**Reference Document on the ESPON EGTC Liability Mechanism**

Considering

* REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (EU) No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 (hereafter referred to as CPR),
* REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (EU) No 1301/2013 of 17 December 2013 on specific provisions concerning the European Regional Development Fund and the Investment for growth and jobs goal on the European Regional Development Fund and repealing Regulation (EC) No 1080/2006 (hereinafter referred as ERDF-Regulation),
* REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (EU) No 1299/2013 of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal (hereinafter referred as ETC-Regulation), and in particular Article 2 paragraph 3 (d) of the ETC-Regulation,
* REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 1082/2006 on the European Grouping for Territorial Cooperation amended by Regulation (EU) 1302/2013 of the European Parliament and the Council of 17 December 2013 (hereinafter referred as EGTC-Regulation),
* Grand–Duché de Luxembourg - LOI DU 19 MAI 2009 portant diverses mesures d’application du règlement (CE) N°1082/2006 du Parlement européen et du Conseil du 5 juillet 2006 relatif à un groupement européen de coopération territoriale (GECT) -the legal base for the EGTC in Luxembourg,

the 28 EU Member States and 4 Partner States (Iceland, Liechtenstein, Norway and Switzerland) cooperate together under the ESPON 2020 Cooperation Programme for the period 2014-2020 (hereinafter referred to as the ESPON 2020 Cooperation Programme).

In accordance with Article 8 paragraph 4 a (vi) of the ETC Regulation and pursuant of section 5.4. of the ESPON 2020 Cooperation Programme and of Article 23 of the “Agreement between the Managing Authority and the Member States and Partner Countries on the Implementation, Monitoring and Control System of the ESPON 2020 Cooperation Programme”, (to be signed after the approval of the ESPON 2020 Cooperation Programme) detailed information shall be provided on the way how liabilities shall be appointed to the participating EU Member and Partner States.

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# SECTION 1: SUBJECT MATTER

## 1.1 – THE SPECIFIC CASE OF ESPON

Under ETC-programmes, liabilities in case of financial corrections are usually linked to the country of origin of each beneficiary. As the beneficiaries are spread over the eligible area of an ETC-programme, also the liability is automatically spread across the programme area (i.e. allocated to the country where the beneficiary is located). In the case of the ESPON 2020 Programme, however, a new situation occurred with the establishment of only a Single Beneficiary, in accordance with Art. 12 (3) of the ETC-Regulation and within the meaning of the notion “sole beneficiary”, carrying through a Single Operation of the Programme which is attributed by a Grant Agreement and financed under the Priority Axis 1 of the ESPON 2020 Cooperation Programme. The role of this Single Beneficiary shall be undertaken by the “ESPON European Grouping of Territorial Cooperation” (hereinafter referred to as ESPON EGTC).

The ESPON EGTC is set up for the purpose of receiving the Grant Agreement and implementing a Single Operation under the monitoring and steering of the ESPON Monitoring Committee. In order to ensure an efficient and lean organisation for the ESPON EGTC a limited number of countries/regions was proposed to become members of the ESPON EGTC, which shall assume this task for the benefit of all countries involved in the ESPON 2020 Cooperation Programme. The Belgian Regions of Brussels, Flanders and Wallonia and the Grand Duchy of Luxembourg shall become members of the ESPON EGTC with the consequence of bearing the liability of the ESPON EGTC. When applying the EGTC-Regulation in the strict sense, this institutional set-up implies that solely the members of the ESPON EGTC would burdened by the full liability for all activities regarding the implementation of the Grant Agreement, although all activities are carried through to serve all States represented in the ESPON 2020 Cooperation Programme.

## 1.2 – THE LIABILITY MECHANISM

In order to guarantee for possible financial consequences of ineligible expenditure borne by the ESPON EGTC in implementing the Grant Agreement as Single Beneficiary, an “ESPON EGTC Liability Mechanism” shall be set up (hereinafter referred to as Liability Mechanism). The Liability Mechanism shall ensure the proper functioning and liquidity of the ESPON EGTC while implementing the Single Operation of the ESPON 2020 Cooperation Programme for all countries involved in the ESPON 2020 Cooperation Programme and guarantee the financing of all ineligible cost that eventually occurs during the implementation of the Single Operation. The Liability Mechanism shall be financed by all States participating in the ESPON 2020 Programme up to a maximum of 2 % of the ineligible cost relating to the total ERDF of the budget allocated by the Grant Agreement to the EGTC, acting as Single Beneficiary of the ESPON Cooperation 2020 Programme and the Grand Duchy of Luxembourg, as the State where the ESPON EGTC is hosted, shall cover all ineligible expenditure beyond the threshold of 2 % of the ERDF allocated by the Grant Agreement, which may occur during the implementation of the ESPON operation.

# SECTION 2: DEFINITIONS

In order to establish a common understanding of important terms which are repeatedly used in the context of the ESPON 2020 Cooperation Programme and the present Reference Document, the following definitions shall apply:

* Operation means, according to Article 2 (9) CPR, (…) *a project, contract, action or group of projects selected by the managing authorities of the programmes concerned, or under their responsibility, that contributes to the objectives of a priority or priorities* (…).
* Beneficiary means, according to Article 2 (10) CPR, (…) *a public or private body* (…) *responsible for initiating or both initiating and implementing operations.*
* The Single Beneficiary receiving the Grant Agreement under Priority Axis 1 of the ESPON 2020 Cooperation Programme is the ESPON EGTC. The Single Beneficiary is already designated in the Cooperation Programme and shall sign the Grant Agreement with the Managing Authority of the ESPON 2020 Cooperation Programme.
* The ESPON EGTC, once established by the Region of Brussels Capital, the Region of Flanders, the Region of Wallonia and the Grand Duchy of Luxembourg, shall have its registered office in Luxembourg. The ESPON EGTC is governed by the “Statutes”. With reference to Article 5 of the Statutes, *the* main objective of the ESPON EGTCshall continue the consolidation of a European Territorial Observatory Network and continue improving the provision and policy use of pan-European, comparable, systematic and reliable territorial evidence.
* The Grant Agreement is the contract concluded between the Managing Authority of the ESPON 2020 Cooperation Programme and the ESPON EGTC and governing the implementation of the Single Operation. The Grant Agreement allocates the total funding (including the ERDF-funding, the national co-financing contribution and Partner Stares contribution) and specifies the conditions under which the funding is granted. Annexes to the Grant Agreement are the Operation Specifications, the approved Operation Proposal with all annexes, the Multiannual Work Programme, an Annual Work Plan for the first year and eventually an addendum covering the obligations resulting from the evaluation of the Operation Proposal by the Monitoring Committee. The Annual Work Plans of the successive years will be amended to the Grant Agreement.

In addition to the terms defined above, also the other definitions as set out by Article 2 CPR shall apply.

# SECTION 3: SPECIFIC CONTEXT, PURPOSE AND MAIN ELEMENTS OF THE LIABILITY MECHANISM

## 3.1 – COVERAGE OF INELIGIBLE EXPENDITURE – LIABILITY CASES

The ESPON Managing Authority shall conclude a Grant Agreement with the EGTC including an Article on Liability and Refund Agreement concerning ineligible expenditure in the sense of the ERDF rules.

When implementing the Grant Agreement, expenditure may occur that is not eligible for funding by the ERDF. As the ESPON EGTC does not dispose of any own capital which could cover such not eligible expenditure, the Liability Mechanism shall be employed.

Ineligible expenditure can be detected at moments of the implementation of the Single Operation and by different actors:

* Before is declared to the European Commission (the Single Beneficiary itself as part of the internal procedures, by the First Level Financial Controller at the moment of the certification of the progress reports, by the Certifying Authority or the Managing Authority as part of their on-the-spot-checks)
* After it has been declared to the European Commission (by the Certifying Authority or the Managing Authority as part of their on-the-spot checks, by the Audit Authority, the audit performed by the European Commission of the European Court of Auditors).

The Liability Mechanism is built on the understanding that in case of ineligible expenditure only the ERDF share of the ineligible expenditure has to be refunded to the EGTC. The share of national co-financing shall not be subject of refunding and therefore is not covered by the Liability Mechanism. All ineligible expenditure occurring at the Single Beneficiary in the context of implementing the Grant Agreement, independent of when it has been detected, shall be covered by the Liability Mechanism as defined in section 1.2 and 5.2. Any claim for a reimbursement by the Liability Mechanism shall hereinafter be referred to as a “Liability Case”.

## 3.2 – LIABILITIES UNDER THE ESPON 2020 COPERATION PROGRAMME RELATED TO THE ESPON EGTC

Section 5.4. of the ESPON 2020 Cooperation Programme and Article 23 of the “Agreement between the Managing Authority and the Member States and Partner States on the Implementation, Monitoring and Control System of the ESPON 2020 Cooperation Programme” identify the situations, where a liability with regard to a possible refunding of ineligible expenditure can be linked to expenditure made by the ESPON EGTC under the Grant Agreement:

* Directly through the possible occurrence of ineligible expenditure or irregularities with financial impacts funded through the ERDF by the Single Beneficiary, for which the financial liability shall be borne by the ESPON EGTC.
* Indirectly through possible flat-rate corrections at the programme level, for which a liability in relation to the proportion concerning the Grant Agreement shall be borne by the ESPON EGTC.

## 3.3 – LIABILITY OF THE ESPON EGTC MEMBERS

The liabilities mentioned under section 3.2 take effect on the members of the ESPON EGTC by virtue of Article 12 (2) of the EGTC-Regulation, which stipulates that “... *to the extent that the assets of an EGTC are insufficient to meet its liabilities, its members shall be liable for its debts irrespective of the nature of those debts, each member's share being fixed in proportion to its financial contribution”*. This means that if the ESPON EGTC as a legal body should not be able to cover its statutory liability, the members of the ESPON EGTC, through their unlimited liability, are jointly liable in order to ensure the functioning of the EGTC.

## 3.4 – PURPOSE OF THE LIABILITY MECHANISM

The Liability Mechanism offers to the ESPON EGTC, which implements the Single Operation on behalf and for the benefit of all Member and Partner States of the ESPON 2020 Cooperation Programme, the necessary counterpart for sharing the potential financial burden of the members of the ESPON EGTC, which results from their unlimited liability in relation to the ERDF-funding allocated under the Grant Agreement.

The Liability Mechanism has the purpose of supporting the basic functioning of the ESPON EGTC and of ensuring the Single Beneficiary the necessary financial means, to cover all potentially occurring ineligible expenditure by a shared approach between all Member and Partner States involved.

## 3.5 – MAIN ELEMENTS OF THE LIABILITY MECHANISM

The main elements governing the operation of the Liability Mechanism are the following:

* Provision for the risk prevention of potential ineligible ERDF expenditure during the implementation of the Single Operation under the Grant Agreement as described in section 4.
* Budgetary provision regarding a joint and limited financing of the Liability Mechanism by the Member States and Partner Countries of the ESPON 2020 Cooperation Programme up to a maximum of 2 % of the ERDF part of the Grant Agreement signed by the ESPON EGTC and complemented by unilateral coverage of the funding needed beyond 2 % by the Grand Duchy of Luxembourg as described in section 5.
* A lean organisation of the administration of the Liability Mechanism and its joint supervision by the Member and Partner States of the ESPON 2020 Cooperation Programme as described in section 6.

# SECTION 4: SPECIFIC STATUTORY AND OPERATIONAL PROVISIONS FOR THE ESPON EGTC

## 4.1 – OPERATIONAL PROVISIONS FOR THE RISK PREVENTION TO MINIMISE LIABILITY CASES

Specific statutory and operational provisions for a transparent functioning and best possible control and monitoring shall be provided with respect to the functioning of the ESPON EGTC. They shall prevent the occurrence of ineligible expenditure during the implementation of the Single Operation under the Grant Agreement and, by doing so, to prevent Liability Cases. The internal organisation and day-to-day operation of the ESPON EGTC shall follow the following principles:

* A transparent and accountable implementation and sound financial management,
* Sufficient ex-ante checks before committing and paying out any expenditure,
* Appropriate escalation procedures in case of disagreement about the treatment of expenditure.

The following provisions shall apply regarding the implementation Single Operation by the ESPON EGTC and shall also be mentioned as conditional in the Grant Agreement in order to ensure the fulfilment of the above-mentioned principles:

* Only staff experienced and trained on the question of minimising and mitigating risks (e.g. lawyer specialised in budget and procurement matters) shall be dedicated to the relevant functions within the ESPON EGTC.
* The ESPON EGTC shall have clearly defined procedures for an ex-ante assessment of the legality of commitments and involve the chair of the ESPON EGTC Assembly for bigger amounts and / or special procurement i.e. starting public procurement, signing contracts).
* For all processes regarding the commitments and payment of expenditure, the “four-eye-principle” shall be employed. This means in practice that one responsible person of the ESPON EGTC demands for the commitment of expenditure, while another person is controlling this request for committing expenditure. In case of a persisting disagreement between the persons being responsible for committing and controlling expenditure, at the first the Director of the EGTC shall be involved. In case the Director finds a persisting non-agreement between the positions, a reporting to the Chair of the ESPON EGTC-Assembly shall be activated to resolve the disagreement.
* The established procedures for a sound internal financial management shall be documented and regular checks shall be carried out in order to assess the application of these procedures.
* In the event that periodical ineligible expenditure is occurring, an in-depth internal assessment shall be carried through in order to assess compliance with the internal procedures and if necessary to adapt those procedures.

## 4.2 - PROVISIONS REGARDING A “CONSULTATIVE COMMITTEE” OF THE EGTC

Article 15 of the Convention and Statute of the ESPON EGTC provides for the establishment of a “Consultative Committee” on demand of the States contributing to the Liability Mechanism. In case that a certain frequency or amount of Liability Cases should occur (see also further below section 6.4) the States contributing to the Liability Mechanism may call for the establishment of the Consultative Committee in order to create transparency and to provide advice on the administrative and financial management of the ESPON EGTC with regard to the commitment and payment of expenditure, the execution of contracts and the corresponding liabilities related to the implementation of the ESPON Grant Agreement.

Once established, the mission of the Consultative Committee is to support the reduction of the Liability Cases below pre-set target as defined in section 6.4. Based on a prior assessment of the situation, the Consultative Committee shall detail a strategy and a timetable for its mission. The Consultative Committee shall be informed by the Director and the Chair of the Assembly about all relevant activities of the ESPON EGTC. The Consultative Committee shall formulate recommendations to the Assembly on all matters related to the ESPON EGTC where it sees the necessity and usefulness with regards to the administrative and financial soundness of the ESPON EGTC. The mission of the Consultative Committee will end by the time when the pre-set targets are reached again.

# SECTION 5: TOTAL BUDGET AND CONTRIBUTIONS BY MEMBER AND PARTNER STATES

## 5.1 – THE JOINT AND LIMITED FINANCING OF THE LIABILITY MECHANISM

In order to endow the Liability Mechanism with the necessary financial capacity allowing it to cover smaller amounts of ineligible expenditure, the States participating in the ESPON 2020 Cooperation Programme shall jointly mobilise financial means with a maximum of 2 % of the ERDF-funding under Priority 1 of the ESPON 2020 Cooperation Programme allocated by the Grant Agreement to the ESPON EGTC. The threshold of 2 % is accumulated over the total period of implementation of the Grant Agreement and represents the upper limit for any involvement of the Member States participating in the financing of the Liability Mechanism.

For the event that Liability Cases would exceed the threshold of 2 %, the Grand Duchy of Luxembourg shall cover any amount above the indicated threshold accumulated at the end of the implementation period.

## 5.2 – JUSTIFICATION OF THE 2 % THRESHOLD - Defining the budget

The 2 % threshold for the budgetary endowment of the Liability Mechanism is defined on the base of the Court of Auditors’ and the European Commission’s appreciation of a limited error. In the context of Audits, only findings above 2 % are classified as serious errors.[[1]](#footnote-1)

Considering that the overall ERDF-contribution to the ESPON 2020 Cooperation Programme is 41,3 Meuro, the allocation of ERDF funding under Priority 1 to finance the Single Operation to be carried out by the ESPON EGTC as Single Beneficiary amounts to a maximum of 94 % of this amount or 38,8 Meuro. The Liability Mechanism shall be equipped by 2 % of the total ERDF allocation under Priority 1, which represents the maximum possible size of the Grant Agreement regarding ERDF funding equaling the amount of XXX Meuro.

The Liability Mechanism is built on the understanding that in case of ineligible expenditure, only the ERDF related co-financing has to be refunded. The national co-financing is not subject of such claim and therefore does not need to be covered by the Liability Mechanism.

## 5.3 – Member States’ contribution to the LIABILITY MECHANISM

The Member and Partner States of the ESPON 2020 Cooperation Programme shall financially contribute to the Liability Mechanism by a total amount which will be transferred through six annual instalments during the years 2015-2020. The amount to be paid to the Liability Mechanism is calculated on ground of the same key which is used to calculate the individual States’ contribution to the ESPON 2020 Cooperation Programme.

The Member States transfer their annual instalment for the Liability Mechanism, together with their annual national contribution for the ESPON 2020 Programme, to the Managing Authority of the ESPON 2020 Programme. As described in section 6.1, the annual instalments collected for the Liability Mechanism will be accumulated as a Fund under a specific budget line separate from the annual national contributions for the ESPON 2020 Cooperation Programme.

**Table 1: Total contribution and annual instalments by Member States**



## 5.4 –COVERAGE OF LIABILITY CASES BEYOND THE 2% THRESHOLD BY LUXEMBOURG

At the end of the programming period and the Grant Agreement, when all possible controls and audits have been executed, the Grand Duchy of Luxembourg shall mobilise all funding needed to cover liability cases of ineligible expenditure beyond the 2 % budget of the Liability Mechanism. This commitment refers to the responsibilities of the Grand Duchy of Luxembourg as the country of the seat of the ESPON EGTC.

## 5.5 – CLOSURE OF THE LIABILITY MECHANISM: RE-TRANSFER OF REMAINING BUDGET

At the end of the programming period and after the Single Operation covered by the Grant Agreement is closed and has passed all possible checks, controls and audits and the closure report according to section 6.5 has been issued, all unused funding of the Liability Mechanism will be re-transferred to the EU Member States and Partner Countries proportionally to their respective previous contributions.

## 5.6. - Charges and interest

No charges for administrating, hosting and operating the Liability Mechanism and for keeping the Fund shall be imposed. The Liability Mechanism will neither produce interests.

## 5.7 - Partner States’ role in the Liability Mechanism

The financing provided by the Partner States as contribution to the ESPON 2020 Cooperation Programme are not used to co-finance ERDF allocations. Therefore, ineligible expenditure in the sense of the ERDF-Regulation will not require reimbursement and is treated in the same way as the national co-financing part of the Grant Agreement of Member States, as mentioned in section 3.1 and 5.3.

# SECTION 6: roles and procedures regarding THE FUNCTIONING OF THE LIABILITY MECHANISM

## 6.1 – LEAN ADMINISTRATION AND JOINT SUPERVISION

In order to ensure a lean administration of the Liability Mechanism and a joint supervision by the Member States and Partner Countries, the Liability Mechanisms’ operational set-up is closely “mirroring” some of the arrangements established for the ESPON 2020 Cooperation Programme and for the ESPON EGTC.

## 6.2 – BODIES RESPONSIBLE FOR THE LIABILITY MECHANISM

A “Liability Mechanism Management Committee” is responsible for supervising the Liability Mechanism. The Liability Mechanism Management Committee shall be composed by the members of the ESPON Monitoring Committee. The Liability Mechanism Management Committee shall act independent from the role and function of the ESPON Monitoring Committee. The role of Liability Mechanism Management Committee is to monitor the conditions of every case of refunding to be made to the ESPON EGTC.

The Liability Mechanism Management Committee meets at least once per calendar year back to back with ESPON Monitoring Committee. A quorum of attendance of two third is required for decision making. The Committee shall work also using written procedures and silent consent. The Committee shall seek for consensus decisions. In case a consensus cannot be found during a meeting or during a written procedure within four weeks, the two third majority shall apply.

The body being in administrative terms responsible for the Liability Mechanism is the Managing Authority of the ESPON 2020 Cooperation Programme (i.e. the Ministry of Sustainable Development and Infrastructures of the Grand Duchy of Luxembourg, Department for Spatial Planning and Development, Division for European Affairs). The Managing Authority shall be in charge of the day-to-day management of the Liability Mechanism according to section 6.3.

The institution responsible for physically hosting of the Fund related to the Liability Mechanism is the Trésorerie d’Etat du Luxembourg. The Trésorerie will receive the contributions and make payments on ground e of claims received via the procedure described in Section 6.3.

## 6.3 – FUNCTIONING OF THE LIABILITY MECHANISM

As part of the Grant Agreement under the ESPON 2020 Cooperation Programme the Managing Authority of the ESPON 2020 Cooperation Programme includes an Article about the “Liability and Refund Agreement” with the ESPON EGTC that defines the conditions for Cases of Liability and the procedures for refunding as defined in section 4.

In the event that ineligible expenditure in the sense of section 3.1 are occurring, a claim for refunding of this expenditure by the Liability Mechanism has to be send by the ESPON EGTC to the Managing Authority.

The Managing Authority of the ESPON 2020 Cooperation Programme shall verify the correctness of the claim and inform the Liability Mechanism Management Committee within four weeks.

An objection shall be stated only if serious doubts about the correctness of the claim can be sustained.

After the confirmation by the Liability Mechanism Management Committee, the Managing Authority shall forward the claim to the Fund-hosting institution - the Trésorerie - which shall activate the payment for refunding to the ESPON EGTC within four weeks.

Claims shall be made at a maximum twice a year. One claim can include several Liability Cases.

## 6.4 – ACTIONS TAKEN FOR LOWERING THE RATE OF INELIGIBLE EXPENDITURE

If at any moment the claimed and refunded accumulated ineligible expenditure exceeds the pre-set target of 1 % of the accumulated total amount of the ERDF-funding paid for the reimbursement of the activities implemented under Grant Agreement, the Liability Mechanism Management Committee may decide to demand the establishment of the “Consultative Committee” of the EGTC ESPON in accordance with Articles 15 and 19 (2) Statute of the ESPON EGTC.

In accordance with the provisions described in section 4.2, the main aim of the temporary mission of the Consultative Committee shall be to support the reduction of the refunding of ineligible expenditure below the threshold of the pre-set target of 1 % of the total amount of ERDF-funding,.

## 6.5 – ONGOING AND FINAL REPORTING ON THE LIABILITY MECHANISM

Throughout the whole programming period and every year until 31 March, the Managing Authority in its function as administratively responsible body presents an annual report to the Liability Mechanism Management Committee, listing all cases of reimbursements which have been covered by the Liability Mechanism including a description of the accumulated level of the use of the Liability Mechanism. The Liability Mechanism Management Committee may assess the report and, based on the assessment, may formulate recommendations to the EGTC.

After the closure and check and financial controls of all activities of the ESPON EGTC as Single Beneficiary, the Managing Authority draws up a final closure report on the Liability Mechanism, which covers the whole programming period. The final report shall indicate the un-used amount of the Liability Mechanism which shall be transferred back to the contributors according to section 5.5.

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1. *It is widely acknowledged that it would be unrealistic to assume that no errors occur in practice and, consequently, a degree of tolerance regarding the appropriate level of accuracy is to be considered acceptable. In terms of audit techniques this is called the "materiality level" and it is set at 2% of the audited amounts. In its annual reports, the Court classifies errors according to “Whether it is possible to measure how much of the amount paid by the Commission is affected by the error, i.e. whether errors are quantifiable or non-quantifiable. When a quantifiable error is above 2% of the audited amount, it is classified as serious, whereas when it is less than 2% it is classified as limited* (…). Source: COMMISSION STAFF WORKING PAPER “Analysis of Errors in Cohesion Policy for the Years 2006-2009”, Commission document SEC (2011) 1179 final, p. 7. [↑](#footnote-ref-1)