



Title	Recommendations for RI Legal Framework (D3.3)
Work Package	WP3
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Notes on Organisational Structures

The Management Board considered the following legal forms and felt that the European Research Infrastructure Consortium (ERIC)¹, although untested should be the preferred model, especially given the input that the Commission had given this new legal form.

A. Legal frameworks available under international law

1. Pan-European Research Infrastructure (ERI)

This type of organisation does not yet exist. The Commission has started work on establishing a new legal framework for Research Infrastructures. It is optimistic that the first such organisations can be set up at the beginning of 2009 (January). The new instrument will facilitate pan-European partnerships by addressing differences between countries relating to management, financial issues, human resources, access arrangements and IP.

Background

In early 2007, a working group of legal specialists carried out a feasibility study on the creation of a European legal framework for pan-European research infrastructures with the following features:

- It must provide a legal personality which is recognised in all Member States;
- It must reflect the spirit of a truly European venture;
- It should be flexible to adapt to the requirements of the different specific infrastructures;

¹ The term ERIC supersedes, and is equivalent to, ERI in the text below.

- It should be easy to use and speed the process of setting up the infrastructures;
- It should provide some of those privileges and exemptions which are allowed at a national level for non-profit research. (VAT exemption and procurement rules are being considered).

The working group reached the conclusion that the solution could be an EC Council Regulation providing a common legal frame for pan-European Research Infrastructures (ERI).

An important advantage is the fact that such a Regulation would be applicable with immediate effect in every EU Member State.

Timetable – this is the most optimistic timetable and is based on having ensured that anyone with an interest has been consulted and relevant national bodies have been informed of intentions and progress.

May/June 2008 - draft regulation is in place;

July 2008 - the proposal is adopted;

September 2008 – Submission to the Council and European Parliament;

December – adoption by Council, following which the first ERI can be established.

Characteristics of an ERI

- Scientific, non-commercial character – funded by public entities or their designated representatives;
- Provides world class research services;
- ‘European character’
 - Must have pan-European interest;
 - At least 3 members (provision needed to permit possible continuation if one drops out);
 - Majority membership must be European.
- Membership – states and/or legal entities designated by them; public authorities; no commercial entities. Non-European entities can participate.
- Headquarters must be in the EC.
- Management – need to ensure professionalism of management – management to be agreed in the statutes but an assembly and board of directors or executive director should be foreseen.
- Applicable law will be specified.
- Periodic evaluation by International Scientific Committee.
- Liability of members will be limited.
- Staff – derogation of national law (aiming to address some staffing issues between countries, for example salary differentials and to allow extension of limited contracts).

2. Organisations based on international treaties

Organisations based on international treaties have a legal personality which is governed by international law. The European Organisation for Nuclear Research

(CERN) was founded in 1954 as the first European research organization based on an inter-governmental agreement and was a model for subsequent scientific organizations. These agreements are concluded by intergovernmental conventions between states and are made up by a number of standard provisions to create an international organization, including the legal personality, the establishment of the organisation and its purpose, the members and organs, an accession clause and the settlement of disputes. Prior to the agreement, there are often time-consuming and cumbersome discussions between the member states about the funding of resources, the site and all other necessary elements to commission and to operate the facility.

These organisations enjoy privileges and immunities. They operate under their own rules and by laws regulating a wide range of issues such as staff rules, rules of procedure, financial rules and procurement procedures. The financial contributions of Member States are either fixed by negotiations (ITER) or calculated according to the net national income of each Member State (CERN). This legal form allows full tax exemption either for the host countries (CERN²) or for all participating members (ITER). Regarding staff policy, the specific status of personnel (international civil servant or United Nation types), with privileges and immunities, allows for very highly skilled collaborators.

The system is effective but negotiation of the necessary intergovernmental agreement or convention which is binding on partner countries, requires lengthy negotiation and procedures which can only be justified for very large international research infrastructures supported by many countries including non-European ones and requiring very large investments. For most of the pan-European research infrastructures, there are arguments that the privileges and immunities for staff working in such intergovernmental organisations could be viewed as unjustified. Therefore, the Commission would not apply this model to new Infrastructures.

3. European Economic Interest Grouping (EEIG)

The EEIG is explicitly designated as a means to “cooperate effectively across frontiers”. Its purpose is to facilitate or develop economic activities of its members. It can comprise companies or firms as well as other legal bodies governed by public or private law and natural persons. It was one of the first legal instruments to bring about the single European market. In view of its far-reaching liability clause¹⁰ (unlimited joint and several liability), it does not seem to be a suitable instrument for large scale facilities in research. Moreover, on many important questions, the European regulations concerning the EEIG refer to national laws, like labour law. Also non-European institutions cannot take part in its activities and it cannot employ more than five hundred people.

4. Societas Eurooaea (SE)

The legal framework for the Societas Europaea European Company derives from Council Regulation (EC) No. 2157/2001 of 8 October 2001. Following a long discussion on how to enable public limited-liability companies (plc) to carry on their

² The CERN Member States agreed in a protocol on tax exemption in all Member States. This protocol is, however, not yet in force, depending on the progress of the ratification procedures in the Member States.

business on a community scale, this regulation was meant to ensure that companies with a “European dimension” can be created and managed. A European Company can only be created if existing companies in more than two EU member states are concerned. The European Company addresses primarily the needs of large industrial firms, whose capital is divided into shares to operate under the legal framework of original European law after a reorganisation as an SE. Thus, the addressees of this regulation are public limited-liability companies that already exist and have their seat in the EU Member States. This does not match very well the case of setting-up new research organisations in the Member States through a joint European effort. Therefore the SE cannot be considered as an appropriate legal entity for an institutional frame for cross-border research.

5. European grouping of territorial cooperation (EGTC)

The European grouping of territorial cooperation (EGTC) is a new cooperation instrument at Community level, based on Article 159 of the Treaty, for the creation of cooperation groupings in Community territory. The objective of an EGTC is to facilitate and promote cross-border, transnational and/or interregional cooperation between its members with the exclusive aim of strengthening economic and social cohesion.

The aims of an individual EGTC set up for research purpose may not necessarily coincide with the finality of the new ERIs. Also non-European institutions can only become members of EGTC under certain conditions. These two features in addition to other specific characteristics of the EGTC which are described in the regulation appear to cause difficulties for providing a legal framework for new pan-European research infrastructures. Therefore, it seems that the EGTC cannot be used in its present form as the fit-all solution for setting-up pan-European research infrastructures. The possibility of its adaptation needs to be further considered.

B. Legal forms under national law

1. Companies.

Companies are often used to set up research infrastructures in Europe because they are well adapted to public-private needs and are better integrated into the legal framework of the country where the research infrastructures are located (e.g. French Societe civile, UK Limited liability Company (Ltd), German Gesellschaft mit beschränkter Haftung (GmbH)). There are many different legal types of companies, most of which are limited liability companies. The shareholders have a limited liability in proportion to their contribution to the capital. One distinguishes non-profit making companies in which members wish to develop a specific activity from commercial and profit-making ventures in which the shareholders invest a capital essentially for their financial interest. Generally, companies can be set up with partners, public or private, coming from the host country and/or from any other state.

This legal form may look well suited, in principle, for research infrastructure organisations involving partners from different countries. However, there is some reluctance by partners from other states to become a member of a company founded under a national law as they have to accept foreign legislation. Furthermore, being

confined to a given legal framework of one of the partner states, this solution does not reflect the spirit of a truly European endeavour that should correspond to a pan-European research infrastructure.

2. Foundations

This legal form is typical for non-profit organisation, governed by national law. In The Netherlands, this legal form is commonly used for research organisations. It emphasises the non-profit character of the research work and allows for a flexible governance structure with a board consisting of representatives from the stakeholders/financing parties and a management, reporting to the board, but having full authority for the daily management of the organisation. Foundations, however, share the same disadvantages which have been highlighted above for Companies and although there are some successful examples (e.g. the German-Dutch Wind Tunnels (DNL49)) it is not clear that this model can be generalised.

3. AISBL (international non-profit organisation under the Belgian Law)

This legal form is typical for non-profit organisation, governed by the Belgian national law, but allowing international partners and activities. It allows for a flexible governance structure with a board consisting of representatives from the stakeholders/financing parties and a management, reporting to the board, but having full authority for the daily management of the organisation. AISBL, however, shares the same disadvantages which have been highlighted above for Companies and it is not clear that this model can be generalised for research infrastructures.