

# PILOT ACTIVITY CONCEPT & LAUNCH REPORT

## D.T2.1.2 PILOT #2

Work paper

Version 2.0

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### 1) Introduction

The aim of the pilot action#2 is to support the Emilia-Romagna Intermodal Cluster (ERIC) transition from informal and collaborative network into a formal entity. The first step was to examine different law models of joint activity and partnership between public administration and companies: mixed companies, associations, institutionalised networks, plain contracts, consortium. All these models are usable under EU law: main limits exist under Italian legislation. In the next paragraph the exam of possible alternatives has been reported.

### 2) Pilot action description

In this section, please describe your pilot action filling in the following chart:

<b>PP involved</b>	<b>Fondazione ITL (PP8), Regione Emilia-Romagna (PP10)</b>
<b>Timescale (start/end date)</b>	April 2020 - April 2021
<b>Main actors/stakeholders involved</b>	Main actors: Emilia-Romagna Region, ITL Foundation  Stakeholder involved: member of cluster ERIC (see Deliverable D.T2.1.3)
<b>Pilot action launch</b> <i>Please describe when and how the pilot action was launched</i>	The Pilot Action was launched in April 2020 with the start of a series of video calls between per PPs involved and the Pilot Action contractor to define in detail the overall workplan.
<b>Description of the activities to be done within the pilot action</b>	<ul style="list-style-type: none"> <li>• Review on national and international experiences of networking within intermodal freight transport sector and of their governance system</li> <li>• Proposal of legal form for ERIC cluster</li> <li>• Guideline for the drafting of ERIC cluster statute</li> </ul>
<b>Expected results</b>	Setting up a dedicated governance structure for the ERIC cluster  Choice and definition of the legal framework of the partners initiative



**Potential risks of the successful outcome of the pilot action and the adopted strategies to overcome them**

The law models of joint activity and partnership between public administration and companies that have been examined are:

1. Association (recognized and not)
2. Temporary association of entrepreneurs
3. Business network
4. Contract/Permanent Conference

For each of these solutions the main advantages and disadvantages will be reported

**1. Association (recognized and not)**

Possible but uninteresting for public bodies, considering public opposition to creation of new legal entities

**Advantages**

- a) Strong presence of members in the activity of the association and flexibility of purpose (compared to the foundation, for example).

In the association there is a pervasive presence of the members, who participate in the assembly, with respect to the foundation, thus allowing for greater control of public member bodies over the work of the directors. Moreover, in the association the purpose does not have the fixity that characterizes the foundation.

The association has an assembly structure that the foundation does not have (art. 20 c.c.) and a system of responsibility of the administrators with respect to the assembly of associates, which is weaker in foundations.

- b) Non-profit purpose (unlike for companies)

The association is aimed at the pursuit of non-economic purposes (F. Galgano, Private Law, 2012), being the pursuit of lucrative purposes proper of companies.

- c) Limited liability with respect to associates (both in the recognized and unrecognized association) and also with respect to managers (only in recognized association)

In unrecognized association, the members are not liable for the association's debts: only the association's common fund (art. 38 c.c.: << For the bonds taken on by the persons representing the association, third parties can assert their rights to the common fund. The bonds themselves also respond personally and solidly to the people who acted in the name and on behalf of the association>>). On the limited liability of associations also not recognized with respect to associates see F. Galgano, Private Law, ult. Cit.

For unrecognized associations, the directors are liable for the association's obligations (art. 38 c.c.: << The bonds themselves also respond personally and solidly to the persons who acted in the name and on behalf of the association>>).

To ensure that the directors do not respond to the obligations of the association with their assets, a recognised association must be formed

According to the object of the association, it is possible to assume that **the recognition is provided by the Prefecture (*Prefettura*)**. The Emilia Romagna Region recognizes only in the area of constitutional competence: <<The recognition of private legal entities operating in the subjects attributed to the competence of the regions by Article 14 of the decree of the President of the Republic 24 July 1977, 616, and whose statutory purposes are exhausted in the scope of a single region, is determined by the registration in the register of legal entities established in the same region.>> (Art. 7 d.m. 361 of 2000).

The conditions for recognition are technical in nature, with reference to the suitability of the structure to pursue the purposes it has: <<3. For the purposes of recognition, the conditions of the law or regulation for the establishment of the institution must be met, the purpose is possible and lawful, and the assets must be adapted to the purpose. 4. The size of the assets must be demonstrated by the appropriate documentation attached to the application. >> (art. 1 d.m. 361 of 2000)

Similar control is carried out with regard to the possible future modification of the statute or the charter: << Amendments to the statute and the charter. 1. Changes to the statute and the charter are approved in the manner and on time for the purchase of the legal personality from Article 1, except in cases of recognition of the legal personality by piece of legislation.

**In the membership, each associate has a vote, on the basis of the principle of equal rights and duties** (Galgano, op. ult. cit.): that is, to vote by heads regardless of the value of the property in the social fund.

#### Disadvantages

- a) Having a permanent structure, it is problematic for public administrations to participate to new organized structures, this also when it is true that associations are not considered in the Madia law 175/2016 (art. 1 paragraph 4: <<This act doesn't apply to: .. (b) the statutory provisions concerning the participation of public administrations in non-corporate and foundations. >>)

## 2. ATI (*Associazione temporanea di imprese* - Temporary association of entrepreneurs to fulfill a contract)

#### Disadvantage

- a) The use of this model is not advised because its institution is related to the execution of a contract, whereas in this case it is an ongoing activity not connected to only a contract.

### 3. Rete di imprese - Business network

#### Disadvantage

- a) It can be an ongoing structure but public administrations cannot be part of it. The same problem exists for consortia, for which the participation of public administration is discussed, and in any case conceivable only with the clear exclusion of the profit (but then it makes more sense an association that creates less doubts)

It is a structure for companies only and to which the participation of public bodies would therefore be problematic: << Parts of the contract can only be entrepreneurs, for whom therefore the substantive connotations referred to in art. 2082 c.c., as well as the formal requirement of registration on the register of companies [BREDARIOL (10), 82]. This includes both individual entrepreneurs and collective entrepreneurs, both companies with lucrative purposes, as well as companies with mutual or non-profit purposes, and the constraint on the distribution of profits, for example social enterprises. Networks can be made up of companies of a single or mixed type, including both for-profit and non-profit enterprises [CAFAGGI (25), 218]. There are no dimensional limits and therefore large enterprises, small and medium-sized enterprises, micro-enterprises [BREDARIOL (10), 82] can participate in network contracts. The network contract is therefore a contract between companies. Participation of non-business public bodies is not permitted. Forms of collaboration between networks and these entities are certainly allowed through the conclusion of agreements between the network and third parties.>> (source: civil code commentary; Contracts Edition: II; Authors: GUIDO ALPA, MARICONDA; Publisher: Wolters Kluwer; Publication: June 2020)

Consortia have some jurisprudence in favour of participation from public bodies.

4. Contract - protocollo di intesa (can be qualified for example as <<permanent conference>>) with a representative (denotable as Conference President) of Eric Cluster, with periodic directives from the conference and reports from representative

#### Advantages

- a) meets the will of public bodies not to create new subjects of law.

#### Disadvantages

- a) Debts and responsibilities remain on the representative if he doesn't have a proxy (procura).

If there is a proxy, the debts are attributed to each principal directly: an analytical discipline is needed on the allocation of costs. Responsibility also rests indefinitely on the principals in the event of proxy.

### 3) Conclusion

According to the possible alternatives examined, the most viable approach it can be one of the following options:

- Recognized association (advantage of limited liability- disadvantage: its too structured )
- Contract with a procurator (advantage of reduced structure - disadvantage of unlimited liability in the principals)