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| From:            | Secretary-General of the European Commission,<br>signed by Mr Jordi AYET PUIGARNAU, Director |
| date of receipt: | 6 July 2018                                                                                  |
| To:              | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of<br>the European Union       |

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Delegations will find attached document COM(2018) 523 final.

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

**Second Report 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)**

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

## Second Report 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 Consortium<sup>1</sup> (hereinafter referred to as “the ERIC Regulation”) was adopted in 2009 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 was amended in December 2013<sup>2</sup> to allow better reflection of the contributions of associated countries in the ERIC by putting those countries at an 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.

The first report on the application of the ERIC Regulation was adopted by the Commission on 14 July 2014<sup>3</sup> and in accordance with Article 19 of the ERIC Regulation submitted to Council and the European Parliament. It was also submitted to the Committee of Regions and the European Economic and Social Committee.

In its conclusions of 5 December 2014, Council "*WELCOMES the progress reported by the Commission in its first Report on the implementation of the ERIC Regulation, and INVITES the Commission to present the next ERIC implementation Report by 2017.*

*INVITES the Commission and Member States to take appropriate measures to facilitate the use of the ERIC instrument and to stimulate investments in ERICs and other ESFRI Roadmap Infrastructures, for example as concerns in-kind contributions."*

The second report on the application of the ERIC Regulation has been drawn up by the Commission pursuant to this invitation from Council.

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

<sup>2</sup> OJ L 326, 6.12.2013, p.1.

<sup>3</sup> COM(2014) 460 final

## **2. BACKGROUND**

The ERIC Regulation addresses 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 facilitates 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 ERIC Regulation would not have existed.

The ERIC Regulation also responds 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 contributes 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 of which they could become member or with which cooperation and possible partnerships could be agreed.

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

## **3. 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.

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 governance 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. 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 provide for different liability regimes going above that limit. 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, on excise duties and may thus benefit from exemption of VAT and Excise Duties. Being also considered an international organisation within the meaning of the Directive on public procurement, an ERIC may adopt its own procurement rules.

An ERIC is set up by an Implementing 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 wishing 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 management committee provided for under Article 20 of the ERIC Regulation (ERIC Committee) which is composed of representatives of the Member States and associated countries.

#### **4. IMPLEMENTATION OF THE ERIC REGULATION**

At the time of writing of the first report on the application of the the ERIC Regulation, seven ERICs were established. These are SHARE-ERIC (Survey of Health, Aging and Retirement in Europe)<sup>4</sup> hosted first by the Netherlands and then by Germany, CLARIN-ERIC (Common Language Resources and Technology Infrastructure)<sup>5</sup> and EATRIS-ERIC ((European Advanced Translational Research Infrastructure in Medicine)<sup>6</sup> both hosted by the Netherlands, ESS-ERIC (European Social Survey)<sup>7</sup> hosted by the United Kingdom, BBMRI-ERIC (Biobanking and Biomolecular Resources Research Infrastructure)<sup>8</sup> hosted by Austria, ECRIN-ERIC (European Clinical Research Infrastructure Network)<sup>9</sup> and Euro-Argo ERIC<sup>10</sup> both hosted by France.

Since then, twelve additional ERICs have been established. These are CERIC-ERIC<sup>11</sup> (Central European Research Infrastructure Consortium) hosted by Italy,

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<sup>4</sup> OJ L 71, 18.3.2011, p. 20.

<sup>5</sup> OJ L 64, 3.3.2012, p. 13.

<sup>6</sup> OJ L 298, 8.11.2013, p. 38.

<sup>7</sup> OJ L 320, 30.11.2013, p. 44.

<sup>8</sup> OJ L 320, 30.11.2013, p. 63.

<sup>9</sup> OJ L 324, 5.12.2013, p. 8.

<sup>10</sup> OJ L 136, 9.5.2014, p.35.

<sup>11</sup> OJ L 184, 25.6.2014, p. 49.

DARIAH-ERIC<sup>12</sup> (Digital Research Infrastructure for the Arts and Humanities) hosted by France, JIV-ERIC<sup>13</sup> (Joint Institute for Very Long Baseline Interferometry), hosted by the Netherlands, the European Spallation Source ERIC<sup>14</sup>, hosted by Sweden, ICOS-ERIC<sup>15</sup> (Integrated Carbon Observation System) hosted by Finland, EMSO-ERIC<sup>16</sup> (European Multidisciplinary Seafloor and Water Column Observatory), hosted by Italy, LifeWatch ERIC<sup>17</sup> (e-Science and Technology European Infrastructure for Biodiversity and Ecosystem Research) hosted by Spain, CESSDA ERIC<sup>18</sup> (Consortium of European Social Science Data Archives) and ECCSEL ERIC<sup>19</sup> (European Carbon Dioxide Capture and Storage Laboratory) both hosted by Norway, INSTRUCT-ERIC (Integrated Structural Biology) hosted by the United Kingdom<sup>20</sup>, EMBRC-ERIC<sup>21</sup> (European Marine Biological Resource Centre) hosted by France and EU-OPENSOURCE ERIC<sup>22</sup> (European Infrastructure of Open Screening Platforms for Chemical Biology) hosted by Germany.

Save for CERIC-ERIC and JIV-ERIC, two European Research Infrastructures that never applied to be included in the European Strategy Forum on Research Infrastructures (ESFRI) Roadmap, all other ERICs are included in the ESFRI Roadmap. It should be noted that two ERICs (SHARE-ERIC and ESS-ERIC) have been established for the design, development and implementation of European surveys. Sixteen other ERICs have been established for the development and implementation of distributed research infrastructures in the area of biological and medical sciences, physics, energy sciences, environmental sciences and social sciences and humanities. The European Spallation Source ERIC is the first ERIC that has been established in the physical sciences area and that is responsible for the construction and subsequent operation of the world's most powerful neutron source. ECCSEL ERIC is the first ERIC that has been established in the energy domain.

Even though the ERIC Regulation is directly applicable in Member States and requires no transposition, it has been necessary for Member States to adopt appropriate administrative measures and procedures for hosting or becoming a member of an ERIC and for providing the VAT and Excise Duties exemption in accordance with the ERIC Regulation. Also the ERIC as a new type of legal entity has to be assimilated in the national regulatory and administrative systems and many practical questions have to be addressed both by the Commission services as well as the Member States before ERICs can become fully operational. These questions relate to for example to which national registers (for instance the chambers of commerce or a register for associations) the ERICs should be assimilated which in turn has an effect on the status of ERIC staff. In addition, if there is no (national) registration is foreseen, practical operational questions arise for example as how bank accounts and notarial acts could be implemented. Another example within the

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<sup>12</sup> OJ L 239, 12.8.2014, p. 64.

<sup>13</sup> OJ L 363, 18.12.2014, p.156.

<sup>14</sup> OJ L 225, 28.8.2015, p. 16.

<sup>15</sup> OJ L 303, 20.11.2015, p. 19.

<sup>16</sup> OJ L 268, 1.10.2016, p. 113.

<sup>17</sup> OJ L 76, 22.3.2017, p. 35

<sup>18</sup> OJ L 149, 13.6.2017, p. 85

<sup>19</sup> OJ L 149, 13.6.2017, p. 91

<sup>20</sup> OJ L 173, 6.7.2017, p. 47

<sup>21</sup> OJ L 51, 23.2.2018, p. 17

<sup>22</sup> OJ L 82, 26.3.2018, p. 8

Commission administrative systems is that there is no special category for the ERIC as a legal entity and this raises questions as concerns their public or private character and their financial capacity as these ERICs are all recently established.

As regards associated countries and other third countries to which the ERIC Regulation is not applicable, these countries need to submit a 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. Significant progress was achieved for the EEA countries when the ERIC Regulation was incorporated in the EEA by a Joint Committee Decision in March 2015<sup>23</sup>. In particular this allowed for two ERICs to be hosted by Norway<sup>24</sup>.

The administrative and procedural measures taken by the 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 contributed significantly to the facilitation of the implementation of the ERIC Regulation as can be illustrated by the substantial increase of established ERICs in the last three years.

Moreover, the six meetings of the informal ERIC network initiated by the Commission in which ERICs, ministry representatives and Commission representatives discuss best practices and common challenges did also facilitate the work of the ERIC operators, ministries and Commission services. The ERIC Network is now transformed into the ERIC Forum with a more institutional set-up led by the ERICs which is another step in empowering them to identify and develop collective responses to common challenges and to foster their visibility, impact and sustainability.

Notwithstanding these positive developments, a number of open standing issues that were reported in the first Implementation Report are still hampering the deployment of the full potential of the ERIC Regulation. These issues will be addressed in the following paragraphs.

## **5. CHALLENGES FOR THE IMPLEMENTATION OF THE ERIC REGULATION**

The ERIC Regulation 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 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 European Research Infrastructures and raises questions about their long term sustainability. This issue is

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<sup>23</sup> Decision of the EEA Joint Committee No 72/2015 of 20 March 2015 amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms (OJ L 129, 19.5.2016, p. 85).

<sup>24</sup> These are CESSDA – Consortium of European Social Science Data Archives and ECCSEL – European Carbon Dioxide Capture and Storage Laboratory Infrastructure

not specific to the ERIC but relates to all European Research Infrastructures<sup>25</sup>. Better synchronisation, more transparency and alignment between Member States, associated countries and other third countries involved in the preparation for the implementation of a European Research Infrastructure would help greatly to speed up the implementation process and could also improve their sustainability when entering into the operational phase when these Research Infrastructures start offering their services.

The involvement of ministry and funding agencies representatives from the very beginning in the preparation for the establishment of ERICs 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 can be made. While the ERIC Regulation does not have time limits in the application process, such delays could negatively impact on the sustainability as budget procedures in the different future members could add even more complexity in setting up the ERIC at a point of time that potential members can support.

In addition, the cross-cutting character of many European Research Infrastructures leads in several instances to a more complex decision making process within the future members as several ministries and funding agencies have to be involved for example in the areas of health, research and innovation, marine, environment and energy matters.

The VAT and Excise Duties Directives and Procurement Directive provisions that are referred to in the ERIC Regulation requires *de facto* that within Member States, associated countries and other third countries involved, several ministries including the ones for finance and foreign affairs have to be included in the preparation and approval of the ERIC application. It appears from the experience gained with the establishment of the nineteen ERICs that Member States and associated countries are becoming more aware of this complexity and have adopted internal decision making procedures to organise and speed up the internal approval process.

Finally, in the reporting period the United Kingdom notified on 29 March 2017 its intention to leave the Union, pursuant to Article 50 of the Treaty on European Union. Which implies that the Treaties will cease to apply to the United Kingdom from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council, in agreement with the United Kingdom, decides to extend that period.

As a consequence, and without prejudice to any provisions of the withdrawal agreement, Commission Implementing Decisions setting up ERICs only apply until the United Kingdom ceases to be a Member State. Since the notification by the United Kingdom, corresponding wording has been introduced in the pre-ambles of

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<sup>25</sup> See for example the 2017 Commission Staff Working Document "Sustainable European Research Infrastructures – A call for action", [https://ec.europa.eu/research/infrastructures/pdf/ri\\_policy\\_swd-infrastructures\\_2017.pdf](https://ec.europa.eu/research/infrastructures/pdf/ri_policy_swd-infrastructures_2017.pdf)

Commission Implementing Decisions setting up ERICs in which the United Kingdom is a member or a host<sup>26</sup>.

## 6. ROLE OF THE COMMISSION SERVICES

The Commission services continue to facilitate 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 opinions on formal ERIC applications in compliance with the ERIC Regulation, these meetings serve to provide and exchange of information on ongoing ERIC applications as well as on the internal measures Member States and associated countries have put in place with respect to the decision making for ERIC membership. In addition, Member States and associated countries are informed about timelines for the setting up of individual ERICs, the scale of funding to be expected, services and other activities to be developed and the opportunities for participation. Finally, the ERIC Committee started in 2017 to receive presentations from established ERICs on their achievements in science and technology development and the impact they had for the scientific user communities and for policy makers. They also present the way they have overcome the challenges to the operation of the ERIC under the national administrative systems in which they operate.

The revised “ERIC Practical Guidelines” have been published in 2015 on the basis of the experiences and lessons learned since 2009 when the ERIC Regulation was adopted. These guidelines will be updated in 2018 in order to reflect recent developments.

The Commission services continued to provide clarifications to a wide range of questions from Member States, existing and future ERIC operators and other stakeholders concerning the provisions of the ERIC Regulation such as the legal character of the ERIC, liability of the members, exemption of VAT and excise duties, creation of spin-offs, applicable law in particular for distributed research infrastructures with nodes and personnel in various countries, the liquidation of an ERIC and the role of the national court in that process.

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 (only for associate countries) or to become member of an ERIC. Until now, two countries -Israel and Serbia- have provided such a declaration of recognition necessary to become a member of an ERIC.

The Commission services continue to play an active role during the preparation of ERIC applications by participating in some of the 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. These points can for example concern the governance structure of the ERIC, the policies with respect to intellectual property or

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<sup>26</sup> See for example OJ L 173, 6.7.2017, p. 47 second and third recital

human resources and other subjects that come up during the finalisation of the provisions of the Statutes for the ERIC.

After the establishment of an ERIC, the Commission services have a more 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. The Commission services may only act if informed or requested by the members of an ERIC of issues that could seriously jeopardise the achievement of the task of the ERIC or on the basis of the annual reporting by the ERIC to the Commission that is provided for in the ERIC Regulation.

## **7. INITIAL CONCLUSIONS**

The ERIC Regulation has proven that it indeed filled the gap between traditional treaty based international organisations and national legal entities for establishing European Research Infrastructures.

Due to many commonalities in the provisions of the Statutes of the ERICs concerning for example accession, decision making and the handling of questions such as liability, the ERIC Regulation has facilitated greatly the opportunities for Member States, associated countries and third countries to consider cooperation or joining these European Research Infrastructures.

The procedure for application for the ERIC status and ease of use has improved but could be further optimised as Member States, the scientific community and the Commission services continue to go through a learning process for understanding better the practical implications of using this relatively new legal instrument.

However, a number of recurrent issues and policy questions should be addressed if the ERIC legal instrument is truly to be a successful instrument in support of European Research and these are described in the next chapter.

## **8. RECURRENT ISSUES AND NEXT STEPS**

As a result of the experience gained in the application process for establishing an ERIC and the increasing number of ERICs established, several recurrent issues will have to be addressed by Member States and Commission services. They relate to the practices in the Commission and Member States for example on how to register an ERIC in the national legal administrative systems, or in other registers which would enable an ERIC to be recognised by the Commission services for being able to be properly recognised when participating as beneficiary or coordinator of grants and in Member States to open bank accounts and to apply for reimbursement for VAT and excise duties. Similarly, as an ERIC is a public-public partnership, the status of personnel that it employs needs to be clarified in the national administrative systems as this will impact on salary scales, income tax issues and personnel costs for the ERIC.

Another recurrent question concerns possible VAT exemption for in-kind contributions to the ERIC 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 the VAT exemption for ERICs has been discussed at various occasions by the Value Added Tax Committee which resulted in Guidelines that were adopted at its 101<sup>st</sup> meeting on 20 October 2014<sup>27</sup>. The Guidelines provide that goods or services acquired by representing entities<sup>28</sup> shall not benefit from VAT exemption not even if the goods or services are acquired with a view to be delivered to the ERIC as an in-kind contribution. At the same time, the Competitiveness Council in its conclusions of the 5 December 2014 meeting "invited the Commission and Member States to take appropriate measures to facilitate the use of the ERIC instrument and to stimulate investments in ERICs and other ESFRI Roadmap Infrastructures, for example as concerns in-kind contributions".

The question of the VAT exemption granted to members of an ERIC is again on the agenda of the VAT Committee<sup>29</sup> for its meeting in April 2018 for further clarification and guidance.

The question of economic-versus non-economic activities remains also to be further clarified as there are increasing demands for 'innovative' and 'socio-economic' impacts of the activities of the research infrastructures justifying the investments to be made by the members.

The socio-economic impact should also be addressed in the context of how ERICs can contribute to the implementation of smart specialisation strategies and contribute to the socio-economic development of regions and thereby also be eligible for possible support from European Regional Development Funds (ERDF).

ERICs play an important role in the defragmentation of European research by creating in a harmonised and structural way European Research Infrastructures which develop and offer services throughout the Union. This increases the transparency concerning the collection of data, access to data and instruments and maintenance of data and services for users. This is not only meant to better support scientific communities but it can also lead to evidence-based policy making in areas such as health, energy, environment and social and cultural innovation policy.

ERIC statutory seats are now located in 10 countries and in the near future it can be expected that more Member States and associated countries will host an ERIC. Due consideration should be given by Member States and associated countries when preparing for the implementation of new ERICs to make an effort for achieving in the longer term a more balanced representation as concerns the geographical location of the Statutory Seats throughout the European Union.

Research Infrastructures can play an important role in international cooperation, e.g. with the African Union, Latin America and the Caribbean countries, Australia, Russia, US, Canada and with the United Nations driven collaborations by providing data, services and access. The Commission is promoting actively ERICs and other European Research Infrastructures in bilateral cooperation mechanisms such as the EU-Community of Latin American and Caribbean States (CELAC).

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<sup>27</sup> Working Paper No 828 Final

<sup>28</sup> A "representing entity" may represent a Member of an ERIC as regards the exercise of specific rights and the discharge of specified obligations in accordance with Article 9(4) ERIC Regulation

<sup>29</sup> Working Paper No 946

The ERIC as a model for a new legal instrument that could help in particular the creation of international distributed research infrastructures was also discussed in the context of the OECD (Organisation of Economic Cooperation and Development) GSF (Global Science Forum). However, the GSF decided not to pursue the proposal of the Commission to explore the use the ERIC as a possible model because it was considered to be too complicated.

As international research infrastructure consortia could be another important element supporting the United Nations Sustainable Development Goals, the Commission intends, where appropriate, in the context of international fora invite members of these fora to further explore the possibilities of creating a dedicated legal instrument for establishing such research consortia which could, like the ERIC did in the European Union, fill the gap between the treaty based organisations and national organisations.