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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the Application of Council Regulation (EC) No 723/2009 of 25 June 2009 on the
Community legal framework for a European Research Infrastructure Consortium
(ERIC)**

1. INTRODUCTION

Council Regulation (EC) No 723/2009 on the Community legal framework for a European Research Infrastructure Consortium¹ (hereinafter referred to as “the ERIC Regulation”) was adopted in order to facilitate the establishment and the operation of large European research infrastructures among several Member States and associated countries by providing a new legal instrument, the European Research Infrastructure Consortium (ERIC).

The ERIC Regulation addressed one of the major difficulties that was identified for the establishment of new European research infrastructures, apart from scarcity of resources and the complexity of technical and organisational issues, i.e. the lack of an adequate legal framework agreed by all countries allowing the creation of appropriate partnership with partners from different countries.

The ERIC Regulation was also to facilitate the quicker establishment of European research infrastructures by saving time in avoiding the repetition of negotiations, project by project, to analyse and discuss the best legal form for such international research organisations, with related advantages and disadvantages and the time saved in avoiding discussions in each national parliament related to the approval of a needed international agreement in case the framework provided for under the ERIC Regulation would not have existed.

The ERIC Regulation was to respond to the European political ambition of creating the European Research Area to enable tackling current challenges (e.g. internationalisation of research; achievement of critical mass; development of distributed facilities; development of reference models). It also was to contribute to building an EU identity around flagship scientific facilities leading to the increase of the positive image of the European Union at international level by providing the international counterparts with a single legal entity to which they could become member or to which cooperation and possible partnerships could be agreed.

The ERIC Regulation was amended in December 2013² to allow better reflection of the contributions of associated countries in the ERIC by putting those countries at a more equivalent level as Member States in the governing bodies of the ERIC in terms of voting rights in the light of the possible hosting of ERICs in associated countries which would lead to an increased participation of associated countries in ERICs. These requests were also made against the background of the possible hosting by Norway of three ERICs that are included in the 2010 ESFRI Roadmap³.

This report has been drawn up by the Commission pursuant to Article 19 of the ERIC Regulation which provides that the Commission will submit not later than 27 July 2014 a report to the European Parliament and Council on its application and proposals for amendments where appropriate.

¹ OJ L 206, 8.8.2009, p. 1.

² OJ L 326, 6.12.2013, p.1.

³ These are: the Consortium of European Social Science Data Archives (CESSDA), the Svalbard Integrated Arctic Earth Observation System (SIOS) and the European Carbon Dioxide Capture and Storage Laboratory Infrastructure (ECCSEL)

2. LEGAL CHARACTERISTICS OF THE ERIC

The ERIC Regulation provides a common legal framework based on Article 187 of the Treaty on the Functioning of the European Union (TFEU) complementing national and intergovernmental legal and regulatory schemes for establishing transnational Research Infrastructures. It represents one of the legal instrument that has been adopted until now in support of the European Research Area.

According to the ERIC Regulation, an ERIC is a legal entity with legal personality and full legal capacity recognised in all Member States. It requires membership of at least three states: one Member State and two other countries that are either Member States or associated countries. Its members may be Member States, associated countries, third countries other than associated countries and intergovernmental organisations. They jointly contribute to the achievement of the objectives of an ERIC, primarily the establishment and operation of a research infrastructure of European importance. Member States, associated countries, third countries other than associated countries and intergovernmental organisations may also be observers without voting rights.

The ERIC internal structure is flexible, allowing the members to define, in the Statutes, their rights and obligations, the bodies and their competences and other internal arrangements. The ERIC Regulation provides for Member States and associated countries to hold jointly the majority of voting rights in the assembly of members, although proposals for amending the Statutes of an ERIC hosted by a Member State require the agreement of a majority of the Member States that are members. The liability of the members for the debts of an ERIC may be limited to their respective contributions; flexibility will however be allowed in the statutes to modify such arrangements. The applicable law is Union law, the law of the State of the statutory seat or of the State of operation regarding certain administrative, safety and technical matters. The Statutes and their implementing rules must comply with such applicable law.

An ERIC is considered as an international body or organisation in the sense of the directives on value-added tax and excise duties but to be exempted from VAT and excise duties it needs to be recognised as such by their host Member State . Being also considered an international organisation within the meaning of the directive on public procurement, an ERIC can be exempted from procurement procedures and may instead adopt its own procurement rules.

An ERIC is set up by a decision of the Commission acting on the basis of implementing powers conferred by the Council. The Commission acts upon an application submitted by those Member States, countries and intergovernmental organisations who wish to become founding members of the ERIC. The procedure for the adoption of a Commission decision includes an assessment by independent experts, in particular in the field of the intended activities of the ERIC. The Commission also seeks the opinion of the committee provided for under Article 20 of the ERIC Regulation (ERIC Committee) which is composed of representatives of all Member States and associated countries.

3. IMPLEMENTATION OF THE ERIC REGULATION

Since the adoption of the ERIC Regulation, seven ERICs have been established. In March 2011 SHARE-ERIC (Survey of Health, Aging and Retirement in Europe)⁴

⁴ OJ L 71, 18.3.2011, p. 20.

was established, first hosted by the Netherlands and since 2014 by Germany, with Austria, Belgium, the Czech Republic, Greece, Israel, Italy, Slovenia and the Netherlands as members and Switzerland as observer. In February 2012, CLARIN ERIC (Common Language Resources and Technology Infrastructure)⁵ was established, hosted by the Netherlands, with the Czech Republic, Denmark, Germany, Estonia and the Dutch Language Union as members. In November 2013, four ERICs were established; EATRIS ERIC ((European Advanced Translational Research Infrastructure in Medicine)⁶ hosted by the Netherlands with Czech Republic, Denmark, Estonia, Italy and Finland as members and France and Spain as observers; ESS ERIC (European Social Survey)⁷ hosted by the UK with Belgium, Czech Republic, Germany, Estonia, Ireland, Lithuania, the Netherlands, Austria, Poland, Portugal, Slovenia, Sweden as members and Norway and Switzerland as observers; BBMRI-ERIC (Biobanking and Biomolecular Resources Research Infrastructure)⁸ hosted by Austria with Belgium, Czech Republic, Germany, Estonia, France, Greece, Italy, Malta, Netherlands, Finland and Sweden as members and Norway, Poland, Switzerland and Turkey observers; ECRIN-ERIC (European Clinical Research Infrastructure Network)⁹ hosted by France with Germany, Spain, Italy and Portugal as members.

Finally, in May 2014, Euro-Argo ERIC¹⁰ was established hosted by France with Germany, Greece, Italy, the Netherlands, Finland and the UK as members and Poland and Norway as observers.

All seven ERICs mentioned above were included in the Roadmaps agreed by the European Strategy Forum on Research Infrastructures (ESFRI). Two ERICs (SHARE-ERIC and ESS ERIC) have been established for the design, development and implementation of European surveys. The five other ERICs have been established for the development and implementation of distributed infrastructures in the area of biological and medical sciences, environmental sciences and social sciences and humanities.

The ERIC legal structure is used to establish and operate different types of infrastructures, either single-sited or distributed. Distributed infrastructures may range between infrastructures having facilities located in different sites, operated by a single legal entity, and infrastructures set up as a central hub coordinating the operation of distributed facilities which may retain their legal personality.

The ERIC Regulation is directly applicable in Member States and requires no transposition. However, it was necessary for Member States to adopt the appropriate measures and procedures for being able to host or for becoming a member of an ERIC. The setting up of an ERIC under the ERIC Regulation requires, amongst other, a declaration by the host Member State recognising the ERIC as an international body in the sense of the VAT Directive and as an international organisation in the sense of Directive 2008/118/EC, in order for VAT and/or excise duty exemption to apply. This took for most of the Member States several years with the exception of the Netherlands that had internal procedures in place already in 2010 to enable the hosting of an ERIC. The reason for this was the fact that the new legal structure had to be assimilated in the national regulatory and administrative systems

⁵ OJ L 64, 3.3.2012, p. 13.

⁶ OJ L 298, 8.11.2013, p. 38.

⁷ OJ L 320, 30.11.2013, p. 44.

⁸ OJ L 320, 30.11.2013, p. 63.

⁹ OJ L 324, 5.12.2013, p. 8.

¹⁰ OJ L 136, 9.06.2014, p. 35.

and that many practical questions had to be addressed both by the Commission services as well as the involved Member States before the ERICs could be established and become operational under the national regulatory and administrative systems.

As regards associated countries or third countries to which the ERIC Regulation is not directly applicable, they need to submit a binding declaration recognising the legal personality and the privileges of an ERIC for possibly hosting (in the case of associated countries) or becoming a member of a specific ERIC.

Five years after the adoption of the ERIC Regulation most Member States and some associated countries have taken measures necessary to be in the position to host or become member of an ERIC. This positive development can also be illustrated by the fact that approximately 20 out of the 48 projects included in the 2010 ESFRI Roadmap are using or planning to use the ERIC for establishing the research infrastructure. Moreover, two ERIC applications have been received by the Commission for establishing European research infrastructures that are not included in the ESFRI Roadmap: the Central European Research Infrastructure Consortium (CERIC-ERIC) to be hosted by Italy and the Joint Institute for Very Long Baseline Interferometry (JIV-ERIC) to be hosted by the Netherlands.

The administrative and procedural measures taken by the competent authorities of the Member States and associated countries, the information exchanged at the regular meetings of the ERIC Committee and the clarifications provided by the various Commission services to questions raised by Member States and associated countries representatives have played an important role in contributing to the facilitation of the implementation of the ERIC Regulation.

The Commission expects that around 15 ERICs will be established by the end of 2015.

4. CHALLENGES FOR THE IMPLEMENTATION OF THE ERIC REGULATION

The ERIC Regulation was adopted and is being implemented at a time when restrictive budgetary measures are taken by Member States and associated countries in order to reduce public deficits. The pooling of resources on a long-term basis necessary for establishment and operation of a proper pan-European Research Infrastructure is therefore a big challenge and becomes even more complicated because of the different time frames for budgetary decision procedures of individual Member States and associated countries involved. This leads to a rather long preparation time to achieve the minimum funding basis for establishing Research Infrastructures. This issue is not specific to the ERIC instrument but relates to all European research infrastructures. Better synchronisation, more transparency and alignment between Member States, associated countries and third countries involved in the preparation for the implementation of the research infrastructure would help greatly to speed up the implementation process.

The condition that only States and Intergovernmental Organisations can apply for setting up an ERIC adds complexity for the scientific communities that are preparing for the establishment and implementation of the research infrastructure as Ministries or funding Agencies mandated by Ministries are usually not involved from the very beginning of the preparation of the ERIC applications. It also triggers discussions between the prospective partners of an ERIC for example on the relation between contributions and voting rights that are not addressed in the same way by the

scientific communities involved. The involvement of ministry and funding agencies representatives from the very beginning of the preparation for the establishment of European Research Infrastructures could help avoiding unnecessary delays at later stages of the preparation phase when siting, financial contributions and commitments from the partners would need to be secured before a formal ERIC application could be made.

In addition, the cross-cutting character of many European research infrastructures leads in several instances to a more complex decision making process within the partners of these infrastructures as several ministries and funding agencies have to be involved for example in the areas of Health, Research, Marine, Environment and Energy matters.

The provisions related to VAT and excise duties and to Procurement as laid down in the ERIC Regulation meant that within Member States, associated countries and third countries involved, several ministries including finance and foreign affairs had to be included in the preparation and approval of the ERIC applications which added some additional complexity and required appropriate internal procedures to be set up for facilitating the approval process. It appears from the experience gained with the establishment of the seven ERICs that more Member States and associated countries are becoming aware of this complexity and have adopted internal decision making procedures to organise and speed up the internal approval process.

Finally, ERICs will for the first time be eligible for submitting and participating in proposals for calls under Horizon 2020. Also in the Research Infrastructure Work Programme, references have been made to possible support to ERICs and ESFRI research infrastructures. The Commission expect that they could play an important role in data management and in clusters around some thematic areas like health and environment research.

5. ROLE OF THE COMMISSION SERVICES

The Commission services have facilitated the process of implementation of the ERIC Regulation by organising and chairing the ERIC Committee meetings that take place three to four times a year. Apart from providing an opinion on the formal ERIC applications in compliance with the ERIC Regulation, these meetings serve to provide and exchange information on ongoing ERIC applications and on the internal measures Member States and associated countries have put in place with respect to the decision making for ERIC membership. In addition, presentations by representatives of future European research infrastructures that are close to start preparing their ERIC applications are given so that all Member States and associated countries are informed about timescales, scale of funding to be expected, services and other activities to be developed and opportunities for participation in the preparation and application of the ERIC.

The Commission published practical guidelines in 2010 that give practical information for potential applicants on how to submit an application for an ERIC and commentaries on the articles of the ERIC Regulation focussing on legal aspects. An updated version of these Guidelines that takes into account the experience gained so far will be published in 2014.

The Commission services have provided clarifications to a wide range of questions concerning the provisions of the ERIC Regulation that were raised by Member States, associated countries and representatives of research infrastructures that were

preparing for an ERIC application. These concerned inter alia, the legal character of the ERIC, whether the ERIC could have as main goal to undertake nuclear research, the liability of the members, applicable law in particular for distributed infrastructures with nodes and personnel in various countries, the liquidation of an ERIC and the role of the national court.

The Commission services provided in 2013 templates necessary for the declaration of recognition of an ERIC by third countries and intergovernmental organisations that clarified and simplified the process for those countries to host or become members of an ERIC.

The Commission services also provided in 2013 a working document containing templates for the provisions of an ERIC based on the experience gained in the application process of the first ERICs in order to facilitate the drafting of the provisions by the applicants and achieving a more coherent set of provisions for the ERICs without prejudice to the flexibility and adaptation necessary for reflecting the diverse character of the various ERICs in terms of structure (single sited, distributed, virtual) and in terms of areas of research (social sciences and humanities, environmental sciences, energy, biological and medical sciences, materials and analytical facilities, physical sciences and engineering).

The Commission services played an active role during the preparation of ERIC applications by participating in board meetings and other preparatory meetings of Member States and associated countries clarifying and identifying possible solutions and compromises for points that were raised in discussions between the future partners.

After the establishment of an ERIC, the Commission services have a limited role in the ERIC activities which are governed and steered by the ERIC members within the boundary conditions of the ERIC Regulation, the Statutes and Implementing Rules adopted for the ERIC. The Commission services can only act if informed or requested by the members of issues that have arisen and on the basis of the annual reporting by the ERIC to the Commission that is provided for in the ERIC Regulation.

In view of the establishment of seven ERICs having statutory seats in five different Member States and in order to facilitate the further development of the ERIC, the Commission is organising ERIC network meetings in which the existing ERICs can exchange best practices and raise common issues. Representatives of the ERIC Committee and of prospective ERICs that are in the final process of the ERIC application are invited to these meetings. A first ERIC network meeting was held in June 2014.

6. CONCLUSIONS

With the successful establishment of seven ERICs by May 2014 and the perspective of having some 15 ERICs in place by the end of 2015, it can be concluded that the take-up of the legal framework i.e. number of new or upgraded European infrastructures using the ERIC has gained momentum and is successful. The ERIC Regulation has proven that it indeed filled in the gap between traditional treaty-based international organisations and national legal entities for establishing pan-European research infrastructures. This can also be demonstrated by the envisaged utilisation of the ERIC by some twenty projects that are included in the ESFRI Roadmap for implementing the research infrastructure.

Due to many commonalities in the provisions concerning accession, decision making and the handling of questions such as liability, the ERIC has facilitated greatly the opportunities for Member States, associated countries and third countries to consider cooperation or joining these European Research Infrastructures. The Commission services have facilitated the process of implementation of the ERIC Regulation by organising and chairing the ERIC Committee meetings that take place.

The procedure for application for an ERIC and ease of use is still to be further optimised as Member States, the scientific community and the Commission services go through a learning period for understanding better the practical implications of using this new legal instrument. It can be expected that, if appropriate measures are taken within the Commission services, the Member States and associated countries, the ease of use will steadily improve because of the experience gained and that the process could be further streamlined and to speed up the creation of European research infrastructures. Therefore, the Commission does not propose any recommendation for amendments at this stage.

7. PENDING ISSUES AND NEXT STEPS

As the result of the experience gained in the application processes for creating an ERIC, several new subjects will have to be addressed by the members of the ERICs and by the Commission services. They relate to the practices in the various Member States for example on how to register an ERIC under the national legal system through the Chamber of Commerce, or other registers which would enable an ERIC to open bank accounts and to apply for reimbursement for VAT and excise duties. Similarly, as an ERIC is a public-public partnership, in many instances the status of personnel that it employs needs to be clarified as it will impact on salary scales, income tax issues and personnel costs.

There are also questions to clarify as concerns in-kind contributions to the ERIC by its members, in particular as to whether these contributions could benefit from the VAT and excise duty exemption and, if so, under which conditions. This is relevant as in many cases members of an ERIC prefer to partly contribute in-kind to the ERIC instead of providing cash-contributions.

The question of economic-versus non-economic activities should be further clarified by the Commission services as there are increasing demands for 'innovative' and 'socio-economic' impacts of the activities of the research infrastructure justifying the investments to be made by the members. This question should also be addressed in the context of the 'smart specialisation' as concerns possible support by regional funds and state aid (for construction of parts of the facilities of an ERIC). It includes other subjects such as in which way ERICs can develop spin-offs, technology transfers and receive revenues from services that are developed while complying with the requirement of having only limited economic activities and without putting into danger their ERIC status.

ERICs play an important role in the defragmentation of the European Research Area by creating in a harmonised and structural way services for the scientific communities throughout the Union because of the transparency that is being introduced as concerning the collection of data, access to data and instruments and maintenance of data and services for users. This is not only to support scientific communities but can also lead to evidence based policy making in areas as health, environment and social and cultural policy. The Commission will explore with the

Member States possible ways of how ERICs could support other research infrastructures by providing such services.

Although there are 20 Member States involved in ERICs set-up so far, ERIC statutory seats are concentrated in a few Member States. Due consideration should be given by Member States and associated countries when preparing for the implementation of new European research infrastructures to make an effort for achieving in the longer term a more balanced representation throughout the European Union.

ERICs can play an important role for international cooperation, e.g. with the African Union, Australia, Russia, US, Canada and with UN driven collaborations. It is in that respect noteworthy that ERIC is actually considered within the framework of the OECD Global Science Forum (GSF) as a possible model for establishing distributed international research infrastructures. In particular, the question of governance, legal personality and dispute settlement would need to be addressed for such infrastructures. The Commission will where appropriate support the efforts in the context of the GSF or other international for further exploring the possibilities of agreeing an regulatory framework for international research infrastructures that could like the ERIC did in the European Union fill in the gap between the treaty based organisations and national organisations.

Finally, as noted before the ERIC Regulation was amended in 2013 to accommodate requests from associated countries and in particular Norway to allow for full recognition of their contributions in an ERIC in terms of voting rights. The Commission will closely monitor whether the amendment will result in an increased participation of associated countries as host or member of ERICs.