LEGAL ANALYSIS FOR THE CREATION OF A CROSS-BORDER PRODUCER ORGANISATION FOR SMALL-SCALE ARTISANAL FISHING BETWEEN ITALY AND CROATIA

In the Italian economic reality, and more widely in Europe, there are consolidated forms of collaboration between companies in the same sector, or even from different commercial sectors, for the common exercise of their activity, sharing all or only some production or commercial phases and related resources, or sharing operational strategies in order to increase their respective competitiveness.

From a legal point of view, the instruments available to enterprises, particularly those in the small-scale fisheries sector, can basically be summarised as consortia, joint ventures, and European Economic Interest Grouping (EEIG).

Business consortia

The consortium is a contract provided for by Italian law and in particular by articles 2602 et seq. of the Civil Code, with which several companies build a common organisation to regulate or carry out certain phases of their activity. The only requirement is that the contract be entered into by entrepreneurs. From a formal point of view, the contract must be stipulated in writing under penalty of nullity, and must contain the following indications:

- the object
- the duration of the consortium
- the seat of the office if any
- the powers and responsibilities of the consortium bodies
- the conditions for the admission of new consortium members,
- cases of withdrawal and exclusion,
- penalties for failure to comply with obligations,
- the quotas of individual consortium members or the criteria for their determination in the case of a consortium for production or trade quotas.

The organisational structure of the consortium is composed of:

- an assembly with deliberative functions
- a management body with management and control functions.

Based on the subject matter of the consortium, we can distinguish between:

- anti-competitive consortia: the restriction of competition on the market from entrepreneurs carrying out the same or similar activities;
- business cooperation consortia: joint implementation of certain phases of the enterprise – they meet the need to reduce costs and promote the survival of small and medium-sized enterprises;
- service consortia: goal is to carry out service activities jointly.

A further distinction is between:

- consortia with internal activity;
- consortia with external activity: only for these there is a regime of legal publicity, the creation of an asset fund and the need to specify the persons to whom the chairmanship, management and representation of the consortium and their powers are attributed.

Often, however, the consortium purpose is pursued through the use of corporate forms and the creation of so- called consortium companies.

The Joint Venture

The Joint Venture, now assimilated by Italian law, originates from Anglo-Saxon law in the context of Common Law and is used to indicate heterogeneous forms of temporary collaboration between several companies, i.e. those types of contracts signed in order to achieve a common objective. It takes the form of a collaboration having as its object the carrying out of a specific common business, with the aim of containing costs, increasing competitiveness, developing new technologies and favouring research.

In terms of control, it is possible to distinguish between:

- Shared Management Joint Venture in which all companies have a balanced and equal role in management;
- Dominant Parent Joint Venture in which only one of the companies is entrusted with the management.

Depending on the object of the joint activity, it is possible to distinguish between:

- Vertical Joint Venture whose purpose is the coordination of activities which, although directed towards a common objective, are of different nature and involve companies located in different positions in the production chain;
- Horizontal Joint Venture concerns companies carrying out similar activities at the same stage of production.

They can also be distinguished:

- Incorporated Joint Venture if a new legal entity arises from the agreement between the undertakings;
- Unincorporated Joint Venture if no new legal entity arises from the agreement between the undertakings.

As regards the possibility of setting up a cross-border producer organisation through the legal form of a joint venture, this would represent an agreement between companies that undertake to cooperate in the pursuit of a specific objective. In this way, member companies will be able to achieve primarily a commercial objective, such as the creation of a new distribution or financial network.

Since this form, in most cases, does not give rise to a new legal entity, it makes it possible to lay down precise obligations for the contracting parties (what resources are made available, when the j.v. will be developed, etc.) and the allocation of any profits or losses, generally pro rata to the resources made available by the participating undertakings or otherwise.

The contract may also provide for an end, for example, once the objectives have been achieved, but also if the objectives prove to be no longer achievable.

The European Economic Interest Grouping

Another possible form of cooperation of undoubtedly transnational importance is the European Economic Interest Grouping, introduced into the laws of the Member States of the European Union by Council Regulation No. 2137 of 25 July 1985, subsequently transposed by each member country through specific supplementary and implementing rules. The Italian legal system implemented this institution with Legislative Decree no. 240 of 23 July 1991 "Rules for the application of Regulation no. 85/2137/EEC on the

establishment of a European Economic Interest Grouping EEIG, pursuant to Article 17 of Law no. 482 of 29 January 1990 (Official Gazette no. 182 of 5 August 1991).

The European Economic Interest Grouping (EEIG) is a transnational cooperation body aimed at European economic operators of any legal form (natural persons, companies, bodies) and any field of activity (professional activities, promotion of agri-food products, support for the management of infrastructures in different countries, etc.), provided that the members belong to at least two different Member States and have an interest that can be satisfied by the activity of the EEIG. Therefore, the EEIG is a legal instrument that allows companies, but also professionals, belonging to different States of the European Community, to implement forms of transnational cooperation based on a common contractual model recognised and protected by internal rights and Community law.

In general, the Community rules provide for the obligation to indicate in the contract for the formation of an EEIG, which for the provisions of national law must be in writing, the name (freely formed but including the initials), seat (located within the Community, it identifies the applicable national law and the private international law of the system of establishment), object of the group, place of registration and duration of the group if it is not indefinite. The rules on publicity operate on several levels: for groups with headquarters in Italy, publicity at national level is entrusted, in two successive stages of a unitary procedure, to the Commercial Register held by the Chambers of Commerce, and the Official Journal; at Community level, the details of the constitution, as well as the dissolution of the EEIG, must be published in the Official Journal of the European Union. Failure to comply with the publicity requirements will expose the EEIG's directors and liquidators to penalties, including criminal penalties. The group may come into existence even without an initial capital endowment made up of contributions from members, and there is no need for the formation of a capital item as an unavailable value, while any contributions made by members are to be considered as non-repayable, with no restriction on remuneration or commitment to the dissolution of the group. The EEIG must have at least two bodies: the members, acting collectively, and the administrator(s). In general, the members have all decision-making powers with a view to implementing the object of the group, while the function of the directors is essentially made to coincide with the representation of the group externally. The liability of the members is joint and and unlimited for the group's obligations: they are called upon to contribute to the losses to the extent provided for in the contract or, in the absence of a specific provision, in equal parts; the Community legislator refers to national law for the consequences of this liability. The provision, in Italian law, has resulted in the exclusion of individual exposure of members to bankruptcy, even in the event of the group's bankruptcy.

The EEIG shall be dissolved by unanimous decision of its members or by judicial decision. After the dissolution, a liquidation phase is initiated, based on the model of the simple company, during which both the subjectivity of the group and the decision-making powers of the members remain. The legal capacity of the EEIG ceases with the closure of the liquidation, which is followed by the publicity procedure at both national and Community level. The Regulation lays down the binding principle of fiscal transparency for the EEIG; the profits or losses of an EEIG are taxable only on its members.

Specifically, the EEIG allows for the creation of an autonomous legal entity, distinct from the entities belonging to it and having its own legal relations because it has legal capacity; it has a streamlined organisational structure, consisting of a collegiate body and an administrative body, which allows its members to carry out economic and commercial activities in common without prejudice to their economic and legal independence. Its main characteristic lies in the purpose for which it is set up, which in itself does not pursue profits for itself but is intended 'to facilitate or develop the economic activity of its members, to improve or increase the results of that activity' through cooperation confined to certain sectors of production.

Under the Community legal order, EEIGs are considered to be cases relating to collaboration contracts between companies, i.e. promiscuous forms of companies and associations, or international consortia and joint ventures. Their constitution and legal existence can therefore only take place under the conditions, in the manner and with the effects laid down by Community law, although the latter refers to national legislation for the regulation of certain aspects.

In the context of the Italian legal system it could be assimilated to the consortium, with some significant differences. In fact, the EEIG must be established by means of a written contract under penalty of nullity (art. 2, Legislative Decree no. 240/91), and may include companies, legal entities under public and private law and also natural persons, provided that they carry out an economic activity and have, according to the legislation of a Member State, their registered office or head office and central administration in a Community country. The Group shall be subject to the law of the State in which it has its registered office.

The contents of the contract must include, pursuant to Article 5 of Regulation (EEC) No 2137/85:

(a) the name of the group preceded or followed by the expression 'European Economic Interest Grouping' or the abbreviation 'EEIG', unless such expression or abbreviation already appears in the name;
(b) the seat of the group;
(c) the object of the Group;
(d) the name, business name, legal form, registered legal seat and, where appropriate, the number and place of registration of each member of the group;
(e) the duration of the group, if it is not established indefinitely.

The seat indicated in the contract of the group must be located in the European Community and fixed alternatively between the place where the group has its central administration, or the place where one of the members of the group has its central administration or, in the case of a natural person, its principal place of business, provided that the group carries out a real activity there.

One group must be composed at least (alternatively):

(a) of two companies or other legal entities having their head office in different Member States;
(b) of two natural persons who pursue an activity principally in different Member States;
(c) of a company or other legal entity and a natural person whose head office is in a Member State and whose principal place of business is in a different Member State.

Regarding limits to participation, a person who has been declared bankrupt, or admitted to the procedure of composition with creditors or subject to compulsory administrative liquidation (art. 6, Legislative Decree no. 240/91) is excluded.

The activity of the EEIG is subject to a strict publicity regime in view of the considerable external importance that the Group may assume. However, the power to identify the internal instruments necessary for the practical implementation of this regime has been left to supplementary national legislation.

The Italian legal system has identified, for registration purposes, the Commercial Register of Companies and, for publication purposes, the Official Gazette, therefore the publication of the contract in the Official Journal has declaratory effect, while its registration in the Register of Companies has constitutive effect. The administrators, within 30 days, must request the registration and filing of the deeds in the Register of Companies in whose district the registered office is located. If the directors fail to do so, each member may do so at the expense of the EEIG (art. 3, 1st paragraph, Legislative Decree no. 240/91). Within 30 days of registration or filing in the Register of Companies, the administrators are required to apply for the full publication in the Official Journal of the essential elements of the contract and its amendments; the number, date and place of registration of the Group and its cancellation from the Register; the closure of the liquidation. Within the following 30 days from the date of publication in the National Official Journal, the

constitution of the Group and the closure of its liquidation with all the details of its registration and publication at national level must be sent to the Publications Office of the European Union so that they can be published in the Official Journal of the European Union (OJEU).

The Group may be dissolved by a decision of the members of the Group which decides its dissolution on the expiry of the period laid down in the Group's contract or any other cause for dissolution provided for in the contract, or on the achievement and realisation of the object of the Group or the impossibility of achieving it. This decision must be taken unanimously unless the contract provides otherwise.

At the request of any interested party or of the competent judicial authority, the court must order the dissolution of the group if it finds that the aims and activities of the group have been breached, or if the seat is transferred outside the Member States of the EEC, unless the situation of the group cannot be regularised and is not regularised before the decision on the substance of the case. In any case, under Italian law, the dissolution of the group shall entail its liquidation, which is governed by Articles 2275 et seq. of the Civil Code, insofar as they are applicable.

It is important to remember that the EEIG is required to keep accounting records. While all members are jointly and severally liable, on a subsidiary basis with respect to the group, for the obligations assumed by the group. In the event of insolvency, the EEIG conducting business activities is subject to bankruptcy.