

European Commission

**Practical Guide**

**for the**

***Community legal framework for a European Research  
Infrastructure Consortium (ERIC)***

**Disclaimer**

This Guide is aimed at assisting potential applicants. It is provided for information purposes only and its contents are not intended to replace consultation of any applicable legal sources or the necessary advice of a legal expert, where appropriate. Neither the Commission nor any person acting on its behalf can be held responsible for the use made of these guidance notes.

This Guide will be regularly updated to take into account experience and feedback from users.

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## Introduction

The Community legal framework for a European Research Infrastructure Consortium (ERIC)<sup>1</sup> has been designed to facilitate the establishment and operation of research infrastructures of European interest with the involvement of several European countries.

Complementing national and inter-governmental schemes, the ERIC Regulation provides a common legal framework based on Article 171<sup>2</sup> of the EC Treaty<sup>3</sup>.

An ERIC is a legal entity with legal personality and full legal capacity recognised in all EU Member States. Its basic internal structure is very flexible, leaving to the members to define, case by case, in the Statutes, their membership rights and obligations, the bodies of the ERIC and their competences. The liability of the ERIC's members will generally be limited to their respective contributions.

An ERIC is recognised as an international body or organisation, by the country hosting its seat, for the purposes of the directives on value-added-tax<sup>4</sup> (VAT), excise duties<sup>5</sup> and on public procurement<sup>6</sup>. An ERIC may therefore, under certain limits and conditions, benefit from exemptions from VAT and excise duties in all EU Member States and it may adopt procurement procedures respecting the principles of transparency, non-discrimination and competition but not subject to the directive on public procurement as implemented in national law.

ERIC is a tool designed for high-profile research infrastructures with a European dimension. Therefore, only a limited number of ERICs are expected to be set up in the coming years.

The ERIC framework has been developed primarily for new research infrastructures. It can, however, also be used for existing infrastructures if these, exceptionally, consider it to be useful to change their legal status and to become an ERIC.

This Guide provides, in section 1, practical information on how to submit an application for an ERIC. Section 2 contains commentaries on the articles of the ERIC Regulation, focusing on legal aspects.

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<sup>1</sup> Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC), OJ L 206, 8.8.2009, p. 1.

<sup>2</sup> "The Community may set up joint undertakings or any other structure necessary for the efficient execution of Community research, technological development and demonstration programmes."

<sup>3</sup> Treaty establishing the European Community, C 325 of 24.12. 2002.

<sup>4</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1.

<sup>5</sup> Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ L 76, 23.3.1992, p. 1.

<sup>6</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

## Section 1. How to apply

### *Before submitting an application*

Members should prepare and agree among themselves all the documents referred to below in "content of the application". The national procedures required to ensure the formal agreement and commitment of the individual members may vary from country to country and the promoters of the future ERICs are advised to work well in advance with their national authorities when preparing the necessary documents.

### *Who can apply?*

States and intergovernmental organisations can apply for the setting-up of an ERIC. An ERIC must include at least three EU Member States as members. Its statutory seat has to be in a Member State or in a country associated to the framework programme<sup>7</sup>.

### *Language*

Applications may be submitted in any official language of the European Union.

### *Pre-submission advice*

The Commission will try its best to assist potential applicants. Any questions concerning the preparation of an application can be sent to: [RTD-ERIC@ec.europa.eu](mailto:RTD-ERIC@ec.europa.eu). Further information may also be found at [http://ec.europa.eu/research/infrastructures/eric\\_en.html](http://ec.europa.eu/research/infrastructures/eric_en.html).

### *Pre-submission verification*

In addition, a pre-submission verification of the application is possible. This allows for clarification of the compliance of the planned research infrastructure with the ERIC Regulation at an earlier stage of the process, giving feedback on all elements of the application without requiring the formal signed commitment of all members. It will be conducted by the Commission with the help of independent experts. An application which has gone through this pre-submission stage would normally not need to be reassessed by experts following its formal submission, unless significant changes are made to it.

The request for pre-submission verification has to be submitted by the Permanent Representation (or Mission) to the European Union of the country of the statutory seat of the ERIC to [RTD-ERIC@ec.europa.eu](mailto:RTD-ERIC@ec.europa.eu). It should contain all elements of the later formal application except the formal request. The result of the assessment will be communicated to the applicants, informing them, if necessary, of possible aspects of their application to be adjusted for their formal application to ensure compliance with the ERIC Regulation.

### *Formal submission of the application*

Applications should be sent electronically by the Permanent Representation (or Mission) to the European Union of the country of the statutory seat of the ERIC to: [RTD-ERIC@ec.europa.eu](mailto:RTD-ERIC@ec.europa.eu)

Applications may be sent in at any time.

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<sup>7</sup> Associated countries to FP7 are: Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Israel, Liechtenstein, Montenegro, Norway, Serbia, Switzerland and Turkey. Other countries may become associated during the course of FP7.

Content of the application (Article 5 of the ERIC Regulation):

**The formal request to the Commission to set up the ERIC;**

This request should either be signed by all members of the ERIC or by the host State, accompanied by a Memorandum of Understanding (MoU) signed by all members. This MoU should clearly express the wish of the members to apply for the ERIC legal form and their agreement on the full content of the application, notably the Statutes.

The request should follow the model provided in Annex I (page 24). It should be signed by a competent official in a Ministry or in a Permanent Representation (or Mission). The authorisation to sign can, however, also be delegated to another legal entity. In the latter case documentation supporting such delegation has to be provided.

The following documents should be attached to the formal request:

- **the proposed Statutes of the ERIC referred to in Article 10 of the ERIC Regulation;**  
*The Statutes, which contain the rights and obligations of the members, the duration of the ERIC, etc., need to be agreed between all members before submission. These Statutes must include, in particular, the obligations of the members to make financial contribution for a sustainable operation of the ERIC, i.e. for a minimum duration appropriate for the purposes of the ERIC concerned. Once the Statutes are in force, they create a binding obligation.*
- **the "technical and scientific description of the research infrastructure to be established and operated by the ERIC, addressing in particular the requirements set out in Article 4 of the ERIC Regulation";**  
*The information should be structured to describe the foreseen principal task and economic activities (if applicable) and address the five specific requirements set out in Article 4 of the ERIC Regulation. In the case of a distributed infrastructure involving other legal entities besides the ERIC in its operation, the description should also explain the boundaries and the planned agreements between the ERIC and those other legal entities. Typically this should be presented on less than 10 pages, containing links to websites for further explanation.*
- **a declaration by the host Member State recognising the ERIC as an international body/organisation in the sense of the VAT and excise duty directives as of its setting up;**  
*This should be a formal declaration (no specific format is foreseen) by the competent national authorities of the host Member State, i.e. the state in which the statutory seat of the ERIC is located, as specified in Article 5(1)(d) of the ERIC Regulation. This formal recognition has to be worded to enter into force immediately once the ERIC will be formally set up.*

*If the host state is an associated country, it will need, as part of the recognition of the privileges of the ERIC, to provide a declaration ensuring equivalent exemptions (Article 9(6)).*

- **the agreement between the members of the ERIC on the limits and conditions of the tax exemptions mentioned above;**

*The limits and conditions of the exemptions may both specify the implementation of the exemptions (e.g. the recording and recovery of the tax paid) and define their exact scope, typically requiring that purchases are made for official use only and possibly excluding purchases of certain types of goods or services or minor purchases or not allowing exemption from certain taxes. This agreement can take the form of a separate document (no specific format is foreseen) or can be part of the Statutes.*

- **the recognition of legal personality and privileges of the ERIC by associated countries or third countries, if applicable.**

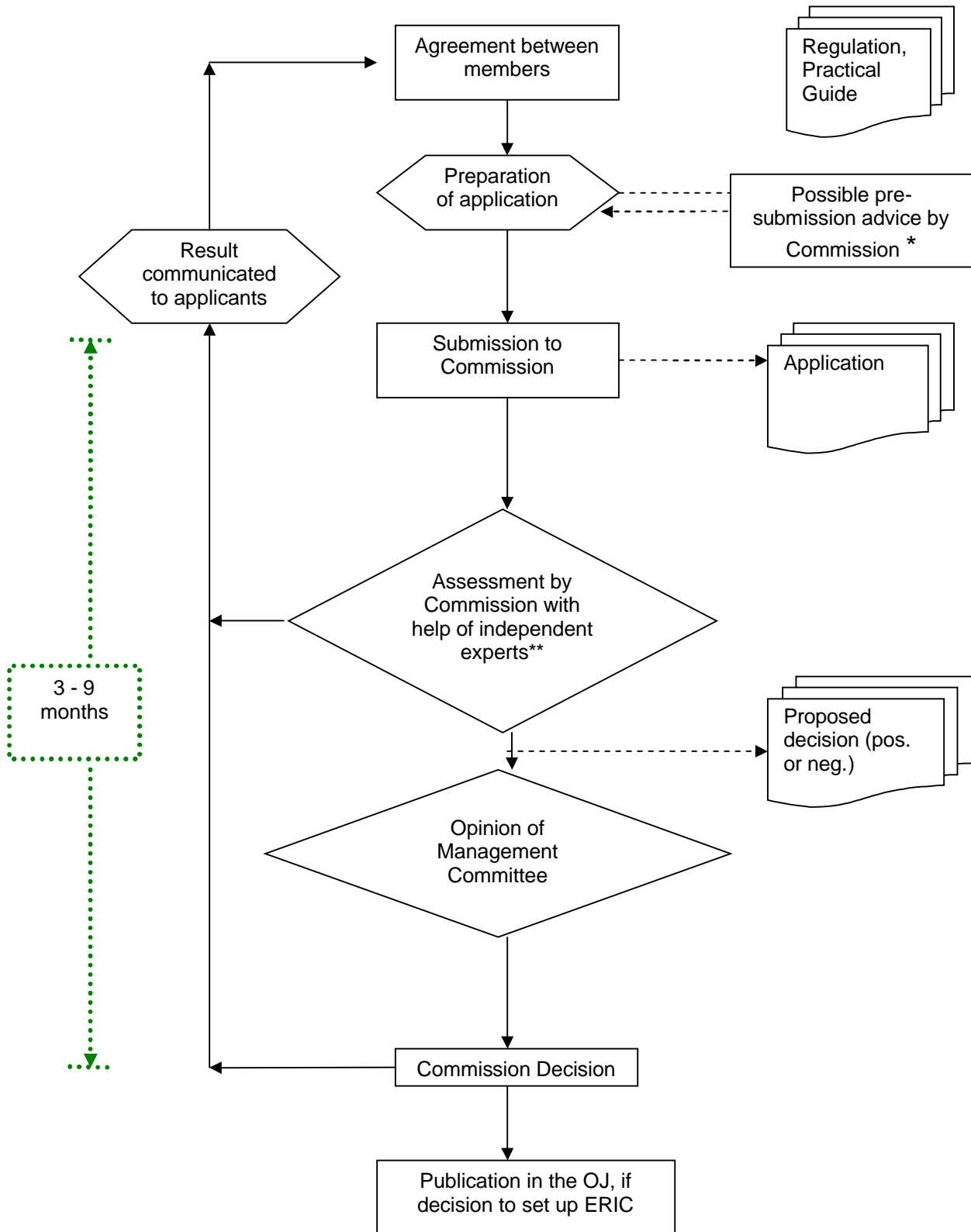
*This will only be necessary if one or more members are not EU Member States. These members have to provide details on how they have ensured that the ERIC will have legal personality in their legal system and is granted the same exemptions as in the EU Member States (see Article 9(5) and (6) of the ERIC Regulation). No specific format is foreseen.*

The Commission will then proceed to assess the application to ensure its compliance with the requirements of the ERIC Regulation. The assessment process is depicted in the following flowchart. The Commission will aim at keeping the assessment process as short as possible so that the benefits of the ERIC are being felt in the European Research Area as quickly as possible, while at the same time ensuring that all steps of the process are duly respected.

To ensure that the application process remains as short as possible, the promoters of an ERIC are invited to contact the Commission at the email address indicated above for pre-submission advice.

Further details on the assessment process are given in the comments on Article 5(2) in section 2 (page 12).

### Flowchart for the treatment of an application



\* To ensure that the application process for the setting-up of an ERIC remains as short as possible, the promoters of an ERIC are invited to contact the Commission at [RTD-ERIC@ec.europa.eu](mailto:RTD-ERIC@ec.europa.eu) for pre-submission advice.

\*\* The expert assessment may already be carried out in the course of a pre-submission verification.

## Section 2. Commentary on the articles of the ERIC Regulation

The purpose of this commentary is to help potential applicants to better understand the provisions of the *Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC)*<sup>8</sup> (further referred to as "*ERIC Regulation*"). It reproduces the articles of the ERIC Regulation and adds explanations where useful. It is important to remember that this commentary only provides guidance on the ERIC Regulation and that it cannot derogate from it.

### *Article 1 - Subject-matter*

This Regulation establishes a legal framework laying down the requirements and procedures for and the effects of setting-up a European Research Infrastructure Consortium (hereinafter referred to as an "ERIC").

### *Article 2 - Definitions*

For the purpose of this Regulation, the following definitions shall apply:

- (a) "research infrastructure" means facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields and covers major scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structures for scientific information; enabling Information and Communications Technology-based infrastructures such as Grid, computing, software and communication, or any other entity of a unique nature essential to achieve excellence in research. Such infrastructures may be "single-sited" or "distributed" (an organised network of resources)<sup>9</sup>;
- (b) "third country" means a State that is not a Member State of the European Union;
- (c) "associated country" means a third country which is party to an international agreement with the Community, under the terms or on the basis of which it makes a financial contribution to all or part of the Community research, technological development and demonstration programmes.

In the case of a distributed infrastructure the ERIC is an appropriate legal form if the infrastructure is sufficiently coordinated to qualify as an "organised network of resources".

This ranges between:

- an infrastructure having facilities located in different sites, operated by one legal entity solely, and
- an infrastructure set up as a central hub which is responsible for the coordinated operation of several closely coordinated distributed facilities, which might however retain their legal personality.

The ERIC distributed research infrastructure should provide the tool for efficient coordinated operations of its distributed facilities. The central hub should therefore have clear and significant responsibility for the operation of the whole infrastructure with, as examples, the following tasks under its responsibility:

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<sup>8</sup> OJ L 206, 8.8.2009, p. 1.

<sup>9</sup> The definition of "research infrastructure" corresponds to the one used for the research infrastructure action within the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-13).



- support to joint evaluation and peer review;
- provision and support to the effective and quality based access to the infrastructure;
- definition of the overall strategy;
- definition of common standards;
- support to joint training and / or technology-transfer activities.

The proposed ERIC must have a clear mission in ensuring scientific excellence in research, supported by the commitment of the distributed facilities it coordinates.

It should also be noted that the privileges regarding VAT, excise duty and procurement only apply to the ERIC and cannot be extended to any connected other legal entities for other operations than those of the ERIC. Consequently, the agreements between the ERIC and these other legal entities should clearly allow identifying the activities and resources which are put under the responsibility of the ERIC.

### ***Article 3 - Task and other activities***

1. The principal task of an ERIC shall be to establish and operate a research infrastructure.

Operation of a research infrastructure normally comprises the complete management of the facility. In the case of a distributed infrastructure, the responsibilities for the operation of the infrastructure may however be distributed between the central hub and the individual nodes, but in an agreed and coordinated way. Article 3.1 does not hinder the setting up of an ERIC in order to operate an existing research infrastructure.

2. An ERIC shall pursue its principal tasks on a non-economic basis. However, it may carry out limited economic activities closely related to its task, provided that they are closely related to its principal task and that they do not jeopardise the achievement thereof.

An ERIC set up under the ERIC Regulation should have as its principal task the establishment and operation of a research infrastructure on a non-economic basis and should devote most of its resources to this principal task. In order to promote innovation and knowledge and technology transfer, the ERIC should however be allowed to carry out some limited economic activities.

#### ***What is "non-economic"?***

In interpreting the notion of "non-economic", the Commission relies on the definition of "economic activities" as developed on the basis of the case law of the Court of Justice in competition matters. An economic activity consists of offering goods and/or services on a given market<sup>10,11</sup>. "The activity in question must be capable of being carried on, at least in principle, with a view to profit"<sup>12</sup>. Consequently, "in principle no economic activity is involved where the State carries out activities that the market could not provide"<sup>13</sup>. It should

<sup>10</sup> Case 118/85 Commission v. Italy, Case C-35/96 Commission v. Italy, Case C-309/99 Wouters

<sup>11</sup> For an ERIC, this would also mean the capability of financially self sustaining / repaying the initial investment

<sup>12</sup> Advocate-General Jacobs, Joint Cases C-180 and 184/92 Pavlov

<sup>13</sup> COM(2004) 83; referring to Cases C-160/91 Poucet, C-218/00 CISAL di Battistello, C-67/96 Albany, C-180/98 Pavlov

therefore be noted that the mere fact that a fee might be charged does not on its own make this an economic activity under the condition that the access and related research support do not correspond to what the market could provide.

### ***What is "limited"?***

In line with the interest that an ERIC engages in cooperation with industry, carries out technology transfer and contributes to innovation, it may carry out economic activities under the conditions stipulated in Article 3(3). The limited character of these activities means that they must remain ancillary, secondary and must not prevail over the executing of the main task of the ERIC, as defined in Article 3. This will be a matter of appreciation in each individual case. Quantifiable elements may be used to analyse the relationship between the non-economic operation of the ERIC and the limited economic activities, such as the respective costs and incomes, use of human resources or the share of access to the facility for economic and non-economic purposes<sup>14</sup>.

If an economic activity is successful enough to be no longer considered to be secondary, the ERIC may consider creating e.g. a spin-off company.

3. An ERIC shall record the costs and revenues of its economic activities separately and shall charge market prices for them, or, if these cannot be ascertained, full costs plus a reasonable margin.

This provision establishes standard protection against distortions of competition based on principles developed in State aid law for preventing so-called cross-subsidisation (flow of public funds earmarked for non-economic activities of a legal entity into the economic operations of that entity).

### ***Article 4 - Requirements relating to infrastructure***

*The infrastructure to be established by an ERIC shall meet the following requirements:*  
 (a) *it is necessary for the carrying out of European research programmes and projects, including for the efficient execution of Community research, technological development and demonstration programmes;*

Requirement (a) is based on Article 171 of the EC Treaty<sup>15</sup>. The Community has the objective, set out in the Treaty, of strengthening the scientific and technological bases of Community industry and boosting its competitiveness at international level (Article 163). To this end the Community implements research, technological development and demonstration programmes through multi-annual framework programmes (Articles 164 and 166). The existence of and access to leading research infrastructures is critical for Europe's ability to sustain a competitive edge in knowledge creation and innovation. This central role of research infrastructures has long been recognised under successive Community's RTD framework programmes and specific actions implemented to support research infrastructures in all fields of science and technology. Therefore, in principle, there are no restrictions as regards the scientific areas addressed by any specific ERIC.

<sup>14</sup> On the basis of a combination of various quantifiable elements available, the Commission will generally assume that a share of economic activities below 25 % of total annual activities is limited.

<sup>15</sup> Article 171 EC Treaty stipulates that "*the Community may set up joint undertakings or any other structure necessary for the efficient execution of Community research, technological development and demonstration programmes*"

*(b) it represents an added value in the strengthening and structuring of the European Research Area (ERA) and a significant improvement in the relevant scientific and technological fields at international level;*

The ERIC legal framework has been developed to help strengthening the development of an efficient European Research Area by better integrating and leveraging national efforts, thereby helping Europe to pool its resources for a new generation of facilities of pan-European relevance which are indispensable for staying at the forefront of research over the next decades. ERICs will also help to develop a European identity and the image of Europe as a place to conduct leading edge research. Therefore, the ERIC status is reserved to state-of-the-art research infrastructures that will create unique opportunities to carry out cutting-edge research, to attract the best researchers from across the world and to train highly qualified students and engineers.

*(c) effective access, in accordance with the rules established in its Statutes, is granted to the European research community, composed of researchers from Member States and from associated countries;*

In line with requirements (a) and (b), requirement (c) implies that a significant part of the access should not just be reserved for its members but should be open to users from all European countries. This openness may of course be extended to all international users. Such access must be made available on the basis of scientific excellence, as established by an independent peer review system<sup>16</sup>. This, however, does not imply that such access has to be provided for free.

There is no fixed minimum percentage of access to be provided to the European research community in order to fulfil the requirement of "effective access". This should be a matter of appreciation in each individual case, depending in particular on the number of countries involved in the ERIC. For example, an ERIC involving only 3 EU Member States would normally be considered to provide "effective access" if at least 20-30 % of its access was open to researchers from other EU Member States and associated countries. If the same ERIC had 20 EU Member States and associated countries as members, this percentage could be lower. Basic principles regarding the access policy of the ERIC will be included in the Statutes (Article 10 (g) (i)). This access policy should strive to attract the best researchers from across the world.

*(d) it contributes to the mobility of knowledge and/or researchers within the ERA and increases the use of intellectual potential throughout Europe; and*

Requirement (d) originates from Article 164 of the EC Treaty. The fulfilment of this criterion will largely depend on the effectiveness of the access.

*(e) it contributes to the dissemination and optimisation of the results of activities in Community research, technological development and demonstration.*

<sup>16</sup> Such peer review system, however, would not be required in the case of a research infrastructure that provides unlimited access over the web.

This implies that the ERIC should develop appropriate measures to ensure the optimal use and exploitation of project results. This should cover, in particular, the management of knowledge and intellectual property, the open access to data produced (if applicable), plans for the use of results (e.g. technology transfer or support to spin-off companies) and dissemination activities (e.g. through educational and/or publishing activities). Basic principles shall be included in the Statutes (Article 10(g)(iii), (iv) and (viii)).

### ***Article 5 - Application for the setting-up of an ERIC***

1. The entities applying for the setting up of an ERIC (hereinafter referred to as "applicants") shall submit an application to the Commission. The application shall be submitted in writing in one of the official languages of the institutions of the Union and shall contain the following:
  - (a) a request to the Commission to set up the ERIC;
  - (b) the proposed Statutes of the ERIC referred to in Article 10;
  - (c) a technical and scientific description of the research infrastructure to be established and operated by the ERIC, addressing in particular the requirements set out in Article 4;
  - (d) a declaration by the host Member State recognising the ERIC as an international body in the sense of Articles 143(g) and 151(1)(b) of Directive 2006/112/EC and as international organisation in the sense of the second indent of Article 23(1) of Directive 92/12/EEC, as of its setting up. The limits and conditions of the exemptions provided for in these provisions shall be laid down in an agreement between the members of the ERIC.

*Details regarding the content of the application are given in section 1 of this Guide, "How to apply"*

The application for the setting-up of an ERIC is the final step in a long process of discussions between the members to agree to establish and operate together a new European Research Infrastructure. By signing the request to the Commission to set up the ERIC, the future members formalise their agreement on the proposed Statutes, which also contain their commitment to ensure its financial sustainability.

Details regarding the declaration of recognition of the host Member State and the agreement on the limits and conditions of the exemptions (Article 5(1)(d)) as well as the consequences of the VAT and excise duty exemptions are provided in Annex II of this Guide (page 25).

2. The Commission shall assess the application in line with the requirements laid down in this Regulation. During the assessment it shall obtain the views of independent experts in particular in the field of the intended activities of the ERIC. The result of such assessment shall be communicated to the applicants who shall, if necessary, be invited to complete or amend the application.

The Commission will assess the application to ensure its compliance with the requirements of the ERIC Regulation. Independent experts will assist the Commission in its assessment of the compliance with Article 4.

The requirements are the following:

- Task and other activities: Principal task to establish and operate a research infrastructure (Article 3(1)); only limited economic activities (Article 3(2), 3(3))

- Requirements relating to the research infrastructure (Article 4):
  - important for European research
  - excellent in its field at international level
  - provides effective access for European researchers
  - contributes to the mobility of knowledge and/or researchers within the ERA
  - contributes to dissemination / optimisation of the RTD results
- Application complete (Article 5), including proposed Statutes containing all the elements listed in Article 10
- Statutory seat: located in Member State or associated country (Article 8(1));
- Name of the ERIC containing "ERIC" (Article 8(2))
- Membership:
  - only states and intergovernmental organisations (Article 9(1))
  - fair terms for joining of new EU Member States (Article 9(2))
  - majority of voting rights held by EU Member States (Article 9(3))
- Bodies of the ERIC: assembly of members; director or board of directors (Article 12)
- Liability regime: insurance in case of limited liability (Article 14(3))

#### ***Article 6 - Decision on the application***

1. The Commission shall, taking into account the results of the assessment referred to in Article 5(2) and in accordance with the procedure referred to in Article 20:
  - (a) adopt a decision setting up the ERIC after it has satisfied itself that the requirements laid down in this Regulation are met; or
  - (b) reject the application if it concludes that the requirements laid down in this Regulation are not met, including in the absence of the declaration referred to in Article 5(1)(d).
2. The decision on the application shall be notified to the applicants. In the case of a rejection, the decision shall be explained in clear and precise terms to the applicants. The decision setting up the ERIC shall also be published in the L series of the Official Journal of the European Union.
3. The essential elements of the Statutes as set out in Article 10 points (b) to (f) and in points (i) to (vi) of point (g) contained in the application shall be annexed to the decision setting up the ERIC.

The Commission for its decision also takes into account the opinion of a management committee composed of representatives of the EU Member States.

The decision setting up the ERIC, together with the essential elements of the Statutes, will be published in the *Official Journal of the European Union* in all official languages of the Community. The proposed research infrastructure will have a legal personality under Community law as from the date the decision setting up the ERIC takes effect.

#### ***Article 7- Status of an ERIC***

1. An ERIC shall have legal personality as from the date on which the decision setting up the ERIC takes effect.
2. An ERIC shall have in each Member State the most extensive legal capacity accorded to legal entities under the law of that Member State. It may, in particular, acquire, own and dispose of movable, immovable and intellectual property, conclude contracts and be a party to legal proceedings.
3. An ERIC is an international organisation within the meaning of point (c) of Article 15 of Directive 2004/18/EC.

Legal personality and full legal capacity established in Article 7(1) and (2) are the most fundamental elements of any legal entity.

Article 7(3) means an ERIC is not obliged to follow procurement procedures established by national law (in the host Member State) implementing Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Article 15 of the Directive states that the Directive "shall not apply to public contracts governed by different procedural rules and awarded: (...) (c) pursuant to the particular procedure of an international organisation". This provision is applicable under condition that the international organisation does have a procurement legal framework of its own, that must comply with international standards and good practices, and Article 7(3) of the ERIC Regulation clearly states that ERICs are international organisations in the sense of Article 15 (c) of the Directive.

Sound rules and practices for procurement are necessary in all entities, especially when it is done from public funding. It is universally acknowledged that maximizing competition, according fair treatment to suppliers and contractors bidding to do public work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses. This is not only a matter of principle, but an operational issue.

Consequently, an ERIC has the freedom to agree its own procurement policy respecting the principles of transparency, non-discrimination and competition. Basic principles of such policy shall be provided in the Statutes (Article 10(1)(g)(vi)).

#### ***Article 8 - Seat and name***

1. An ERIC shall have a statutory seat, which shall be located on the territory of a member which shall be a Member State or an associated country.
2. An ERIC shall have a name containing the abbreviation "ERIC".

An ERIC can have operations and sites in any country in the world, but its statutory seat has to be based in an EU Member State or an associated country.

While Article 8(1) does not further qualify the statutory seat, it should be located in a place (address) where some or all of the activities are carried out. It is not sufficient to have a mailbox in a country in which no actual operations are carried out. It must be kept in mind that, according to Articles 13(5) and 15(1)(b), the applicable law is, in certain circumstances, linked to the country of the statutory seat. It would also unnecessarily complicate the administration of the ERIC if the statutory seat was not located in the country of actual operation.

The qualification as associated country for the purpose of determining a country's eligibility to be the host state of an ERIC should be determined at the moment of the decision setting up the ERIC. The fact that a country may be not associated to a later Framework Programme does not change this qualification for the purposes of the ERIC, as it still will be considered as associated to that past Framework Programme, unless such association agreement is repudiated.

The name has to contain "ERIC" as a separate term allowing to recognise it as a description of the legal form. A combination as e.g. "SHERIC" would consequently not be possible. Please note that "ERIC" is identical in all language versions, without regard to the translations of the full name of "European Research Infrastructure Consortium".

**Article 9 - Requirements for membership**

1. The following entities may become members of an ERIC:
  - (a) Member States;
  - (b) associated countries;
  - (c) third countries other than associated countries;
  - (d) intergovernmental organisations.
2. An ERIC shall have at least three Member States as members. Further Member States may join as members at any time on fair and reasonable terms specified in the Statutes and as observers without voting rights on conditions specified in the Statutes. Further associated countries and third countries other than associated countries as well as intergovernmental organisations may also become members of an ERIC, subject to approval by the assembly of members, referred to in Article 12(a), in accordance with the conditions of and procedure for changes in membership laid down in its Statutes.

Article 9(1) contains a comprehensive list of the entities which are entitled to become members of an ERIC. In order to allow the treatment of ERICs as international organisations in the sense of the VAT and excise duty directives, membership is open to subjects of international public law only.

ERICs are free to define in their Statutes their procedures and conditions for accepting new members. The only qualification made to this freedom in Article 9(2) is that the Statutes have to provide fair and reasonable conditions for further EU Member States to join. This is a matter of bona fide negotiations and may, for example, include a compensation for investments already made. The Statutes also need to contain conditions and procedures for the joining of associated countries and third countries.

3. Member States shall hold jointly the majority of the voting rights in the assembly of members.
4. Any Member State, associated country or third country may be represented by one or more public entities, including regions or private entities with a public service mission, as regards the exercise of specified rights and the discharge of specified obligations as a member of the ERIC.

In order to ensure a sufficient EU dimension, it is stipulated that EU Member States (at least three EU Member States must be members) shall jointly hold the majority of the voting rights in the assembly of members. The assembly is the body having full decision-making powers where all members are represented. This provision does not prevent the Statutes from stipulating various qualified majorities or unanimity to decide specified issues.

In order to take account of the reality where expertise on research matters is often concentrated in legal entities separate from the State and where hence the representation of a member who is a State by e.g. a research organisation is quite common in existing international facilities, Article 9(4) allows such representation of members of an ERIC by one or more public entities (including regions) or private entities with a public service mission. The terms of such representation depend on the specific mandate a member wishes to give to one or several such entities and should be clearly communicated to the other members of the ERIC, especially as regards eventual voting rights.

***What is private entity with a public service mission?***

Where a public sector body or the state has majority ownership of an entity established under private law, this entity can be deemed to have a public service mission.

For an entity established under private law that is not owned by a public sector body, the entity must be explicitly granted such a mission through a decision by a public sector body. Secondary and higher education establishments that deliver diplomas recognised by a public

authority according to criteria established by the state or perform research with public funding and in accordance with objectives agreed by the state would meet this criterion.

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| <ol style="list-style-type: none"> <li>5. Associated countries, third countries and intergovernmental organisations applying for the setting up of or for membership in an ERIC shall recognise that that ERIC shall have legal personality and capacity in accordance with Article 7(1) and (2) and that it shall be subject to rules determined in application of Article 15.</li> <li>6. Associated and third countries applying for the setting up of or for membership in an ERIC shall accord to the ERIC treatment equivalent to that following from Articles 5(1)(d) and 7(3).</li> </ol> |
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Since EU law is not applicable in third countries, provisions have to be made by third countries wanting to be a member of an ERIC in order to ensure that the ERIC will have legal personality and capacity in their legal order, that it will be governed by EU law and that it will be exempted from VAT, excise duties and public procurement rules in their country to the same extent as in the EU Member States.

For associated countries within the EEA (Norway, Iceland, Liechtenstein), the ERIC Regulation already applies by virtue of Protocol 31 of the EEA Agreement. As regards certain other associated countries, their association agreement includes a clause foreseeing their participation in initiatives adopted under Article 171 of the EC Treaty (which is the legal basis of the ERIC Regulation). The Joint Committee established under such association agreement should decide on the applicability of the ERIC Regulation under the jurisdiction of that associated country.

For other associated countries (as for any other third country), an instrument of international law will be needed to fulfil the obligations arising out of Article 9(5) and (6).

### ***Article 10 - Statutes***

The Statutes of an ERIC shall contain at least the following:

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| <ol style="list-style-type: none"> <li>(a) a list of members, observers and, where applicable, of entities representing members and the conditions of and the procedure for changes in membership and representation in compliance with Article 9;</li> <li>(b) the tasks and activities of the ERIC;</li> <li>(c) the statutory seat in compliance with Article 8(1);</li> <li>(d) the name of the ERIC in compliance with Article 8(2);</li> <li>(e) the duration, and the procedure for the winding up in compliance with Article 16;</li> <li>(f) the liability regime, in compliance with Article 14(2);</li> <li>(g) the basic principles covering:             <ol style="list-style-type: none"> <li>(i) the access policy for users;</li> <li>(ii) the scientific evaluation policy;</li> <li>(iii) the dissemination policy;</li> <li>(iv) the intellectual property rights policy;</li> <li>(v) the employment policy, including equal opportunities;</li> <li>(vi) the procurement policy respecting the principles of transparency, non discrimination and competition;</li> <li>(vii) a decommissioning, if relevant;</li> <li>(viii) the data policy;</li> </ol> </li> <li>(h) the rights and obligations of the members, including the obligation to make contributions to a balanced budget and voting rights;</li> <li>(i) the bodies of the ERIC, their roles and responsibilities and the manner in which they are constituted and in which they decide, including upon the amendment of the Statutes, in compliance with Article</li> </ol> |
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- 11 and 12;
- (j) the identification of the working language(s);
  - (k) references to rules implementing the Statutes.

The Statutes shall be publicly available on the website of the ERIC and at its statutory seat.

The Statutes set the main rules for the governance of the ERIC.

Any amendment to key elements of the Statutes (points (b) to (f) and point (g) sub-points (i) to (vi), marked in bold in the text above) has to be passed through the same procedure as the setting-up of the ERIC itself (as described below in Article 11). It is therefore recommended to devote careful attention to making these principles stable.

The basic principles listed in point (g) should clearly be covered by the Statutes, which have to contain the essential provisions on access policy etc. These provisions can be completed (but of course not contradicted) by detailed provisions which may be contained in separate documents. Such documents would be internal to the ERIC and may be modified in a way foreseen by the Statutes without the need for the amendment procedure foreseen under Art. 11.

Point (a) requires listing observers in the Statutes if they are foreseen at the time of setting-up of the ERIC, but does of course not require each ERIC to have observers. The entities representing the members at the time of the setting-up of the ERIC will also be listed in the Statutes (see Article 10 (a)). Modifications of observers or representing entities do not, however, necessarily require an amendment of the Statutes, if the Statutes provide for a different mechanism for notification of changes of representation.

Point (e) requests to specify the duration of the ERIC, and point (h) requires to detail the obligations of members to contribute to a balanced budget to ensure the sustainability of the facility over its lifetime. These provisions, in combination with the conditions for withdrawal of membership (point (a)), should as a minimum ensure financing for the first five years of the lifetime of the ERIC<sup>17</sup>.

The distribution of voting rights (point (h)) is at the discretion of the ERIC members. The Statutes can foresee one vote per member, weighted voting according to shares in the financing or any other mechanism which appears fair to the ERIC members. If a member is represented by more than one entity, clear rules should ensure that there will be only one position per member in case of votes in the assembly of members.

The requirement to make the Statutes publicly available at the statutory seat obliges the ERIC to provide them upon request.

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<sup>17</sup> See e.g.

- the CERN Convention, ARTICLE XII - Withdrawal: "After this Convention has been in force for seven years, a Member State may, subject to the provisions of paragraph 4 of Article III, give notice in writing to the President of Council of withdrawal from the Organization and such withdrawal shall take effect at the end of the financial year following that in which notice is given, or at such later date as the Member State proposes" (<http://dsu.web.cern.ch/dsu/ls/conventionE.htm#7>)
- the ESRF Convention, Article 13: DURATION: "The present Convention is concluded for an initial period ending on 31 December 2007 and shall remain in force after that date. It may be denounced with three years notice, such notice to be given to the Government of the French Republic. Withdrawal can only take effect on 31 December 2007 or at the end of each successive period of three years". (<http://www.esrf.eu/AboutUs/CompanyInfo/KeyDates/History/Convention/convention.pdf>)

**Article 11 - Amendments of the Statutes**

1. Any amendment of the Statutes concerning the matters referred to in points (b) to (f) or in points (i) to (vi) of point (g) of Article 10 shall be submitted to the Commission by the ERIC for approval. Such amendment shall not take effect before the decision granting approval has come into force. The Commission shall apply Articles 5(2) and 6, *mutatis mutandis*.
2. Any amendment of the Statutes other than that referred to in paragraph 1 shall be submitted to the Commission by the ERIC within ten days after its adoption.
3. The Commission may raise an objection to such amendment within sixty days from the submission giving reasons why the amendment does not meet the requirements of this Regulation.
4. The amendment shall not take effect before the period for objecting has expired or has been waived by the Commission or before an objection raised has been lifted.
5. The application for the amendment shall contain the following:
  - (a) the text of the amendment proposed or, where appropriate, as adopted, including the date on which it enters into force;
  - (b) the amended consolidated version of the Statutes.

Certain essential elements giving the main orientations of an ERIC should be made public by being attached to the decision setting up the ERIC, which is published in the *Official Journal of the European Union*. They should also remain in principle stable over the ERIC's existence. For these reasons, changes of the principles of these essential elements are subject to the same procedure as the one of setting up the ERIC itself. These essential elements are the ones mentioned in Article 10, points (b) to (f) and in point (g) sub-points (i) to (vi).

Less essential amendments of the Statutes are subject to a lighter "objection procedure". Within ten days after adoption, the ERIC shall submit the amendment to the Commission, by post or electronically. The Commission then has sixty calendar days to object in case an amendment might violate the ERIC Regulation. Within that period, the Commission can also inform the ERIC that it will not raise objection. No reaction from the Commission equals no objection.

While the amendment can be adopted (voted) by the ERIC, it cannot enter into force (and hence become binding on the ERIC and its members) if the provisions of paragraphs 2, 3 and 4 have not been respected. The sixty-day period starts after receipt by the Commission of the submission of the amendment (even if it is submitted later than within the ten days required). For the respect of the deadline of Article 11(2), however, the sending of the amendment within 10 days is sufficient.

Article 11(5) requires identifying the date of entry into force of the amendment. In view of the procedure explained above, this may be with alternatives. For example, in case of an amendment adopted on 1 March adding 10 days for submission, 60 days for objection period and a reserve for post travel, the simplest provision is: "This amendment enters into force on 1 June or at any later date upon which the Commission lifts any objection raised pursuant to Article 11(3) and (4) of the ERIC Regulation."

**Article 12 - Organisation of the ERIC**

The Statutes shall provide for at least the following bodies having the following competencies (a) an assembly of members as the body having full decision-making powers, including the adoption of the budget; (b) a director or a board of directors, appointed by the assembly of members, as the executive body and legal representative of the

ERIC. The Statutes shall specify the manner in which the members of the board of directors legally represent the ERIC.

Each ERIC is free to choose its own internal organisation – Article 12 only lists the minimum governing bodies required, following the experiences of existing research infrastructures. It is recommended to keep the provision on legal representation of the ERIC by its Director/Board of Directors as simple as possible in order not to confuse third parties as to the validity of the ERIC's representation. Any national rules applicable to legal entities and complementing legal representation by the director or board of directors apply.

### ***Article 13 - Budgetary principles, accounts and audit***

1. All items of revenue and expenditure of an ERIC shall be included in estimates to be drawn up for each financial year and shall be shown in the budget. The revenue and expenditure shown in the budget shall be in balance.
2. The members of an ERIC shall ensure that the appropriations are used in accordance with the principles of sound financial management.
3. The budget shall be established and implemented and the accounts presented in compliance with the principle of transparency.
4. The accounts of an ERIC shall be accompanied by a report on budgetary and financial management of the financial year.
5. An ERIC shall be subject to the requirements of the applicable law as regards preparation, filing, auditing and publication of accounts.

The budget is the responsibility of the members of the ERIC. The Statutes will contain the binding agreements between members to provide their contributions to a balanced budget /Article 10 (h)).

### ***Article 14 - Liability and insurance***

1. An ERIC shall be liable for its debts.
2. The financial liability of the members for the debts of the ERIC shall be limited to their respective contributions provided to the ERIC. The members may specify in the Statutes that they will assume a fixed liability above their respective contributions or unlimited liability.
3. If the financial liability of the members is not unlimited, the ERIC shall take appropriate insurance to cover the risks specific to the construction and operation of the infrastructure.
4. The Community shall not be liable for any debt of the ERIC.

Article 14 (1) provides that an ERIC is liable for its debts. It has no immunity from seizures of its assets in case of forced recovery of debts. It also is not immune from insolvency proceedings, which will in general be governed by the law of the statutory seat (Article 16(4) is just complementary to applicable insolvency law).

Article 14 (2) deals with the liability of the members for the ERIC's debts. The default regime is liability limited to each member's contribution provided to the ERIC. Contributions may be financial or "in kind". "Provided" here means "paid or promised in a legally binding way". For example, indicative projections and planning without any enforceable commitment do not qualify for such liability.

The Statutes can also foresee unlimited liability of the members to (any debtor could claim all debt from any single member) or fixed liability above the contributions provided. The

maximum liability can be set by way of an absolute amount for each member or by way of a share of the debt; any debtor could claim debt from any member subject to such limitations.

Article 14 (3) ensures that if the construction or operation of the infrastructure causes any damages, injured parties are reimbursed either by the ERIC, through unlimited liability of the members or by an insurance.

### ***Article 15 - Applicable law and jurisdiction***

1. The setting-up and internal functioning of an ERIC shall be governed:
  - (a) by Community law, in particular this Regulation, and the decisions referred to in Articles 6(1)(a) and 11(1);
  - (b) by the law of the State where the ERIC has its statutory seat in the case of matters not, or only partly, regulated by acts referred to in point (a);
  - (c) by the Statutes and their implementing rules.
2. The Court of Justice of the European Communities shall have jurisdiction over litigation among the members in relation to the ERIC, between the members and the ERIC and over any litigation to which the Community is a party.
3. Community legislation on jurisdiction shall apply to disputes between an ERIC and third parties. In cases not covered by Community legislation, the law of the State where the ERIC has its statutory seat shall determine the competent jurisdiction for the resolution of such disputes.

Article 15 focuses on the setting-up and internal functioning of an ERIC, which is governed by the ERIC Regulation, the law of the statutory seat and the Statutes. The law of the statutory seat will be relevant e.g. for the requirements as regards preparation, filing, auditing and publication of accounts (Article 13(5)).

As regards social security provisions, EC regulations on coordination of social security schemes<sup>18</sup> determine the legislation applicable for social security.

For individual employment contracts, an ERIC is governed by the same provisions as any other employer. Consequently, the employment contract can specify which national law is applicable, but such choice of law is subject to the normal rules, notably those deriving from the Rome I Regulation<sup>19, 20</sup>.

<sup>18</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

<sup>19</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, p. 6). The Regulation will as of 17 December 2009 and with the exception of Denmark and the UK, replace the Convention on the law applicable to contractual obligations (Rome Convention) of which all EU Member States are signatories.

<sup>20</sup> Art 6 of the Rome Convention states: "a contract of employment shall (normally) be governed by the law of the country in which the employee habitually carries out his work, even if he/she is employed in another country". It should therefore be stressed that the law applicable to an ERIC itself or the place where its statutory seat is located are not directly relevant. "*To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his/her work in performance of the contract*". Thus the relevant connection is that of the contract and not of the employer. The principle is

**Article 16 - Winding-up, insolvency**

1. The Statutes shall determine the procedure to be applied in the case of winding-up of the ERIC following a decision of the assembly of members. Winding-up may include the transfer of activities to another legal entity.
2. Without undue delay after the adoption of the decision by the assembly of members to wind up, and in any event within ten days after such adoption, the ERIC shall notify the Commission thereof. The Commission shall publish an appropriate notice in the C series of the Official Journal of the European Union.
3. Without undue delay after the closure of the winding-up procedure, and in any event within ten days after such closure, the ERIC shall notify the Commission thereof. The Commission shall publish an appropriate notice in the C series of the Official Journal of the European Union. The ERIC shall cease to exist on the day of publication of the notice.
4. At any time, in the event that the ERIC is unable to pay its debts, it shall immediately notify the Commission thereof. The Commission shall publish an appropriate notice in the C series of the Official Journal of the European Union.

**Article 17 - Reporting and control**

1. An ERIC shall produce an annual activity report, containing in particular the scientific, operational and financial aspects of its activities referred to in Article 3. It shall be approved by the assembly of members and transmitted to the Commission and relevant public authorities within six months from the end of the corresponding financial year. This report shall be made publicly available.

The annual activity report should describe the activities of the ERIC and contain the financial information compiled according to Article 13(4).

2. An ERIC and the Member States concerned shall inform the Commission of any circumstances which threaten to seriously jeopardise the achievement of the task of the ERIC or to hinder the ERIC from fulfilling the requirements laid down in this Regulation.
3. Where the Commission obtains indications that an ERIC is acting in serious breach of this Regulation, the decisions adopted on the basis thereof or other applicable law, it shall request explanations from the ERIC and/or its members.
4. If the Commission concludes, after having given the ERIC and/or its members a reasonable time to provide their observations, that the ERIC is acting in serious breach of this Regulation, the decisions adopted on the basis thereof or other applicable law, it may propose remedial action to the ERIC and its members.
5. If no remedial action is taken, the Commission may repeal the decision establishing the ERIC in accordance with the procedure referred to in Article 20. Such decision shall be notified to the ERIC and be published in the L series of the Official Journal of the European Union. This shall trigger the winding-up of the ERIC.

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that the employer and the employee have freedom of choice of the applicable law, but as a consequence of this choice the employee cannot be deprived of the protection afforded to him/her by provisions under the law that, in the absence of choice, would have been applicable, i.e. the law of the country to which the contract is more closely connected (i.e. the law of the country in which the employee habitually carries out his/her work).

### ***Article 18 - Appropriate provisions***

Member States shall take such measures as are appropriate to ensure the effective application of this Regulation.

### ***Article 19 - Report and Review***

Not later than July 2014, the Commission shall forward to the European Parliament and the Council a report on its application and proposals for amendments, where appropriate.

### ***Article 20 - Committee procedure***

1. The Commission shall be assisted by a management committee.
2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply. The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at two months.

The power to set up entities under Article 171 of the EC Treaty belongs to the legislator, i.e. the Council, who in the ERIC Regulation delegates the power to set up individual ERICs to the Commission. This delegation is bound by the Comitology rules to ensure that the Council remains involved in the decisions it delegates via a committee composed of representatives of all EU Member States. The committee therefore gives its opinion after the assessment of each application by the Commission. The Comitology rules are laid down in the Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>21</sup>.

### ***Article 21 - Entry into force***

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

The ERIC Regulation was published in the Official Journal of the European Union on 8 August 2009 and entered into force on 28 August 2009.

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<sup>21</sup> (1999/468/EC) : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:184:0023:0026:EN:PDF>  
See [http://europa.eu/scadplus/glossary/comitology\\_en.htm](http://europa.eu/scadplus/glossary/comitology_en.htm) for further information on Comitology in general

## **Glossary**

- EEA:** Economic European Area  
*The EEA was established on 1 January 1994 following an agreement between EU Member States of the European Free Trade Association (EFTA), the EC and all Member States of the European Union. It allows these EFTA countries to participate in the European single market without joining the EU.*
- ERA:** European Research Area  
*In 2000, the EU decided to create the European Research Area (ERA). This means creating a unified area all across Europe, in which researchers are able to move and interact seamlessly, benefit from world-class infrastructures and work with excellent networks of research institutions; knowledge can be shared, valued, used effectively for social, business and policy purposes; European, national and regional research programmes can be optimised and coordinated in order to support the best research throughout Europe. Strong links should also be developed with partners around the world so that Europe benefits from the worldwide progress of knowledge, contributes to global development and takes a leading role in international initiatives.*
- ESFRI:** European Strategy Forum on Research Infrastructures  
*Launched in April 2002, ESFRI brings together representatives of the 27 EU Member States, appointed by Ministers in charge of Research, and a representative of the Commission. The countries associated with the Framework Programme for Research were invited to join in 2004. The role of ESFRI is to support a coherent approach to policy-making on research infrastructures in Europe, and to act as an incubator for international negotiations about concrete initiatives.*
- Excise duties:** Indirect taxes levied on certain products when released for consumption, in particular spirits, beer, wine, mineral oils and manufactured tobacco, irrespective of whether they are produced within the country, brought in from another EU Member State or imported from a third country. Depending on the product, the tax base is determined by quantity and/or value.
- OJ:** *Official Journal of the European Union*
- VAT:** Value Added Tax

## ***Annex I: Model request for the setting up of an ERIC***

Formal request for the setting-up of the [ full name of the proposed ERIC ] as an European Research Infrastructure Consortium (ERIC)

All members of the future ERIC having agreed to the documents listed below,

[ name of Country 1 ]

[ name of Country 2 ]

etc.

hereby request the European Commission to set-up the [ full name of the proposed ERIC ] as an ERIC with the Statutes attached hereto.

For the Government of [ name of host State ]

(Signature)<sup>22</sup>

For the Government of [ name of Country 2 ]

Signature

For the Government of [ name of Country 3 ]

etc

### Annex:

- Statutes
- Technical and Scientific Description
- Declaration by the host Member State recognising the ERIC as an international body/organisation in the sense of the VAT and excise duty directives as of its setting up
- Agreement between the members of the ERIC on the limits and conditions of the tax exemptions mentioned above [if not included in the Statutes]
- Recognition of legal personality and privileges of the ERIC by members which are associated countries or third countries [if applicable]

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<sup>22</sup> Signature options: (1) by a representative of the Country of the statutory seat of the ERIC, attaching an agreement of all ERIC members to submit the application (e.g. in an MoU); (2) by representatives of all ERIC members.



## ***Annex II: VAT and excise duty exemptions***

### **A. General requirements for VAT and excise duties exemptions to apply:**

Before a research infrastructure can be set up as an ERIC, the Member State which will be hosting the ERIC, is required under Article 5(1)(d) of the ERIC Regulation to recognise it as an international body/organisation. This will help to ensure that all three requirements for the exemption from VAT and excise duties are fulfilled:

- Qualification as an international body/organisation
- Recognition by the public authorities of the host Member State and
- The conditions and limitations of the exemption have to be stipulated in an agreement between the members of the ERIC or in a host agreement.

The qualification of an ERIC as an international body within the meaning of the VAT Directive was discussed by the VAT Committee on 22 April 2009. The committee, composed of representatives of all EU Member States, unanimously agreed guidelines confirming that, subject to certain conditions, an ERIC will qualify as international body for the purpose of the VAT Directive. The same would be the with regard to the Directive on Excise Duties.

The recognition by the host Member State, i.e. the State in which the statutory seat is located, of a research infrastructure as an international body/organisation is required if the infrastructure is to be set up as an ERIC. Such recognition has to be provided by the competent national public authority. Depending on the Member State, this may be the Ministry for Foreign Affairs, the Ministry of Finance or another Ministry.

The limits and conditions of the exemption may be part of the Statutes or it may instead be contained either in a separate agreement among the members or in an agreement with the host Member State. The main difference is that Statutes are publicly accessible while separate agreements do not necessarily have to be made public. The agreement may specify what is required to benefit from exemption (e.g. recording and recovery of the tax paid) and also define its exact scope, typically stipulating that only purchases made for official use benefit from exemption and possibly excluding certain purchases (minor purchases or purchases of certain items) or certain taxes from the exemption.

### **B. Effects of the VAT exemption:**

#### 1) For an ERIC which has its statutory seat in a Member State:

a) The exemption provided for under the VAT Directive will be applicable in all EU Member States once the ERIC is set up. Subject to the limits and conditions laid down in the agreement, the exemption applies to goods or services purchased by an ERIC, regardless of whether these are local purchases or intra-Community purchases, and to goods imported from third countries.

The exemption has no effect as regards goods or services procured from and taxable in third countries. These will only be exempted from taxes in the third country if that country has granted exemptions to a specific ERIC bilaterally (e.g. because it had to do so in order to become a member of the ERIC).

The method of exemption – direct exemption from VAT or exemption by means of a refund of the tax – may have been set out in the agreement on the limits and conditions. If not, the method used will depend on the Member State in which purchase is made.

b) In practical terms, specific requirements will have to be met, as described below. If those requirements are not met, the ERIC would not be entitled to exemption.

If an ERIC procures in its host Member State, directly on its budget, goods or services, the supply of which is taxable in the host Member State, the ERIC will need to comply with the procedure put in place by that Member State in order to have the purchase exempted. Some EU Member States require use of the 15(10) form for domestic purposes. Other EU Member States make use of national forms.

Are the goods or services procured from and taxable in another Member State, the ERIC will need to produce a 15(10) form duly filled and signed by the host Member State in order to confirm its status as an international body/organisation recognised as such and to show that the purchase complies with the conditions and limitations of the agreement among the members. If direct exemption applies, that certificate must be given to the supplier to allow him to exempt his supply of goods or services. Where exemption is given by means of a refund of the tax, the certificate should be attached to the request for reimbursement.

When goods procured from third countries are imported into the EU, the ERIC will need to comply with the procedures put in place by the Member State of importation in order to have the import exempted. Apart from demanding the inclusion of appropriate indications in the customs declaration, some EU Member States require use of the 15(10) form. Other EU Member States make use of national forms.

## 2) For an ERIC which has its statutory seat in an associated country:

The effects of the exemption provided under the VAT Directive derive from Community Law and the exemption only applies if the host State of the ERIC is a Member State. Goods or services supplied to an ERIC whose statutory seat is located in an associated country may not benefit from that exemption.

Exemption of goods or services procured from an EU Member State may still be possible but only based on the normal rules such as export (for goods/products) or the place of supply rules (for services).

As regards goods or services procured in third countries, an exemption from taxes will depend on the treatment granted bilaterally by that third country to a specific ERIC. To become members, associated and third countries must recognise the ERIC as an international body/organisation and ensure that it is given the same treatment as that afforded by EU Member States. The associated country hosting an ERIC, and any other third country which is a member, will therefore have to provide for tax exemption.

The method of exemption, and the procedure to follow, will need to be agreed between the members of the ERIC.