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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: **COUNCIL REGULATION on the Community legal framework for a
European Research Infrastructure Consortium (ERIC)**

COUNCIL REGULATION (EC) No .../2009

of

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 171 and the first paragraph of Article 172, thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament¹,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

¹ Opinion of 19.2.2009 (not yet published in the Official Journal).

² Opinion of 14.1.2009 (not yet published in the Official Journal).

³ OJ C 76, 31.3.2009, p. 2.

Whereas:

- (1) Pursuant to Article 171 of the Treaty the Community may set up joint undertakings or any other structure necessary for the efficient execution of Community research, technological development and demonstration programmes.
- (2) The support and development of research infrastructures in Europe has been an ongoing objective of the Community, as last reflected in Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013)¹ and in particular in Council Decision No 2006/974/EC of 19 December 2006 on the specific programme "Capacities"².
- (3) While traditional support for the use and development of European research infrastructures has essentially taken the form of grants in favour of established research infrastructures in the Member States, the need for additional efforts has become apparent in recent years in order to stimulate the development of new structures by creating an appropriate legal framework which should facilitate their establishment and operation at the level of the Community.
- (4) This need has been expressed on numerous occasions both at political level by the Member States and the Community institutions, and by the various actors within the European research community such as undertakings, research centres and universities and, in particular, the European Strategy Forum on Research Infrastructures (ESFRI).

¹ OJ L 412, 30.12.2006, p. 1.

² OJ L 54, 22.2. 2007, p. 101.

- (5) While the central role of world-class scientific research infrastructures for the attainment of the Community's RTD objectives set out in Article 163 of the Treaty has thus long been recognised under Community RTD Framework Programmes, the rules governing establishment, financing and operation of these structures are still fragmented and regionalised. Considering that European research infrastructures are in competition with those of the Community's global partners which are and will be strongly investing in modern large-scale research infrastructures, and that these infrastructures are becoming increasingly complex and expensive, often placing them beyond the reach of a single Member State or even continent, it is now necessary to exploit and develop the full potential of Article 171 of the Treaty by establishing a framework containing the procedures and conditions for the setting-up and operation of European Research Infrastructures at Community level which are necessary for the efficient execution of the Community's RTD programmes. This new legal framework would complement other legal forms existing under national, international or Community law.
- (6) In contrast to Joint Technology Initiatives (JTI) constituted as Joint Undertakings of which the Community is a member and to which it makes financial contributions, a European Research Infrastructure Consortium (hereinafter referred to as "ERIC") should not be conceived as a Community body within the meaning of Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities¹ (the Financial Regulation), but as a legal entity of which the Community is not necessarily a member and to which it does not make financial contributions within the meaning of point (f) of Article 108(2), of the Financial Regulation.

¹ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 (OJ L 248, 16.9.2002, p. 1.).

- (7) Given the close cooperation between Member States and the Community in programming and implementing their respective research activities in a complementary manner, as set out in Articles 164 and 165 of the Treaty, it should be for interested Member States, on their own or in conjunction with other qualified entities, to define their needs for the establishment of research infrastructures in this legal format, based on their research and technological development activities and on the requirements of the Community. For the same reasons, membership of an ERIC should be open to interested Member States with the possible participation of qualified associated countries in the Community framework programme for research, technological development and demonstration (hereinafter referred to as "associated states") and third countries and specialised intergovernmental organisations. In addition to full membership, Member States should be able to become observers of an ERIC on the conditions specified in its Statutes.
- (8) An ERIC set up under this 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 be allowed to carry out some limited economic activities if they are closely related to its principal task and they do not jeopardise its achievement. The establishment of research infrastructures as ERICs does not exclude that research infrastructures of pan-European interest that have another legal form can equally be recognised as contributing to the progress of European research, including to the implementation of the roadmap developed by ESFRI. The Commission should ensure that ESFRI members and other interested parties are informed about these alternative legal forms.

- (9) Research infrastructures should help to safeguard the scientific excellence of Community research and the competitiveness of the Community's economy, as based on medium-term to long-term forecasts, through the efficient support of European research activities. To achieve this they should be effectively open to the European research community at large in accordance with the rules established in their Statutes and should have the aim of enhancing European scientific capabilities beyond the current state of the art and should thereby contribute to the development of the European Research Area.
- (10) In order to permit an efficient procedure for the setting-up of an ERIC, it is necessary for the entities willing to set up an ERIC to submit an application to the Commission which should assess, with the help of independent experts, which may include ESFRI, whether the proposed research infrastructure is in conformity with this Regulation. Such an application should contain a declaration of the host Member State recognising the ERIC as an international body or organisation for the purpose of the application of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax¹ and 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 products², as of its setting up. The ERIC should also benefit from certain exemptions as an international organisation for the purpose of applying 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 contracts³, in conformity with State aid rules.

¹ OJ L 347, 11.12.2006, p. 1.
² OJ L 76, 23.3.1992, p. 1.
³ OJ L 134, 30.4.2004, p. 114.

- (11) For reasons of transparency, the decision setting-up an ERIC should be published in the Official Journal of the European Union. For the same reasons, the essential elements of its Statutes should be annexed to such decisions.
- (12) In order to carry out its tasks in the most efficient way, an ERIC should have legal personality and the most extensive legal capacity as from the day on which the decision setting it up takes effect. It should have a statutory seat, in order to determine the applicable law, within the territory of a member of that ERIC which is a Member State or an associated country.
- (13) Membership of an ERIC should comprise at least three Member States and may include qualified associated countries and third countries other than associated countries as well as specialised intergovernmental organisations.
- (14) In line with the Community dimension of this Regulation, Member States should jointly hold the majority of votes in the assembly of members of an ERIC.
- (15) For the implementation of this framework, more detailed provisions should be laid down in Statutes, on the basis of which the Commission should examine the compliance of an application with the framework established in this Regulation.

- (16) It is necessary to ensure that, on the one hand, an ERIC has the necessary flexibility to amend its Statutes and, on the other hand, that the Community which sets up the ERIC retains control over certain essential elements. If an amendment concerns an essential element of the Statutes annexed to the decision setting up the ERIC, such amendment should be approved, prior to taking effect, by a Commission decision taken following the same procedure as that for setting up the ERIC. Any other amendment should be notified to the Commission, which should have an opportunity to object if it considers the amendment contrary to this Regulation.
- (17) It is necessary for an ERIC to equip itself with its own bodies for the effective management of its activities. The Statutes should determine the manner in which those bodies legally represent the ERIC.
- (18) It is necessary for an ERIC to carry out its activities according to sound budgetary principles for the exercise of its financial responsibility.
- (19) An ERIC could qualify for funding in accordance with Title VI of the Financial Regulation. Funding under the Cohesion Policy could also be possible, in conformity with the relevant Community legislation.
- (20) In order to carry out its tasks in the most efficient way and as a logical consequence of its legal personality, an ERIC should be liable for its debts. In order to allow the members to find appropriate solutions regarding their liability, the option should be given to provide in the Statutes for different liability regimes going above the liability limited to the contributions of the members.

- (21) Since an ERIC is established under Community law, it should be governed by Community law, in addition to the law of the State where it has its statutory seat. However, the ERIC could have a place of operation in another State. The law of that latter State should apply in respect of specific matters defined by the Statutes of the ERIC. Furthermore, an ERIC should be governed by implementing rules complying with the Statutes.
- (22) Member States are free to apply or to adopt any laws, regulations or administrative measures which do not conflict with the scope or objectives of this Regulation.
- (23) In order to ensure sufficient control of compliance with this Regulation, an ERIC should transmit to the Commission and relevant public authorities its annual report and any information about circumstances threatening to seriously jeopardise the achievement of its tasks. If the Commission obtains indications, through the annual report or otherwise, that the ERIC acts in serious breach of this Regulation or other applicable law, it should request explanations and/or actions from the ERIC and/or its members. In extreme cases and if no remedial action is taken, the Commission could repeal the decision setting up the ERIC; thus triggering the winding-up of the ERIC.

- (24) Since the objective of this Regulation; i.e. the establishment of a framework for European Research Infrastructures between Member States, cannot be sufficiently achieved by the Member States in the framework of their national constitutional systems, by reason of the trans-national nature of the problem, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (25) Since this Regulation is primarily established for the efficient execution of Community research, technological development and demonstration programmes, and since the measures necessary for its implementation are essentially management measures, they should therefore be adopted by the management procedure provided for in Article 4 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred to the Commission¹,

HAS ADOPTED THIS REGULATION:

¹ OJ L 184, 17.7.1999, p. 23.

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);
- (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.

Article 3

Task and other activities

1. The principal task of an ERIC shall be to establish and operate a research infrastructure.
2. An ERIC shall pursue its principal task on a non-economic basis. However, it may carry out limited economic activities, provided that they are closely related to its principal task and that they do not jeopardise the achievement thereof.
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.

Article 4

Requirements relating to infrastructure

The research 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;
- (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;

- (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;
- (d) it contributes to the mobility of knowledge and/or researchers within the ERA and increases the use of intellectual potential throughout Europe; and
- (e) it contributes to the dissemination and optimisation of the results of activities in Community research, technological development and demonstration.

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.
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.

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.

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.

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".

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.

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.
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.
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).

Article 10

Statutes

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

- (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;
- (b) the tasks and activities of the ERIC;

- (c) the statutory seat in compliance with Article 8(1);
- (d) the name of the ERIC in compliance with Article 8(2);
- (e) the duration, and the procedure for the winding-up in compliance with Article 16;
- (f) the liability regime, in compliance with Article 14(2);
- (g) the basic principles covering:
 - (i) the access policy for users;
 - (ii) the scientific evaluation policy;
 - (iii) the dissemination policy;
 - (iv) the intellectual property rights policy;
 - (v) the employment policy, including equal opportunities;
 - (vi) the procurement policy respecting the principles of transparency, non-discrimination and competition;
 - (vii) a decommissioning, if relevant;
 - (viii) the data policy;
- (h) the rights and obligations of the members, including the obligation to make contributions to a balanced budget and voting rights;

- (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 Articles 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.

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.

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.

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.

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 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 16

Winding-up and 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.
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.

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 ^{*}, 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.

* OJ: please insert a date five years from the date of entry into force as set out in Article 21.

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.

Done at Brussels,

For the Council
The President
