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## ***b-solutions***

### **FINAL REPORT BY THE EXPERT**

**Advice Case:** Juridical obstacles in establishment and financing of trans-national business incubator

**Advised Entity:** Lazdijai District Municipality, LT

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## **I. Description of the Obstacle**

Lazdiju rajono savivaldybe (Lazdijai Region Self-Government) wants together with Lithuanian and Polish local governments to establish international business incubator in Polish-Lithuanian borderland area. Many local business development agencies, governments and other public institutions have used incubators as a tool to reduce the likelihood of failure and speed up the process of starting a business.<sup>1</sup>

The main objective of public business incubators is to reduce the costs of doing business by offering a set of services ranging from the provision of space, infrastructures and facilities, to more elaborate services, as well as by offering access to technical and managerial expertise, assistance in business plan development, etc. In the course of talks with actors of cross-border cooperation conducted on 19.9.2019 in Lazdijai and on 20.9.2019 in Suwałki, the tasks of the incubator are to be substantive support in the form of provision of advisory services (legal, accounting, tax and later financial) for entities planning to start business activity on the Polish-Lithuanian border.

At present, the nearest business support centres operate in Suwałki and Kaunas, i.e. far from the border area itself and are not available to entities on the other side of the border. This hampers the creation of joint business projects by natural persons from the border area.

However, support for economic development falls within the competence of local authorities in Poland (see Art. 6 of Polish Act on Municipal Self-Government<sup>2</sup> - ['all public matters of local importance not reserved by statutes for other entities']) and in Lithuania (Act on Local Self-Government<sup>3</sup> - Art. 6 No 38 ["creation of conditions for the development of business and tourism, and promotion of such activities"]).

The municipalities are therefore looking for possibilities for a joint and thus cost-efficient provision of these services to the population from the border region.

The Polish and Lithuanian law on public finances and cooperation of public entities does not allow for direct financing of activities in foreign self-governments. Financial supervision is based on the assumption that the transfer of public funds abroad is not acceptable.

Therefore, from the applicant's point of view, there are no possibilities of establishing of common entities and finance such entities by Lithuanian or Polish municipalities.

## **II. Indication of the Legal/Administrative Dispositions causing the Obstacle**

Legal obstacles result from both Lithuanian and Polish law regulations.

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<sup>1</sup> Grimaldi R., Grandi A., 2005, p. 112.

<sup>2</sup> Polish Official Journal of 1990 No 16 item 95 with amendments.

<sup>3</sup> Lithuanian Law on Local Self-Government, 7 July 1994 No I-533 (Last amended on 15 May 2014 XII-883).



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## 1. Lithuanian Law

Lithuanian Law on Local Governments in Art. 16 (2) point 42 of the Act theoretically allows municipal council to decide to join inter-national association of local governments with intention to sign cooperation agreements, but there is not written, that it can decide to join and create common company or organizational structure with itself budget.

2. The exclusive competence of the municipal council shall be as follows:

(...)

42) taking of decisions on joining municipality unions, co-operation with municipalities of foreign states or joining international self-government organisations;

In Art. 22 (4) of the Law on the Management, Use and Disposal of State and Municipal Assets is written that the municipality may invest the assets by acquiring shares of a public limited company or private limited company that is to be founded or increases its share capital by giving more than 50 per cent of the votes to the state or municipality (municipalities) at the general meeting of shareholders. It is not clear what will happen and how should be counted number of votes if entity will be created by more than one local-government and if self-governments will be from two different countries.

4. The State or a municipality may invest the assets by acquiring the shares of a public limited liability company or a private limited liability company being incorporated or increasing its authorised capital, which grant over 50 per cent of votes to the State or the municipality (municipalities), or to them collectively, at a general meeting of shareholders.

Additionally, in Point 6, Paragraph 1 of Art. 22 of the Law on the Management, Use and Disposal of State and Municipal Assets<sup>4</sup> is written that Local governments may create international entities if it foreseen in other laws. Problem is that till now, there are no such laws or implementing rules.

1. Investment of state and municipal assets shall mean the transfer, as a contribution, of assets belonging to the State or a municipality by the right of ownership:

(...)

6) in the course of acquiring units offered by an investment fund established in the Republic of Lithuania or another EU Member State or a state of the European Economic Area and investing the accumulated funds in the Republic of Lithuania, which is a private capital collective investment undertaking. This point shall not apply to the investment of municipal assets.

<sup>4</sup> Law on the Management, Use and Disposal of State and Municipal Assets of 12.5.1998, No VIII-729 (last amended on 17 November 2015 No XII-2023)



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## 2. Polish Law

Polish law also generates some obstacles to effective cooperation in this area.

### a. Creation Of Joint Units By Local Governments

Also according to Polish law, it is not possible to establish joint municipal units with foreign self-governments. The Act on Municipal Self-Government in Art. 64 allows for the creation of the so-called inter-communal association and Art. 84 of private-law associations. However, these entities may be established only with Polish local government units.

Art. 64

1. In order to perform public tasks jointly, municipalities may form intercommunal associations.

Art. 84

1. In order to support the idea of local self-government and to defend common interests, municipalities may form associations, including with poviats and voivodships.

International associations of local and regional communities are an exception. Polish municipalities may accede to such associations on the basis of Art. 172 (2) of the Polish Constitution<sup>5</sup>, Art. 84a of the Act on Municipal Self-Government and the Act of 15.9.2000 on the principles of accession of local government units to international associations of local and regional communities<sup>6</sup>. However, as follows from the provisions of the Act, Accession to the association may not be associated with the transfer to it or to any of the members associated in it of the performance of public tasks of the joining local government unit (Art. 3 of the Act).

Art. 3

Accession to the association may not be associated with the transfer to it or to any of the members associated in it of the performance of public tasks of the joining local government unit, or real estate or property rights to intangible assets vested in that unit.

These powers as well as the constitutionally guaranteed right to cooperate with local and regional communities of other countries stem from the commitments made by Poland following the ratification of the European Framework Convention on Transfrontier Co-operation between Territorial Communities and Authorities, signed in Madrid on 21.5.1980.<sup>7</sup>

### b. Transfer Of Public Funds Abroad

Similarly, local government entities, as units of the public finance sector, do not have the right to make transfers of public funds abroad. The interpretation made by the supervisory authorities with regard to Art. 220 and Art. 221 of the Act on Public Finance<sup>8</sup> therefore excludes, for example, the granting of targeted subsidies by the Polish self-government to foreign entities. Thus, subsidies for activities

<sup>5</sup> Polish Official Journal of 1997 No 78 item 483 with amendment.

<sup>6</sup> Polish Official Journal of 2000 No 91 item 1009 with amendment.

<sup>7</sup> Polish Official Journal of 1993 No 61 item 287.

<sup>8</sup> Polish Official Journal of 2009 No 157 item 1240 with amendments.



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conducted by an entity located abroad, even if it acts for the benefit of Polish entities, are generally excluded.

The so-called subsidies within the framework of the so-called European projects are an exception.

### **III. Description of a Possible Solution**

The following solutions are possible: starting with an interpretation of the previously presented national regulations open to cross-border cooperation (e.g. recognition of the possibility of establishing intercommunal relations with foreign self-governments or transfer of financial resources to carry out tasks also for the benefit of the local community).

Moreover, it is possible to take advantage of the possibilities offered by international agreements and European law to create joint entities.

#### **1. Interpretation Of National Provisions In A Spirit Of Cooperation**

The simplest solution, allowing for a quick implementation of the project, is to change the interpretation of the provisions of the financial law in the area of granting subsidies to foreign self-government for the implementation of public tasks.

Such an approach may be based on international treaties (f. e. Madrid Outline Convention of 1980 and Polish-Lithuania Agreement of 1996) in which both states have committed themselves to facilitating and fostering transfrontier co-operation between territorial communities or authorities within its jurisdiction and territorial communities or authorities within the jurisdiction of other states.

#### **2. Creation Of A Joint Legal Entity Under An Intergovernmental Agreement**

Currently, the provisions of bilateral agreements between Lithuania and Poland<sup>9</sup> allow regional and local authorities to conclude, within the limits of their competences, civil-law and other agreements on cross-border cooperation (Art. 1 and 4 of the Agreement). The agreements in question may in particular concern the creation of joint ventures, companies, societies, foundations and other associations. In addition, local and regional authorities may set up joint coordination bodies for cross-border cooperation (Art. 6 (2) of the Agreement).

The Agreement was signed in 1996 and entered into force after an exchange of notes showing that all the requirements of national law necessary for the entry into force of the Agreement had been fulfilled.

The formation of a limited liability company under Polish or Lithuanian law can therefore initially be recommended. This would remove concerns about the liability of local authorities in particular. However, other national regulations on municipal enterprises under Polish and Lithuanian law must be taken into account.

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<sup>9</sup> See Annex 1.



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### **3. Creation Of A Joint Body Under European Law**

It is also possible to set up a cross-border institution under EU law. This includes EGTC, EEIG and SCE. In principle, all three formats are possible here, although the special requirements must also be taken into account.

#### **a. European Grouping Of Territorial Cooperation (EGTC)**

The EGTC<sup>10</sup> is a legal form of European law designed to facilitate and promote territorial cooperation between public authorities and other public bodies from the Member States and, more recently, third countries. It creates an institutional basis for the implementation of joint projects by its members, who come from different Member States. Since the provision of this legal form in 2006, more than 70 EGTCs have been established.

The EGTCs created or being set up that have responded encompass 20 Member States. Bulgaria, Estonia, Finland, Ireland, Latvia, Lithuania and Malta do not report to participate in any EGTC.

The EGTC is primarily governed by Union law, namely the EGTC Regulation<sup>11</sup>, which was amended in 2013. However, the corresponding European regulations are supplemented by national regulations.

The EGTC is only open to the institutions listed in Art. 3 and 3a EGTC Regulation. Therefore, only the public sector and institutions supported by the public sector or their associations may participate in this structure. This cooperation format is therefore open to local authorities and their associations.

Since the EGTC Regulation is directly and unrestrictedly applicable, all legal questions of this legal form are initially subject to the Regulation, which is also expressly provided for in Art. 2 para. 1 letter a) EGTC Regulation. Furthermore, according to the EGTC Regulation, an EGTC is subject to the agreement of its members on the establishment of the EGTC concerned and to a statute to be adopted on this basis (Art. 2 para. 1 letter b) EGTC Regulation). Only if these rules do not provide a solution to a specific (legal) question can comparable provisions of the national legal order be applied as an alternative. The content of both founding instruments was defined in Art. 8 and 9 EGTC Regulation. However, the convention is subject to approval (Art. 4 para. 3 EGTC Regulation). Formally, however, it only needs to be approved by the State in which the proposed EGTC registered office is to be located (Art. 4 para. 3 EGTC Regulation). In other cases, tacit approval is sufficient. Although the statutes are not subject to approval, they must be submitted at the time of approval and checked by the approval authority for their conformity with the convention and with higher-ranking law (Art. 4 para. 3 EGTC Regulation).

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<sup>10</sup> Polish: europejskie ugrupowanie współpracy terytorialnej (EUWT); Lithuanian: europos teritorinio bendradarbiavimo grupės (ETBG).

<sup>11</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) amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 (OJ L 347, 20.12.2013, p. 303), Corrigendum, OJ L 330, 3.12.2016, p. 5 (1302/2013).



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EGTCs perform the tasks assigned to them by mutual agreement between the members (Art. 7 EGTC Regulation). They may also establish and/or manage the common infrastructure, like cross-border incubators.

**Advantages of the EGTC:** This cooperation format has many advantages, including legal independence (legal personality under the law of the host country) and binding nature of the cooperation and the resulting durability of the cooperation. Furthermore, as sole beneficiaries, EGTCs are also independently responsible for the development, application for funding and subsequent implementation of cross-border projects. In this way, they relieve the burden on municipal administrations and carry out their tasks effectively and efficiently.

Another argument in favour of the EGTC is that it can carry out the tasks that are at the very heart of its members' remit. As an independent organisation, it can thus work in a goal- and task-oriented manner and perform its tasks more effectively and efficiently.

The EGTC shall also establish uniform rules for the implementation of joint initiatives in different Member States. This will also make it possible to introduce uniform rules, for example for the recruitment of staff and for public procurement procedures.

The EGTC is also relatively flexible with regard to changes in membership (withdrawal or accession of new members). Possible changes are possible after a simplified approval procedure according to Art. 4 para. 6a EGTC Regulation has been carried out.

There is also flexibility with regard to the design of the internal constitution of the EGTC. The internal procedures are primarily determined by the statutes (Art. 9 para. 1 letter b) EGTC Regulation). Thus, the members can autonomously determine the decision-making and other rules of cooperation without having to involve the approval authorities.

Since the EGTC automatically fulfils the four requirements of good partnership and cross-border cooperation pursuant to Art. 12(4) Regulation 1299/2013. Its applications have therefore a better chance of receiving funding, the advantage for the members can be seen in the fact that more projects are implemented in their fields. This advantage is particularly evident when the EGTC is constructed as the sole beneficiary.

The EGTC will pool and make available technical, linguistic and intercultural competences, which can be very relevant for the start-up support of new commercial projects in a business incubator.

**Disadvantages of the EGTC:** The main argument against this form of cooperation, however, is that it requires a lengthy start-up procedure - despite the reform of the EGTC Regulation in 2013.

So far, no start-up procedures have been initiated for a Lithuanian-Polish EGTC. This also results in a lack of testing of this cooperation format in Lithuanian-Polish constellations. If private companies participate directly in the cooperation model, the EGTC cannot be used as a cooperation format because it is only accessible to public or publicly funded institutions (Art. 3 EGTC Regulation). A further major disadvantage is the difference in the liability of Polish and Lithuanian members; the EGTC itself



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is liable for its liabilities with its assets (Art. 12 para. 2a EGTC Regulation). However, if the assets of the group are not sufficient for the settlement of liabilities, the members may be liable in a subsidiary manner. Since however by law Polish members of an association are not liable for its obligations, the creditor can only hold Lithuanian members accountable.

However, this obstacle can be removed by introduction of a provision in the Lithuanian EGTC Law on the possibility to limit the liability of EGTC members (Art. 12 para. 2a EGTC), following the example of the Czech Republic, Bavaria, Saxony, Upper Austria and others. Furthermore, these problems can be avoided by setting up a limited liability companies or associations to become EGTC members under national law or use of existing municipal companies to set up EGTCs in their field of competence.

**Overall, the EGTC should be regarded as a noteworthy legal form and could possibly be recommended. It is intended in particular for public partners from several Member States, enabling joint cross-border activities, in particular project implementation.**

#### **b. European Economic Interest Grouping (EEIG)**

As this involves the coordination of economic development activities, the European Economic Interest Grouping (EEIG<sup>12</sup>) can also offer an efficient cooperation platform. In Lithuania the first EEIG in Central and Eastern Europe has been registered on 2.3.2006.

The legal form of the EEIG, which has been available since 1985, is popular in the EU. There are currently over 2,100 groupings registered throughout the EU. The existing EEIGs are mainly made up of small and medium-sized enterprises. The EEIG can be described as a flexible and informal institution, endowed with legal subjectivity, enabling its members from at least two different EU Member States to combine certain types of economic activity while respecting economic and legal independence.<sup>13</sup>

An EEIG is primarily governed by a European regulation: the EEIG Regulation<sup>14</sup>. Nevertheless, the EEIG Regulation provides for some areas in which the Member States may and must regulate details of the EEIG. For this reason, the Member States have issued corresponding implementing provisions with regard to the EEIG.<sup>15</sup> Therefore, unless the European Regulation provides an answer to certain questions concerning EEIGs, the relevant law should be applied in Lithuania and Poland. If neither the EEIG Regulation nor the national implementing provisions provide for a solution, the EEIG is subject to supplementary provisions on the general partnership (Polish: *spółka jawna*; Lithuanian: *tikrosios*

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<sup>12</sup> Polish: europejskie ugrupowanie (zgrupowanie) interesów gospodarczych (EUIG or EZIG); Lithuanian: europos ekonominių interesų grupių (EEIG).

<sup>13</sup> R. Adamus, European Economic Interest Grouping as an instrument of cross-border cooperation in the European Union, 2019.

<sup>14</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ L 199, 31.7.1985, p. 1).

<sup>15</sup> In Lithuania: The Law on European Economic Interest Grouping (EEIG) of the Republic of Lithuania, No. IX 1939, 22. December 2003, in force on 1. May 2004, Official Gazette No. 4-43 of 2004. In Poland: Act of 16.4.2004 on European Economic Interest Grouping, Official Journal of 2004, No. 130, item 1375.





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*ūkinės bendrijos*).<sup>16</sup> The application of the provisions of company law gives the members extensive freedom with regard to the internal constitution and functioning of the EEIG.

The legal personality of the EEIG gives rise to fundamental disputes as to its nature ("ambiguous", "imperfect"), since its members are jointly liable for their obligations. In most EU countries, EEIGs have legal personality. The exception is Poland.<sup>17</sup> In Lithuania the EEIG is a private legal person of unlimited liability.<sup>18</sup>

The main task of an EEIG must be to facilitate cooperation between its members. It should therefore not replace the members' own activities but facilitate cooperation between them. It follows that, unlike a limited company or an EGTC, an EEIG has more of an auxiliary function towards its members, namely to support them, coordinate them and promote their economic activities.<sup>19</sup> This does not preclude the participation of public bodies (local authorities, public undertakings, etc.). In particular, if the object of the cooperation is the promotion of a cross-border economic region, the participation in such a structure is justified by the economic and economic promotion activities of the EEIG members.

The grouping can be used in particular to joint market research, development of necessary statistics, etc. joint investments, joint marketing and advertising, organizing specialized training, organizing legal services, organizing cooperation between chambers of commerce from different countries, information exchange and know-how and implementation of programs financed from EU funds.<sup>20</sup>

The basis for the establishment of the EEIG is a written contract with the content according to Art. 5 EEIG Regulation. The contract contains only the most important information on the name of the association, its registered office, members and duration (limited or unlimited). Furthermore, the object of the enterprise for which the association has been set up must be specified. The tasks of the EEIG should be described here. The contract does not require approval. Only the EEIG is registered in its Member State of residence and published in a corresponding official journal.

The EEIG Regulation and the national implementing legislation do not provide for any specific capital for EEIGs. Accordingly, it was not necessary to regulate the obligation of members to pay contributions. The question of EEIG financing is therefore the question of the members. The EEIG is therefore financed in principle by the contributions of the members and other permissible income. The extent to which it can be a recipient of subsidies depends on the tasks assigned to the EEIG. The EEIG has the power to act through the delegation of its members and can submit applications for funding for its

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<sup>16</sup> Art. 1 para. 3 Lithuanian Law on EEIG; Art. 7 Polish Act on EEIG.

<sup>17</sup> R. Adamus, *European Economic Interest Grouping as an instrument of cross-border cooperation in the European Union*, 2019.

<sup>18</sup> Legislation Review. *Laws and other Legal Acts*. December 2003.

<sup>19</sup> Salger/Neye in: Gummert H., Weipert, L. (ed.), *Münchener Handbuch des Gesellschaftsrechts*. Band 1, 2014, § 94 item 28.

<sup>20</sup> R. Adamus, *European Economic Interest Grouping as an instrument of cross-border cooperation in the European Union*, 2019.



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members. Project-related co-financing from European Territorial Cooperation (ETC) is permitted from the Structural Funds managed on a decentralised basis.

The EEIG shall be represented by the Managing Director. His power of representation shall be determined in the memorandum of association. In case of doubt, this is the sole power of representation. The granting of procurement and power of attorney is possible.

**The advantages of EEIG** are above all the binding nature of the cooperation, which is permanently ensured by the establishment of the EEIG. Both public authorities and private entrepreneurs may participate in the cooperation format at the same time. The EEIG also allows the involvement of public and private partners in a common structure. This can be particularly relevant if the business incubator will draw on the experience of private companies and to win them over to support new commercial projects. However, an EEIG with exclusively public institutions is also possible.<sup>21</sup> It can therefore be composed of partners with different legal structures. Despite the binding structure, EEIG members remain legally independent with regard to their previous activities. Further advantages of the EEIG are obvious; it is a flexible and unbureaucratic legal form; the foundation is independent not only of the capital but also of the political decisions (in particular of an official permission). The formation procedure is not very complicated and only requires the conclusion of a written contract (Art. 1 p. 2 EEIG Regulation) and entry in a corresponding register. A further characteristic is that the transfer of the registered office is unproblematic and easy to carry out.<sup>22</sup> The grouping may employ up to 500 persons. EEIG can therefore have its own staff to support the projects of businesses.

**The disadvantages of the EEIG** include the unlimited and joint and several liability of the members of the association for all their liabilities (Art. 24 para. 1 EEIG Regulation). The liability also relates to tax arrears and social security liabilities (Recital No. 10 EEIG Regulation). However, the liability of the members is subsidiary, i.e. it can only be considered if the EEIG itself has been requested to pay and the payment has not been made by the EEIG within a reasonable period of time (e.g. due to lack of assets). Thus, the principle of liability subsidiarity applies here, i.e. creditors must first make use of EEIGs. In contrast to the EGTC, all members - both Lithuanian and Polish - are equally responsible for the obligations of the EEIG. It is permissible to freely formulate the liability regulations in the internal relationship of the EEIG, including a contractual exclusion of liability or determination of certain liability quotas (e.g. depending on the financial participation). The internal distribution of liability takes place in a direct agreement between the EEIG contracting parties (Recital No. 10 EEIG Regulation). However, this only applies to the internal relationship between the partners and not to third parties. In practice, however, no relevant case of the liability of an EEIG is known so far. The reason for this is that in the EEIG all relevant management issues are solved by consensus between the partners and thus the risks can be reduced accordingly.<sup>23</sup>

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<sup>21</sup> F.e. "arte TV" with participation of public broadcasters from Germany and France.

<sup>22</sup> H.J. Zahorka, Gründung und Betrieb einer EWIV, 2010, S. 11-12.

<sup>23</sup> H.J. Zahorka, Gründung und Betrieb einer EWIV, 2010, S. 10.



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**The EEIG can therefore generally be recommended. The formation procedure will be described in detail later.**

### **c. European Cooperative Society (Societa Cooperativa Europea, SCE)**

Another legal form for joint cross-border cooperation between Polish and Lithuanian municipalities could be the SCE.<sup>24</sup> The SCE is also a form of cooperation for cross-border cooperation based on EU law. The legal basis for the operation of an European Cooperative Society shall be the SCE Regulation.<sup>25</sup>

The SCE Regulation in Lithuanian legislation has been implemented through a Law on European Cooperative Societies on 15.6.2006, entered into force on 18.8.2006<sup>26</sup>. The SCEs which have their registered office in Lithuania shall be governed *mutatis mutandis* by the legal norms regarding cooperative societies (cooperatives) and public limited liability companies to the extent that the SCE Regulation permits and the SCE Regulation, Lithuanian Law on SCE and other legal acts regulating European cooperative societies do not establish otherwise (Art. 1 para. 3 Law on SCE). In Poland the Act on European cooperative society of 22.7.2006<sup>27</sup> has been entered in force on 18.8.2006.

The SCE provides a legal instrument for legal bodies wishing to group together to achieve economies of scale, or undertake research and development activities. Its purpose is "to meet the needs of its members and/or to promote their economic and/or social activities" (Art. 1 para. 3 SCE Regulation). SCE is not designed to make profits for investors. Profits are divided equally among members. SCEs are also part of the "social economy".<sup>28</sup> The most important fields of action of the SCE are therefore: agriculture, forestry, banking, retailing, legal advice, education, transport and energy conversation. One of the main characteristics of an SCE is the involvement of its employees. Employees must be involved in the strategic direction of the company.

In order for an SCE to be set up, its statutes must be drawn up and signed in writing. The statutes must be in accordance with laws for the country the registered office is located in (see above remarks on Lithuanian and Polish law). An SCE must be registered also in the member state in which its head office is located.

**Advantage of the SCE:** SCE has its own legal personality (Art. 1 para. 5 SCE Regulation) and is therefore legally independent of its members. An SCE may be formed by legal bodies governed by public law formed under the law of a Member State, resident in, or governed by the law of, at least two different Member States (Art. 2 para. 1 SCE Regulation). This opens up the possibility for municipalities to

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<sup>24</sup> Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE), 2014.

<sup>25</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1).

<sup>26</sup> Law on European Cooperative Societies 15 June 2006 – No X-696 (last amended on 15 December 2009 – No XI-566).

<sup>27</sup> Polish Official Journal of 2006 No 149 item 1077 with amendments.

<sup>28</sup> <https://www.nibusinessinfo.co.uk/content/european-cooperative-societies>



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participate in the cooperative. Furthermore members of cooperatives have no liability for the losses of the cooperative, unless otherwise provided by the statutes of the SCE when that SCE is formed. This is also the only form of European legal entity that can be established from the beginning and with limited liability. Furthermore, the registered office of an SCE may be transferred to another Member State without winding-up of the SCE or in the creation of a new legal person (Art. 7 SCE Regulation). This represents a significant advantage over the EGTC and the EEIG if the members plan to relocate their registered office (e.g. for political reasons) or if such a move proves necessary.

**Disadvantages of the SCE:** An SCE shall have as its principal object 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 therefore relies more on the activities of its members. The SCE therefore relies more on the activities of its members. This is not exactly the idea of the business incubator, whose mission is to promote the creation of businesses by providing the financial and organisational support required. Furthermore, the minimum subscribed capital requirement is EUR 30,000 spread between different amounts of members' shares (Art. 3 SCE Regulation). This may be problematic if members are not sufficiently financially strong.

**For these reasons, the SCE is not recommended as a carrier for an business incubator.**

#### **d. European Company (Societas Europaea, Se)**

The European Company is a public limited company based on EU law<sup>29</sup>, which makes it possible to conduct business in different European countries according to a uniform set of rules. It provides an instrument for greater mobility in the single market. The minimum subscribed capital requirement is EUR 120,000. It is therefore suitable for larger projects.<sup>30</sup>

**Therefore, this cooperation format will not be further investigated here.**

#### **4. The General Proceedings**

Regardless of the legal form chosen, the following steps are proposed to create a joint cross-border business incubator.

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<sup>29</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, p. 1) and national implementing acts.

<sup>30</sup> F.e. Galleria di Base del Brennero – Brenner Basistunnel BBT SE: A European public limited company for the construction of a railway tunnel between Austria and Italy (Brenner Base Tunnel), see more: <https://www.bbt-se.com>.



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### **1. Step: Tasks Of The Cross-Border Business Incubator**

It is necessary to determine the tasks of the incubator. According to the Mayor of Sejny<sup>31</sup>, it would make the most sense if the incubator supported entrepreneurship by providing infrastructure to entrepreneurs who could use it on more or less commercial terms, e.g. transport infrastructure would be provided to micro-entrepreneurs for the purpose of implementing public transport services.

### **2. Step: Select Partners**

Partners should be competent in the above mentioned tasks. It should also be decided whether the partners can be private entities. This affects the choice of form of cooperation (e.g. excludes EGTCs).

### **3. Step: Choice Of The Appropriate Legal Form For The Incubator**

According to the tasks and structure of the partners, the appropriate legal form should be chosen from among all the available ones.

Other factors should also be taken into account when choosing the relevant legal form and its seat, such as:

- (1) determine the tasks of the incubator,
- (2) select partners according to their competences under national law (public entities and/or/without private entities),
- (3) choice of the appropriate legal form for the incubator and its seat according to the advantages offered by the national legislation of the potential host state (f.e. applicable tax law, legislation applicable in a subsidiary way to the joint organisation),
- (4) securing the financing of common structure by the members and/or by external subsidies,
- (5) starting of the formation of joint organization by conclusion of appropriate contracts and its registration if necessary.



Tourist Information Centre of Lazdijai (LT). Potential seat for a joint cross-border business incubator?

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<sup>31</sup> Interviewed on 20.09.2019 in Suwałki by the expert.



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## **5. Example: Procedure Of Establishing Of EEIG**

The formation of an EEIG requires the conclusion of a written formation contract and registration in the Member State in which the EEIG has its seat.

### **a. Founding Treaty**

Experience has shown that the written memorandum of association should regulate only the essentials.<sup>32</sup> The ongoing decisions shall be taken by consensus of the members.

According to Art. 5 EEIG Regulation, the members shall determine the name of the association with the prefix or prefix "European Economic Interest Grouping" or the abbreviation "EEIG".

The seat of the association shall also be decided. The seat may be the place where the association has its head office or the place where one of the EEIG members has its head office. The seat of the EEIG may be moved within the Community if necessary. The procedure for the transfer of the registered office has been specified in the EEIG Regulation. It is also permissible to establish branches of the EEIG in the individual local authorities. Any establishment in a Member State other than that of the head office must be registered in that Member State.

The contract shall also specify the object of the enterprise for which the association was established. In particular, the common objectives, tasks and instruments for their implementation shall be defined.

In addition, the contract shall contain the designation of the full members of the Association. It is recommended that the membership be initially limited to the regional authorities or their economic development institutions.

The EEIG may also be established for an initial period of time. If this is the case, the limited duration of the association must also be laid down in the contract. On the other hand, a temporal development and possibly the conversion into a separate structure are not to be included as contents of the contract.

Since the memorandum of association does not have to have any special content and can only be drawn up in writing, it can also be concluded relatively quickly.

No cash or non-cash contributions are necessary for the formation of the EEIG; the raising of the share capital is therefore not a prerequisite for the formation of the EEIG.

### **b. Organs Of The EEIG**

The statutory bodies of the association are the members acting jointly and one or more managing directors.

The members (e.g. as a general meeting) shall take the most important decisions on the functioning and development of the EEIG. Since the EEIG is - at first - to have only a few members, the unanimity principle is recommended for decision-making. An annual evaluation of the cooperation by the

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<sup>32</sup> H.J. Zahorka, Gründung und Betrieb einer EWIV, 2010, S. 12.



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members with regard to the goals achieved and the results envisaged is indispensable. This should avoid implementation deficits and ensure continuous cooperation.

The managing director of the EEIG to be appointed shall at the same time act as moderator of the cross-border cooperation. In addition to the tasks already defined by law, he should also prepare topics and coordinate meetings. If the EEIG has its seat in Lithuania, exclusively natural persons may be appointed as managing directors (Art. 5 EEIG Law of 2003). A person employed by one of the members may be appointed as managing director. This allows to save costs during the start-up phase.

Since the agreement establishing the EEIG may provide for other bodies, it may be recommended that a political and/or scientific body be set up within the EEIG. The powers of these "bodies", which primarily perform advisory functions, should also be further specified in the EEIG's founding agreement.

The political body would create a platform for reaching consensus on particularly politically sensitive issues. Furthermore, the interests of the location could be better represented before the national and European political institutions. The solutions worked out within the framework of the EEIG will be better presented to the political decision-makers and discussed directly with them. This body will also ensure political support for the cooperation of the economic development institutions by involving local, regional and national politicians in the ongoing work.

The scientists and practitioners should form a think tank within the framework of the EEIG for the development of solutions for special problems of the cross-border location (e.g. public transportation models<sup>33</sup>) and for the feasibility study of the solution approaches. The think-tank will be moderated and convened by the managing director of the EEIG. Thus a continuous exchange and transfer between science and practice will take place. It is also possible to set up several think tanks on the permanent issues of cross-border cooperation and joint location promotion.

### **c. Financing The EEIG**

Members shall contribute to the financing of the EEIG through annual membership fees. Their amount could e.g. depend on the inhabitant key and the corresponding inhabitant amount (e.g. 10 Eurocent per inhabitant). These financial means should first of all ensure an operative action of the EEIG (daily course of business, events, project development).

The EEIG may also provide services to members and third parties to cover the operational part of the costs. Funds acquired in this way may also be used for the EEIG's own contribution to Interreg projects. It should be stressed at this point that the EEIG carries out an ancillary activity for its members and may not pursue its own business idea for profit. If the EEIG carries out transactions, it is subject to VAT in its Member State of domicile, whereby in the case of cross-border activities the rules on the reverse-charge procedure still have to be observed.

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<sup>33</sup> This field was explicitly mentioned by the mayor of Sejny in a direct interview with the expert.



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The EEIG can obtain other funds from the funded projects. In particular, Interreg programmes should be mentioned here, which list the eligible institutions. For example, the EEIG can be understood as an association of units of local self-government within the meaning of the INTERREG A cooperation programme. The EEIG's eligibility for funding has also been confirmed in the literature.<sup>34</sup> SUBMARINER Network can be cited as an example of the networking of public institutions for the implementation of joint INTERREG projects.<sup>35</sup>

#### **d. Registration Of The EEIG**

The EEIG shall be registered in the State in which it has its seat. For a successful application, the letter of application (name of the EEIG, subject matter, registered office and list of members), the memorandum of association and the decision on the appointment of the managing directors are required. The EEIG is registered by the managing director through a notary.

The national registration will then be published in the Official Journal of the European Union.

#### **6. Example Of Existing Cross-Border Incubator – Yess**

YESS<sup>36</sup> (Young entrepreneurship Startup School) Project is a cross-border incubator between Greece and Italy. It aims to promote the entrepreneurial spirit and to incubate new companies for the economic development of the regions. Most important topics are tourism, design, blue growth and e-health. The incubator will provide most of its services both through physical and virtual environment. It offers the following services: matchmaking, free training, new markets, mentoring, reduce costs, access to funds. The cross-border incubator is financed from Interreg V-A Greece Italy Programme 2014 – 2020.<sup>37</sup>

#### **IV. Pre-Assessment of whether the Case could be solved with the European Cross-Border Mechanism**

Certainly, subjecting the functioning of an incubator to one legal order, but with the provision that assistance is granted to all entities meeting the material criteria and coming from the area of its units, will facilitate its functioning.

It would therefore be necessary to establish that the neighbouring country honours the disposal of public funds contributed to the incubator, in accordance with the law of the country in which the business incubator is located. However, an agreement to set up an incubator may, for example, stipulate that financial statements are to be audited or drawn up in accordance with, or at least on the

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<sup>34</sup> BBSR, Vom Projekt zu dauerhaften Strukturen, August 2015.

<sup>35</sup> <https://www.submariner-network.eu/network>

<sup>36</sup> <https://yessincubation.eu/>

<sup>37</sup> PRIORITY AXIS: 1 - Innovation and Competitiveness: THEMATIC PRIORITY: 03-Enhancing the competitiveness of small and medium-sized enterprises, the agricultural sector (for the EAFRD) and the fisheries and aquaculture sector (for the EMFF); SPECIFIC OBJECTIVE: SO1.2-Supporting the incubation of innovative specialized micro and small enterprises in thematic sectors of interest to the Programme Area.





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basis of, the rules of the other country. In addition, members from the other country should have a right of access to the documents of the joint institution.

With the assistance of the ECBM, it would also be possible to remove the issues raised for the establishment of joint entities under the 1996 bilateral agreement.

## **V. Other Relevant Aspects to this Case**

The creation of the incubator is closely linked to the social and legal issues described in the Borderland citizen status proposal. Both initiatives are important components of the concept of creating a Polish-Lithuanian cross-border functional area.

The creation of this area was signalled in the Declaration of Local Governments of 2018<sup>38</sup>.

## **VI. References and Appendix/Appendices if any**

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<sup>38</sup> More on the Declaration of 2018 and the links to the cross-border functional area in the report "Lack of flexibility of social and health insurances across the border".