be the competence conferred upon the EU under the policies for education, youth and sport, vocational training and for research and innovation. However, these competences are very restrictive (1). Hence, one must explore the other competences available to pursue the objectives of the foreseen regulation (2).

3.1.1. The EU's restrictive competence under the policies for Education, Youth and Sport, vocational training and Research and innovation

Competences have been conferred upon the EU regarding education, youth and sport, vocational training, and research and innovation. However, the exercise of these competences is subject to different conditions (A). The unclear definition of these conditions questions the extent of the EU's competence on the matter (B).

3.1.1.1. The existence of competence for Education, Youth and Sport, vocational training and Research and innovation submitted to strict conditions

The EU is competent regarding education, as provided for in article 165 TFEU.

At paragraph 2, this article states the different objectives of the EU's policy for education, youth and sport. These objectives are:

- "developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,

[14] CJEC, GC, 30th January 2001, *Kingdom of Spain v. Council*, Case C-36/98, *Reports* p. I-810, at Point 59.
[15] CJEC, 29th April 2004, *Commission v. Parliament*, Case C-338/01, *Reports* p. I-4852, at Point 57-58.

- promoting cooperation between educational establishments,
- developing exchanges of information and experience on issues common to the education systems of the Member States,
- encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,
- encouraging the development of distance education,"

When it comes to Higher Education, the EU also is also competent under the policy for vocational training, provided for in article 166 TFEU. Indeed, the Court of Justice of the European Union has given a wide interpretation of vocational training[16] in a case concerning the competence of the EU to adopt the first Erasmus programme.

It is worth noting that the objectives of these policies resonate with the project of European Universities and the ones of UNITA. Nonetheless, the EU's competence in those fields is limited as they pertain to the competences for support, coordination, and supplement. As provided for in article 6, letter e, TFEU, the EU only has "competence to carry out actions to support, coordinate or supplement the actions of the Member State". Moreover, for this kind of competence, Article 2, paragraph 5, provides that "legally binding acts of the Union […] shall not entail harmonisation of Member States' laws or regulations."

Articles 165 TFEU further restrain the competence of the EU in the field of Education. Indeed, if the first paragraph of article 165 TFEU provides that the EU "shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action", its fourth paragraph is more restrictive. It provides for the actions that the EU can take to pursue the objectives of this policy, which can take two different forms.

First, following the ordinary legislative procedure (OLP), the Council and the Parliament can "adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States"[17]. Second, the Council can adopt recommendations.

The second option is of limited interest when it comes to the EGAI project, as recommendations "have no binding force"[18]. Therefore, the first option seems to be the more suitable but raises at least three questions and uncertainties that will be explored below[19].

Another specific competence of the Union shall be found at articles 179 to 190 TFEU which regulate the policy for research, technological development, and Space. For this policy, the EU has a shared competence with the

[16] On this wide interpretation, see J.-C. BARBATO, « Éducation », *JCl. Europe Traités*, 2023, Fasc. 2500, at paras. 32-35. CJEU, GC, 30th May 1989, *Commission v. Council*, Case 242/87, *Reports* p. 1449, at Point 27 : "in general the studies to which the contested programme [i.e. the Erasmus programme] applies fall within the sphere of vocational training, and only in exceptional cases will the action planned under the programme be found to be applicable to university studies which, because of their particular character, are outside that sphere. The mere possibility of the latter cannot justify the conclusion that the contested programme goes beyond the scope of vocational training and that therefore the Council was not empowered to adopt it pursuant to Article 128 of the Treaty". The two preceding point should also be noted: "25 In its judgment of 2 February 1988 in Case 24/86 Blaizot [1988] ECR 379, the Court has already stated that, in general, university studies fulfil those criteria and the only exceptions are certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation".
[17] Article 165, paragraph 4, TFEU.
[18] Article 288 TFEU.
[19] See *infra* I. B.

Member States. This competence is of specific nature as Article 4, paragraph 3, TFEU provides that "in the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs". Therefore, while it is not a competence for support, coordination and complement, this competence does not deprive the Member States of theirs. Based on Articles 187 and 188 TFEU, the Council and the Parliament can, through Ordinary legislative procedure, "set up joint undertakings or any other structure necessary for the efficient execution of Union research, technological development and demonstration programmes"[20]. For example, undertakings have been created under the Horizon Europe program[21]. This same legal basis has been used to adopt the rules applicable to European Research International Consortiums (ERIC). This legal basis could be considered for the creation of cooperation structures between European universities. However, it might be limited to the execution of the European Union's Research programs. Moreover, this legal basis could not allow for the creation of a cooperation structure regarding the teaching activities of universities[22].

Therefore, as the creation of an EGAI pursues both teaching and research purposes without one being ancillary to the other, the suitable legal bases would be Articles 165, 166, 187 and 188 TFEU. As all these articles provide for the use of the Ordinary Legislative Procedure, there is no incompatibility between the different adoption procedures. However, it is necessary to interpret the wording of Articles 165 and 166 TFEU to assess the possibility to adopt an EGAI status based on these articles combined with articles 187 and 188 TFEU.

3.1.1.2. The uncertain extent of the competence for education, youth, sport, vocational training and Research and technological development

Three limitations are brought to the extent of the EU's competence under Articles 165 and 166 TFEU. Both belong to "supporting competences" pursuant to Article 6 TFEU, and both exclude any harmonisation. However, only Article 165 TFUE limits the use of the Ordinary Legislative Procedure to the adoption of "incentive measures"[23] First, it is unclear what an "incentive measure" means. Second the very meaning of what can be construed as harmonisation is also uncertain.

The intent of the Treaties' authors when it comes to the meaning of an "incentive measure" pursuant to Article 165 and 166 TFEU is not clear. Indeed, in the conclusions from the Edinburgh Summit of 2002, the European Council stated that: "at articles other than 126 to 129 might not produce effects in these areas. Where Articles 126, 128 and 129 refer to "incentive measures", the Council considers that this expression refers to Community measures designed to encourage cooperation between Member States or to support or supplement their action in the areas concerned, including where appropriate through financial support for Community programs or national or cooperative measures designed to achieve the objectives of these

[20] Article 187 TFEU.
[21] Council Regulation (EU) 2021/2085 of 19 November 2021 establishing the Joint Undertakings under Horizon Europe and repealing Regulations (EC) No 219/2007, (EU) No 557/2014, (EU) No 558/2014, (EU) No 559/2014, (EU) No 560/2014, (EU) No 561/2014 and (EU) No 642/2014, *OJ* L 427, 30th Novembre 2021, p. 17.
[22] See B. GAGLIARDI E.A., « The path towards the European University in the current EU legal framework: the UNITA – Universitas Montium experience », *op. cit.*, at p. 21.
[23] Article 165, paragraph 4, and Article 166, paragraph 4, TFEU.

articles"[24]. This interpretation seems quite open and indicates that "incentive measures" are not limited to financial support, as implies the use of the word "including". However, the Convention on the Future of Europe which drafted the project for a Treaty establishing a Constitution for Europe first wanted to exclude any legislative power for the Union when it came to supporting competences, which would imply a much more restrictive understanding of what is an "incentive measure"[25].

Nevertheless, it remains unclear whether the creation of an EGAI could qualify as an "incentive measure" as very few case-law enlightens the meaning of this expression. In the aforementioned case about the Erasmus programme, the Court of justice judged that "[a]lthough it is true that Action 3 of the programme concerns 'measures to promote mobility though the academic recognition of diplomas and periods of study', examination of the various measures provided for in this part of the programme shows that they are designed merely to prepare for and encourage the recognition envisaged; that recognition itself is not the subject-matter of the action. The nature of the action is thus sufficient to show that it does not fall under the exclusive scope of application of Article 57 of the Treaty"[26]. Two lessons can be drawn from this case. Therefore, financial support to foster the mutual recognition of diplomas amounts to an "incentive measure" as they only "prepare and encourage" such recognition whereas the recognition of diplomas *per se* would not constitute an incentive measure. It also should be kept in mind that, in this case, the EEC had a specific competence for the recognition of diplomas. For the creation of an EGAI, the question is therefore whether the nature of such a measure would be considered as "preparing and encouraging" the recognition of diplomas or other of the objectives of Articles 165 TFEU or if, by itself, the creation of an EGAI would exceed the realm of "incentive measures".

Another case submitted before the General Court about the EU's competence on cultural policy gives some indications about the extent of the EU's competence to adopt incentive measures. This case is to be considered with caution as the judgement by the General Court has been annulled by the Court of Justice on other grounds[27]. In this case, an ECI had been submitted to the Commission for registration with purpose of protecting the specificities and the cultural diversity of "minority regions". Among other legal bases, the organizers had identified Article 167 TFEU, which exactly mirrors the competence of the Union for education, youth and sport. The General Court judged that "the adoption of the proposed act, which necessarily implied that a definition be given to the concept of a 'national minority regions' for the purpose of implementing EU cohesion policy, did not relate to any of the possibilities of action provided for in the second paragraph of Article 167 TFEU for contributing to the achievement of the objectives sought by EU cultural policy, namely the adoption of incentive measures, excluding any harmonisation of the laws and regulations of the Member States […]"[28]. From this point, two conclusions can be drawn. First, for education and vocational training, the EU only has the power to adopt incentive measures. Second, the adoption of a common definition of a legal concept cannot be deemed an incentive measure. In this sense, this last case seems to equate the limited

[24] European Council in Edinburgh 11-12 Decembre 1992, doc. SN 456/1/92 REV 1 footnote 1, p. 17. See also C. KADDOUS, « Article 149 CE (ex-article 126) » *in* P. LEGER (dir.), *Commentaire article par article des traités UE et CE*, Helbing et Lichtenham, Bâle/Genève/Munich, Dalloz, Paris, Bruylant, Bruxelles, 2000, pp. 1211-1221 at 1216.
[25] See V. MICHEL, « Article I-17 – Les domaines des actions d'appui, de coordination ou de complément », *in* L. BURGORGUE-LARSEN, A. LEVADE et F. PICOD (dir.), *Traité établissant une Constitution pour l'Europe – Commentaire article par article*, Bruylant, Bruxelles, 2007, pp. 254-264 at 261.
[26] CJEU, GC, 30th May 1989, *Commission v. Council*, Case 242/87, *supra*, at Point 20.
[27] CJEU, 7th March 2019, *Balázs-Árpád Izsák and Attila Dabis*, Case C-420/16 P, *Electronic Reports* ECLI:EU:C:2019:177 at Point 73.
[28] GCEU, 10th May 2016, *Balázs-Árpád Izsák and Attila Dabis*, Case T-529/13, *Electronic Reports* ECLI:EU:T:2016:282.

possibility to adopt "incentive measures" with the prohibition of harmonisation. However, it is not certain that the mere absence of harmonisation would suffice to qualify as an "incentive measure".

Moreover, in a recent opinion, Advocate General Szpunar offers a very restrictive reading of the competence conferred on the Union at article 165 TFEU. To give this restrictive reading, Advocate General Szpunar equates the meaning of harmonisation to any kind of legislation[29]. Therefore, in his opinion, the first Advocate General of the Court of Justice considers that article 165 TFEU only allows for the adoption of soft law[30], such as the recommendations of the Council pursuant to article 165, paragraph 4, second phrase. This understanding of "harmonisation" as amounting to "legislation" is surprising as Article 165, paragraph 4, first phrase, TFEU provides for the use of the OLP, which means that legislative acts can be based on this article[31]. In its judgement on the case, the Court of justice did not give more information on the interpretation of Article 165 TFEU[32].

The question also remains of what can be deemed an 'harmonisation' and to what extent it limits the possibilities to adopt a status for an EGAI under articles 165 and 166 TFEU. The Court of justice usually refers to "harmonisation" in cases about Article 114 TFEU. In these cases, harmonisation does not necessarily amount to a complete alignment of national legislations[33]. Indeed, the Court refers to a wide array of harmonisation techniques, including minimal harmonisation, when national laws can establish more protective standards than EU law requires[34]. Therefore, harmonisation could refer to any means which purpose is to align the different national legislations and therefore deprives the Member States of their competence[35].

The creation of a new legal form does not usually amount to harmonisation. In a case for annulment of the regulation creating the European cooperative society, the Grand Chamber of the Court of justice judged that a regulation which purpose is the introduction of "a new legal form in addition to the national forms"[36] and "leaves unchanged the different national laws already in existence, [therefore] cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose

[29] This is particularly blatant at endnote 30 of the Opinion: "Admittedly, it takes some time to get one's head around this provision which, in Orwellian-like fashion, allows the political institutions to resort to the ordinary legislative procedure in order to adopt … anything but legislation". See Opinion of Advocate General Szpunar delivered on 9 March 2023, *UL, Royal Antwerp Football Club*, Case C-680/21.
[30] *Ibid.*, at Point 51.
[31] Indeed, Article 289, paragraph 3, TFEU provides that "Legal acts adopted by legislative procedure shall constitute legislative acts".
[32] CJEU, GC, 21st December 2023, *Royal Antwerp Football Club*, Case C-680/21, *Not yet published*, Pts. 63-75.
[33] See for instance CJEU, 4th May 2016, *Philip Morris Brands e.a.*, Case C-547/14, *Electronic Reports* ECLI:EU:C:2016:325, at Point 63: " It is also to be observed that, by using the words 'measures for the approximation' in Article 114 TFEU, the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features (judgments in *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 42, and *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 102). It was thus open to the EU legislature, in the exercise of that discretion, to proceed towards harmonisation only in stages and to require only the gradual abolition of unilateral measures adopted by the Member States (judgment in *Rewe-Zentral*, 37/83, EU:C:1984:89, paragraph 20)". On the different harmonisation techniques, see G. DELLIS, "Le rapprochement des législations », *in* P. Léger (dir.), *Commentaire article par article des traités UE et CE*, *supra*, pp. 896-952, at pp. 923-926.
[34] See for example Article 153, paragraph 4, second indent.
[35] V. MICHEL, "Article I-17 – Les domaines des actions d'appui, de coordination ou de complément", *in* L. BURGORGUE-LARSEN, A. LEVADE et F. PICOD (dir.), *Traité établissant une Constitution pour l'Europe – Commentaire article par article*, Bruylant, Bruxelles, 2007, pp. 254-264, at p. 263.
[36] CJEU, GC, 2nd May 2006, *Parliament v. Council*, Case C-436/03, *Reports* p. I-3733, at Point 40. On this case, see A. BOUVERESSE, « Bases juridiques autorisant la création d'organismes dotés d'une personnalité juridique propre », *Europe*, 2006, n°7, comm. 203.

the creation of a new form of cooperative society in addition to the national forms"[37]. The Court concluded that "Article 95 EC [now article 114 TFEU] could not constitute an appropriate legal basis for the adoption of the contested regulation, which was correctly adopted on the basis of Article 308 EC"[38]. Thus, one can assume that the creation of a legal entity for the cooperation of legal entities from Member States does not amount to an approximation of legislations.

From the study of the competences of the EU for education, vocational education and research, it appears that the legal basis for an EGAI might be the plural basis of Articles 165 and 166 TFEU, and article 187 and 188 TFEU. Nevertheless, the extent of this competence is uncertain, and it cannot be guaranteed that an EGAI status could be the subject of a regulation by the EU. Indeed, articles 165 and 166 TFEU only provide for the possibility to adopt incentive measures. Moreover, any harmonisation is forbidden. This means that, in any event, a regulation for the creation of an EGAI status could not have the effect or objective of approximating the laws of the Member States, for example by creating a common concept that should be incorporated in the legal orders of the Member States. But the main limitation to the possibility of creating an EGAI might originate in the fact that Article 165 TFEU merely provides for the adoption of "incentive measures". This last expression has not received a clear definition and, if it comprises financial measures, it is doubtful that the adoption of an EGAI status could be construed as such. Indeed, acts based on articles providing for the adoption of "incentive measures" usually provide for financial instruments, such as the Erasmus + programme. Other measures are adopted through the means of recommendations, without legal effect, and decisions, such as the ones creating the European year for youth or the European Capitals for culture, which do not impose obligations on Member States but only coordinate the actions of the EU and Member States[39]. One could note the creation, by a decision, of the *Europass* system for facilitating access to information on education between Member States. However, once again, this decision only provides for the creation, by the institutions, of online tools[40]. If such an act could not be adopted on this basis, other options ought to be explored.

3.1.2. Other foreseeable competences to create an EGAI

Two comprehensive legal bases have consistently been used to adopt legal acts when the Union or the Communities did not have a clearly identified competence: Article 114 TFEU (formerly article 100A TEEC and 95EC) and article 352 TFEU (formerly article 235 TEEC and 308 EC). The first provides for the approximation of the laws by the EU to ensure the proper functioning of the internal market and should probably be excluded for the present purpose (A). The second is a flexibility clause that could prove useful for adopting an EGAI status (B).

[37] *Ibid*, at Point 44.
[38] *Ibid.*, at Point 46.
[39] See Decision No 445/2014/EU of the European Parliament and of the Council of 16th April 2014 establishing a Union action for the European Capitals of Culture for the years 2020 to 2033 and repealing Decision No 1622/2006/EC, *OJ* L 132 of 3rd May 2014, p. 1 and Decision (EU) 2021/2316 of the European Parliament and of the Council of 22 December 2021 on a European Year of Youth, *OJ* L 462 of 28th December 2021, p. 1.
[40] Decision (EU) 2018/646 of the European Parliament and of the Council of 18 April 2018 on a common framework for the provision of better services for skills and qualifications (Europass) and repealing Decision No 2241/2004/EC, *OJ* L 112 of 2nd May 2018, p. 42.

3.1.2.1. The most probable exclusion of Article 114 TFEU.

Article 114 TFEU provides, at its first paragraph, that "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

This legal basis allows for the approximation of legislation to ensure the proper establishment and functioning of the internal market. However, it must probably be excluded for the adoption of an EGAI status which would not pursue the objective of ensuring the proper functioning of the internal market and would probably not amount to harmonisation.

One of the main advantages of Article 114 TFEU is to allow for the approximation of legislations even if this approximation or harmonisation is forbidden elsewhere in the treaties. Indeed, the use of Article 114 TFEU over another legal basis - for instance Article 165 TFEU- obeys to the usual rules for the determination of the legal basis of a legal act of the Union[41]. If the act foreseen has the prominent objective of ensuring the good functioning of the internal market, Article 114 TFEU should be used. In that case, the fact that another legal basis forbids harmonisation does not preclude the use of article 114 TFEU as admitted by the Court of Justice in the realm of the protection of human health[42]. Indeed, the Court has considered that the harmonisation of the packaging of tobacco products could be adopted on the basis of article 114 TFEU even if the EU has been granted a competence regarding public health which excludes harmonisation[43]. To admit the possibility to base a measure on Article 114 TFEU, the Court recalled that "while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market"[44]. It continued by mentioning that "it is also settled case-law that, although recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them"[45].

As required by the settled case-law of the Court of Justice, the adoption of a legal act on the basis of Article 114 TFEU requires that the objective of the foreseen act must have the purpose of implementing the internal market by eliminating disparities between the laws of the Member States that create obstacles to the free movement of goods, services, persons or capital or prevent the likely emergence of such obstacles. To choose this legal basis over a specific competence, the objective of ensuring the proper functioning of the internal market must be prominent. S. Garben has argued that it could be the case of a regulation with the purpose of ensuring the mutual recognition of diplomas for academic purposes as it would ensure the free movement of

[41] See *supra* Introduction.
[42] CJEU, 4th May 2016, *Philip Morris Brands e.a.*, Case C-547/14, *supra*.
[43] Article 168, paragraph 5, TFEU.
[44] CJEU, 4th May 2016, *Philip Morris Brands e.a.*, Case C-547/14, *supra*, at Point 58.
[45] *Ibid.*, at Point 59.

services[46]. Nonetheless, this conclusion cannot be extended to the adoption of an EGAI status. Indeed, the primary objective of such a regulation would be to foster cooperation between different Higher Education and Research institutions. The pursuit of free movement of services or persons[47] would be an objective of this regulation to a much lesser extent. It should be added that such a regulation would not pursue approximation of the different national legislations to overcome obstacles. Furthermore, as previously mentioned, the Grand Chamber of the Court of Justice has already considered that new legal forms could not be adopted on the basis of Article 114 TFEU[48]

Nonetheless, the Commission has recently proposed the adoption of legal status for European Cross-Border Associations based on Articles 50[49] and 114 TFEU. In lieu of a Regulation, the Commission proposes the adoption of a directive, the purpose of which is to create, in the Member States National Legislations, a new status for a European Cross-Border Association. The comparison between this proposal for a directive and the regulation on the EEIG shows that they follow the same model. Resorting to Article 50, if it might be explained by the fact that this directive refers to the Commission's action plan for the social economy[50], is nonetheless surprising. Indeed, as provided for in the directive on services in the internal market, establishment "means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out"[51]. This definition is a codification of the jurisprudence of the Court of Justice, which has consistently stated that "[t]he concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons"[52]. It is therefore doubtful that it can be used for the creation of an EGAI.

This proposal has recently been transmitted to the Council. The latter, or a single Member State, might submit an action for annulment before the Court on the grounds of competence as the use of Article 352 TFEU would require unanimity. It would be very interesting to see if the Court were to maintain its judgement in the aforementioned Case 436/03 or if it could accept the use of Article 114 TFEU as a legal basis for the creation of a legal entity. This would prove immensely useful for the creation of an EGAI, as it would permit to resort to harmonisation. In any event, this recent proposal by the Commission casts doubt on the possible use of Article 114 TFEU to create a new legal form.

However, as a regulation on the creation of an EGAI status might still probably not be based on article 114 TFEU, Article 352 TFEU appears as the prominent legal basis.

---

[46] S. GARBEN, "The Bologna Process: From a European Law Perspective", *European Law Journal*, 2010, vol. 16, n°2, pp. 186-210, at pp. 189-196.
[47] It should be noted that harmonisation to ensure the free movement of persons can only be adopted under Article 115 TFEU, which requires unanimity. See Article 114, paragraph 2, TFEU.
[48] CJEU, GC, 2nd May 2006, *Parliament v. Council*, Case C-436/03, *Reports* p. I-3733, at Point 40.
[49] This Article provides for the freedom of Establishment in the EU.
[50] *Ibid.*, recital 4.
[51] Article 4, under 5), of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* L 376 of 27th December 2006, p. 36.
[52] CJEU, GC, 30th November 1995, *Reinhard Gebhard*, Case C-55/94, *Reports* p. I-4186, at Point 25. The Court has recently referred to this judgement in CJEU, 15th September 2022, *FK*, Case C-58/21, Not yet published, at Point 60.

3.1.2.2. The foreseeable use of Article 352 TFEU

The first paragraph of Article 352 TFUE is sometimes called the "flexibility clause"[53]. Article 352, paragraph 1, TFEU reads as follows: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament"[54]. Three conditions[55] appear distinctively:

-The necessity of the action to attain one of the objectives set out in the Treaties

-The integration into one of the policies defined in the treaties

-The absence of the necessary powers to attain this objective

The interpretation of these conditions is shrouded in uncertainty. Indeed, the Treaty of Lisbon has brought several modifications to Article 352 TFEU[56] in comparison to Article 308 EC and these changes have not been interpreted by the Court of Justice yet. Nevertheless, some indications can be found in former cases of the Court of Justice.

The first condition does not entail many difficulties. Indeed, the use of the term "objectives" refers to every objective of the EU as established in the Treaties. This might also include sectoral objectives such as the ones of the different EU policies[57]. However, Declaration 41, annexed to the Final Act of the intergovernmental conference, casts some doubt about the extent of the objectives that can be attained through Article 352 TFEU. This declaration states that the objectives mentioned at Article 352 TFEU refer only to the ones enumerated at Article 3, paragraphs 2, 3, and 5 TEU. Yet, these paragraphs do not refer to the objectives of Article 165 TFEU. Thus, it is unclear if Article 352 TFEU could be used to achieve the sectoral objectives of the EU's policy for education, youth, and sport. This still might be the case, for two reasons. First, Declarations attached to the final act of the European Conference do not have the same legal value as

[53] On this clause, see C. FLAESCH-MOUGIN, "Article 235", *in* V. CONSTANTINESCO, J.-P. JACQUÉ, R. KOVAR et D. SIMON (dir.), *Traité instituant la CEE – Commentaire article par article*, Economica, Paris, 1992, pp. 1509-1540 ; L. WEITZEL, "Article 308 CE", in P. LEGER (dir.), *Commentaire article par article des traités UE et CE*, Helbing et Lichtenham, Bâle/Genève/Munich, Dalloz, Paris, Bruylant, Bruxelles, 2000, pp. 1945-1957 ; R. SCHÜTZE, "Dynamic Integration – Article 308 EC and Legislation 'in the Course of the Operation of the Common Market': A Review Essay", *Oxford Journal of Legal Studies*, 2003, Vol. 23, n°2, pp. 333-344 and "Organized Change towards an 'Ever Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence", *Yearbook of European Law*, 2003, vol. 22, pp. 79-115 ; T. KOSTADINIDES, "Drawing the line between Circumvention and Gap-Fillling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause", *Yearbook of European Law*, 2012, vol. 31, pp. 227-262.

[54] Emphases added.

[55] This list of conditions is inspired by three similar lists: see V. MICHEL et V. CONSTANTINESCO, « Compétences de l'Union européenne », *Répertoire Dalloz de droit européen*, 2011, at paras. 93-95. V. MICHEL and V. CONSTANTINESCO enumerate only three competences as they consider the first and third conditions exposed beforehand as only one. See L. WEITZEL, « Article 308 CE », *in* P. LEGER (dir.), *Commentaire article par article des traités UE et CE*, Helbing et Lichtenham, Bâle/Genève/Munich, Dalloz, Paris, Bruylant, Bruxelles, 2000, pp. 1945-1957, at 1948-1955 and C. Flaesch-Mougin, « Article 235 », *in* V. CONSTANTINESCO, J.-P. JACQUE, R. KOVAR et D. SIMON (dir.), *Traité instituant la CEE – Commentaire article par article*, Economica, Paris, 1992, pp. 1509-1540, at p. 1510.

[56] See T. KOSTADINIDES, "Drawing the line between Circumvention and Gap-Fillling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause", *supra* at pp. 256-259.

[57] See L. WEITZEL, « Article 308 CE », *supra*, at p. 1950.

the Treaties. If the Court might use them as a guide for interpreting the treaties, its practice is not consistent as it does not always take these declarations into account[58]. Second, several authors still consider that Article 352 TFEU can be used to achieve not only general objectives of the EU but also specific objectives from different policies[59]. If this could be admitted, the creation of an EGAI would pursue the following objectives of Article 165 TFEU:

- "developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,
- promoting cooperation between educational establishments, […]
- encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,
- encouraging the development of distance education"[60]

The second condition does not represent a difficulty. Indeed, the envisioned modification pursues the objectives of the EU's Policy for education, youth, and sport and of the policy for research and technological development.

The third condition might pose other difficulties. First, because - as exposed above - it is unclear whether Article 165, 166 and 188 TFEU could provide a legal basis for the adoption of a legal status for an EGAI. Second, as V. MICHEL points out, this condition is somewhat vague as two interpretations could be retained[61]. A restrictive interpretation would only cover the cases in which no power has been given to achieve the objective of the European Union[62]. A wider interpretation would cover the cases in which no or insufficient powers have been conferred on the EU[63]. The Court has also condoned its use as a complementary legal basis as admitted in a case about the Erasmus programme[64]. Both these interpretations have been retained by the Court of Justice, depending on the extent of the powers conferred upon the Union through a specific competence. As developed by V. CONSTANTINESCO and V. MICHEL, the use of article 352 TFUE varies following the ambit of the specific competences conferred on the EU[65]. However, the use of article 235 TFEU has been excluded when the Communities were given enough power to achieve their objectives.

In addition to these different conditions, this flexibility clause entails different limitations. First, in Opinion 2/94, the Court stated about article 235 TEEC (now Article 352 TFEU) that "That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty

[58] See V. MICHEL, « Actes annexés aux traités », *JCl. Europe traité*, 2010, Fasc. 150, at para. 52.
[59] See for instance F. MARTUCCI, *Droit de l'Union européenne*, 2ème édition, Dalloz, 2019, 924 p., at p. 200.
[60] Article 165, paragraph 2, TFEU.
[61] See V. MICHEL et V. CONSTANTINESCO, « Compétences de l'Union européenne », *supra*, at para. 94. See also C. FLAESCH-MOUGIN, « Article 235 », *supra*, at pp. 1514-1515.
[62] For instance, CJEC, 26th March 1987, *Commission v. Council*, Case 45/86, *Reports* p. 1517, at Point 13: "it follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question".
[63] For instance in CJEC, 12th July 1973, *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, Case 8/73, *Reports* p. 897, at Point 4, the Court admitted the use of Article 235 TEEC for reasons of legal certainty.
[64] CJEC, GC, 30th May 1989, *Commission v. Council*, Case 242/87, *supra*, at Point 37.
[65] See V. MICHEL et V. CONSTANTINESCO, "Compétences de l'Union européenne", *supra*, at para. 94.

as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose"[66].

Second, Article 352 § 3 TFEU provides that this subsidiary competence cannot be used to adopt a harmonisation when harmonisation is otherwise excluded by the treaties. Therefore, if the limitation to the possibility of adopting a status for European Universities were to originate in the impossibility to adopt harmonisation measures, Article 352 could not provide an appropriate solution.

Third, even if Article 352 TFEU could be used, the adoption of a legal act of the EU would require the unanimity in the Council. It is therefore necessary that a consensus could be achieved between all the Member States. This constitutes an obstacle as unanimity tends to make the Member States settle on a limited consensus that all of them could agree on. However, it has the advantage of limiting the risk of a judicial challenge by a Member State against the adopted regulation.

However, the past practice of the institutions shows that Article 352 TFEU is a serious prospective legal basis for the creation of an EGAI. Out of four other legal statuses for European cooperation legal entities – i.e. the European Economic Interest Grouping (EEIG)[67], the European Society[68] and the European Grouping of Territorial Cooperation (EGTC)[69], the European Cooperative Society[70] – three have been based on the flexibility clause. These three instances are the EEIG, the European Society and the European Cooperative Society - the regulation establishing the EGTC being based on the EU's competence for economic, social, and territorial cooperation[71].

Even after the entry into force of the Treaty of Lisbon, Article 352 TFEU seems to be the preferred legal basis for the creation of such legal entities. This would tend to be confirmed by a recent resolution of the European Parliament[72]. In this resolution of initiative, the Parliament asks the Commission to propose the adoption of a regulation on a Statute for a European Association. The proposition annexed to the resolution is based on Article 352 TFEU. The Commission resorted on the same legal basis to propose a regulation for the creation of a European Foundation[73]. However, as mentioned above, the Commission casted doubt on the use

[66] CJEC, 28th March 1996, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *Reports* p. I-01759, at Point 30. This is a consistent jurisprudence as illustrated by GCEU, 19th April 2016, *Costantini v. Commission*, Case T-44/14, *electronic Reports* ECLI:EU:T:2016:223, at Point 51.
[67] Council Regulation (EEC) No 2137/85, *supra*.
[68] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *OJ* L 294 of 10th Novembre 2001, p. 1
[69] Regulation (EC) No 1082/2006, *supra*.
[70] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), *OJ* L 207 of 18th August 2003, p. 1.
[71] 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), *supra*.
[72] European Parliament resolution of 17 February 2022 with recommendations to the Commission on a statute for European cross-border associations and non-profit organisations (2020/2026(INL)), P9_TA(2022)0044, *OJ* C 342 of 6th September 2022, p. 225.
[73] European Commission, Proposal for a Council Regulation on the Statute for a European Foundation (FE) of 8th February 2012, COM(2012) 35 final. The Commission even refers to Case C-436/03, *supra*, at p. 5. It is however noteworthy that this proposal was subsequently withdrawn by the Commission. See Withdrawal of Commission proposals, *OJ* C 80 of 7th March 2015, p. 17.

of Article 352 TFEU when it has proposed the adoption of a directive based on Article 114 TFEU for the creation of a status for European Cross-Border Associations.

Conclusion on the EU's competence

From the exploration of the competences offered by the Treaties, it appears that a legal status could be based on two alternative legal bases.

First, a competence could be found at Articles 165, 166, 187 and 188 TFEU only if the creation of legal form for the EGAI could be deemed an "incentive measure". Second, if such a measure were not deemed an incentive measure and if Articles 187 and 188 TFEU only allow for the creation of a legal entity for the management of Union programs, it could be based on article 352 TFEU. It would require the Council to adopt this regulation unanimously.

In any case, the regulation must respect the principles of subsidiarity[74] and proportionality. The Court of Justice has interpreted the principle of subsidiarity as providing "that, in areas which do not fall within its exclusive competence, the European Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level"[75]. In the case at hands, the added value of an action at EU level is obvious and the same result could not be achieved at Member States level. However, this principle is subject to a political control by National Parliament under the provisions of the Second Protocol annexed to the Treaties. The principle of proportionality is provided for at Article 5, paragraph 4, TEU[76]. In its interpretation of this principle, the Court has put forward the broad discretion of the institutions[77]. It could be assumed that the creation of an EGAI does not go beyond what is necessary for the purpose of creating a European University Alliance.

These legal bases would provide the opportunity to create a legal entity complementary to the national ones, to pursue academic purposes as they would pursue the objectives set out at Articles 165, 166 and 187 TFEU. In any event, the regulation foreseen could not resort to any harmonisation. It could be drafted on the model of the regulations establishing a the EEIG and the EGTC. This means that an EGAI would be registered in a Member State. It would be subject to the regulations and laws of the Member State in which it

[74] The Principle of Subsidiarity is provided for at Article 5, paragraph 3, TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

[75] CJEU, 6th June 2019, *P.M. v. Ministeraad*, Case C-264/18, *Electronic Reports* ECLI:EU:C:2019:472, at Point 20. On this principle, see F. MARTUCCI, *Droit de l'Union européenne*, 2ème édition, *supra*, at pp. 208-213.

[76] This paragraph reads as follows: " Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

[77] See CJEC, GC, 6th December 2005, *ABNA e.a.*, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *Reports* p. I-10423, at Points 68-69: "68 According to settled case-law, the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (*Arnold André*, paragraph 45, and *Swedish Match*, paragraph 47). 69 With regard to judicial review of the conditions referred to in the previous paragraph, it should be noted that the Community legislature must be allowed a broad discretion in an area such as that in issue in the present case, which involves political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue (see, in this regard, *Arnold André*, paragraph 46, *Swedish Match*, paragraph 48, and *Alliance for Natural Health and Others*, cited above, paragraph 52)."

has been incorporated. Therefore, several gaps would remain for the possibility to create fully-fledged autonomous universities such as the possibility for an EGAI to award degrees or even the mutual recognition of diplomas for academic purposes. Indeed, it would not be possible to insert in the regulation rules imposing on the Member States to grant EGAIs the power to award degrees or to ensure the mutual recognition of diplomas between the member universities of an EGAI. Therefore, it would rest on National legislations to grant such capacities to EGAIs created under their national law. In the same way, the justiciability of the decisions adopted by an EGAI would be subject to the rules of private international law. Therefore, to identify the proper legal basis and what can be achieved, it is necessary to strictly define the powers of an EGAI and what must be included in the regulation. In this view, the rules defining an EGAI must be drafted considering its whole regulatory environment. This regulatory environment includes the whole EU initiative for a European Education Area[78].

Provided this legal framework, it can then be assessed how a legal status for European University Alliances can be created. In that view, the current legal structures available and their limitations when it comes to academic purposes should be considered.

4. The foreseeable paths

Two main instruments at European level allow for cooperation among universities: the EEIG and the EGTC. As explained earlier, these two instruments are partly ill-suited for academic purposes. For this reason, new cooperation structures are needed.

Considering the limited competence of the EU, several paths could be explored. First, it might be possible to make a few adjustments to the current legal structures that are the EGTC and the EEIG by modifying the regulations. Second, it might be possible to go further and adopt a new regulation, based on Articles 165, 166, 187, and 188 TFEU or Article 352 TFEU or, possibly, a directive, based on article 114 TFEU.

4.1. Adapting Current Legal Entities

4.1.1. An Academic EGTC

The proposed amendments:

-At Article 1: A third paragraph should be added after paragraph 2, with the following content:

“3. When at least one of the EGTC is competent, under national law, to grant diplomas, the objective of an EGTC shall be to facilitate and promote academic cooperation”.

-At article 3: A (g) is added to the first paragraph, redacted as follows:

[78] For a recent account of the progress in the formation of a European Education Area, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on progress towards the achievement of the European Education Area of 18th November 2022, COM(2022) 700 final.

"(g) public or private undertakings competent, under national law, to grant diplomas, or undergoing higher education and research activities."

-At article 7, paragraph 1, a second indent should be written as follows:

"An EGTC comprising members pursuant to Article 3, paragraph 1 (g) shall act within the confines of the tasks given to it, namely to encourage mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study, promote cooperation between educational establishments, encourage the development of distance education, and any other task conferred upon it by its members pursuant to the aforementioned purposes".

-At article 7, paragraph 4, a third Alinea should be written as follows:

"However, in compliance with applicable Union and national law, the assembly of an EGTC, referred to in point (a) of Article 10(1), may define the terms and conditions of a curriculum the EGTC is managing, including the tariffs and fees to be paid by the students."

These amendments could be based on article 352 TFEU or Article 165 TFEU. It might also be based on the EU's competence for economic, territorial, and social cohesion. However, in this last case, the extension of the purposes might prove impossible.

Moreover, this would create two different regimes in the regulation, and it might lead to creating EGTCs between academic institutions and local authorities. More, some of the features of the regulation would still be ill-suited for academic cooperation. For example, the possibility to admit public persons from third countries is limited to those located in countries neighbouring the country where one of the members of the EGTC is located. However, academic cooperations, in particular for distant learning purposes, do not share the impetus and dynamics as other cooperations. Universities located in western Europe can very well have strong ties to Eastern European Universities.

4.1.2. An Academic EEIG

Taking into account the benefits and limitations of the EEIG for academic purposes, several amendments to the EEIG regulation can be proposed. In particular, the purpose of the EEIG should be extended beyond economic activities to include non-economic academic activities. Moreover, the provisions concerning the liability of the members of an EEIG should be adapted and the responsibility limited. Such an adaptation would however have two main flaws.

First, it would create a dual legal regime among EEIGs that would be difficult to apprehend. Second, even in this case, it might not be perfectly suited to academic activities and public activities as it would not have the possibility to adopt regulations or by-laws.

4.2. Creating a New Instrument: The EGAI

As the EEIG had been created on the model of the French EIG, an EGAI could be drafted on the model of the French Public Interest Grouping. Indeed, limitations of the EIG like the ones of the EEIG were an important driver to create a Public Interest Grouping for academic purposes. Moreover, the Public Interest

Grouping offers more flexibility and has been widely used for academic cooperation (see for example the UNJF project). The Public Interest Grouping has evolved but the former Public Interest grouping for academic purposes could be the main source of inspiration as it answers to several of the main limitations of both the EGTC and the EEIG:

- Open to both public and private entities
- Not limited to economic activities
- Not subject to shared liability

However, for some aspects, it should be adapted to the European context and its academic purpose. For example, the Public Interest Grouping does not allow to pursue for-profit activities which would put in jeopardy the possibility to entrust them with teaching activities in exchange for tuition. Therefore, at least for the definition of their competences, it could be better to rely on the example of the "Communautés d'universités et d'établissements" or the "Établissements publics expérimentaux" both provided for in the *Code de l'éducation*. Therefore, the competence of an EGAI could be defined as Research, Teaching, and Innovation activities, within the limits of the competences of its members.

As such a regulation would amount to the creation of a new legal form under EU law, some of the features of the EEIG and EGTC regulations should inspire a prospective regulation when it comes to the outline of the regulation, the recognition of the legal standing of an EGAI, or the interaction between EU law and national law.

It should also be noted that the participation of private undertakings to an EGAI might pose questions when it comes to the application of the rules on public procurements as set out in Directive 2014/24/EU[79] and the relevant case-law.

Considering the aforementioned aspects, a regulation could be organised as follows:

REGULATION (EU) No XXX/XXX OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of ….

on a European grouping of academic interest (EGAI)

Article 1

Nature of an EGAI

1. A European grouping of academic interest may be established on Union territory under the conditions and subject to the arrangements provided for by this Regulation.

2. The objective of an EGAI shall be to facilitate and promote, in particular, interuniversity cooperation, including one or more of the cross-border, transnational and interregional strands of cooperation,

[79] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ* L 94 of 28th March 2014, p. 65.

between its members as set out in Article 3(1), with the aim of strengthening academic, teaching and research cooperation as provided for at articles 165 and 179 TFEU.

3. An EGAI shall have legal personality.

4. An EGAI 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.

5. In accordance with national law, an EGAI might have the same rights and capacity as higher education institutions under the same requirements.

6. The registered office of an EGAI shall be located in a Member State under whose law at least one of the EGAI's members is established.

Article 2

Applicable law

1. The acts of the organs of an EGAI shall be governed by the following:

(a) this Regulation;

(b) the convention referred to in Article 10, where it is expressly authorised under this Regulation to do so; and

(c) in the case of matters not, or only partly, regulated under this Regulation, the national law of the Member State where the EGAI has its registered office.

Where it is necessary to determine the applicable law under Union law or private international law, an EGAI shall be considered to be an entity of the Member State where it has its registered office.

2. The activities of an EGAI relating to carrying out tasks, referred to in Article 9(2) and (3), inside the Union shall be governed by applicable Union law and national law as specified in the convention referred to in Article 10.

The activities of an EGAI that are co-financed from the Union budget shall comply with the requirements set out in applicable Union law and the national law relating to the application of that Union law.

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

Article 3

Composition of an EGAI

1. The following entities may become members of an EGAI:

(a) Public or Private entities entrusted or exercising teaching, research, and innovation activities.

(b) Associations consisting of bodies belonging to one or more of these categories may also be members.

2. An EGAI shall be made up of members located on the territory of at least two Member States, except as provided for in Article 4(2) and (5).

Article 4

Accession of members from third countries or overseas countries or territories (OCTs)

1. In accordance with Article 5, an EGAI may be made up of members located on the territory of at least two Member States and of one or more third countries.

2. In accordance with Article 5 and subject to the conditions set out in paragraph 1 of this Article, an EGAI may also be made up of members located on the territory of at least two Member States, including their outermost regions, and of one or more OCTs, with or without members from one or more third countries.

3. In accordance with Article 5 and subject to the conditions set out in paragraph 2 of this Article, an EGAI may also be made up of members located on the territory of only one Member State, including its outermost regions, and of one or more OCTs, with or without members from one or more third countries.

4. An EGAI shall not be set up only between members from a Member State and one or more OCTs linked to that same Member State.

Article 5

Establishment of an EGAI

This procedure could be inspired by the one established at Article 4 of Regulation 1082/2006. However, as mentioned above, this procedure proves cumbersome and should be adapted to better suit the needs of academic cooperation.

Several avenues could be explored to make this procedure simpler:

-The creation of an EGAI could be subjected only to a notification procedure to the Member States, possibly with a possibility for them to oppose the convention for limited reasons;

-The Member States might only have three months to agree with an EGAI convention;

-Only some modifications of the statutes or the convention should be subjected to an authorization procedure. This should only concern modifications which modify the tasks conferred upon an EGAI or the law applicable to it.

In any event, the authorisation should be given by the ministry in charge of higher education and research in the different Member States.

Article 6

Participation of members from an OCT

This article could be inspired by Article 4a of Regulation 1082/2006.

Article 7

Acquisition of legal personality and publication in the Official Journal

1. The convention and the statutes and any subsequent amendments thereto shall be registered or published, or both, in the Member State where the EGAI concerned has its registered office, in accordance with the applicable national law of that Member State. The EGAI shall acquire legal personality on the date of registration or publication of the convention and the statutes, whichever occurs first. The members shall inform the Member States concerned and the Commission of the registration or publication of the convention and the statutes. In accordance with national laws, an EGAI might be entrusted with the same rights as a Higher Education institution under national laws.

2. The EGAI shall ensure that, within ten working days of the registration or publication of the convention and the statutes, a request is sent to the Commission following the template set out in the Annex to this Regulation. The Commission shall then transfer that request to the Publications Office of the European Union for publication of a notice, in the C series of the Official Journal of the European Union, announcing the establishment of the EGAI, along with the details set out in the Annex to this Regulation.

Article 8

Control of management of public funds

This article could be inspired by Article 6 of Regulation 1082/2006

Article 9

Tasks

1. An EGAI shall carry out the tasks given to it by its members in accordance with this Regulation. Its tasks shall be defined by the convention agreed by its members, in conformity with Articles 5 and 10.

2. An EGAI shall act within the confines of the tasks given to it, namely to encourage mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study, promote cooperation between educational establishments, encourage the development of distance education, research and technological development and mobility of researchers and technologies and any other task conferred upon it by its members pursuant to the aforementioned purposes.

3. The tasks given to an EGAI 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.

However, in compliance with applicable Union and national law, the assembly of an EGAI, referred to in point (a) of Article 12(1), may define the terms and conditions of the use of an item of infrastructure the

EGAI is managing, or the terms and conditions subject to which a service of general economic interest is provided, including the tariffs and fees to be paid by the users as well as, in compliance with applicable Union and national law, the assembly of an EGAI may define the terms and conditions of a curriculum the EGAI is managing, including the tariffs and fees to be paid by the students. In compliance with applicable Union and national law, the assembly of an EGAI, referred to in point (a) of Article 12(1), may define the rules applicable to the mutual recognition of diplomas between the different members of the EGAI.

4. The members of an EGAI may decide by unanimity to empower one of the members to execute its tasks.

Article 10

Convention

1. An EGAI shall be governed by a convention concluded unanimously by its members in accordance with Article 4.

2. The convention shall specify:

(a) the name of the EGAI and its registered office;

(c) the objective and the tasks of the EGAI;

(d) the duration of the EGAI and the conditions for its dissolution;

(e) the list of the EGAI's members;

(f) the list of the EGAI's organs and their respective competences;

(g) the applicable Union law and national law of the Member State where the EGAI has its registered office for the purposes of the interpretation and enforcement of the convention;

(h) the applicable Union law and national law of the Member State where the EGAI's organs act;

(i) the arrangements for the involvement of members from third countries or from OCTs if appropriate including the identification of applicable law where the EGAI carries out tasks in third countries or in OCTs;

(j) the applicable Union and national law directly relevant to the EGAI's activities carried out under the tasks specified in the convention;

(k) the rules applicable to the EGAI's staff, as well as the principles governing the arrangements concerning personnel management and recruitment procedures;

(l) the arrangements for liability of the EGAI and its members in accordance with Article 14;

(m) if applicable, the appropriate arrangements for mutual recognition, including for financial control of the management of public funds and diplomas for continuation of studies from one member of the EGAI to another; and

(n) the procedures for adoption of the statutes and amendment of the convention, which shall comply with the obligations set out in Articles 5 and 6.

Article 11

Statutes

1. The statutes of an EGAI shall be adopted on the basis of, and in accordance with, its convention, by its members acting unanimously.

2. The statutes of an EGAI shall specify, as a minimum, the following:

(a) the operating provisions of its organs and those organs' competences, as well as the number of representatives of the members in the relevant organs;

(b) its decision-making procedures;

(c) its working language or languages;

(d) the arrangements for its functioning;

(e) its procedures concerning personnel management and recruitment;

(f) the arrangements for its members' financial contributions;

(g) the applicable accounting and budgetary rules for its members;

(h) the designation of the independent external auditor of its accounts;

(i) if applicable, the rules for the recognition of dilpomas and credits between the members; and

(j) the procedures for amending its statutes, which shall comply with the obligations set out in Articles 5 and 6.

Article 12

Organisation of an EGAI

1. An EGAI shall have at least the following organs:

(a) an assembly, which is made up of representatives of its members;

(b) a director, who represents the EGAI and acts on its behalf.

2. The statutes may provide for additional organs with clearly defined powers.

3. An EGAI shall be liable for the acts of its organs as regards third parties, even where such acts do not fall within the tasks of the EGAI.

4. Upon establishing the organs set out at paragraphs 1 and 2 of this article, the members of the EGAI shall involve learners, academics, researchers and staff and take into account the existing democratic elements of academic self-governance[80]

Article 13

Budget

This article could be inspired by Article 11 of Regulation 1082/2006.

Article 14

Liquidation, insolvency, cessation of payments and liability

This article could be inspired by Article 12 of Regulation 1082/2006.

Article 15

Public interest

An EGAI shall respect academic freedom and be inspired by the principle of academic freedom in accordance with Article 13 of the Charter of Fundamental Rights and the rules of National law and Union law.

The remaining of this article could be inspired by Article 13 of Regulation 1082/2006.

Article 16

Dissolution

This article could be inspired by Article 14 of Regulation 1082/2006.

Article 17

Jurisdiction

This article could be inspired by Article 15 of Regulation 1082/2006.

It should be added that, in the event of a dispute arising between the EGAI and a student enlisted in a teaching activity entrusted to the EGAI, the competent court for the resolution of the dispute should be the courts of the Member State of residence of the student.

Article 18

Final provisions

This article could be inspired by Article 16 of Regulation 1082/2006.

[80] See Council Recommandation of 5 April 2022 on building bridges for effective European higher education cooperation, *OJ* C 160 of 13 Arpil 2022, p. 1, at para. 10.

Article 19

Report

This article could be inspired by Article 17 of Regulation 1082/2006.

Article 20

Exercise of the delegation

This article could be inspired by Article 17a of Regulation 1082/2006.

Article 21

Entry into force

This article could be inspired by Article 18 of Regulation 1082/2006.