



# **EU Legal Structures and Their Applicability to ECIU**

## **A Cross-Examination of EU Legal Entities in Relation to Use Cases**

**Erasmus+ Project “A European Status for ECIU University” (ESEU Project)**

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**Lavinia Kortese  
Juliette Byl  
Osama Arshad**

**Utrecht University**



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## 1. Introduction

The European Union is currently working towards the creation of **the European Education Area by 2025**. In the field of higher education, an important role is reserved for cooperation between higher education institutions for which the Commission has proposed the creation of a “**policy framework allowing for seamless and ambitious transnational cooperation between higher education institutions**”.<sup>1</sup> Whereas such cooperation can either take place within or outside the context of the European University Alliances, it is clear that an important role is reserved for discussion on a legal statute enabling higher education cooperation to take place in accordance with a fixed legal structure.<sup>2</sup>

Early 2022 the European Commission presented its European strategy for universities which included a new framework to enhance cooperation in higher education and research. This framework consisted of four flagship initiatives, one of which concerns the **development of a legal statute** for alliances of higher education institutions.<sup>3</sup> The strategy determined that such a statute would allow higher education institutions to mutualise their strengths together, make common strategic decisions, act together with a legal personality, and facilitate the pooling of resources, activities and data – ultimately resulting in deeper, long-term and flexible transnational cooperation.<sup>4</sup>

Whereas these initiatives clarify the policy importance of a clear legal status for cooperating higher education institutions, its importance has also repeatedly been brought up by stakeholders working on such cooperation in practice. For example, stakeholder consultations conducted in the context of a report commissioned by the European Parliament showed that the current mode of operation of the European University Alliances is considered **unsustainable in the long-term**, among others, due to uncertainty related to their governance structures and legal status.<sup>5</sup>

ECIU has long been aware of the importance of its legal structure. ECIU has the ambition to become a Europe-wide ecosystem combining education, research and innovation established by means of a public-private entity at European level.<sup>6</sup> To this end, ECIU has previously commissioned a review of possible options to deepen cooperation between partner universities. The review considered various scenarios ranging from looser forms of cooperation such as networks to far-reaching cooperation such as mergers.<sup>7</sup> Van der Hijden and Van der Wende especially identified **two governance scenarios** relevant to ECIU:<sup>8</sup> the first involving the **retention of the status quo while stretching the limits** of legal instruments currently used such as foundations under national law and Erasmus+ partnership agreements. The second scenario, providing the basis for the present report, involves the construction

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on achieving the European Education Area by 2025, COM(2020) 625 final, p. 19.

<sup>2</sup> Ibid., p. 21.

<sup>3</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, COM(2022) 16 final, p. 5.

<sup>4</sup> Ibid.

<sup>5</sup> Craciun et al. The European Universities Initiative: first lessons, main challenges and perspectives – Study requested by the CULT Committee – European Parliament, January 2023, p. 53-54.

<sup>6</sup> P. van der Hijden & M. van der Wende, ECIU University 2030: Towards a legal framework for governance – An Exploratory Review of Options and Scenarios, May 2021, p. 3

<sup>7</sup> Ibid., p. 5.

<sup>8</sup> Ibid., p. 8.

of a **“holding-like” ECIU legal entity** in which use is made of one (or more) holding-like legal entities to create a general governance framework. In this respect, Van der Hijden and Van der Wende particularly referred to the *Societas Europaea* as a tool allowing ECIU to have a private law entity to “organize supply and demand for learning, research and innovation in new ways”.<sup>9</sup> Nevertheless, they also identified other instruments as legal entities possibly relevant to advancing ECIU’s mission. In light of these findings, the instruments identified as particularly relevant – and that will accordingly form the basis for the present report – **are the European Grouping of Territorial Cooperation (EGTC), Societas Europaea (SE), European Cooperative Society (SCE), and European Institute for Innovation and Technology (EIT).**<sup>10</sup>

In a broader context, considerable efforts have already been made by alliances of higher education institutions in the search for the most suitable legal arrangement to structure their cooperation. Here, reference can – among others – be made to the CHARM-EU alliance which examined opportunities to adapt its governance model into a separate legal entity. Whereas the alliance examined the EGTC as a possible instrument for deepened cooperation, it emphasised the necessity for the model to be adapted to the needs of European University Alliances to actually achieve deepened long-term cooperation as expressed by the Commission.<sup>11</sup> A similar initiative was undertaken in the context of the 4EU+ alliance which examined the feasibility of establishing a legal entity in the form of a German charitable limited liability company (gGmbH) focusing especially on challenges arising from German company law and tax law. Despite seeing opportunities for the use of the gGmbH, the researchers considered the conversion to a European legal entity desirable. As far as existing instruments were concerned, the researchers concluded that the use of these instruments was likely to result in a considerable administrative burden and high costs associated with legal advice.<sup>12</sup>

**The present report seeks to combine previous efforts in search of the best suitable legal structure for ECIU’s cooperation.** In line with the “holding-like” scenario identified by Van der Hijden and Van der Wende, this report presents an analysis of the four EU legal entities defined in their work (EGTC, SCE, SE, and EIT) applied to eight use cases identified by ECIU in the context of the ESEU project.<sup>13</sup> Rather than consisting of problem descriptions, these use cases consist demonstrate a state of affairs ECIU strives to achieve in the future. The eight use cases identified concern:

1. The hiring of staff;
2. The receiving of public and private funding in a flexible manner from various sources;
3. The provision of flexible learning paths at EU level;
4. The creation of private revenue on continuous education;
5. The investment into and management of facilities;
6. The management of data-related issues;
7. The management of issues related to Intellectual Property Rights (IPR); and
8. The buying and owning of goods and services by ECIU.

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<sup>9</sup> Ibid., p. 8.

<sup>10</sup> Ibid., p. 9.

<sup>11</sup> See X. Pons Rafols et al., White Paper on the Governance of European Universities: The case of CHARM-EU, December 2022.

<sup>12</sup> See S. Schwemmer and M.P. Weller, Establishing a Legal Entity for the 4EU+ University Alliance: Feasibility Study from a German Corporate and Tax Law Perspective, June 2022.

<sup>13</sup> H. Harrikari, ESEU: Legal Use Cases, fall 2022.

The core aim of this report is therefore to conduct a cross-examination of the aforementioned legal structures in relation to the abovementioned eight use cases.

We adopt a multi-step approach to fulfil this objective. In **Section 2**, we examine ECIU's current state of affairs as far as legal entity is concerned. At present, ECIU is a foundation under Dutch law. We will first explore the general functioning of this legal entity, its possibilities as well as its limitations. **Section 3** subsequently introduces the four legal entities EGTC, SCE, SE, and EIT. For each of these instruments, their functioning is described in terms of governance and implementation. Where available, examples are provided of initiatives active in the area of higher education making use of these respective instruments. **Section 4** subsequently constitutes the core of this report containing the cross-examination of the four EU legal entities with the eight use cases. **Section 5** reflects on the cross-examination and determines which instruments are most suitable for certain use cases and discusses which core issues would need to be resolved per instrument in order to lead to a more likely application to the field of higher education cooperation. **Section 6** concludes.

## 2. Status Quo: ECIU's Current Legal Status – Opportunities & Limitations

ECIU can currently be considered to consist of different elements of which two are of central importance to this report: First, there is the **European Consortium of Innovative Universities (ECIU)** constituting the network of participating universities.<sup>14</sup> Second **ECIU University** is the name used for the consortium's cooperation as one of the first 17 European University Alliances initiated in 2019.<sup>15</sup>

However, the aforementioned elements of ECIU concern core activities ECIU partner universities engage in in the context of the cooperative framework of ECIU. In order to connect these partners and activities from the different universities ECIU currently has an overarching legal structure registered as a Foundation in the Netherlands, a status they have held since 2006.<sup>16</sup> At present, the foundation consists of a management board and daily management.<sup>17</sup> The former is composed of representatives of the member universities, the latter is appointed by the members of the management board. The management board is especially tasked with setting priorities and decision-making on new projects as well as financial matters related to the foundation's funds. In order to fund its activities, each of the partners makes an annual contribution to ECIU.

Nevertheless, ECIU is currently not able to undertake all desired activities in the context of the foundation. Accordingly, ECIU does not yet have one overarching and encompassing legal structure that governs all its existing and prospective operations. At present, such may be seen with the two aforementioned elements ECIU consists of, namely the consortium (solidified in the foundation) and ECIU University. The latter has come into existence as one of the initial 17 European University Alliances. Whereas both initiatives require a governance framework, ECIU has resolved this double requirement by making use of the existing governance structure created by the foundation when establishing its governance as a European University Alliance.<sup>18</sup>

At present, the ECIU Foundation (NL) is used for several purposes, including:<sup>19</sup>

- participation in project proposals;
- having a general governance framework;
- creation of a logo and trademarking;
- issuance of micro-credentials;
- conclusion of rental contracts; and
- conclusion of employment contracts.

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<sup>14</sup> More specifically, the ECIU consortium consists of ten members: Aalborg University, Dublin City University, Hamburg University of Technology, Institut National des Sciences Appliquées, Kaunas University of Technology, Linköping University, Lodz University of Technology, Tampere University, Universitat Autònoma de Barcelona, Universidade de Aveiro, University of Stavanger, Università di Trento, and the University of Twente. ECIU also has one non-EU associate member (Tecnológico de Monterrey).

<sup>15</sup> See the European Commission, 'First 17 "European Universities" selected: a major step towards building a European Education Area', [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_3389](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3389); and European Commission 'Annex: European Universities selected – June 2019', <https://ec.europa.eu/commission/presscorner/api/files/attachment/857832/ANNEX.pdf.pdf>.

<sup>16</sup> The Stichting European Consortium of Innovative Universities is registered at the Dutch Chamber of Commerce (KvK 08164880).

<sup>17</sup> In principle, foundations under Dutch law consist of a board (and not of members, as in the case of other legal structures such as associations – *verenigingen*); Article 285(1) Dutch Civil Code – Book 2.

<sup>18</sup> Interview with representative ECIU, 6 April 2023.

<sup>19</sup> Interview with representative ECIU, 6 April 2023.

Whereas ECIU university therefore currently already employs the foundation under Dutch law for a variety of purposes, the question may be raised to which extent such a foundation could also be of further use to ECIU in its pursuit of becoming the ecosystem it strives to be. Despite its flexible structure, it is clear that ECIU is experiencing some of the **limitations** of the foundation under Dutch law. Particular challenges were reported in relation to **voting rights, the hiring of staff, and generating income**.

In relation to **voting rights**, for example, ECIU maintains majority voting in the context of its activities. Due to its strong emphasis on co-creation, ECIU values the input from its external stakeholders representing, for example, businesses and industry. Therefore, the desire was to have additional stakeholders represented in the management board of ECIU (in particular: external representatives, student representatives, and representatives from industry and society). However, such external stakeholders do not have voting rights in relation to the foundation in part due to requirements applicable to several universities where decisions related to the management of the university and the distribution of financial resources cannot be taken by external stakeholders. This challenge has been resolved by placing the 13 university members of the foundation in a body provisionally called the ECIU governing authority, which is to decide on resources, legal issues, and membership.<sup>20</sup> All other decisions are subsequently taken by the ECIU governing authority including the additional stakeholders.

At the same time, limitations of the foundation became clear in relation to the **hiring of staff** (use case 1). Whereas this can take place relatively easily in the Netherlands in the context of the foundation, ECIU reported such issues to be particularly present in the case of potential employees based in other Member States.<sup>21</sup> One example of a recent challenge described by ECIU concerned the hiring process of a colleague based in Italy. In order to realise their employment, a company had to be created in Italy. ECIU reports this to be a particularly problematic point since it considerably delays the hiring process (meaning the best prospective candidate may be gone by the time the hiring process – including the creation of a company – is concluded) and leads to additional costs. The issue was solved intermediately by keeping staff members at their own universities and organising their remuneration through centralised ECIU funding (e.g. obtained in the context of the European University Alliance). Despite this temporary solution, the issue of hiring staff is considered by ECIU as a limitation of the foundation under Dutch law – especially since ECIU is looking to expand its core team in the future.

Another limitation reported in respect to the foundation concerns challenges related to **making revenue** (use case 2 and 4). As long as ECIU receives funding in the context of the European University Alliances call under Erasmus+, the issue regarding revenue is not yet pertinent. However, it is a core activity ECIU foresees to undertake in the future (see also Section 4 of this report on the use cases). The capacity to make revenue subsequently plays an important role to ensure the sustainability of ECIU. Indeed, the dependence on project-based funding can be said to pose as a risk to sustainability in general in relation to European University Alliances and other initiatives to undertake university cooperation.

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<sup>20</sup> Important to note in this respect is that the decision on a legal structure will therefore also be taken by the ECIU governing authority/management board consisting exclusively of the 13 university members.

<sup>21</sup> Interview with representative ECIU, 6 April 2023.

Indeed, the generating of income is an activity ECIU does not yet undertake but is considered crucial to ensure ECIU's sustainability and independence of EU and national project-based funding and is limited in the context of a foundation under Dutch law. As far as revenue goes, the **foundation under Dutch law places a limitation on revenue**: namely, that **all revenues made must benefit the foundation**. Foundations under Dutch law have the primary characteristic that they have a **social or idealistic objective**.<sup>22</sup> Foundations can thereby receive funds that can result in a surplus but these can generally only be used for the benefit of the foundation itself (i.e. the realisation of the objective) and cannot be paid to the foundation's administrators.<sup>23</sup>

Interestingly, despite the foundation's main objective as social or idealistic, **there is a possibility for foundations to also be considered as companies under Dutch law**. This is especially the case if the foundation also undertakes entrepreneurial activities (*ondernemersactiviteiten*). If such is the case, the foundation must register itself in the Dutch trade register (*Handelsregister*).<sup>24</sup> An important consequence of a foundation also undertaking entrepreneurial activities is the payment of various taxes.<sup>25</sup> In particular, this applies to corporate tax (*vennootschapsbelasting*) over the profits made, value added tax (*btw*) over turnover, and payroll taxes (*loonheffingen*) in the event that the foundation hires staff.<sup>26</sup> Applicability of such taxes is dependent on the type of activities that a foundation undertakes. Whereas exemptions are possible,<sup>27</sup> it needs to be determined in each case whether the foundation is to be considered a company in the context of the applicable tax legislation.<sup>28</sup> It is thereby important that a foundation operates a material company (*een materiële onderneming drijven*) which consists of a sustainable organisation of labour and capital aiming to achieve profit through participation in economic transactions.<sup>29</sup> Whereas this is to be determined on a case-by-case basis,

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<sup>22</sup> Article 285(3) Dutch Civil Code – Book 2 (*Burgerlijk Wetboek – Boek 2*).

<sup>23</sup> Article 285(3) Dutch Civil Code – Book 2 (*Burgerlijk Wetboek – Boek 2*).

<sup>24</sup> See Art. 299a Dutch Civil Code – Book 2 (*Burgerlijk Wetboek – Boek 2*) which reads "A foundation that maintains one or more companies that must be registered in the trade register pursuant to the law shall state the net turnover of these companies in the statement of income and expenditure" (original: *Een stichting die een of meer ondernemingen in stand houdt welke ingevolge de wet in het handelsregister moeten worden ingeschreven, vermeldt bij de staat van baten en lasten de netto-omzet van deze ondernemingen*). See also Art. 5(a) Trade Register Act (*Handelsregisterwet 2007*).

<sup>25</sup> See Belastingdienst, 'Stichting of vereniging en gevolgen voor uw belastingen', [https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/ondernemen/onderneming\\_star\\_ten/rechtsvorm/stichting-of-vereniging](https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/ondernemen/onderneming_star_ten/rechtsvorm/stichting-of-vereniging).

<sup>26</sup> Belastingdienst, 'Stichtingen en verenigingen: belastingplicht', [https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/bijzondere\\_regelingen/stichtingen\\_en\\_verenigingen/belastingplicht/belastingplicht](https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/bijzondere_regelingen/stichtingen_en_verenigingen/belastingplicht/belastingplicht).

<sup>27</sup> For example, some activities that are exempt from the value added tax (*btw*) are educational activities ranging from primary education to higher education. However, these exemptions apply especially in the case of legally organised education but may nonetheless also cover cooperation between educational institutions and the provision of personnel. See Belastingdienst, 'Stichtingen en verenigingen: btw-vrijstellingen', [https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/bijzondere\\_regelingen/stichtingen\\_en\\_verenigingen/omzet-en-btw/btw-vrijstellingen](https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/bijzondere_regelingen/stichtingen_en_verenigingen/omzet-en-btw/btw-vrijstellingen) and Belastingdienst, 'Vrijstelling in het onderwijs', [https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/btw/tarieven\\_en\\_vrijstellingen/vrijstellingen/onderwijs/vrijstelling\\_in\\_het\\_onderwijs](https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/btw/tarieven_en_vrijstellingen/vrijstellingen/onderwijs/vrijstelling_in_het_onderwijs).

In a similar vein, exemptions are possible from the corporate tax. Generally, this tax applies to companies taking part in economic activities that are making or striving for profit. See Belastingdienst, 'Wanneer moet een stichting, vereniging of vergelijkbare organisatie aangifte doen?', [https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/winst/vennootschapsbelasting/belastingplicht\\_en\\_aangifte/wanneer\\_moet\\_een\\_stichting\\_vereniging\\_of\\_vergelijkbare\\_organisatie\\_aangifte\\_doen/wanneer\\_aangifte\\_vp\\_b\\_doen](https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/winst/vennootschapsbelasting/belastingplicht_en_aangifte/wanneer_moet_een_stichting_vereniging_of_vergelijkbare_organisatie_aangifte_doen/wanneer_aangifte_vp_b_doen) and

<sup>28</sup> J.L. van de Streek, 'Algemene opmerkingen over de beperkte belastingplicht van stichtingen en verenigingen', [https://new.navigator.nl/document/inod4be7e1591903b0c9346f69e9b329b54e?ctx=WKNL\\_CSL\\_381&tab=tekst&searchid=821578875](https://new.navigator.nl/document/inod4be7e1591903b0c9346f69e9b329b54e?ctx=WKNL_CSL_381&tab=tekst&searchid=821578875).

<sup>29</sup> Ibid.



the most important aspect is therefore whether entrepreneurial activities are actually taking place. This means that for tax purposes it is not of importance whether the foundation has taken up its profit-making activities in its statutes.<sup>30</sup>

These tax-related considerations are therefore particularly relevant in relation to revenue-making activities of foundations. In this context, precautions related to applicable tax legislation must also be extended in cases of possible investments by foundations (see for example use cases 5 and 8). Although it is possible for foundations to make investments, the non-profit nature of the foundation and application of national tax legislation must be taken into account. Such awareness must also be had in the event that ECIU wants to undertake both public and private educational activities. Whereas it appears possible for a foundation to undertake continuous professional education and make revenue, specific rules apply in the Netherlands to regulate investments made with public funds into private activities.<sup>31</sup> Ultimately, the objective of those rules is to prevent public funding destined for education from being used for unintended uses and preventing that funding destined for education causes unfair competition.<sup>32</sup>

To conclude, it is important to **carefully consider the undertaking of economic activities** in the context of a foundation in light of the aforementioned tax and education legislation. Furthermore, as indicated previously, revenue made by the foundation must be used for the realisation of the foundation's objectives. Consideration therefore needs to be had of the correspondence between revenue-making activities and the objectives set by the foundation in its statutes.

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<sup>30</sup> See Article 286(4) Dutch Civil Code – Book 2 (*Burgerlijk Wetboek – Boek 2*) and Belastingdienst, 'Belastingplicht: kent u de regels?' (brochure), retrievable at: <https://download.belastingdienst.nl/belastingdienst/docs/broch-belastplicht-kent-u-regels-st0011z1fd.pdf>.

<sup>31</sup> See Inspectie van het Onderwijs, 'Toezicht op private activiteiten', <https://www.onderwijsinspectie.nl/onderwerpen/private-activiteiten>; Beleidsregel van de Minister van Onderwijs, Cultuur en Wetenschap van 22 maart 2021, nr. 26953552, houdende voorwaarden waaronder bekostigde HO- en MBO-instellingen met publieke middelen mogen investeren in private activiteiten (Beleidsregel investeren met publieke middelen in private activiteiten).

<sup>32</sup> Inspectie van het Onderwijs, 'Toezicht op private activiteiten', <https://www.onderwijsinspectie.nl/onderwerpen/private-activiteiten>.

### 3. Inventory of Instruments: A Re-cap of the Landscape on Legal Structures and their Applicability to Higher Education Cooperation

Before turning to the cross-examination of selected legal instruments with the use cases defined by ECIU it is important to gain an understanding of the opportunities and limitations of the four instruments central to the present report. In the present Section we examine the European Grouping of Territorial Cooperation (EGTC), Societas Europaea (SE), European Cooperative Society (SCE), and European Institute for Innovation and Technology (EIT). Each of the instruments will be briefly introduced by focusing on their scope as seen in the EU legislation governing their creation. Next, we examine the foreseen governance structure by examining what the roles and responsibilities of each of the respective partners are. In a third step, we provide a “quick guide” to the implementation of the legal instrument guided by the question of which steps are necessary to create the legal instrument in question. Finally, the attention is placed on best practices (where available) of existing initiatives active in the area of higher education making use of the legal instruments selected.

#### 3.1. European Grouping of Territorial Cooperation – EGTC

Firstly, we will touch upon the EGTC. Established via EU Regulation, an EGTC is “an alternative to the inter-governmental cooperation models.”<sup>33</sup> Indeed, compared to classic intergovernmentalism cooperation models, the creation of an EGTC allows for a better implementation of actions of territorial cooperation. Cross-border development concepts or programmes can now be worked out and implemented in a centralised way. Therefore, the EGTC Regulation brings a more solid cooperation structure compared to “soft” cross-border cooperations. However, it remains a relatively flexible instrument to use.<sup>34</sup>

The aim of the EGTC Regulation is to improve the implementation conditions for territorial cooperation by reducing difficulties encountered by public authorities.<sup>35</sup> Even if it can be questioned whether the cooperation of universities can be qualified as a “territorial cooperation” in the sense of the regulation<sup>36</sup>, some alliances of universities already use this European instrument for cooperation (see 3.1.4).

##### 3.1.1. Introduction to the Instrument

The Regulation 1082/2006 on a European grouping of territorial cooperation (EGTC) of 5 July 2006<sup>37</sup> is the EU legal basis for EGTCs, drawing a framework around this structure. The original Regulation

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<sup>33</sup> T. Malatinec, J. Kyjovsky, 'European Grouping of Territorial Cooperation - a Legal Form Supporting Cross-Border Cooperation in the European Union' (2019) 9 *Juridical Trib*, p. 264.

<sup>34</sup> C. Beate, 'European Groupings of Territorial Cooperation: a means to harden spatially dispersed cooperation?', *Regional Studies, Regional Science*, 4(1) (2017), p. 53.

<sup>35</sup> European Committee of the Regions, Guidebook on registering EGTCs, available at ;

[https://cor.europa.eu/en/engage/studies/Documents/4508\\_COTER\\_Guidebook\\_registering\\_EGTC.pdf](https://cor.europa.eu/en/engage/studies/Documents/4508_COTER_Guidebook_registering_EGTC.pdf)

<sup>36</sup> S. Schwemmer, M. Weller, 'Establishing a legal entity for the 4EU+ University Alliance: Feasibility study from a German Corporate and Tax law perspective', Heidelberg University, p. 8

<sup>37</sup> 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*, 31.7.2006, p. 19

was amended in 2013 by Regulation 1302/2013.<sup>38</sup> Taken together, the EGTC Regulation allows the cooperation of regional authorities, associations or other public bodies of various Member States<sup>39</sup> to form an independent legal entity to promote and facilitate cross-border cooperation.<sup>40</sup> In this context, the first point to highlight for the eventual creation of an EGTC by ECIU is the specific wording of the EGTC Regulation which prescribes the EGTC to consist of a cooperation of public entities. Even if universities are – generally – part of the public sector of EU Member States, not all European universities have a legal status that would allow them to participate to an EGTC.<sup>41</sup> This poses a limitation regarding the possible participation of privately owned universities.

EGTCs as such shall have legal personality.<sup>42</sup> Consequence of this legal personality is that an EGTC shall have the most extensive legal capacity accorded to legal persons under a certain Member State's national law.<sup>43</sup> This extensive status allows the EGTC to acquire movable and immovable property, as well as employ staff. Upon creation, the EGTC shall have a registered office located in a Member State where at least one of the EGTC's members is established.<sup>44</sup> This means that the choice of where to have the EGTCs registered office would be limited to the countries in which ECIU's partner universities are located. Furthermore, the choice of the location of the registered office should be assessed attentively by ECIU because the national law of the Member State of the registered office applies for several matters, including:

- The acts of the EGTC's organs for matters not regulated under the Regulation<sup>45</sup>: the EGTC Regulation generally clarifies which matters related to the organisation of the EGTC are governed by EU law. However, when such is not the case the law applicable will be that of the Member State in which the EGTC has its registered office.
- The budget of the EGTC<sup>46</sup>: the EGTC Regulation prescribes that the law of the Member State of the registered office determines the mode of preparation of its accounts including, where required, the accompanying annual report, and the auditing and publication of those accounts.

Should there be any doubts regarding applicable legislation, the EGTC shall be considered an entity [of national law] of the Member State in which the EGTC has its registered office.<sup>47</sup>

### 3.1.2 Governance

As indicated previously, EGTCs bring a more solid cooperation structure to cross-border cooperation initiatives. This becomes especially clear in relation to its governance framework. Once created, the

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<sup>38</sup> Regulation (EC) No 1302/2013 of the European Parliament and of the Council of 17 December 2013, OJ L 347, 20.12.2013. The consolidated version can be consulted at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1082-20140622>. In this report, the amended regulation will henceforth be referred to as the EGTC Regulation.

<sup>39</sup> Art. 3 EGTC Regulation.

<sup>40</sup> Art. 1(2) to (4) EGTC Regulation

<sup>41</sup> X. Pons Rafols et al., White Paper on the Governance of European Universities: The case of CHARM-EU, December 2022, p.44.

<sup>42</sup> Art. 1(3) EGTC Regulation.

<sup>43</sup> Art. 1(4) EGTC Regulation.

<sup>44</sup> Art.1(5) EGTC Regulation.

<sup>45</sup> Art.2(1)(c) EGTC Regulation.

<sup>46</sup> Art.11(2) EGTC Regulation.

<sup>47</sup> Art. 2(1) EGTC Regulation

EGTC's members must adopt unanimously a convention with notably the list of the EGTC's organs and their respective competences.<sup>48</sup> The content of this convention will mostly govern the EGTC, especially as the EGTC's Regulation gives a broad scope of action to the members concerning the governance of the cooperation. Indeed, the EGTC Regulation consists only of 18 articles so many specific matters are left at the discretion of the EGTCs members via the EGTC's convention.<sup>49</sup>

The convention is thereby crucial to determine matters such as the EGTC's name and registered office, objective of the EGTC, list of members, and list of organs and their respective competences. These organs' details are provided for by the Statute of the EGTC, adopted by its members.<sup>50</sup> An EGTC shall have at least an assembly, which is made up of representatives of its members and a director, who represents the EGTC and acts on its behalf.<sup>51</sup> The assembly specifically has the power to adopt the budget of the EGTC.<sup>52</sup> Therefore, all members of an EGTC are included in the governance process of the alliance once it is established.

Apart from determining the organs of the EGTC, the convention also determines the applicable EU legislation and legislation of the Member State of the registered office for the interpretation and enforcement of the convention, actions of the EGTC's organs, and all other activities carried out under the tasks specified in the convention.<sup>53</sup> Moreover, the convention also lays down which rules shall be applicable to the EGTC's staff in terms of personnel management and recruitment procedures.

### 3.1.3 Implementation

Several steps need to be undertaken in order to create an EGTC. First and foremost, the creation of an EGTC requires explicit consent of all involved Member State competent authorities as far as the participation of universities in their respective countries is concerned.<sup>54</sup> Therefore, all members of ECIU would need to involve their national ministries in order to create ECIU as an EGTC. In the event that the decision was made to structure (some of the activities of) ECIU as an EGTC, the first step would then be to involve the national ministries of education for their approval of the initiative. However, prior to doing so, the involved partners must already draft a convention and statutes for the EGTC since these must be forwarded to the competent national authorities together with the notification of the desire to create the EGTC.<sup>55</sup>

In general, these competent authorities are to approve the universities' participation in the EGTC.<sup>56</sup> However, the Member State does not have to approve the EGTC where participation therein would be contrary to the EGTC Regulation and other provisions of EU or national law related to the EGTC's activities or powers and competences of the prospective EGTC member.<sup>57</sup> The same applies if participation in the EGTC cannot be justified for reasons of public interest or public policy, or the

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<sup>48</sup> Art. 8(2)(f) EGTC Regulation.

<sup>49</sup> Art.8 EGTC Regulation.

<sup>50</sup> Art. 9(2)(a) EGTC Regulation.

<sup>51</sup> Art. 10(1) EGTC Regulation.

<sup>52</sup> Art. 11(1) EGTC Regulation.

<sup>53</sup> Art. 8(2)(g)(h)(j) EGTC Regulation.

<sup>54</sup> Art. 4(3) EGTC Regulation.

<sup>55</sup> Art. 4(1) EGTC Regulation.

<sup>56</sup> See Art. 4(3) EGTC Regulation.

<sup>57</sup> Art. 4(3)(a) EGTC Regulation.

proposed statutes are inconsistent with the convention.<sup>58</sup> In any case, any non-approval must be paired with a statement of reasons and, where possible, amendments to the EGTC convention. Another aspect to emphasise is that the national competent authority is stimulated to take a timely decision on the EGTC's approval: if the application is not approved within six months, the prospective member and convention shall be deemed to be approved. The only Member State that needs to explicitly approve the convention is that where the registered office is to be located.

After the creation of the convention and the Statute, the national administrations are not involved in the EGTCs anymore, except if there are some changes made in the convention. It is then important to keep in mind that every change operated in the text of the convention would require the agreement of all national authorities.<sup>59</sup> This can be tricky to acquire, especially for ECIU where more than a few Member States are involved.

The abovementioned paragraphs provide a short overview of the formal procedure towards creating an EGTC. Nevertheless, the Committee of the Regions has provided prospective EGTCs with a guidebook detailing the preparatory process ultimately leading up to the formal procedure described above.<sup>60</sup> Apart from more information on the preparatory process, the guidebook also provides information on the registration process for a large selection of Member States or Member State regions.

### **3.1.4 Example from Practice: Eucor**

By the 10 March 2023, 85 EGTCs were established per information from the Committee of the Regions.<sup>61</sup> One example of the existing EGTCs that applies in the field of higher education cooperation and that can accordingly be considered as an example is Eucor-The European Campus.

Eucor is an alliance of five universities.<sup>62</sup> "With more than 117,000 students, it offers a dozen joint courses leading to double or triple degrees, while all students have the opportunity to take the courses of their choice in five institutions without multiplying the administrative procedures and the costs."<sup>63</sup> Furthermore, this EGTC allows for many researchers to collaborate on a wide range of cross-border projects. This university alliance is the first EGTC established by higher education institutions.

The creation of the Eucor's agreement took only around one year.<sup>64</sup> The process was able to take place swiftly because it involved only 5 universities that had very good contacts among themselves. Indeed, the universities had already been cooperating in the context of Eucor since 1989. Whereas Eucor's activities were previously managed by one of the universities on behalf of the others, Eucor formally

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<sup>58</sup> Art. 4(3)(b)(c) EGTC Regulation.

<sup>59</sup> Art. 4(6)(6a) EGTC Regulation.

<sup>60</sup> For a detailed guide on implementing and registering an EGTC:

[https://cor.europa.eu/en/engage/studies/Documents/4508\\_COTER\\_Guidebook\\_registering\\_EGTC.pdf](https://cor.europa.eu/en/engage/studies/Documents/4508_COTER_Guidebook_registering_EGTC.pdf)

<sup>61</sup> European Committee of the Regions, List of European Groupings of Territorial Cooperation, available at:

[https://cor.europa.eu/en/our-work/Documents/Official\\_List\\_of\\_the\\_EGTCs.pdf](https://cor.europa.eu/en/our-work/Documents/Official_List_of_the_EGTCs.pdf)

<sup>62</sup> Namely the Universities of Basel, Freiburg, Haute-Alsace, Strasbourg as well as the Karlsruhe Institute of Technology (KIT).

<sup>63</sup> Eucor's website, available at : <https://www.eucor-uni.org/en/>

<sup>64</sup> Interview with representative Eucor, 20 April 2023.

became a EGTC in 2015.<sup>65</sup> Furthermore, the road to the EGTC was greatly facilitated due to good contacts and strong support from the local authorities. Therefore, the role of a strong network in relation to the prospective EGTC partners as well as authorities such as regional and national ministries and the Commission is not to be underestimated. This applies not only during the creation process, but also after. It is recommendable to keep in touch with national administrations, even if they have a limited formal role in the EGTC post-creation.

According to Eucor, advantages of being an EGTC concern the strong legal status and possibility to obtain joint funds.<sup>66</sup> In relation to the legal status, the connection of the EGTC to Member State authorities was considered positive as a way to solidify the creation of the legal entity.<sup>67</sup> At the same time, an important related aspect is that – once created – the interests of the EGTC also need to be represented and defended. This is especially important where separate institutions have been in existence for a long time previously and the EGTC is created in addition to them and to strengthen their bonds. In relation to funding, the EGTC is reported to have the possibility to jointly raise and manage funds, for example in relation to national and European-level funding programmes such as Horizon Europe, or by creating a joint Seed Money funding instrument.

However, challenges may also be identified. Despite its strong legal status, Eucor reports the main issues encountered to be related to tax, social security and labour law.<sup>68</sup> The EGTC Eucor's registered office is established in Germany, meaning German law applies to the EGTC's operations. However, some issues may still persist despite this choice of law. For example, regarding tax law, German law (and more specifically, the law of Baden-Württemberg, Land in which the head of the EGTC is located in) did not provide specifics regarding the functioning of EGTCs meaning it was necessary to make use of legal and tax advice to present the annual budget and the annual budget reports. As indicated previously, the choice of the Member State when establishing the EGTC's office is fundamental. It is possible that some Member States are more familiar with EGTC's and therefore generally facilitate their creation and functioning more.<sup>69</sup>

At the same time, the EGTC cannot be considered to create an overarching framework for a large variety of activities related to higher education cooperation. In this context, the EGTC was considered less European than would appear at first sight.<sup>70</sup> Such can, for example, be seen in relation to the hiring of staff. Dependence on national social security and tax legislation may still be unavoidable since these areas of law are still to a great extent nationally oriented. In the case of Eucor, the lack of clarity in relation to the application of national tax legislation ultimately led to the decision to hire staff within the framework of the respective universities. The universities provide the staff to the EGTC, which then reimburses the universities for the incurred costs.<sup>71</sup> This was also considered to have the added benefit that Eucor's staff was embedded in a larger organisation, meaning it was not necessary to set

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<sup>65</sup> Interview with representative Eucor, 20 April 2023.

<sup>66</sup> Interview with representative Eucor, 20 April 2023.

<sup>67</sup> Interview with representative Eucor, 20 April 2023.

<sup>68</sup> Interview with representative Eucor, 20 April 2023.

<sup>69</sup> Interview with representative Eucor, 20 April 2023; see also UNIVERSEH, 'European Grouping of Territorial Cooperation & 'European Universities' Alliances (FOREU2 – legal entity group – ET 20220204), p. 2; FilmEU, European Groupings of Territorial Cooperation (EGTC) – Report, p. 3.

<sup>70</sup> Interview with representative Eucor, 20 April 2023.

<sup>71</sup> Interview with representative Eucor, 20 April 2023.

up all relevant structures in parallel within the context of the EGTC. Furthermore, it allows to use the competencies of the member universities' staff and to attract a high quality work force, also for shorter periods of time (project management, etc.). However, the member states can consider the provision of staff as a service and therefore taxable (VAT), which can considerably increase the budget of the EGTC.

Another area where national legislation still prevails is seen in relation to the issuance of degrees. Whereas Eucor's universities cooperate on education, degrees can still only be issued by the individual universities).<sup>72</sup> In this context, reference can also be made to another limitation related to funding of education, namely the Erasmus+ programme. Eucor reports the impossibility to receive funding in the context of Erasmus since the EGTC is not considered a higher education institution under national law (a core criterion for application to Erasmus funding). In principle, the EGTC Eucor would have to be recognized by the Land Baden-Württemberg as a higher education institution and would then be eligible for the Erasmus+ funding managed by the German National Agency. Whereas the creation of the EGTC therefore functions well for research funding, its opportunities are more limited in relation to Erasmus.

To conclude, the EGTC provides an opportunity to solidify higher education cooperation by creating a common legal structure.<sup>73</sup> Nevertheless, the connection to national legislation persists. In this context, Eucor indicated to have had to pay considerable fees for legal advice related to various aspects of the EGTC's functioning, which did not always result in a cross-border solution.<sup>74</sup> According to Eucor, the EGTC as an instrument could be adapted to better suit the field of higher education. Particular points of adaptation identified concern:<sup>75</sup> a more flexible arrangement related to the approval of Member State authorities for the creation of EGTC's (especially where multiple Member States are involved), conflict rules on the common issuance of degrees within the EGTC and eligibility for Erasmus+ funding (access to the Erasmus charter for higher education), and clarity on the possible application of different MS legislation in the context of EGTCs (i.e. employment of staff under the law of a member state other than the one in which the EGTC is located in).

## 3.2. *Societas Europaea* – SE

### 3.2.1. Introduction to the Instrument

Since 2001 an EU law instrument, called *Societas Europaea* (SE), allows the creation of a legal entity that provides the possibility to carry out business activities in a multinational form. Practically speaking, an SE is established with at least 2 companies originating in different EEA countries and is created in several ways:<sup>76</sup>

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<sup>72</sup> Interview with representative Eucor, 20 April 2023.

<sup>73</sup> See also U. Blaurock & J. Hennighausen, 'Der Europäische Verbund territorialer Zusammenarbeit (EVTZ) als Rahmen universitärer Kooperation', *Ordnung der Wissenschaft* (2016), p. 73-84.

<sup>74</sup> Interview with representative Eucor, 20 April 2023.

<sup>75</sup> Interview with representative Eucor, 20 April 2023.

<sup>76</sup> Art. 2 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294/1. The regulation will henceforth be cited as the SE Regulation.

- by the merging of two (or several) Public Limited Companies (PLC);
- through the creation of a holding at the initiative of two public or private limited liability companies established under national law;
- by creation of a joint subsidiary;
- by transformation of a PLC owning a subsidiary in another MS for at least 2 years.

The groups participating in the creation of an SE can gain significant benefits, such as the possibility to save management expenses, enhance the brand image by becoming a global player, change the place of registration relatively easily and the possibility to conduct simplified business across the EU. In the case of ECIU, the most suitable option would be that of creating a holding SE, since this would allow for the participating universities to come together in a European-level company (and legal structure). However, due to variations in national legislation, universities may have different qualifications. Therefore, to establish a Holding Societas Europaea (SE) involving the 14 member universities, it is necessary for each university to possess at least one legal entity in the form of a company that meets the requirements specified for companies within the respective national laws.

The SE is directed towards public and private limited-liability companies specifically, but it can also be applied to companies or other legal bodies. The aim of the regulation is to create a single legal framework within which companies from different EU Member States can plan and carry out the reorganisation of their business on an EU-wide scale as well as in countries belonging to the European Economic Area (EEA).<sup>77</sup> As such, the SE is especially relevant for legal entities which have the main purpose of gaining profit.

The establishment and functioning of a Societas Europaea is governed by a combination of EU and national law. The creation of an SE is regulated by Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (hereinafter: SE Regulation). This regulation is supported by Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees (hereinafter: SE Employees Directive).<sup>78</sup> In fact, the co-determination rules guiding the functioning and governance of the SE in relation to the rights of employees are determined on the basis of the Directive 2001/86/EC.

Once created, an SE is subject to a multi-layered legislative package. At the first level, the SE Regulation as a matter of primacy of EU law governs the overarching rules directly applicable to SEs. At second level, the national rules executing the SE Regulation are applicable to SEs. Finally, the regulation is supplemented by national rules that apply to public limited-liability companies in countries where the SE is registered as prescribed in article 9 of Regulation 2157/2001. Of course, these provisions related to the SE are supplemented by the SE Employees Directive. The SE is therefore strongly dependent on EU and national legislation for its functioning.

As a result of this multi-layered legislative package, a few challenges may be formulated in relation to the SE:

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<sup>77</sup> <https://eur-lex.europa.eu/EN/legal-content/summary/statute-for-a-european-company.html>

<sup>78</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294/22. The Directive will henceforth be cited as SE Employees Directive.



- Continued dependence on national law: Even if Regulation 2517/2001 creates a European legal form for public limited-liability companies to be set up within the territory of the EU, the effectiveness of such a legal form is restricted by the need to extensively rely on national laws which can be very diverse.
- Limitations under national law: The legal systems of individual Member States might expressly exclude the establishment of corporations to pursue the institutional purposes of public universities, accordingly to the so called “specialty principle”. To that effect, the French legal system can be of example. In 2013, the Paris administrative Court for example annulled the decision of creating a private law company by the University Paris II Assas with an object that is typically pursued by public institutions.<sup>79</sup>
- Lack of tax harmonisation: SEs remain subject to taxes and charges in all EEA countries according to rules applicable in those countries. This could lead to forum shopping and consequently the operational set-up might be subject to several transfers. In fact, although the CJEU’s case law in *Centros*<sup>80</sup> and *SEVIC*<sup>81</sup> clarified the possibility to change the place of registration for companies without the need to dissolve them,<sup>82</sup> transferring the place of registration can be burdensome. That is explained by the fact that a transfer of place of registration requires authorisation on the part of national authorities involved, which also need to be in continuous contact, and by the fact that a request to transfer needs to be justified. Article 8 SE Regulation prescribes that the management or administrative organ shall draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees.
- Limitations to public funding: In view of the ambition of ECIU to gather public funding, reliance on the creation of an SE could limit such a desired public funding due to the corporate nature of SE.

Nevertheless, as indicated previously, the SE is also paired with some positive advantages. These particularly concern:

- Brand management: the SE could be beneficial for higher education cooperation by giving image of a European level/global player.
- Change of registered seat of SE: Following the *Centros* case,<sup>83</sup> it is possible to move the registered seat to another Member State which offers more flexibility in terms of legislation from a corporate, tax and labour law point of view. However, as explained above the rules on change of seat established in the SE regulation are highly dependent on the national rules implementing the SE regulation.
- Determination of employment representation: Given that the SE negotiates an agreement with the employees on a share in the management of the company, for example the possibility of electing part of the members of the Supervisory Body, it is possible to negotiate the extent

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<sup>79</sup> TA Paris 29 October 2013, n° 1217449; Barbara Gagliardi et al, “The path towards the European university in the current legal framework: The UNITA- Universitas montium experience”, *International journal of film and media arts* (2022) Vol. 7, N 3 pp. 10-26.

<sup>80</sup> Case C-212/97 *Centros*, ECLI:EU:C:1999:126.

<sup>81</sup> Case C-411/03 *SEVIC Systems*, ECLI:EU:C:2005:762.

<sup>82</sup> See also Art. 8 SE Regulation.

<sup>83</sup> Case C-212/97 *Centros*, ECLI:EU:C:1999:126.

of the participation of employees in the management. If no agreement is reached, the standard set of rules set by national law apply.<sup>84</sup>

- Attracting private investments: Considering its public limited liability nature, an SE having a European dimension and identity would allow for the attraction of more private investors.

### 3.2.2 Governance

The SE Regulation enables two different systems to organise an SE. First, the two-tier system, where company management consists of a management board and a supervisory board; and second, the one-tier system, where company management consists exclusively of an administrative board.<sup>85</sup> In relation to the governance and management of the SE the connection between EU law (i.e. the SE Regulation) and national law again plays a role, as the next paragraphs will show.

A two-tier SE has an executive body (management board) and a supervisory body (supervisory board) in addition to the general meeting of shareholders.<sup>86</sup> The two executive and supervisory bodies must be strictly separated from each other in terms of function and personnel.<sup>87</sup> It is thereby the supervisory organ that shall supervise the work of the management organ, meaning it may not itself manage the SE.<sup>88</sup> The management organ, by contrast, shall report to the supervisory organ at least once every three months on the progress and foreseeable development of the SE's business.<sup>89</sup> This latter organ shall be responsible for managing the SE, *but* a Member State may provide that a managing director or managing directors shall be responsible for the current management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory.<sup>90</sup> The member or members of the management organ shall be appointed and removed by the supervisory organ, *but* a Member State may, however, require or permit the statutes to provide that the member or members of the management organ shall be appointed and removed by the general meeting under the same conditions as for public limited-liability companies that have registered offices within its territory.<sup>91</sup> The number of members of the management organ or the rules for determining it shall be laid down in the SE's statutes, *but* a Member State may fix a minimum and/or a maximum number of members.<sup>92</sup>

As indicated, the governance structure differs, however, in the case of the one-tier SE. In addition to the general meeting of shareholders, a one-tier SE only has an administrative board, which is the administrative body of the company.<sup>93</sup> The administrative board thus assumes both an executive and a supervisory function. This organ meets at least once every three months, as determined by the statutes.<sup>94</sup> The number of members of this administrative organ is again determined in the SE's statutes, although a minimum and maximum may be set by Member States.<sup>95</sup> The administrative

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<sup>84</sup> Article 7 SE Employees Directive.

<sup>85</sup> Article 38 SE Regulation.

<sup>86</sup> See Articles 38 and 39 SE Regulation.

<sup>87</sup> Article 39(1) SE Regulation.

<sup>88</sup> Article 40(1) SE Regulation.

<sup>89</sup> Article 41(1) SE Regulation.

<sup>90</sup> Article 39(1) SE Regulation.

<sup>91</sup> Article 39(2) SE Regulation.

<sup>92</sup> Article 39(4) SE Regulation.

<sup>93</sup> Article 43 SE Regulation.

<sup>94</sup> Article 44(1) SE Regulation.

<sup>95</sup> Article 43(2) SE Regulation.

organ is furthermore presided by a chairman, elected from among its members.<sup>96</sup> Furthermore, it is possible that the company is represented in external relations by managing directors (if determined under national law), who are appointed by the administrative board.<sup>97</sup> Unlike the management board in the two-tier system, managing directors are bound by instructions from the administrative board.

For operational purposes and considering that most companies are composed under a two-tier system, the latter would be the recommended form of creating an SE for ECIU. This would also match the current structure ECIU has as a foundation under Dutch law better (consisting of a management board and daily management). Nevertheless, the choice of organisational system is of great importance. Depending on the type of organisational system chosen, responsibilities can vary. And although the SE Regulation provides guidance, there is considerable discretion for Member States (of registration) to further impose rules on the functioning of the decision-making bodies within the SE.

Finally, as far as liability is concerned, members of an SE's management, supervisory and administrative organs shall be liable, in accordance with the provisions applicable to public limited-liability companies in the Member State in which the SE's registered office is situated.<sup>98</sup> Therefore, depending on the place of domicile of the SE, the national laws applicable to personal liability will apply only to the members of the management, supervisory and administrative organs. Instead, no shareholder shall be liable for more than the amount he has subscribed.<sup>99</sup> Thus, the shareholders will only be affected to the extent they have shares in the SE.

### 3.2.3 Implementation

The procedure for the formation of a holding SE can be found under article 32 of regulation 2157/2001. More specifically, a holding SE may be formed by two or more private or public limited companies (including existing SEs) formed under the law of a Member State and with a registered office in a Member State. The companies promoting the formation must become majority owned by the SE. At least two of the companies must be governed by the laws of a different Member State. If not, they must for two years, have had a subsidiary company governed by the laws of another Member State, or had a branch in another Member State.<sup>100</sup> Draft terms for the formation and an explanatory report must be drawn up by the management or administrative organs of the companies promoting the formation and presented to general meetings of their shareholders for approval.<sup>101</sup> The explanatory report must explain and justify the legal and economic aspects of the formation and indicate the implications for the shareholders and for the employees of the adoption of the form of a holding SE.<sup>102</sup>

Shareholders subsequently have three months after the draft terms have been approved, to notify the company whether they intend to contribute their shares to the formation of the holding SE.<sup>103</sup> The SE cannot be formed if the minimum proportion of shares are not assigned within that time. Where

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<sup>96</sup> Article 45 SE Regulation.

<sup>97</sup> Article 43(1) SE Regulation.

<sup>98</sup> Article 51 SE Regulation.

<sup>99</sup> Article 1(2) SE Regulation.

<sup>100</sup> Linmondin, Karol 'The European Company (Societas Europaea) – A Successful Harmonisation of Corporate Governance in the European Union?' *Bond Law Review*. 15 p162-164 (2003)

<sup>101</sup> Article 32(2) SE Regulation.

<sup>102</sup> article 8(3) SE Regulation

<sup>103</sup> Article 33(1) SE Regulation.

the conditions are fulfilled, a notice to that effect must be delivered to the respective registration offices in the Member States in which participating companies are found. Any company involved in its formation must file the draft terms for its formation at the respective registries in the Member States in which they are registered (which might have varied time-limits for notifications). Thus, practically speaking all 14 member universities' companies deciding to form an ECIU SE will have to file the draft terms to their respective national registration offices. This may constitute a considerable burden.

Once the SE has been registered in a MS, it is required to publish a notice of registration: a notice of registration must be published in the Official Journal of the European Union. Finally, depending on the Member State, there may be other registration requirements, such as obtaining a tax identification number, registering for social security contributions, and registering with other regulatory authorities.

It is therefore clear that several administrative steps are to be taken to create an SE. These can be considered to follow on a more informal phase where the parties concerned (in ECIU's case, the partner universities), decide to create the holding SE and draft the various documents involved. Nevertheless, another aspect to be discussed concerns the situation where the holding SE is planning to hire staff and therefore involve workers in its activities. In such a situation, before an SE can be registered by the national courts, negotiations about employee involvement are obligatory.<sup>104</sup> With the decision to set up an SE and the publication of the terms of foundation its employees also have to be informed and asked to set up a "Special Negotiation Body" (SNB) to negotiate with the management about the form and content of employee involvement.<sup>105</sup> The period of time for setting up the SNB is usually ten weeks. For the negotiations themselves usually a six-month-period is indicated.

The SNB is set up and represents all employees of the companies and all its subsidiaries.<sup>106</sup> Basically, each country and each subsidiary is supposed to have at least one representative in the SNB. Furthermore, the number and distribution of its members is based on a proportionality of the total number of employees and their distribution across Member States.

Despite the need for the SNB, there is no precise legal provision for the scope and contents of employee involvement. An agreement between SNB and the companies' management can be reached in full "autonomy of the parties". Article 4 of the Directive thereby only specifies the topics an agreement usually could contain. They include "the scope of the agreement; the composition, number of members and allocation of seats on the representative body; the functions and the procedure for the information and consultation of the representative body; the frequency of [its] meetings [and its] financial and material resources". This "representative body" that is responsible for information and consultation of the employees is usually called the "SE works council" (SE WC). Secondly, the parties can decide about an "arrangement of participation" in the governing bodies of the SE, i. e. especially in the supervisory board (two-tier system) or administrative board (one-tier system). Therefore, the

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<sup>104</sup> Article 12(3) SE Regulation.

<sup>105</sup> See Article 3 SE Employees Directive.

<sup>106</sup> Ibid.

negotiations usually refer to two levels of employee involvement, information and consultation/the SE WC on the one hand and board level participation on the other hand.<sup>107</sup>

Finally, negotiations can have three outcomes: First, the management and the SNB reach an agreement which would make the agreed conditions binding upon registration of the SE. Second, the management and the SNB do not manage to reach an agreement, in which case the “standard rules” laid down in Article 7 of the SE Employees Directive become effective. Third, the so-called “zero option” can apply if the SNB decides not to start negotiations with the management at all or to terminate them before an agreement is achieved. In this case, **only** the national provisions for employee involvement apply. This therefore shows that the decision to hire staff in the context of the SE brings additional administrative activities to take into account.

### 3.3. European Cooperative Society – SCE

#### 3.3.1. Introduction to the Instrument

The European Cooperative Society (SCE) aims to reduce existing cross-border obstacles and to make it easier for companies to operate across European borders, thereby enhancing their competitiveness. In this sense, the SCE complements the legislation on European Companies (SE) which has enabled companies to set up as a European public limited company. The SCE fills the gap regarding the transnational activities of cooperatives. As in the case of the SE, the SCE legislation consists of an EU Regulation on the Statute for an SCE and an accompanying EU Directive on worker involvement.<sup>108</sup>

According to Article 1(3) of the SCE Regulation,<sup>109</sup> the principal object of an SCE is the satisfaction of its members’ needs and/or the development of their economic and social activities, in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions. The SCE distinguishes itself from stock corporations through its focus on the economic furtherance of its members. By contrast, stock corporations earn profit on their capital (i.e shares).<sup>110</sup>

Finally, according to the Commission,<sup>111</sup> cooperatives have several defining characteristics: 1) they are open and voluntary associations; 2) they have a democratic structure, with each member having one vote; and 3) they have an equitable and fair distribution of economic results based on the volume of operations made through them. In this regard, cooperatives are enterprises that serve the needs of their members, who, in turn, contribute to the cooperatives' capital.

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<sup>107</sup> Berndt Keller and Frank Werner, ‘Negotiated Forms of Worker Involvement in the European Company (SE) –First Empirical Evidence and Conclusions’, *Management Revue*, Vol. 19, No. 4, Special Issue: Industrial Democracy (2008), pp. 291-306.

<sup>108</sup> Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, [2003] OJ L 207/25.

<sup>109</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), *OJ L* 207/1.

<sup>110</sup> Thomas Von Hippel, ‘European Cooperative (Societas Cooperativa Europaea) - Max-EuP 2012’ [https://maxeup2012.mpipriv.de/index.php/European\\_Cooperative\\_\(Societas\\_Cooperativa\\_Europaea\)](https://maxeup2012.mpipriv.de/index.php/European_Cooperative_(Societas_Cooperativa_Europaea)).

<sup>111</sup> [https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu/cooperatives\\_en](https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu/cooperatives_en)

The **main advantages** associated with the SCE are as follows:

- Cross-border operations and legal recognition: The SCE has legal recognition in all EU Member States, and the SCE allows cooperatives to operate in different EU Member States without the need to create separate legal entities in each country.
- Flexibility: The SCE has a flexible legal structure that allows cooperatives to tailor their governance to their specific needs (although this can be limited by specific rules of governance of a MS – see below).
- Members' rights: The SCE guarantees members' rights, including the right to participate in the management of the company and the right to receive information about its operations.
- Tax benefits: The SCE may benefit from certain tax advantages, depending on the national tax laws of the Member States in which it operates.

By contrast, the SCE is also associated with some **disadvantages/limitations**:

- Complex legal framework: The legal framework for the SCE is complex and may be difficult to navigate for a cooperative intending to include 14 members from various Member States.
- Higher costs: The cost of setting up and maintaining an SCE can be higher than for other legal forms of cooperatives, such as setting up a purely national cooperative.
- Limited harmonization: The legal framework for the SCE is not fully harmonized across all EU Member States, which may create challenges for cross-border operations. This means the legal framework of the SCE is constituted of the EU-level Regulation and Directive and supplemented by relevant national legislation.

### 3.3.2. Governance

A European Cooperative Society can be created in the following ways:

- from scratch by five or more natural persons, by two or more legal entities, or by a combination of five or more natural persons and legal entities;
- by a merger of two or more existing cooperatives; or
- by the conversion of an existing cooperative that has, for at least two years, been established or been a subsidiary in another EU country.

The minimum capital requirement for the creation of an SCE is €30 000.<sup>112</sup> An SCE can have a limited proportion of 'investor members'.<sup>113</sup> An SCE must be registered in the EU Member State where it has its head office. Voting in an SCE is generally conducted in accordance with the cooperative principle of 'one member, one vote'.<sup>114</sup> However, weighted voting may be allowed in certain circumstances to reflect the amount of business done with the SCE. An SCE must call a general meeting (in which all members or their representatives participate) at least once a year.<sup>115</sup> Decisions are thereby taken by

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<sup>112</sup> art 3(2) SCE Regulation.

<sup>113</sup> article 14(1) SCE Regulation.

<sup>114</sup> Article 59 SCE Regulation.

<sup>115</sup> Art 36(a) SCE Regulation.

simple majority of members present or represented. In the case of changes to the internal statutes, these require a two-thirds majority.<sup>116</sup>

Like the SE, the SCE also knows a two-tier and one-tier management system. Where there is a two-tier board system,<sup>117</sup> the management organ is responsible for managing the SCE and represents it in dealings with third parties and in legal proceedings.<sup>118</sup> The member or members of the management organ shall generally be appointed and removed by the supervisory organ.<sup>119</sup> The supervisory organ, whose members are generally appointed by the general meeting, shall supervise the duties performed by the management organ.<sup>120</sup> To fulfil this task the supervisory organ has specific information rights.<sup>121</sup>

Where a one-tier board system is operating,<sup>122</sup> an administrative organ manages the SCE and shall represent it in dealings with third parties and in legal proceedings.<sup>123</sup> The members of the administrative organ are as a rule appointed by the general meeting.<sup>124</sup> A Member State may provide that a managing director shall be responsible for the current management under the same conditions as applicable for cooperatives that have registered offices within that Member State's territory.<sup>125</sup> The administrative organ shall meet at least once every three months and each member of the administrative organ shall be entitled to examine all reports, documents and information submitted to it.<sup>126</sup>

Generally, both in the two-tier board system and in the one-tier board system, members of SCE organs shall be appointed for a period laid down in the statutes not exceeding six years.<sup>127</sup> Re-appointment is permitted. An SCE's statute may list the categories of transactions requiring authorization from another SCE organ.<sup>128</sup>

Notwithstanding the possibility to flexibly choose the system of governance, it is important to point out a potential obstacle stemming from the membership requirements of Cooperatives. Contrary to the public limited liability corporate companies, where the shareholders are free to sell their shares at any time, cooperatives, due to their very purpose, do not allow membership investments/capitals to be traded freely. Membership rules are determined by the statutes forming the cooperative. Here, in principle all members shall have equal voting rights regardless of investment, which may not be the ideal option if ECIU seeks to attract investments. Another limitation may arise from the dependency of members' access to and removal from the cooperative on the statute forming the latter. Considering the scale of ECIU university, this is an important point of attention as the rules regarding membership should be framed as flexible as possible.

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<sup>116</sup> Cemal Karakas, 'Cooperatives: Characteristics, activities, status, challenges', European Parliamentary Research Service (EPRS) 2019.

<sup>117</sup> Articles 37–41 SCE Regulation.

<sup>118</sup> Art 37(1)1 SCE Regulation.

<sup>119</sup> Art 37(2) SCE Regulation.

<sup>120</sup> Art 39 SCE Regulation.

<sup>121</sup> Art 40 SCE Regulation.

<sup>122</sup> Arts 42–44 SCE Regulation.

<sup>123</sup> Art 42(1)(1) SCE Regulation.

<sup>124</sup> Art 42(3) SCE Regulation.

<sup>125</sup> Art 42(1)(2) SCE Regulation.

<sup>126</sup> Art 43 SCE Regulation.

<sup>127</sup> Art 45 SCE Regulation.

<sup>128</sup> Art 48(1) SCE Regulation.

### 3.3.3. Implementation

As regards the rules of formation, the national law of the Member States is generally applicable.<sup>129</sup> Nevertheless, setting up an SCE is also governed by the law that applies to cooperatives and by the SCE regulation. In order to set up a new European Cooperative Society, the SCE's statutes must be drafted in line with Art. 5 of the SCE Regulation. More specifically, the statutes should include, among others, information on the company name (preceded by the SCE acronym), statement of the SCE's purpose, names of the founders, address of the SCE's registered office, terms and conditions governing the relation to the SCE's members, members rights and duties, value of shares and capital, and rules on how surpluses are allocated to the legal reserve. Depending on the chosen structure, either a Certificate of appointment of the Supervisory Board (two-tier system) or the appointment of the advisory body (one-tier system) shall also be submitted. In some cases, a Certificate from a cooperative auditing association (or equivalent national-level institution) stating that the European Cooperative Society is eligible to join may be necessary. This condition is reflected in article 71 of the SCE Regulation and is, for example, mandatory to establish an SCE in Germany. Currently, no other Member State has comparable national laws requiring the cooperative to become a member of an auditing association. Nevertheless, such a requirement shows the possibility of additional national legislation to be taken into account in case a decision is made to create an SCE.

Once drafted, the SCE's statutes must be submitted to the registry of the Member State where the SCE will be formed.<sup>130</sup> It is clear that registration constitutes an important step. The day of registration is also the moment the SCE acquires legal personality. Nevertheless, submission in a registry is not the only step to be taken to create an SCE. Apart from this submission, SCEs must also be incorporated before a notary in the same conditions that apply for the incorporation of public limited companies.<sup>131</sup> In this context, it is important to note that the national law (of the chosen Member State of registration) applicable to public limited companies regarding the publication of legal instruments and other details also applies to SCEs.<sup>132</sup> Furthermore, the incorporation of an SCE must be published in the Official Journal of the European Union.<sup>133</sup>

The previous paragraph has shown the importance of registration of the SCE. Nevertheless, before this formal aspect of the SCE procedure is undertaken, one important aspect regarding worker involvement must be resolved. In fact, this issue must be resolved before the SCE can be validly incorporated. Concerning this important topic of worker involvement (information, consultation and board-level representation rights) the SCE follows almost exactly the procedures and standards set by the SE (See Section 3.2). This means that – prior to its registration – an agreement shall be negotiated between the employer and a special negotiating body (SNB), the latter being composed of representatives from all Member States in which the future SCE has employees. The “Directive on employee involvement in the SCE” lays down standard rules which shall apply if the social partners do not reach an agreement. These minimum rights include the setting up of an “SCE works council” with transnational information and consultation rights. Whether the SNB has the legal right to ask for representatives on the supervisory or administrative board depends on whether such rights existed

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<sup>129</sup> Art. 17(1) SCE Regulation.

<sup>130</sup> Art 11(1) SCE Regulation.

<sup>131</sup> Art 39(2) SCE Regulation.

<sup>132</sup> Art 24(1) SCE Regulation.

<sup>133</sup> Art 13 SCE Regulation.



before in at least one of the participating cooperatives (before/after principle). If certain thresholds are met, the standard rules on participation apply automatically.<sup>134</sup> A special procedure applies to SCEs established by natural persons or by a single legal entity and natural persons, which employ less than 50 employees or employ 50 or more employees in only one Member State. Worker involvement in these SCEs is governed by the national provisions for cooperatives of the country in which the SCE has its registered office. For its subsidiaries and establishments, the provisions of the Member State where these are situated shall apply.<sup>135</sup>

### 3.4. European Institute of Innovation and Technology – EIT

#### 3.4.1. Introduction to the Instrument

The last instrument that is analysed in this report is the European Institute of Innovation and Technology (EIT). The Regulation around the EIT and its functioning has been recast in 2021 and is now the Regulation (EU) 2021/819 (hereinafter: EIT Regulation).<sup>136</sup> For ECIU, one possibility to advance in their objectives could be to create a Knowledge and Innovation Community (KIC) under the EIT. In this context, it is important to note that the possibility to become a KIC is dependent on the initiative of EIT following a competitive, open and transparent procedure.<sup>137</sup> The EIT shall therefore select and designate all KICs. The relationship between all the KICs and the EIT after the creation of the KICs is that of a partnership. The KICs nevertheless have substantial autonomy to establish their internal organisation and composition, as well as their agenda and working methods.<sup>138</sup>

The EIT's mission is to “Increase Europe’s competitiveness, its sustainable economic growth and job creation by promoting and strengthening cooperation among leading business, education and research organisations and to power innovation and entrepreneurship in Europe by creating environments for creative and innovative thoughts to thrive”.<sup>139</sup> To do so, the EIT operates through the KICs which integrate partners from the “Knowledge Triangle of higher education, research and business”.<sup>140</sup> Even though higher education is specifically identified, there is no existing KIC dedicated exclusively to the cooperation of universities.

#### 3.4.2. Governance

The EIT Regulation can be considered flexible as far as governance of the KICs is concerned. In this context, a core aspect to be emphasized regarding the KICs is that each KIC is its own legal entity with a CEO that runs its operations. Each KIC accordingly has its own management, legal structure and business plan. Therefore, each KIC is governed by its own structure. This again means that there is considerable importance regarding the selection of the legal structure and a need to consider different

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<sup>134</sup> For example, in the case of a merger if at least 25% of the employees previously had participation rights; in the other cases the threshold is 50%.

<sup>135</sup> <https://www.worker-participation.eu/European-Company-SE/European-Cooperative-Society/Background-The-SCE-The-small-sister-of-the-SE>

<sup>136</sup> Regulation (EU) 2021/819 of the European Parliament and of the Council of 20 May 2021 on the European Institute of Innovation and Technology. The regulation is hereinafter referred to as the EIT Regulation.

<sup>137</sup> Art. 9(1) EIT Regulation.

<sup>138</sup> Art. 7(2) EIT Regulation.

<sup>139</sup> European Institute of Innovation and Technology, Vision and mission, <https://eit.europa.eu/who-we-are/eit-glance/mission>.

<sup>140</sup> J. M. Leceta, T. Könnölä (2021), “Fostering entrepreneurial innovation ecosystems: lessons learned from the European Institute of Innovation and Technology”, *Innovation: The European Journal of Social Science Research*, p.479.

national (or perhaps European) legal entities to determine which one is most suited for the KIC's objectives. As a consequence, it also means that most aspects related to the operations of the KICs are governed by national law, save where provided otherwise in the EIT Regulation. Nevertheless, the latter regulation supports the flexibility of the KIC governance framework and is instead aimed more at the general set-up of EIT as an EU body existing in the context of Horizon Europe, tasks of the EIT and KICs, and their interrelationship.

As far as the relationship goes between EIT and the KICs, the EIT Regulation prescribes that EIT shall organise continuous monitoring and periodic external evaluations of the output, results and impact of each KIC.<sup>141</sup> So even if KICs are autonomous, they are still subject to the agreements made with EIT and furthermore are subject to monitoring processes by the EIT.

### 3.4.3 Implementation

As indicated previously, EIT designates the KICs following a competitive, open and transparent procedure.<sup>142</sup> For this selection procedure, the conditions and criteria of Regulation 2021/695 (on Horizon Europe) are applicable and can be supplemented by additional criteria defined by the EIT Governing Board.<sup>143</sup> Where the board adopts such criteria, these shall be based on the "principles of excellence and innovation relevance in delivering on global challenges and Union policy priorities". The criteria used by the EIT to assess the potential KICs have to be published by the EIT together with the procedures for financing, monitoring and evaluating the activities of the KIC.<sup>144</sup>

To be selected as a KIC, there must be at least three independent partner organisations, at least one higher education institution, one research organisation and one private company established in at least three different Member States.<sup>145</sup>

In light of the need for KICs to represent the knowledge triangle, there is no KIC constituted exclusively of the cooperation of universities. In this context, the question may be raised to which extent the EIT KICs provide a suitable framework to structure higher education cooperation such as that undertaken by ECIU. Whereas the missions of KICs together with the idea of the knowledge triangle and emphasis on ecosystems aligns with the ambitions of ECIU, the requirements for selection as well as the selection process being dependent on the initiative of EIT may lead to questions concerning the suitability of the instrument. The same applies to the need for representation of members from the knowledge triangle.

### 3.4.4 Example from Practice: EIT Digital

At present, EIT has approved a total of eight KICs across different areas ranging from climate to urban mobility. One of the selected KICs is EIT Digital which focuses on creating a pan-European multi-stakeholder open-innovation ecosystem of European corporations, SMEs, start-ups, universities, and research institutes.<sup>146</sup> EIT Digital thereby combines different activities ranging from the provision of education through master programmes, summer schools, and online education to the support to start-

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<sup>141</sup> Art. 10 EIT Regulation.

<sup>142</sup> Art. 9(1) EIT Regulation.

<sup>143</sup> Art. 9(1) EIT Regulation.

<sup>144</sup> Art. 9(5) EIT Regulation.

<sup>145</sup> Art. 9(3) EIT Regulation.

<sup>146</sup> See EIT Digital, 'Purpose', <https://www.eitdigital.eu/our-community/purpose/>.

up new companies and scale up of existing ones.<sup>147</sup> Whereas EIT Digital started its activities with 30 partners, the initiative has now grown to bring together more than 300 partners from different parts of the knowledge triangle.

As far as its legal structure is concerned, EIT Digital is an international non-profit association under Belgian law.<sup>148</sup> Whereas EIT Digital is therefore created in Belgium, the organization has 14 subsidiaries in the group. Each KIC is different and each of them has a different legal structure. For EIT Digital, the choice was made to create the association in Belgium by way of providing a neutral base (since originally no partner was from Belgium). Furthermore, the choice for an international non-for profit association also allowed for flexibility in terms of entry and exit of members (different from other legal structures such as a cooperative, for example, which would require more work surrounding the membership of the cooperative) and applicable tax legislation.

The choice for a legal structure under Belgian law also means all national legislation regarding the governance of the legal structure takes place under national law. EIT Digital consists of a general assembly where each of the partner organisations is represented. This organisation takes decisions on matters related to, for example, the statutes and the approval of annual accounts.<sup>149</sup> On a more practical level, the daily management is constituted of a supervisory board (consisting of board members and independent directors) and a management committee (consisting of the CEO, COO, CFO, Chief education officer, and regional directors). Whereas the supervisory board is tasked with determining EIT Digital's strategy and approval of memberships and partnership fees, among others, the management committee runs EIT Digital on an operational level.

EIT Digital was originally created to develop innovation and education programmes as well as to create a public-private partnership initiative capable of filling the gap between innovation, research, and education.<sup>150</sup> The organisation thereby provides public and private education, whereby the public education consists of a master programme constituting a double degree recognised nationally in the Member States where the universities are located.

One important mission for EIT is the diversification of its funding methods. Whereas EIT Digital initially received funding from EIT, EIT Digital is currently in the phase where EIT funding is gradually scaled down thus leading to the need for diversified funding. Funding is constituted from various sources such as membership fees, course participation fees, revenues from start-ups created in the context of EIT Digital and where the organisation acquires an equity share or becomes shareholder, and consulting fees for scale up activities.<sup>151</sup> EIT Digital indicates to be working on diversifying these funding methods further by, for example developing services relevant to a broader audience/potential customer base as well as working to become more active on EU-funded programmes such as Horizon Europe and similar national initiatives.

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<sup>147</sup> EIT Digital, 'Enhance Digital & Entrepreneurial Skills', <https://www.eitdigital.eu/enhance-digital-entrepreneurial-skills/>; EIT Digital, 'Engage in Digital Innovation & Entrepreneurship', <https://www.eitdigital.eu/engage-in-digital-innovation-entrepreneurship/>.

<sup>148</sup> Interview representative EIT Digital, 13 April 2023.

<sup>149</sup> Interview representative EIT Digital, 13 April 2023.

<sup>150</sup> Interview representative EIT Digital, 13 April 2023.

<sup>151</sup> Interview representative EIT Digital, 13 April 2023.

A challenge related to funding concerns the generating of revenue to become self-sustaining.<sup>152</sup> Whereas EIT Digital undertakes a variety of activities, funding in part constitutes a challenge due to the requirements set to the legal structure of an association under national law. More specifically, this concerns the need to ensure the non-profit nature of the non-profit association under Belgian law and proving the re-investment of revenues made. Furthermore, EIT Digital indicated that it may be necessary to have a legal entity in a certain Member State to be able to obtain funding there. A complexity in this context is therefore the need to always carefully consider what national requirements exist for the ability to operate in another Member State.

In this context, EIT Digital also reports a challenge regarding the hiring of staff and the need for ‘national embeddedness’.<sup>153</sup> In this context, EIT Digital has indicated there to be a need to adhere to national legislation for the hiring of staff. Apart from national law on labour, taxes, and social security, EIT Digital indicates that national law has occasionally resulted in the need for the creation of a subsidiary in other Member States. Nevertheless, caution is expressed to ensure the creation of such a subsidiary or company in another Member State is an absolute necessity. In particular, it is not always necessary to create a fully-fledged legal entity to hire staff. Instead, it is often possible to register an entity as a foreign employer in the relevant country and set up a local payroll. Another alternative is the creation of a permanent establishment or a branch. Caution was particularly expressed in creating unnecessary legal entities in various countries since they introduce unnecessary complexities challenging operations.<sup>154</sup>

Challenges such as these therefore show the importance of the choice of the legal structure chosen when creating a KIC. In this context, the need for frequent legal advice was indicated to constitute an important factor to aid such decision-making.<sup>155</sup>

To conclude, several parallels may be drawn between challenges faced by KICs in the context of EIT and challenges ECIU currently faces. In a way both initiatives’ challenges can be considered opposite. Whereas ECIU is perhaps looking to branch more into the private domain to diversify funding, KICs such as EIT Digital are branching out into the public domain to diversify their funding. Furthermore, challenges related to the hiring of staff can be seen in both KICs as well as ECIU both reporting similar issues in different Member States. Furthermore, both initiatives face challenges related to the national legal structure and the non-profit nature thereof (EIT Digital as a non-profit association under BE law and ECIU as a foundation under NL law).

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<sup>152</sup> Interview representative EIT Digital, 13 April 2023.

<sup>153</sup> Interview representative EIT Digital, 13 April 2023.

<sup>154</sup> Nevertheless, in some cases it may be necessary in the case of commercial activities.

<sup>155</sup> Interview representative EIT Digital, 13 April 2023.

## 4. Cross-Examination: Matching Use Cases to Legal Structures

In the previous Sections we have explored the status quo of ECIU's legal status as a foundation under EU law and explored the four instruments central to this report. The present Section constitutes the core of the report and consists of the cross-examination of the four EU legal instruments in relation to ECIU's pre-determined use cases. These use cases concern output scenarios of where ECIU intends to be in the near future and consist of:

1. The hiring of staff;
2. The receiving of public and private funding in a flexible manner from various sources;
3. The provision of flexible learning paths at EU level;
4. The creation of private revenue on continuous education;
5. The investment into and management of facilities;
6. The management of data-related issues;
7. The management of issues related to Intellectual Property Rights (IPR); and
8. The buying and owning of goods and services by ECIU.

It is important to remark that, although the use cases distinguish different situations, these must ultimately be considered holistically to form the future ECIU University Ecosystem. Hence, there is no hierarchy between the individual use cases and they must be considered to co-exist in the same system. Nevertheless, in light of feasibility concerns the use cases are assessed consecutively in the present report. The following Sections are therefore dedicated to identifying and exploring the most relevant legal instrument for each use case. The question central to this analysis is to which extent the legal instrument selected is capable of solving the challenge currently faced in each of the use cases. In the event that none of the legal instruments proves suitable to resolve a dedicated use case, the identified lack of an instrument is followed-up by a general analysis of the legal landscape in a particular use case.

### 4.1. Use Case 1: Hiring of Staff

<b>Category:</b>	Human capital
<b>Goal:</b>	ECIU University, as one European legal entity, can hire (full-time) staff from all EU Member States through simple, agile and equal processes.
<b>Example use case:</b>	ECIU University is planning to hire 5 new full-time employees across Europe as ECIU University employees. The main working site of all 5 employees resides in their home country (i.e., 5 different countries), however, all employees are treated similarly and equally in the hiring process. The contractual salary, taxing, social security, and pension rules are simple and fast to handle.

#### 4.1.1 Quick Scan: Identifying the Most Suitable Legal Instrument

Over the course of this report it has become apparent that the hiring of staff in different EU Member States is considered as one of the biggest challenges related to higher education cooperation. Issues

in this respect were experienced by ECIU in its capacity as a foundation under Dutch law and by EIT Digital as a KIC.

The analysis of the different instruments in Chapter 3 has shown that EIT, SE and SCE are less suitable for the hiring of staff. More specifically, the Knowledge Innovation Communities (KICs) in the context of EIT are not suitable for the hiring of staff since these KICs must become legal entities under national law. This would lead to similar limitations in terms of the hiring of staff as ECIU is currently experiencing as a foundation under Dutch law and as also expressed by EIT Digital (in its capacity as association under Belgian law). Both of these examples show that the hiring of staff in other Member States is very much dependent on national law, which may require the creation of company to effectuate the employment (itself a time-consuming and potentially costly exercise). In the case of the SE and SCE, the relevant Sections of Chapter 3 have shown that both instruments are accompanied by EU Directives on workers involvement which regulate employee representation and co-determination rules for both legal entities. Additionally, the hiring of staff situated in different locations would depend largely on national rules. As such, in practice this means that if a holding SE is created, the staff hired in locations where the subsidiaries of the holding are located is subject to national employment rules of the specific location of the subsidiary. Similarly, hiring staff under an SCE will be dependent on the respective rules of employment of the places where the different members are located. This also means that, based on the exploration of the different instruments in Chapter 3 of this report, the EGTC appears to be the most suitable instrument for the hiring of staff.

#### 4.1.2 Analysis

Little information is given in the EGTC Regulation on the hiring of staff. Whereas Article 1(2) determines that that EGTCs can employ staff, Article 8(2)(k) determines that the rules applicable to staff determined in the EGTC's convention. In principle, for matters not regulated under the EGTC Regulation, the national law of the Member State where the EGTC has its registered office will apply.<sup>156</sup> It appears to follow from this that the hiring of staff is then subject to the same national law for employees hired by the EGTC.

Nevertheless, on closer inspection the image appears a bit more blurred. When the original EGTC Regulation was updated in 2013 some amendments were made regarding personnel and applicable law. Indeed, the proposal indicated to propose solutions in line with the EU *acquis* for tax and social security regimes applicable to EGTC employees.<sup>157</sup> According to the proposal, staff “may be employed in any of the Member States whose territories comprise the EGTC”.<sup>158</sup> Regulation 1302/2013 indeed indicates that in relation to staff “it should be possible for different options as to the choice of rules applicable to staff of EGTCs to be laid down in the convention”.<sup>159</sup> Specific arrangements on personnel management and recruitment procedures should accordingly be addressed in the EGTC's statutes.<sup>160</sup> This seems to indicate that a broader choice of law can be made regarding the hiring of staff beyond

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<sup>156</sup> Article 2(1)(c) EGTC Regulation

<sup>157</sup> Proposal for a Regulation of the European Parliament and of the Council amending 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) as regards the clarification, simplification and improvement of the establishment and implementation of such groupings, COM(2011) 610 final, p. 4.

<sup>158</sup> Ibid.

<sup>159</sup> Recital 26 Regulation 1302/2013.

<sup>160</sup> Recital 26 and Article 9(2)(e) Regulation 1302/2013.

the application of the national law of the Member State where the EGTC has its registered office. Indeed, Regulation 1302/2013 also encourages Member States to make use of the possibilities of Regulation 883/2004 on social security coordination to identify applicable legislation in that respect.<sup>161</sup> Originally, the proposal for Regulation 1302/2013 also included a provision indicating that the rules applicable to the EGTC's staff were those of the Member State where the EGTC has its registered office, those of the Member State where the EGTC's staff is actually located, or those of the Member State of which the staff member is a national.<sup>162</sup> It was thereby foreseen that *ad hoc* rules would need to be fixed by the EGTC to allow equal treatment of all staff working at the same location.<sup>163</sup> However, these last provisions were ultimately not taken up in the final version of Regulation 1302/2013. What was taken up in the Regulation is a joint statement of the European Parliament, the Council and the Commission on staff which clarifies that Member States are to consider different available employment regime options to be chosen by the EGTC. In the case EGTC staff members contracts are governed by public law, the statement provides that “national public rules will be those of the Member State where the respective EGTC *organ* is located. However, national public law rules of the Member State where the EGTC is *registered* may apply as regards EGTC staff members already subject to these rules prior to becoming an EGTC staff member”.

This shows that there are still different sets of legislation that may be applicable to employees employed by an EGTC – and that the different options regarding the choice of rules should be laid down in the convention. Whereas previously this choice of law was indicated as being of crucial importance for the definition of the applicable legislation to ECIU's operations, the aforementioned shows that consideration of different legal systems is also necessary to organise matters related to staff. Apart from social security and the provisions of Regulation 883/2004, account should also be taken of applicable tax legislation.<sup>164</sup>

#### 4.1.3 Conclusions Use Case 1

The present Section confirms the findings from Section 3.1.4 – the example from practice concerning Eucor. Although the EGTC creates a European legal entity, the entity is not fully European in nature since it does not prevent application of national tax and social security legislation. The EGTC's added value in terms of hiring staff therefore lies in the streamlining of the hiring process, but does not fully overcome obstacles originating from national law.

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<sup>161</sup> Recital 27 Regulation 1302/2013; Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L 6/3.

<sup>162</sup> Proposal for a Regulation of the European Parliament and of the Council amending 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) as regards the clarification, simplification and improvement of the establishment and implementation of such groupings, COM(2011) 610 final, p. 15.

<sup>163</sup> *Ibid.*

<sup>164</sup> Whereas employees are in principle required to pay tax in their home country and also in the Member State where the employee is hired by ECIU, the principle of double taxation has been dealt with by Member States through double tax agreements, which are also to be observed in this context; See all these agreements at [https://taxation-customs.ec.europa.eu/treaties-avoidance-double-taxation-concluded-member-states\\_en](https://taxation-customs.ec.europa.eu/treaties-avoidance-double-taxation-concluded-member-states_en).

## 4.2. Use Case 2: Receive Public and Private Funding Flexibly from Various Sources

<b>Category:</b>	Funding
<b>Goal:</b>	ECIU University as one legal entity is eligible to apply for national, regional and EU funding across Europe as well as receiving private funding. ECIU University can manage and distribute funding, also jointly with the ECIU member universities and other partners in the ECIU University ecosystem. This applies for all areas of operations.
<b>Example use case:</b>	A group of researchers in the ECIU member universities plans a research project where multiple types of funding are combined for different parts of the project. The group applies for EU funding together with ECIU University (as one legal entity) and for regional co-funding in 6 different Member States. The process for handling synergies between the multiple types of funding is transparent and clear across Europe and will ensure that the pool of funding from different sources will be optimally used for the research project and thus create more substantial impact across Europe. The legal role of ECIU University (as one legal entity) is clear in the process.

### 4.2.1 Quick Scan: Identifying the Most Suitable Legal Instrument

It is clear that the possibility to generate revenue in a flexible way, regardless of its origins is to become of great importance for the sustainability of higher education cooperation such as that undertaken by ECIU. In this context, the examination of the different instruments shows that all of them may be applicable in this context. The EGTC enables the receiving of both public and private funding and may therefore be suitable for this end – though it has to be remarked that the instrument is mainly aimed at the public domain. In the case of the SE, the instrument appears relevant at first sight, but may be limited in its applicability considering that this instrument might not be able to gather public funding such as that provided for by the EU institutions considering that this model is based on profit. The SE may nonetheless be relevant for the activities undertaken by ECIU resulting in revenue from private funding. As far as the SCE is concerned, the instrument appears more suitable in light of its purpose which is that of furthering the benefits for its own members and society as a whole. As such, under an SCE it is much more likely to obtain public as well as regional funding. However, it might be more difficult to attract private fundings exactly because of the very purpose of a cooperative, meaning the instrument is not meant to lead to profits and all revenues must be for the benefit of the SCE's members. This obstacle can be overcome thanks to the possibility provided by the SCE Regulation which allows the option to admit investor-members. Finally, EIT may be particularly relevant in this context since it is aimed to bring together activities from the knowledge triangle of higher education, business, and research – implicitly covering all types of activities and funding.

### 4.2.2 Analysis: Examining Legal Instruments & Their Suitability for Use Case 2

Starting with the **EGTC**, the Regulation only mentions the use of public fundings.<sup>165</sup> However, no evidence can be found against private fundings. It therefore seems that ECIU as a new EGTC could

<sup>165</sup> Art. 6, EGTC Regulation.



acquire private funds. Nevertheless, considering the EGTC is mainly aimed at the public domain, it is likely more challenging to obtain private funding as EGTCs are designed to have an predominantly public dimension. Indeed, EGTCs are aimed for the cooperation of public authorities, in principle not for universities. Whereas some universities already use this legal structure,<sup>166</sup> it has to be emphasised that the EGTC Regulation is in principle not intended to be used for the cooperation/alliance of universities. In the example of Eucor, experience was gained recently in acquiring private funding. In particular, a co-funding system with a private company was set up for a specific project. This shows that private fundings are possible, but are to be considered more of an exception.

Moving to the **KIC under EIT**, one of the tasks of the EIT is to “support the KICs in the development of an effective financial sustainability strategy for the mobilisation of funds from other public and private sources”.<sup>167</sup> One of the tasks of the KICs is “to mobilise funds from public and private sources”.<sup>168</sup> The KICs are eligible for public and private fundings, and even more, they are required to have funds from public and private sources.

The KICs shall be financed, in particular, from the following sources: voluntary contributions from Member States, associated countries or other third countries or public authorities within those Member States or countries (public funding); contributions from international bodies or institutions (public funding); bequests, donations and contributions from individuals, institutions, foundations or any other bodies established under national law (private funding); financial instruments, including those funded from the general budget of the Union(public funding).<sup>169</sup> The combination of funding is important since EIT funds the KICs until 100% at the beginning but this will decrease with time and the KICs then must become financially sustainable, thus requiring diversified funds from both the public and private domains. It is however important to recall that KICs are dependent of national law. Depending on the legal structure chosen when the KIC is created, acquisition of fundings will be different. The choice of the Member States and the legal structure when establishing a new KIC is therefore very important because all the national provisions regarding funding will apply.

As far as the **SE is concerned**, no mention is made in the SE regulation about funding methods, but the instrument can clearly apply. However, it is much more likely to get private fundings rather than public fundings as an SE due to its profit-based corporate nature. In fact, it can be a very useful legal instrument to gather private funding due to its European brand image and due to its composition of 14 companies under the holding SE. For the example of the use case, SE can be an optimal resource for pooling private funding, while SCE can be the optimal entity for applying at EU and regional/national level funding schemes as well as receiving private funding.

Moving to the **SCE**, the SCE regulation does not specifically mention funding schemes for cooperatives. Financial aspects outlined in the regulation pertain to the distribution of surplus collected by the SCE. However, the SCE allows the inclusion of "non-user investor members" to obtain private funding. In fact, according to Article 14(1) SCE Regulation, if the Member State where an SCE is registered permits the inclusion of investor members, the SCE's statute can also include provisions for accepting investor

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<sup>166</sup> See example of Eucor, section 3.1.4.

<sup>167</sup> Art. 6(i) EIT Regulation.

<sup>168</sup> Art. 7(1)(h) EIT Regulation.

<sup>169</sup> Art. 18, (1) EIT Regulation

members. Furthermore, Article 3(5) of the SCE Regulation states that changes in capital amounts do not require amendments to the statutes. This is significant as it avoids the time-consuming process of amending the statutes, which would depend on the conditions specified by national law and the statute itself. There is no explicit limit on the number of investor members, but the combined voting rights of all investor members cannot exceed 25% of the total voting rights, or the lower percentage specified by applicable national law (as stated in Article 59(2) of the SCE Regulation). Therefore, if the national laws of the Member State allow the inclusion of investor members, this possibility can be advantageous in attracting private investments even as a cooperative.

Furthermore, should ECIU decide to opt for an SCE but not wish to work with non-user investor members, the SCE regulation provides for a non-member alternative for private fundings. Article 64(1) of the SCE Regulation allows for non-member options to raise private funds. It permits the issuance of securities or debentures without voting rights, which can be subscribed by members or non-members. Acquiring these securities does not grant membership status. The statutes of the SCE must also establish the redemption procedure. This provision allows SCEs to issue securities or debentures irrespective of national laws for cooperatives. Thus, the ECIU SCE, regardless of its place of registration, can rely on this right due to the primacy of EU law and the direct applicability of EU regulations.

Finally, the SCE also appears suitable to receive public funding. To access public funding, the SCE must meet the eligibility criteria set by public funding programs at the EU, regional, or national level. Public funding in the form of grants, subsidies, or reduced taxes is permitted for SCEs without conflicting with State aid rules. In cases where cooperatives are factually and legally distinct from 'normal' commercial companies, State aid rules (such as subsidies or tax exemptions) do not apply. However, the national law governing cooperatives must adhere to certain basic characteristics of cooperatives to qualify as non-comparable with corporate companies.<sup>170</sup>

#### **4.2.3 Implications of the Regulations on Foreign Direct Investments & Dual Use Items**

In relation to the different funding streams explored in the context of the EGTC, SE, SCE and KIC under EIT it is important to note that funding received will have to adhere to the Regulation 2019/452 on Foreign Direct Investments and Regulation 2021/821 on Dual Use Items.

##### **Regulation 2019/452 on Foreign Direct Investments**

Foreign Direct Investment (FDI) is characterized as an investment made by a "foreign investor" with the objective of establishing or maintaining enduring and direct connections with an entrepreneur to engage in economic activities within a Member State.<sup>171</sup> This includes investments that enable effective participation in the management or control of the target entity. "Foreign investors" can be either natural persons or undertakings from a third country.<sup>172</sup> Both completed and proposed investments are subject to review for a maximum period of 15 months, as outlined in the relevant article of the regulation.<sup>173</sup>

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<sup>170</sup> As outlined in considerations 56 to 61 of Joint Cases C-78/08 and C-80/08 ECLI:EU:C:2011:550.

<sup>171</sup> Article 2(1) Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, [2019] OJ L 79 1/1 (hereinafter: FDI Regulation).

<sup>172</sup> article 2(2) FDI Regulation.

<sup>173</sup> article 7(8) FDI Regulation.

It is important to note that the Regulation does not seek to standardize national screening systems. Each Member State retains the autonomy to decide whether to implement a national screening mechanism and determine the need to screen specific FDI cases. However, if a Member State chooses to conduct screening, it is required to cooperate with the Commission through a defined mechanism.<sup>174</sup> This cooperation entails timely notification to the Commission and other Member States by the screening Member State. Additionally, other Member States have the right to provide comments if they believe that the FDI could impact their security or public order. The Commission, in turn, can issue an opinion if it deems that the FDI may affect security or public order in multiple Member States.<sup>175</sup> The Commission is obligated to inform other Member States when comments or opinions have been submitted.

Considering the expansive scope and scale of activities undertaken by the ECIU university, it is noteworthy that if the Commission determines that projects and programs of European Union (EU) interest could be affected based on security or public order grounds, it has the authority to issue an opinion to the Member State where the FDI is planned or already in place.<sup>176</sup> This is particularly relevant as the FDI Regulation's annex includes the 'Horizon Europe' funding program among the projects of Union interest. Therefore, while the host country ultimately retains decision-making power, the Member State in question must duly consider the comments provided by other Member States and the Commission.<sup>177</sup> In the case of investments categorized as being of "Union interest," host Member States are required to give utmost consideration to Commission opinions and provide an explanation if non-compliance occurs.<sup>178</sup>

### **Regulation 2021/821 on Dual Use Items**

Furthermore, while export controls are necessary to prevent the proliferation of dual-use items Regulation 2021/821 has significant implications for universities and academics in Europe, particularly regarding academic freedom and research collaboration.<sup>179</sup> The scope of the regulation extends to a diverse assortment of dual-use items, encompassing software and technology.<sup>180</sup> In adherence to the regulation, exporters are obligated to secure an export license prior to shipping specific dual-use items beyond the borders of the European Union. Additionally, the regulation introduces fresh reporting obligations for exporters, mandating the provision of information regarding the intended purpose and recipient of certain dual-use items.<sup>181</sup> Notably, the publication of research concerning particular dual-use items is subjected to new restrictions under the regulation.<sup>182</sup> To ensure compliance, the regulation imposes penalties, including fines and imprisonment, for those who fail to meet its requirements.<sup>183</sup>

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<sup>174</sup> article 6 FDI Regulation.

<sup>175</sup> article 8 FDI Regulation.

<sup>176</sup> article 8(1) FDI Regulation.

<sup>177</sup> article 6(4) and 7(3) FDI Regulation.

<sup>178</sup> article 8(2)(C) FDI Regulation.

<sup>179</sup> Stalenhoef, Claire and Kanetake, Machiko and van der Wende, Marijk, The Implications of the EU's Dual-Use Export Control Regulation 2021/821 for Universities and Academics (October 1, 2022) Utrecht University School of law research paper.

<sup>180</sup> article 3 and annex I Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, [2021] OJ L 206/1 (hereinafter: Dual-use Regulation).

<sup>181</sup> article 12 Dual-use Regulation.

<sup>182</sup> *ibid* n166, p 14; and article 2(9) Dual-use Regulation.

<sup>183</sup> article 25 and 26 Dual-use Regulation.

#### 4.2.4 Conclusions Use Case 2

To conclude use case 2, the EGTC, SE and SCE can in principle apply for public and private funding. However, in the case of the EGTC, the instrument is mainly geared to the public domain. Questions may therefore be raised of its general suitability to attract and handle private funding. By contrast, SE's can be considered the ideal form to gather private fundings due to their corporate nature. KICs under EIT can be considered the least relevant. Although KICs are meant to attract both public and private funding, their national origins result in limited added value for ECIU in respect of the status quo as foundation under national law. Based on the analysis in the previous section, the SCE appears to be the most suitable instrument thanks to the advantage of possibly attracting both streams of funding. Nevertheless, it is important to mention in this respect that even the creation of an SCE would not completely resolve possible challenges originating from differences in national law. Indeed, functioning of the SCE is still strongly rooted in and dependent on national law. In this context, it is important to continue to observe national legislation on public and private funding acquired by higher education institutions.

#### 4.3. Use Case 3: Provide Flexible Learning Paths at the European Level

<b>Category:</b>	Education
<b>Goal:</b>	ECIU University as one European legal entity, is recognised as a higher education provider at the European level and in the EU member states and can recruit and manage (non-degree) learners, provide learning opportunities (other than degrees) and reward micro-credentials/micro-certificates which are quality assured and recognised at the European level.
<b>Example use case:</b>	A learner, who is not registered in any of the ECIU member universities, aims to enrol to ECIU University to take advantage of the flexible learning opportunities. S/he enrolls through a simple registration process at the European level directly in ECIU University (as one legal entity). Next, s/he participates in a challenge and takes two micro-modules. In the end, s/he is rewarded with micro-credentials/micro-certificates by ECIU University (one legal entity). Afterwards s/he decides to continue for a master's degree in a university which is not connected to ECIU University (not an ECIU member university). All micro-credentials that s/he received from ECIU University (as one legal entity) are automatically recognised by the national university.

##### 4.3.1 Introduction

The present use case revolves around the possibility for learners at ECIU university to take courses at different member universities ultimately resulting in micro-credentials that can be used to gain access to further education beyond ECIU university. This means there are two aspects to this use case: one internal aspect concerning the ECIU member universities among themselves, and an external aspect concerning how micro-credentials issued by ECIU are considered outside ECIU university. The internal aspect can be expected not to be problematic since this concerns recognition within the ECIU consortium, meaning recognition by other ECIU member universities. The situation is more complex when focusing on the external aspect, namely the recognition of micro-credentials issued by ECIU

University and recognized by non-ECIU member universities. The present Section shows how the current state of affairs allows for limited opportunities to achieve the output scenario of the present use case. Nevertheless, this Section will show this is not so much due to the legal instruments included in this report, but rather due to the status quo of the broader legislative framework at national and European level.

#### **4.3.2 Lack of a Solution in the Legal Instruments Examined**

As a preliminary point, the four instruments examined in the context of this report (EGTC, SE, SCE and EIT) prove unsuitable to solve the challenge formulated in the context of the present use case.

To start, the regulations and directives creating these instruments are either silent on the topic of the provision of education or indicate that EU-level action is excluded. For example, the **EGTC** regulation makes no mention of the provision of education. Even if the instrument does provide for a choice of legal system to apply to the whole of the EGTC's operations,<sup>184</sup> the choice of applicable law may not result in the recognition sought in the current use case. Indeed, if ECIU university were to become an EGTC with its registered office in one of the university's partner countries, this would only mean that the law applicable in terms of qualifications would be that of the country where the registered office is located. This would mean that – even if one country's qualification system would apply, the resulting micro-credential would be issued in accordance with the national law and quality assurance processes of one Member State. In turn, this would ultimately require recognition procedures at a later stage in other Member States if a former learner wants to use the micro-credentials issued by ECIU university outside the context of that university.<sup>185</sup>

When it comes to **SE**, the legal instrument is by definition a business model and therefore less suitable for the provision of education services such as micro-credentials. Furthermore, there may be objections to companies providing educational services and being recognised as higher education providers laid down in national law. In some Member States education may primarily be seen as a function held by public institutions due to “specialty clauses”, meaning private entities may find difficulties to provide such services (see use case 4 below).<sup>186</sup> In a similar vein, the **SCE** Regulation does not mention the provision of education and the instrument is intended primarily to expand the knowledge and development of cooperatives as cross-border businesses.

In the case of the **KICs** operating under the framework of EIT it is again national law that will apply in this case due to the KICs becoming legal entities under national law. Furthermore, the EIT Regulation includes Article 13 which indicates that degrees and diplomas issued in the context of KICs shall be awarded by the participating Higher Education Institutions and vocational education and training providers in accordance with national rules and accreditation procedures. Whereas these degrees are also granted the label of EIT degrees and diplomas, their origins remain rooted in national law. The role of EIT is thereby limited to supporting work of the KICs by, for example, encouraging the award of joint and multiple degrees, promoting the use of the EIT label in degrees, stimulating the creation

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<sup>184</sup> See Article 2 EGTC Regulation.

<sup>185</sup> To give the example of Eucor, the EGTC provides for education jointly although the degrees are still issued by the individual universities.

<sup>186</sup> Ibid n78.

of programmes focused on lifelong learning.<sup>187</sup> To give the example of EIT Digital, the KIC provides master's degrees but does so in line with the national law of the countries in which the participating universities are located.

Therefore, the four instruments included in this report provide limited opportunities to enhance the recognition and quality assurance of micro-credentials upon completion of learning at ECIU University. It is thereby important to also note that, where connections are made to the provision of education (such as in the case of the EIT Regulation), this concerns higher education in its traditional form following the bachelor, master, doctorate cycle. Therefore, newer forms of education such as micro-credentials can also be held not to be foreseen by such instruments.

However, as mentioned previously, there are greater challenges to be found regarding the recognition and quality assurance of micro-credentials. These can be considered to range beyond the scope of the four instruments examined in this report. The following Section will look into what was previously described as the external aspect, namely the situation where a person has concluded a micro-credential at an ECIU member university and is seeking access to higher education at a non-ECIU university.

#### **4.3.3 The External Aspect: Challenges to the Recognition of Micro-credentials in Europe**

As a preliminary point, it must be noted that there are currently no instruments in place that *guarantee* European-level recognition of micro-credentials, nor their quality assurance. Accordingly, this is the main factor challenging the external recognition of micro-credentials at non-ECIU universities.

In general, it should be noted that recognition for access to higher education is governed by the Lisbon Recognition Convention.<sup>188</sup> This type of recognition (i.e. academic recognition) is decentralized in the sense that higher education institutions themselves are responsible for recognizing qualifications. The aforementioned Convention can be said to streamline recognition processes and operates in accordance with the principle of substantial differences: recognition is in principle granted, unless substantial differences can be shown.<sup>189</sup> Nevertheless, it is important to emphasize here that the Lisbon Recognition Convention applies to higher education qualifications<sup>190</sup> and periods of studies<sup>191</sup>, each of which do not appear to cover smaller study components such as micro-credentials.<sup>192</sup> Instead,

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<sup>187</sup> See Article 13(2) EIT Regulation.

<sup>188</sup> Convention on the Recognition of Qualifications concerning Higher Education in the European Region – ETS. No. 165 (hereinafter: Lisbon Recognition Convention).

<sup>189</sup> See for example Article IV.1 of the Lisbon Recognition Convention.

<sup>190</sup> Defined in Article I of the Lisbon Recognition Convention as “any degree, diploma or other certificate issued by a competent authority attesting the successful completion of a higher education programme”.

<sup>191</sup> Defined in Article I of the Lisbon Recognition Convention as “any component of a higher education programme which has been evaluated and documented and, while not a complete programme of study in itself, represents a significant acquisition of knowledge or skill”.

<sup>192</sup> The same can indeed be said of EU initiatives such as the Council Recommendation of 26 November 2018 on promoting automatic mutual recognition of higher education and upper secondary education and training qualifications and the outcomes of learning periods abroad, [2018] OJ C 444/1. This Recommendation, like the Lisbon Recognition Convention, focuses on qualifications signifying completion of education at one level and the search for access to a qualification at another level.

it is currently recommended that credential evaluators use procedures for the Recognition of Prior Learning (a process not harmonized in Europe) to recognize such credentials.<sup>193</sup>

At the European level a Recommendation was adopted in 2022 on “a European approach to micro-credentials for lifelong learning and employability”.<sup>194</sup> An important element of the recommendation is the creation of a common definition as well as standard elements to describe micro-credentials. Point 5 of the Recommendation defines micro-credentials as follows:

*‘Micro-credential’ means the record of the learning outcomes that a learner has acquired following a small volume of learning. These learning outcomes will have been assessed against transparent and clearly defined criteria. Learning experiences leading to micro-credentials are designed to provide the learner with specific knowledge, skills and competences that respond to societal, personal, cultural or labour market needs. Micro-credentials are owned by the learner, can be shared and are portable. They may be stand-alone or combined into larger credentials. They are underpinned by quality assurance following agreed standards in the relevant sector or area of activity.*

As per the last sentence of the definition, quality assurance takes place following the standards agreed in a certain sector or area of activity. European-level action exists on quality assurance but is not codified in binding legal texts, nor harmonized. Important instruments in this respect are the Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG) and the European Quality Assurance Reference Framework for Vocational Education and Training (EQAVET).<sup>195</sup> These instruments play an important role in streamlining approaches taken by national quality assurance agencies, but do not create one single European-level quality assurance system. This means that as far as the higher education sector (and micro-credentials issued in that context) is concerned, quality assurance again largely takes place at the national level.

As far as the usage of micro-credentials for later formal learning is concerned, the Recommendation also indicates that micro-credentials should in principle be stackable – although it immediately notes that this does not create an automatic entitlement to a qualification or a degree.<sup>196</sup> The Recommendation goes on to indicate that these decisions remain with regional and national authorities/institutions in line with existing awarding processes. Space precludes a full analysis of the European approach to micro-credentials as laid down in the Recommendation, but it suffices to say that the status quo at European level regarding the recognition of micro-credentials is not yet capable of facilitating the scenario envisaged by the present use case.

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<sup>193</sup> See ENIC/NARIC, ‘Micro-credentials’, <https://www.enic-naric.net/page-micro-credentials>.

<sup>194</sup> Point 5(a) Council Recommendation on a European approach to micro-credentials for lifelong learning and employability (retrievable here: <https://data.consilium.europa.eu/doc/document/ST-9237-2022-INIT/en/pdf>).

<sup>195</sup> Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG), May 2015 (retrievable at: [https://www.ehea.info/media.ehea.info/file/2015\\_Yerevan/72/7/European\\_Standards\\_and\\_Guidelines\\_for\\_Quality\\_Assurance\\_in\\_the\\_EHEA\\_2015\\_MC\\_613727.pdf](https://www.ehea.info/media.ehea.info/file/2015_Yerevan/72/7/European_Standards_and_Guidelines_for_Quality_Assurance_in_the_EHEA_2015_MC_613727.pdf)); Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Quality Assurance Reference Framework for Vocational Education and Training, [2009] OJ C 155/1.

<sup>196</sup> See point 5(h) Council Recommendation on a European approach to micro-credentials for lifelong learning and employability.

#### 4.3.4 Conclusion: A Gainful Scenario?

Is there a scenario where some simplification can be instituted in relation to micro-credentials and their recognition and quality assurance? A possible scenario – which is very much in line with the status quo of ECIU University – is to create and issue micro-credentials in the context of the Dutch foundation and go through the national quality assurance process in the Netherlands to be a recognized provider nationally. In the transnational context, it would nevertheless mean that learners need to get recognition of their micro-credential following national procedures for recognition of prior learning when they are looking to access higher education at a non-ECIU university.

Hypothetically, it would also be possible to achieve the same in the context of the EGTC or EIT, the situation would factually be quite similar (if not the same) to that in which ECIU currently finds itself as a Dutch foundation. Indeed, in case of both the EGTC as well as EIT national quality assurance processes would also have to be pursued. Nevertheless, the added administrative work of having to create an EGTC or become a KIC under EIT (which again involves a national legal entity) would not appear the most efficient nor effective way for ECIU to advance in achieving its output situation for the present use case.

#### 4.4. Use Case 4: Create Private Revenue on Continuous Education

<b>Category:</b>	Funding
<b>Goal:</b>	ECIU University as one legal entity can create private revenue by providing continuous education opportunities. Continuous education can mix contents- and resources with free public degree education (e.g., shared learning modules stemming from the ECIU member universities). Consequently, commercial continuous education in ECIU University might use learning opportunities developed with public funding.
<b>Example use case:</b>	Customers of ECIU University (both individuals and public and private organisations) pay for continuous education opportunities to ECIU University (as one legal entity). The payment can be either through a one-time payment or through a re-occurring subscription model. ECIU University (as one legal entity) can use the revenue freely for further development of the ECIU University ecosystem without further reporting on the usage.

##### 4.4.1 Quick Scan: Identifying the Most Suitable Legal Instrument

The present use case revolves around possibilities to provide for continuous education and to generate private revenue from this. In the present Section, the focus is mainly placed on opportunities coming from EIT and SCE. In the case of EIT it could be relevant since its purpose is indeed to intensify cooperation between higher education, research and innovation, thus crossing public and private spheres and sharing knowledge across them. In the case of the SCE, the instrument could be of relevance due to its business nature which enables the sharing and pooling of resources.

By contrast, the instruments that are not selected for analysis here concern the EGTC and SE. In relation to the EGTC, the instrument is more about organisational cooperation of universities, instead



of actual teaching cooperation. In relation to the SE, issues may predominantly be perceived in relation to uncertainties coming from national law. As described in Chapter 3, some Member States may prevent private companies from being able to provide educational services. Use of the SE would therefore need to be accompanied with research into national law aiming to identify whether there are barriers to companies providing educational services – and how these are defined. Another question in this respect is whether prohibitions related to educational services are related only to public education or whether they cover any type of educational service. This question is particularly pertinent since both forms of education may be mixed in the event that ECIU utilizes learning opportunities developed with public funding for its commercial continuous education activities.

#### **4.4.2 Analysis: Examining Legal Instruments & Their Suitability for Use Case 4**

Starting with the **KICs under the EIT** framework, the KICs are financed by revenue generated by the KICs' own assets and activities.<sup>197</sup> An activity undertaken by ECIU, as a KIC, could be to offer some education program in a continuous way. As an example of that, we can take the case of EIT Digital which provides for private education as one of its activity. However, the exact conditions under which this is possible would be subject to national law following that of the legal structure adopted.

In relation to **SCE**, in order for ECIU to be recognized as an educational provider, it must obtain the necessary qualifications or licenses, complying with national requirements. This can potentially lead to conflicts between national laws and the structure of ECIU as a company or cooperative. It is essential to assess whether national laws permit entities like ECIU, in the form of an SCE, to qualify as educational providers. Once an SCE fulfils the criteria to offer educational services, it also gains eligibility to apply for both public and private funding. As a legal entity, it can engage in any lawful activity, including selling its own products in the form of educational services. The revenue generated from individuals seeking educational services can be utilized to develop additional courses, while materials produced through public funding can be used for private continuous education initiatives. However, a clear distinction is to be drawn between using materials developed with public funding to continue to develop courses for the purpose of private education and using public funding for private activities. As Chapter 2 on the Dutch foundation has shown, national law may set limitations related to the usage of public funds for private purposes (cross-subsidising).

#### **4.4.3 Conclusions Use Case 4**

Ultimately, the SCE therefore appears to be the most suitable instrument for use case 4 due to its possibility to attract both public and private funding (see also use case 2). Nevertheless, essential to its potential use is the verification of whether SCE's are capable of providing educational services under national law. Furthermore, national law also needs to be observed to determine to which extent public and privately funded educational activities may (or may not) overlap.

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<sup>197</sup> art.18(1)(d) EIT Regulation.

#### 4.5. Use Case 5: Invest Into and Manage Facilities

<b>Category:</b>	Education, research, innovation
<b>Goal:</b>	ECIU University can invest in and manage physical and digital infrastructure and facilities, also jointly in collaboration with the ECIU member universities and the other ECIU University ecosystem partners.
<b>Example use case:</b>	ECIU as a legal entity invests in necessary infrastructures and facilities. The Universities and other partners contribute into ECIU financially to facilitate these investments into infrastructures and facilities. For example, a certain infrastructure requires 80.000 euros to be realized. ECIU puts in 20.000 euros and the remaining 60.000 euros originate from ECIU's member universities and other partners. Once the funding is obtained ECIU as a legal entity buys and owns the infrastructure. Upon acquisition ECIU and the member universities and partners agree that everyone who invested can use the infrastructure owned by ECIU.

##### 4.5.1 Quick Scan: Identifying the Most Suitable Legal Instrument

In the case of the present use case, all four instruments examined may be of relevance to ECIU.

##### 4.5.2 Analysis: Examining Legal Instruments & Their Suitability for Use Case 5

When it comes to the **EGTC**, the EGTC Regulation ensures that EGTCs will, in all Member States of the EU, benefit from the most extensive legal capacity accorded to legal persons under that Member State's national law.<sup>198</sup> As such, EGTCs can specifically acquire or dispose of movable and immovable property.<sup>199</sup> In this context, investments into facilities are also possible.

In relation to the **KICs under EIT**, the capacity of a certain KIC to invest and manage facilities would depend on the national law under which the KIC decides to create its structure. This should be a point of attention when ECIU, as a new KIC, chooses its national structure.

As far as the **SE and SCE** are concerned, there are no explicit indications about investments in both SE and SCE regulations. However, as business entities both the SE and SCE would be eligible for investing into and managing infrastructure that would be owned by ECIU solely. ECIU's ownership would be an important aspect to be determined together with its members and partners. In order to ultimately make the investments ECIU could consider the following steps: investment terms must be defined, outlining the investment agreement's specifics, including investment amounts, rights, obligations, and infrastructure usage rights. To give a practical illustration of the example use case for which ECIU as a single entity invests €20,000 while the remaining capital of €60,000 is provided by the members and partners to reach the total of €80,000, the following steps could be followed: Fundraising efforts should be coordinated, aiming to secure €60,000 from the SCE/SE's members and partners, e.g. through issuing shares, collecting contributions, or obtaining loans or grants; Once the funding is obtained, the SCE/SE can legally acquire and become the owner of the infrastructure, utilizing the combined funds; A usage agreement should be created, establishing terms between the SCE/SE (ECIU)

<sup>198</sup> Art. 1(4) EGTC Regulation.

<sup>199</sup> Ibid.

and the members/partners regarding infrastructure usage, covering rights, responsibilities, access arrangements, maintenance obligations, and associated fees or contributions; Legal documentation, such as contracts or agreements, must be prepared to ensure the enforceability of rights and obligations; Lastly, an ongoing management system should be established to oversee infrastructure usage, encompassing maintenance, scheduling, and the resolution of any disputes or issues that may arise.

#### 4.5.3 Conclusions Use Case 5

The present use case has shown that all instruments appear to allow and facilitate the investment into facilities. As far as their added value is concerned, this may be questioned since the foundation under Dutch law as explored in Chapter 2 also appears to permit investments. In this context, added value perhaps originates not so much from coordinated provisions on investments but rather on the creation of an overarching legal structure.

#### 4.6. Use Case 6: Manage Data-related Issues

<b>Category:</b>	Other
<b>Goal:</b>	ECIU University as one legal entity can own, share, receive, and manage data.
<b>Example use case:</b>	To create a seamless digital flow of services for learners across the ecosystem, ECIU University needs personal (digital) information from the ECIU member universities and will also provide information towards the ECIU member universities. ECIU University (as one legal entity) is allowed to receive, store, manage and provide personal information through agile, digital processes without legal barriers.

##### 4.6.1 Introduction

ECIU university's ambition is to eventually become a hub capable of coordinating an ecosystem in a flexible and transparent manner. To allow the smooth functioning of such an ecosystem, it should be able to manage and process big quantities of data. As such, this use case intends to verify which potential obstacles might arise in relation to national laws and the GDPR.<sup>200</sup> The analysis in relation to such obstacles will be conducted on all four instruments at hand, namely: SE, SCE, EGTC and KIC under EIT. Whereas there appear to be no limitations to the owning and processing of data under each of the respective instruments, the GDPR is the main instrument governing all issues related to data.

##### 4.6.2 Interaction between the GDPR and national laws

In view of the intended use of data by ECIU, it can be said that national laws on data protection are not a major issue. Nevertheless, it is important to acknowledge that differences in the application of the GDPR between EU member States persist. That is mainly due to the GDPR not fully harmonizing data rules due to limited legislative competences on some topics such as national security and public

<sup>200</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 05/46/EC (General Data Protection Regulation), [2016] OJ L 119/1 (hereinafter: GDPR).

order.<sup>201</sup> Another reason divergences is explained by the room for manoeuvre left by the GDPR to the Member States on some topics. As such, for the type of activities envisaged by ECIU university and its members, national laws could be diverging mainly on conditions of consent and on the requirements of retention of data.

#### **4.6.3 Compliance Steps**

In any case, to ensure compliance with national data protection laws and the GDPR, ECIU must adhere to several key steps. Firstly, ECIU should establish a lawful basis for processing personal data and, depending on the purpose of processing, obtain valid and explicit consent from its members, ensuring compliance with jurisdiction-specific consent requirements.<sup>202</sup> Secondly, ECIU must be prepared to handle data subject rights, including granting individuals' access, rectification, erasure, and restriction of processing, as well as the right to object.<sup>203</sup> Additionally, if ECIU transfers personal data outside the EEA, it must comply with additional legal requirements for cross-border data transfers and implement adequate safeguards, such as Standard Contractual Clauses or Binding Corporate Rules.<sup>204</sup> Data security and breach notification mechanisms should be established to protect personal data, detect breaches, and notify supervisory authorities and affected individuals.<sup>205</sup> ECIU should adhere to the principles of purpose limitation and data minimization by collecting and processing personal data only for legitimate and specified purposes and retaining only necessary data.<sup>206</sup> When engaging third-party service providers, such as cloud storage or learning management systems, to support its educational services, the ECIU must ensure that these providers comply with data protection regulations and adequately protect personal data. Furthermore, as educational services may involve processing special categories of personal data, such as health information or information about disabilities, the ECIU must ensure that it has a lawful basis for processing such sensitive data and complies with the additional requirements imposed by the GDPR for processing this type of information. Lastly, clear and transparent privacy policies and notices should be developed, providing comprehensive information to members about data collection, use, processing purposes, legal basis, retention periods, and data subject rights.<sup>207</sup>

#### **4.6.4 Conclusions Use Case 6**

In principle, a regulation should not be subject to implementation. It is nevertheless possible that some measures are adopted at national level to effectuate a regulation. This may lead to divergencies on conditions of consent and requirements of retention of data at the national level. Furthermore, it is important to point out that the focus of this use case seems to be on the sharing, receiving and managing data in accordance with the GDPR, while owning/buying data seems more suitable to fall under use cases 5 or 8. This split is of practical importance as the legal consequences of processing data on the one hand and buying data on the other can vary. Finally, it can be concluded that ECIU will have to comply with GDPR rules regardless of its legal structure as a Dutch foundation as it is currently or as any of the abovementioned four legal instruments.

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<sup>201</sup> White and Case, 'GDPR guide to national implementation' (2019) <https://www.whitecase.com/insight-our-thinking/gdpr-guide-national-implementation> accessed on 19 May 2023.

<sup>202</sup> Art. 5(1)(a) and art. 7 GDPR.

<sup>203</sup> Articles 15, 16, 17, 18 and 21 GDPR.

<sup>204</sup> Article 46 GDPR.

<sup>205</sup> Articles 32 and 33 GDPR.

<sup>206</sup> Articles 5(1)(b) and 5(1)(c) GDPR.

<sup>207</sup> Articles 13 and 14 GDPR.

#### 4.7. Use Case 7: Manage IPR-related Issues

<b>Category:</b>	Other
<b>Goal:</b>	The role of ECIU University is clear in all Intellectual Property Rights (IPR) contracts. ECIU University as one legal entity can own (jointly) IPR as needed.
<b>Example use case:</b>	<p><u>Education:</u> ECIU University (as one legal entity) has provided a 24/7 online micro-module as part of the ECIU University learning portfolio. The contents of the micro-module were developed by a group of teachers from the different ECIU member universities as part of their daily workload in the universities. ECIU University has the right to use the contents of the micro-module for future learning portfolio purposes. This includes the needs of continuous education which might also produce revenue for the ECIU University ecosystem in the future.</p> <p><u>Research:</u> ECIU University (as one legal entity) together with a group of researchers from the ECIU member universities and two private enterprises involved in the ECIU University ecosystem have received funding for a research project and IPR contracts are needed. The role of ECIU University (as one legal entity) is clear in the contracts and ensures that ECIU University can own (jointly) IPR for the purposes of the European level ecosystem, as needed.”</p>

##### 4.7.1 Introduction

This use-case revolves around the possibility of ECIU to own Intellectual Property Rights (IPR) and create revenues on it if necessary (royalties). For this matter, we will not analyse the four instruments separately because all of them result in the same situation, namely the applicability of national law and European directives on IPR. Indeed, for **SE and SCE**, the regulations specify that they do “not cover [...] intellectual property [...]. The provisions of the Member States’ law and of Community law are therefore applicable”.<sup>208</sup> For **EGTCs**, the Regulation does not mention IPR but specifies that “in the case of matters not, or only partly, regulated under this Regulation, the national law of the Member State where the EGTC has its registered office”<sup>209</sup> will apply. For the **KICs under the EIT**, national law will apply in principle due to the legal entity being adopted under national law. Furthermore, the EIT Regulation indicates that EIT is to foster exchange about knowhow on innovative intellectual property rights models, thereby indicating that no overarching model is provided.<sup>210</sup> Therefore, this use-case examines relevant EU law and its interaction with national law to see if ECIU, as one legal entity, can own IPR.

##### 4.7.2 IPR under EU law

There are some key laws and directives<sup>211</sup> that govern intellectual property rights within the EU. It is important to note that while the EU has (partially) harmonized many aspects of intellectual property law, some variations may still exist among member states. More specifically, IPR can be owned by :

<sup>208</sup> Recital 16 SCE Regulation; Recital 20 SE Regulation.

<sup>209</sup> Article 2(1)(c) EGTC regulation.

<sup>210</sup> See Article 6(m) and 7(i) EIT Regulation.

<sup>211</sup> For an exhaustive list of the IPR related directives, see the European Parliament’s Fact Sheet available at <https://www.europarl.europa.eu/factsheets/en/sheet/36/intellectual-industrial-and-commercial-property>.

- Regarding trade mark: Any natural or legal person, including authorities established under public law, may be the proprietor of an EU trade mark<sup>212</sup>. This includes companies and firms<sup>213</sup> (which could be created under SE and SCE).
- Regarding copyright and related rights: research institutions are covered by the European framework<sup>214</sup> and as such have to be recognized as capable of owning copyright rights in the different MS.
- Regarding patents: national patents are subject to national rules and provisions. Next to national patents rules, there is the possibility to register an European patent (unitary patent protection<sup>215</sup>) to the European Patent Office (EPO) but this still need to be recognized by Member States to be enforceable in their jurisdiction.<sup>216</sup> National law is here predominant.

#### 4.7.3. National law

Each EU member state has its own national legislation concerning IPR. While the laws of individual member states may differ, they generally align with or implement the relevant EU legislation. This creates a minimum harmonization between the different Member States and ensure that there are less clashes of national law. Specific details about legal entities that can own IPR in a particular Member State can nevertheless still be found in the respective national intellectual property laws.

In the event of creating a new structure, ECIU has to keep this application of national legislation in mind. For example, when creating an EGTC, the choice of the Member State where to have its registered office remains important because the law of this Member State will apply for IPR. Considering the variety and specialty of national IPR legislation, it is advisable to examine the topic further regarding ownership and protection of intellectual property depending on the applicable legal system.

#### 4.7.3 Conclusions Use Case 7

As a conclusion, all the instruments should allow ECIU to own IPR. However, it is important to stress out that most of the rules on IPR still originate largely from national law. ECIU, in order to comply with national procedural law and specific national IPR provisions, will have to take into account the national law of the applicable legal system before creating a new instrument (EGTC, SE, SCE, or KIC under EIT).

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<sup>212</sup> Art. 5, Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, *OJ L 154*, 16.6.2017

<sup>213</sup> Art. 3, Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, *OJ L 154*, 16.6.2017

<sup>214</sup> Preamble 14, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *OJ L 130*

<sup>215</sup> Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, *OJ L 361*

<sup>216</sup> Rule 5(2), Rules relating to Unitary Patent Protection as adopted by decision of the Select Committee of the Administrative Council of the European Patent Organisation of 15 December 2015 and as last amended by decision of the Select Committee of the Administrative Council of 23 March 2022, *OJ EPO 2022, A41*

#### 4.8. Use Case 8: Buy and Own Goods and Services

<b>Category:</b>	Other
<b>Goal:</b>	ECIU University (as one legal entity) can buy goods and services globally through simple, agile processes.
<b>Example use case:</b>	ECIU University (as a one legal entity) plans to purchase data through a subscription model from a global vendor and use the data as part of educational services across the ECIU University ecosystem, thus also connecting to the ECIU member universities as needed. Issues related to taxing, competition law, public procurement etc. are straightforward and agile.

##### 4.8.1 Quick Scan: Identifying the Most Suitable Legal Instrument

Under the present use case the purchasing of goods and services by ECIU university is central, in this context, all of the instruments are relevant for this use case. This is especially so since all of them allow for the creation of new legal entities with the capacity to engage in the purchase of goods and services. It is therefore possible for ECIU, as a legal entity (either under national law or under EU law) to buy and own goods and services.

##### 4.8.2 Analysis: Examining Legal Instruments & Their Suitability for Use Case 4

Starting with the **EGTC**, the instrument not only has legal personality,<sup>217</sup> but has the most extensive legal capacity in each MS.<sup>218</sup> The EGTC Regulation specifies that EGTCs can dispose of movable and immovable property. The buying and owning of goods and services should in principle not be an issue in the event of an EGTC. A potential challenge could however be located in the area of procurement, since there is again a possibility for a choice of applicable legal system.<sup>219</sup> Accordingly, a choice must be made to determine which legislation of the Member States covered by the EGTC is to be applied.

In the case of **KICs under EIT**, the KICs first have to determine one specific national legal structure (see, for example, Section 3.4.4 containing the example of EIT Digital, a non-profit association under Belgian law). KICs such therefore have legal personality under national law and – depending on what is provided in relation to that a specific legal structure under national law – should in principle be able to buy and own goods and services.

When focusing on the **SE and SCE**, the benefits of these regulations are that they allow the possibility for these forms of business organization to facilitate cross-border activities. Thus, both instruments allow for cross-border cooperation and cost saving through joint procurement. Both SE and SCE can negotiate with suppliers on behalf of their subsidiaries and members and purchase goods and services in bulk, achieving economies of scale and cost savings. Nevertheless, under taxation rules the SE or SCE would need to comply with taxation rules both at the place of their registration and with the rules

<sup>217</sup> Art.1(3) EGTC Regulation.

<sup>218</sup> Art.1(4) EGTC Regulation.

<sup>219</sup> See Proposal for a Regulation of the European Parliament and of the Council amending 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) as regards the clarification, simplification and improvement of the establishment and implementation of such groupings, COM(2011) 610 final, p. 3-4. See also recital 25 Regulation 1032/2013.

applicable to the places where their subsidiaries and members are located. Furthermore, both these forms of business must ensure that their activities do not hinder competition within the EU (i.e. adhere to applicable competition law). Compliance with competition rules will depend on the chosen place of registration and on the subsequent effects derived from the modified market landscape in the sector of Higher Education Institutes (HEI).

#### **4.8.3 Conclusions Use Case 8**

In conclusion of use case 8 it can be remarked that either one of the instruments could be suitable to buy and own goods and services. For KIC under EIT, however, this is dependent on the possibilities offered by a legal structure under national law. From the analysis of the instruments it does not appear that streamlined provisions are made regarding tax and competition law. Despite therefore allowing for the purchase of goods and services, observance of tax and competition law still needs to take place when adopting either one of the instruments.



## 5 Completing the Picture: The Suitability of the Legal Structures

Over the course of this report we have examined the existing situation ECIU finds itself in as a foundation under Dutch law as well as the four legal instruments and their relevance in relation to the eight use cases identified by ECIU. The present Chapter combines the findings from the previous Chapters to draw conclusions on the relevance and suitability of each of the respective instruments ranging from the status quo to the possible adoption and implementation of one of the EU-level instruments. Ultimately, the objective is to show which of the instruments would be the most suited should ECIU to decide to implement it to advance its operations. Apart from providing such reflection, the present Chapter also examines the extent to which the suitability of EU-level legal structures can be enhanced for the purpose of higher education cooperation.

### 5.1 Overview on the Potential Added Value of Instruments

To answer the question of the suitability of each of the instruments their main advantages (value added) and disadvantages are summarised in the tables below.

Instrument	Foundation under Dutch law (status quo)
<b>Main advantages &amp; added value</b>	<ul style="list-style-type: none"> <li>- Already in existence with developed and functioning governance structure</li> <li>- Flexible legal entity under Dutch law.</li> <li>- Used for a variety of purposes, some of which are covered by the use cases.</li> <li>- Possibility to engage in entrepreneurial activities and attracting private funding.</li> </ul>
<b>Main disadvantages</b>	<ul style="list-style-type: none"> <li>- Caution in relation to entrepreneurial activities and combining public and private activities – adherence to national tax &amp; education legislation.</li> <li>- Foundation not meant to make profit – all revenues must be re-invested to achieve the foundation’s main objective.</li> <li>- Difficulty in hiring staff due to challenges in navigating different national legal systems.</li> </ul>

Table 1: Summary Foundation Dutch Law

Instrument	European Grouping of Territorial Cooperation
<b>Main advantages &amp; added value</b>	<ul style="list-style-type: none"> <li>- EGTC is the only instrument allowing a choice of law applicable to the whole of the EGTC’s activities.</li> <li>- EGTC could streamline processes for the hiring of staff (e.g. prevent need for companies in all participating Member States).</li> </ul>
<b>Main disadvantages</b>	<ul style="list-style-type: none"> <li>- Heavy procedure to create EGTC dependent on involvement and approval of national authorities.</li> <li>- Despite being a European instrument, it is still strongly rooted in national law.</li> <li>- Choice of law is not unlimited, tax and social security legislation (among others) are still national.</li> </ul>

Table 2: Summary EGTC

Instrument	Societas Europaea
<b>Main advantages &amp; added value</b>	<ul style="list-style-type: none"> <li>- The capacity to attract private fundings as a European company.</li> <li>- More flexibility and liberty in spending the profits compared to the current structure as a foundation.</li> </ul>
<b>Main disadvantages</b>	<ul style="list-style-type: none"> <li>- Strong connection with national law and various forms of implementation.</li> <li>- Obstacles to provide education as a higher education institute.</li> </ul>

Table 3: Summary SE

Instrument	European Cooperative Society
Main advantages & added value	<ul style="list-style-type: none"> <li>- Capacity to gather flexibly both public and private funds.</li> <li>- Non-member investments to attract private fundings (i.e. no membership of the cooperative necessary to provide private funding).</li> </ul>
Main disadvantages	<ul style="list-style-type: none"> <li>- Strong connection with national law and various forms of implementation.</li> <li>- Bureaucratic burden following from the SCE Regulation &amp; Directive, applicable national law, and SCE's own statutes.</li> </ul>

Table 4: Summary SCE

Instrument	Knowledge Innovation Community under EIT
Main advantages & added value	<ul style="list-style-type: none"> <li>- Meant to bring together the knowledge triangle and only instrument explicitly mentioning higher education.</li> <li>- Meant to generate funding both publicly and privately.</li> </ul>
Main disadvantages	<ul style="list-style-type: none"> <li>- Creation of KIC dependent on the initiative of EIT.</li> <li>- Governed fully under national law, general objectives are set by the EIT Regulation.</li> </ul>

Table 5: Summary KIC under EIT

## 5.2 Compatibility Matrix

The findings and conclusions on each of the instruments (NL Foundation, EGTC, SE, SCE, KIC under EIT) can be summarised and presented schematically by means of a compatibility matrix. The matrix represented in Table 2 on the next page features the five aforementioned instruments on the left side of the matrix and the eight use cases at the top. Table 1 below shows the indicators used in the matrix to provide a quick overview of an instrument's suitability to achieve ECIU's objectives as expressed in the individual use cases. In the matrix itself short explanations are given to sustain the use of each indicator colour. It is to be emphasised that the explanations in the matrix are short summaries of the results. The full analysis of each instrument's compatibility can be found in Chapter 4 of this report.

Compatibility Matrix – Indicators		
Colour	Indicator	Explanation
	Good compatibility	The instrument is suitable for the designated use case
	Medium compatibility	The instrument could be used for the designated use case but account needs to be taken of implementing activities
	Low/no compatibility	The instrument is not suitable for a designated use case or there are particular difficulties in implementation
	No impact instrument	Application of a legal instrument does not result in achievement of the use case objective (i.e. external factors must be considered)

Table 6: Compatibility Matrix Indicators

	Use Case 1	Use Case 2	Use Case 3	Use Case 4	Use Case 5	Use Case 6	Use Case 7	Use Case 8
	Hiring of staff	Receiving public & private funding	Providing flexible learning paths	Creating private revenue on continuous education	Investing into & managing facilities	Managing data-related issues	Managing IPR-related issues	Buying & owning goods & services
NL Foundation	Need to navigate differences in i.a. national tax & social security law	Account to be taken of non-profit nature NL foundation	No automatic recognition & quality assurance subject to national law	Consideration of legislation on cross-subsidising & of non-profit nature of foundations	Account to be taken of non-profit nature NL foundation	Data management subject to GDPR	IPR subject to national law	Foundations can buy goods & services
EGTC	Need to navigate differences in i.a. national tax & social security law	Geared mainly to public domain	No automatic recognition & quality assurance subject to national law	Instrument mainly aimed at public domain & aimed at structural matters, not teaching activities	Investments possible	No provisions on management of data	No provisions on IPR	EGTC can dispose of property & services
SE	Staff needs to be hired in subsidiaries & additional criteria on worker involvement	Limited possibilities public funding	No automatic recognition & quality assurance subject to national law	Need for verification if companies can provide education	Investments possible	No provisions on management of data	No provisions on IPR	SE can buy & own goods & services
SCE	Staff needs to be hired in subsidiaries & additional criteria on worker involvement	Public & private possible, but regard for national law on cooperatives	No automatic recognition & quality assurance subject to national law	Need for verification if companies can provide education	Investments possible	No provisions on management of data	No provisions on IPR	SCE can buy & own goods & services
EIT (KIC)	Subject to national law & dependence EIT	Subject to national law & dependence EIT	No automatic recognition & quality assurance subject to national law	Subject to national law & dependence EIT	Subject to national law & dependence EIT	No provisions on management of data	No provisions on IPR	Subject to national law & dependence EIT

Table 7: Compatibility Matrix – Summary of results

### 5.3 Reflections on the Suitability of Legal Structures

As the compatibility matrix shows, **there does not appear to be one instrument that can be considered more suitable than others examined in this report.** From the matrix, the KIC under EIT appears as the least favourable option. This is mainly due to KICs being created at the initiative of EIT, meaning that even if ECIU would strive to become a KIC it would depend on EIT opening a particular procedure for the creation of a KIC and ECIU participating in a competitive procedure to be selected as KIC. Furthermore, KICs are created as entities under national law. **Since ECIU is already a foundation under Dutch law becoming a KIC would not result in a material change in their situation.** If the Dutch foundation were also to be selected for this, nothing would change in ECIU's situation. By contrast, if another national entity were to be selected it would result in the need first, to identify another suitable national legal entity, and second, once created, that entity may face similar challenges as ECIU is currently facing as a foundation under Dutch law. In this context, it is interesting to refer back to the example from practice of EIT Digital (see Section 3.4.4) which – though created as a non-profit association under Belgian law – indicated to face similar challenges as ECIU in its capacity as a foundation.

As far as the **EGTC** is concerned, though that instrument is the only one actively providing for a **choice of applicable law**, the analysis in Section 4 has shown that such a choice is not unlimited. The choice of law will primarily cover the operations of the EGTC, but **may not range as far as solving matters related to national tax & social security legislation.** Hence, the choice of law under EGTC does not result in the true application of only one legal system thereby preventing any conflict with other national laws. Furthermore, the EGTC is paired with a particularly **heavy adoption process.** In needing to secure the approval of the national competent authorities and considering that ECIU consists of partners in 13 Member States, this would also result in needing the approval of 13 Member State national authorities. It is thereby likely that considerable time and efforts will be spent in aligning national authorities for their approval. Furthermore, as shown by the example from practice EGTC Eucor (see Section 3.1.4), once created EGTCs may not be relieved of the need to spend funds on legal advice.

Regarding the company structures of **SE and SCE** we can perceive from the compatibility matrix that the latter appears to have greater suitability than SE. Important **limitations regarding the SE** can be perceived in the **hiring of staff** (which need to be hired in subsidiaries and according to procedures to secure worker involvement) and its **limited opportunities to receive public funding.** In particular, this may be retraced to the fact that SE's are ultimately companies where private funding is more likely. Whereas the **SCE** may face similar challenges regarding the hiring of staff, its cooperative nature provides **more flexibility to receive public and private funding.** Nevertheless, the bureaucratic burden associated with SCE's originating from the **interplay of European and national legislation**, as well as **complexities in creating the statutes**, also lead to questions on the overall suitability of the SCE. Another important potential obstacle for both SE and SCE is furthermore **rooted in national law.** Caution is to be exerted here. Though both instruments are EU-level companies created in accordance with EU legislation, much of their operations are left to the Member States to regulate in national law. Accordingly, differences in their operation may persist and the **need to take special account of national legislation persists.** One area where it is especially necessary to take this interplay of national laws into account is in the provision of education (which may be limited for companies) and the interaction thereof with means of funding (be it public or private).

From the compatibility matrix it becomes apparent that the (un)suitability of instruments is related mainly to use cases 1, 2, 4, 5, and 8. **Use cases 3, 6, and 7 are marked differently from the others.** Core parts of the use case descriptions show that **their successful realisation is dependent on the legislative framework beyond what is covered by the different instruments.** This means that, although either one of the four instruments could be adopted, they would not contribute considerably to achieving the use case objective. Indeed, in the case of use case 3, any of the instruments could be adopted, but could not lead to the direct and automatic recognition of micro-credentials issued by ECIU beyond the university consortium since such processes still largely depend on other legislation on recognition and quality assurance. Similarly, for use case 6 any of the instruments is capable of owning and managing data, but the rules governing those processes are laid down in the GDPR. Finally, for use case 7 most instruments explicitly mention not to cover intellectual property rights (IPR) and to leave this to national law. Accordingly, adoption of any of the four instruments will not directly lead to a unified process on IPR.

The cross-examination therefore shows that there is **not one particular instrument appearing to be more suitable than the others or more capable to advance ECIU's mission as a whole.** Indeed, due to their **different characteristics** each of the instruments may be more **suitable for particular objectives.** For example, the EGTC is much more geared to the public domain than SE and SCE that are more private-sector oriented. The analysis has shown that their advantages (and limitations) can accordingly be attributed to their **public/private nature.**

This also means that, should ECIU wish to advance its activities in a stronger legal structure, it is likely that a **combination of instruments** should be used to best match activities across use cases. It is thereby **crucial to take into account that the preparation, adoption, implementation and maintenance of a particular instrument will take considerable time, efforts and funds.** The question must thereby be raised **to which extent the adoption of one (or more) of the four instruments examined will actually have added value** – or whether it will add considerable workload without providing all-encompassing solutions.

In this context, it is crucial to remark that **none of the instruments examined in the context of this study were created with the objective to facilitate higher education cooperation.** This also explains why none of the instruments appears to be fully compatible to resolve the challenges related to the use case activities. Furthermore, it is also important to realise that **the instruments examined do not provide for an EU-level legal structure that provides for absolute conflict rules capable of mitigating clashes of national legislation.** Accordingly, it is very challenging to issue recommendations to enhance the suitability of the different instrument for the purpose of higher education cooperation. In the case of the EGTC such recommendations followed from contact with the EGTC Eucor which noted that enhanced application to the field of higher education would depend on having a more flexible arrangement related to the approval by national authorities, having clarity on the possible application of different Member State's legislation, and having clear conflict rules on matters such as the issuing of qualifications and eligibility for Erasmus+ funding.<sup>220</sup> In a similar vein, the call for conflict rules can also be made in relation to SE and SCE due to the extensive freedom still awarded to Member States and continued interplay with national law. From the use cases and the analysis in this report

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<sup>220</sup> Interview with representative Eucor, 20 April 2023.

we may deduce that **one of the greatest challenges faced in the context of higher education cooperation relates to having to navigate differing sets of national legislation** which may contradict and clash with one another. Therefore, it is clear that in the **absence of such conflict rules – or an EU-level instrument providing for such rules that is specifically targeted to higher education cooperation – there is a clear need for cooperating universities to continue to observe national law and actively navigate and resolve possible incoherencies.**

In the case of ECIU with its partner universities in 13 Member States, this strengthens the **question to which extent the adoption of one (or more) of the four instruments will actually resolve, rather than add, legal questions and challenges to the existing ones.** Based on the analysis in this report the instruments examined seem to offer **insufficient gains to offset the challenges associated with their adoption, implementation, and maintenance.**

Furthermore, as the compatibility matrix shows, **the Dutch foundation scores similarly** to the other instruments examined in the context of this report. Whereas there may be more challenges related to the differing national legal systems to navigate, possibilities for cooperation are similar to the other instruments. In addition, maintaining the Dutch foundation as the primary legal structure means it is possible to use the existing cooperation and governance structures created without having to re-work these to tailor to the frameworks suggested by the other four instruments. Furthermore, legal advice is bound to remain an imperative part of operations, but **continuing to work within the existing framework of the Dutch foundation avoids the need to add another layer of legal advice related to a potential new structure** (i.e. legal advice is likely to remain necessary to navigate national systems, but not to understand a new instrument *in addition to* dealing with national legal systems).

Ultimately, this scenario corresponds with one of the scenarios identified by Van der Hijden and Van der Wende.<sup>221</sup> It may be recalled that one of the governance scenarios proposed in their paper concerns the **retention of the status quo while stretching the limits of legal instruments currently used.** They thereby make explicit reference to foundations under national law and Erasmus+ partnership agreements. It must thereby be noted that ECIU is already employing the foundation under Dutch law for a wide range of usages including the hiring of staff, issuance of micro-credentials, conclusion of rental contracts, logo and trademarking, and participation in project proposals. Whereas the foundation is not yet used for revenue-making activities, Section 2 of this report showed that this is also a possible route to be pursued (whereby it is important to keep in mind the non-profitmaking nature of the foundation, national taxation, and legislation on the financing of education). Since the need to navigate national law will continue to pose as a challenge, whether in the context of the Dutch foundation or another possible instrument, the adoption of another instrument is unlikely to lead to sufficient gains to balance the challenges currently perceived by the differences in national law. This would lead the “stretching the mould” scenario to appear as the most suitable at this point in time.

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<sup>221</sup> P. van der Hijden & M. van der Wende, ECIU University 2030: Towards a legal framework for governance – An Exploratory Review of Options and Scenarios, May 2021.

## 6 Conclusions & Recommendations

The present report has focused on examining various instruments to enhance ECIU's cooperation on higher education. Apart from taking stock of the status quo of ECIU as a foundation under Dutch law, the report has also examined the EGTC, SE, SCE and KIC under EIT as possible avenues for strengthened higher education cooperation. Nevertheless, the cross-examination of instruments with the eight use cases defined by ECIU did not result in the identification of one instrument having better suitability to help achieve ECIU's objectives. Accordingly, questions may be raised to which extent the adoption of one (or more) instruments will lead to a material improvement in ECIU's situation. As Section 5.3 showed, the challenges related to the adoption, implementation, and maintenance of one (or more) legal instruments is unlikely to provide sufficient gains to offset challenges currently experienced by ECIU having to navigate multiple systems of national law. In fact, the challenges related to the creation of a new instrument are likely to come to exist *in addition to* the need to navigate national legal systems due to the lack of encompassing conflict rules.

Following these observations, there are **three possible avenues** for ECIU to consider in relation to its legal status:

- **Adopt one (or more) instruments:** this option would involve the adoption of one (or more) of the instruments examined in this report (EGTC, SE, SCE, and KIC under EIT). As mentioned previously, it is likely that this option will rather add to existing workload and raise new challenges rather than facilitate and advance ECIU's cooperation.
- **Maintaining status quo:** this option would involve maintaining the present activities ECIU undertakes without considerably expanding these activities and continuing to make use of the existing legal structure as a foundation under Dutch law (possibly in attendance of an EU-level instrument more suitable to advance higher education cooperation).
- **Stretching the mould:** this option entails not only the continued use of the foundation, but would also involve seeking to use that legal structure to the best of its abilities (for example, by examining further opportunities offered to engage in revenue-making activities) as well as advancing such activities through EU (and national) level funding mechanisms such as Erasmus+ and Horizon Europe.

As mentioned previously, the latter option appears most suitable at this point in time. Indeed, considering the maintained complexity related to national law and added complexities in adopting new legal instruments it appears most suitable for ECIU – in the absence of an option providing for an instrument tailored to higher education cooperation – to continue its current operations in the context of the Dutch foundation and explore avenues to make the best use possible of the opportunities offered by that instrument.

## Annex I: ECIU Conversation Guide

The present conversation guide provides an overview of talking points to be taken into account for ECIU's future activities in the ESEU project (notably Task 2.3 concerning the analysis of the national context in relation to the selected legal structures). These talking points are based on the identification of opportunities and limitations identified in relation to the four selected legal structures (EGTC, SE, SCE, and EIT) and their application to the eight use cases.

- **EGTC**

- Important to verify that all universities are public bodies and identify which party at the national level is the authority responsible to authorise the EGTC.
- Verify in conversations with ministries and other national authorities what their general receptiveness is towards the EGTC as a legal instrument. Is there willingness to engage in EGTCs, to approve EGTCs, aid them in their development, facilitate their work? Is the EGTC considered as a suitable instrument to achieve the objective of higher education cooperation?
- Verify in conversations with ministries and other national authorities what their experience is with the EGTC and to which extent the functioning of an EGTC is facilitated through national legislation. This point is also of importance for the potential choice of law to become applicable to the EGTC and its general functioning.

- **SE & SCE**

- What is the level of experience with SE's and SCE's? What does the national legal framework surrounding these company structures look like? Is it facilitating towards their functioning or are there limitations? If so, what do these limitations consist of and why was the decision made to institute such limitations? More specifically:
  - Enquire about company formation requirements: The SE and SCE must comply with the national laws of each member state where it has registered offices or is incorporated. This may include specific requirements for forming a company, such as minimum share capital, types of shares, and the number of shareholders or directors required. What do these look like at national level?
  - Taxation and accounting rules: The SE and SCE must comply with the taxation and accounting rules of each Member State where they operate. This may include rules related to tax registration, filing tax returns, and paying taxes.
  - Employment laws: The SE and SCE must comply with the employment laws of each Member State where it has employees or operates. This may include rules related to minimum wage, working hours, employee benefits, and termination of employment.
  - Corporate governance: The SE and SCE must comply with the corporate governance rules of each Member State where they operate. This may include rules related to board composition, decision-making processes, and shareholder rights.



- Changing place of registration for SE and SCE: under both SE and SCE regulations (respectively article 7(14) and article 8(14)), it is provided that any of the national authorities and the national financial supervisory authority, may oppose the change of place of registration on the basis of public interests and if the change of place of registration results in a change of applicable law.
  - In relation to SCE's, the following is still to be taken into account:
    - Important to know if the national law on cooperatives allow the possibility to take on board investor members also for national cooperatives. In fact, only if national law of the place of registration allows such option only then can the SCE also take on board investor members by including this possibility in the Statute.
    - In view of potentially benefitting from reduced taxes for cooperatives (e.g. in Italy) and in view of not violating article 107 (1) TFEU (State aid prohibition) it is very important to take in account the ECJ ruling in the joint cases C-78/08 and C-80/08. To be able to justify a special treatment of cooperatives (for example under national tax law) national law should regulate cooperatives in conformity with the parameters and criteria employed by the ECJ to determine cooperative identity. Thus, the conversation with national ministries shall also touch upon the cooperative identity under national laws. They should focus on the core distinguishing features of a cooperative compared to other 'normal' business models such as those of corporates.
- **EIT**
  - Since EIT depends on the creation of an entity under national law, it is of importance to gain sufficient understanding of opportunities for existing national legal entities. What would national authorities or ministries suggest in terms of legal entities to help forward the work of ECIU? What are the experiences with the use of such legal entities in the area of higher education? Do they consider such national entities to be sufficient to help the further development of ECIU and its objectives? Do they see added value in the creation of an EU-level legal entity for higher education cooperation? If so, what should it look like?

## Annex II: Overview of Interviews

Party	Date	Main topic
Interview with representative ECIU	29 March 2023	Specification of use cases
Interview with representative ECIU	6 April 2023	ECIU's functioning as a foundation under Dutch law
Interview with representative EIT Digital	13 April 2023	Functioning of EIT/KICs and their relevance for higher education cooperation
Interview with representative EUCOR	20 April 2023	Functioning of the EGTC and its relevance for higher education cooperation