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Deliverable 2.2

**Selection and Analysis of the Legal Frameworks for
Distributed Research Infrastructures
and the preferred model for
European Holocaust Research Infrastructure**

**Dirk Luyten & Adina Babeş-Fruchter
CegeSoma/SAB**

**Reto Speck & Frank Uiterwaal
KNAW/NIOD**

**Veerle Vanden Daelen & Dorien Styven
KD**

**Anna Ulrich
IfZ**

**Jiří Tejkal
MUA**

**Toby Simpson
WL**

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Abstract (for dissemination)	The EHRI – PP Deliverable 2.2 on legal forms and recommended models for EHRI contains an analysis of the different legal possibilities at the international, European and national levels to establish a permanent EHRI RI and makes a reasoned recommendation for approval.
Management Summary	This deliverable consists of an analysis of the different legal frameworks potentially suited for the establishment of EHRI as a permanent research infrastructure with a legal personality. The aim of conducting this analysis was to review the relevant legal forms available at the international, European Union and national levels;

to study their advantages and the disadvantages for a research infrastructure with a focus on EHRI objectives; to identify other research infrastructures of European interests and to review the legal frameworks they have been established.

For the purpose of this deliverable several legal forms have been mapped and analyzed considering EHRI legal needs & objectives as a future research infrastructure with a legal personality. At the international level the International Governmental Organisation legal framework has been identified and discussed. The European level legislation offers several options for a legal entity: the European Economic Interest Group, the European Company, the European Grouping of Territorial Cooperation, and the European Research Infrastructure Consortium. Considering the main aim of EHRI Preparatory Phase, the ERIC legal framework is discussed in more detail. Several national legal frameworks from Belgium, Czech Republic, Germany and The Netherlands, under which a research infrastructure of European interest can be established have been selected, reviewed and analyzed.

The analysis of the legal frameworks has been complemented with a review of several research infrastructures of European interest in social sciences and humanities and the legal framework they have been established: CESSDA - Consortium of European Social Science Data Archives; CLARIN - European Research Infrastructure for Language Resources and Technology; DARIAH - Digital Research Infrastructure for the Arts and Humanities; ESS - European Social Survey, SHARE - Survey of Health, Ageing and Retirement in Europe, and APEF - Archives Portal Europe Foundation.

Analyzing the different international, European and national legal frameworks from EHRI as a RI of European interest legal needs & objectives in the field of Holocaust documentation, research, education and commemoration has provided useful insights. It also allowed us to draw a recommendation for the most appropriate legal framework for EHRI to be set up as a research infrastructure with a legal personality.

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Abbreviations

AISBL: International Association without Lucrative Purpose (Association internationale sans but lucratif)

ANBI: Institution for General Benefit (Algemeen nut beogende instelling)

CEESDA: The Consortium of European Social Science Data Archives

CERIC: Central European Research Infrastructure Consortium

CLARIN: European Research Infrastructure for Language Resources and Technology

DARIAH: Digital Research Infrastructure for the Arts and Humanities

e.V: eingetragener Verein

EC: European Commission

EEIG: European Economic Interest Group

EGTC: European Grouping of Territorial Cooperation

EHRI: European Holocaust Research Infrastructure

EHRI-PP: European Holocaust Research Infrastructure – Preparatory Phase

ERA: European Research Area

ERIC: European Research Infrastructure Consortium

ESFRI: European Strategy Forum on Research Infrastructure

ESS: European Social Survey

EU: European Union

EU Council: European Union Council

FP7: European Commission's 7th Framework Programme

IGO: international governmental organization

RI(s): Research Infrastructure(s)

SE: European Company (Societas Europaea)

SHARE: Survey of Health, Ageing and Retirement in Europe

1 Purpose of this document

The European Holocaust Research Infrastructure – Preparatory Phase (hereafter EHRI – PP) project is a Preparatory Phase project of the European Holocaust Research Infrastructure (hereafter EHRI). It aims to advance EHRI’s organisational, financial, and legal maturity to the point that it can be implemented as a permanent European Research Infrastructure with its own legal personality and long-term funding streams.

With regards to developing a legal personality for EHRI, several steps are necessary: first, the most adequate legislation is to be identified, on the basis of which a legal person can be built, taking into account EHRI legal needs and specific objectives. Then an adequate governance structure is to be outlined. Finally, statutes have to be drawn, to transpose the governance structure into the requirements of the legal form. This Deliverable is the first step in the process of building a legal person.

The purpose of Deliverable 2.2 *Deliverable on the Selection and Analysis of the Legal frameworks for distributed Research Infrastructures and the preferred model for European Holocaust Research Infrastructure* is to study the different legal frameworks best suited for the establishment of EHRI as a permanent Research Infrastructure (hereafter RI) with a legal personality.

This study’s objectives are: to review the relevant legal forms available at the international, European Union (hereafter EU) and national levels; to study their benefits and disadvantages for a research infrastructure with a focus on EHRI needs; to identify other RIs of European interests and to review the legal frameworks under which they have been established; and to conclude on a recommendation for the most appropriate legal framework for EHRI to be set up as a research infrastructure with a legal personality.

2 Introduction

This report structure follows its objectives. First, the different possibilities for legal frameworks are mapped and evaluated from the perspective of the legal needs of a EHRI as a RI; second, they are analyzed from EHRI’s objectives as a RI in the field of Holocaust documentation, research, education and commemoration; third, RI’s in social sciences and humanities and their legal form are analyzed; fourth, the conclusions of this analysis are presented.

The last part of this report makes a recommendation for the most appropriate legal framework for EHRI to be set up as a research infrastructure with a legal personality.

3 Conceptual clarifications and methodology

3.1 Conceptual clarifications

A *legal framework* comprises laws which are more specific than constitutional provisions. A legal framework can elaborate further on rights and obligations and thus make it operational in practice. A legal framework lays down the general principles and leaves its implementation to competent authorities.¹

Legal entity/legal person is a legal concept which grants to a group a legal capacity that is in principle identical to the one that benefits a physical person. Therefore, the legal entity acquires its own existence, distinct from the members it is composed. One of the most important consequences of legal entities is that they can own their own property distinct from the one of its members. In its quality of being a subject to the law, a legal entity/person holds attributed rights and obligations. The legal entity which has a legal personality holds all the necessary rights and means to achieve its objectives such as: own property, receive donations, appeal to justice (i.e. to defend its rights, to reclaim a prejudice), exercise the functions of administrator, liquidator and arbiter, sign contracts and make associations.²

Research infrastructure(s) (RI/RIs) means facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields and cover large scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structures for scientific information.³ These resources and services aim beyond the research itself, being also intended for educational and cultural purposes, while a research infrastructure can be single-sited, distributed or virtual. They can include collections, archives or scientific data; research, educational and cultural services; communication networks; and any other infrastructure unique in nature but open to external users.⁴

3.2 Methodology

For the purpose of this report EHRI – PP WP2 established several tasks to reach its objectives. WP2 members collected relevant data through (online) desktop and library research. They concentrated their work on: identifying relevant international, EU and national legislation under which EHRI can be established as a RI; analyse and compare the relevant legislation from a legal point of view, focusing on EHRI aims. For the national legal frameworks, a selection was made for practical reasons. The analysis is limited to the relevant national

¹ https://www.webcitation.org/69lfZvFdH?url=http://www.fao.org/righttofood/publi11/constitutional_2011.pdf

² Elie Alfandari and Amaury Nardone, *Les associations en Europe. Regime Juridique et Fiscal*, Les Edition Juris Service, 1990, pp. 63-64.

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 11.

⁴ https://ec.europa.eu/info/research-and-innovation/strategy/european-research-infrastructures_en

legislation in EU-member states of four key partners in EHRI-1 and EHRI-2, including federal as well as unitary states. Moreover, these states are EU-member states from Western and Central Europe, with some of them having a tradition in building European RIs. This selection provides a representative sample to study the national legal framework for the purposes of this deliverable. WP2 members further identify RIs with European purposes and analyse the legal frameworks under which these RIs have been established and the rationale behind this option. Based on this data further analyses have been performed, conclusions drawn, and a recommendation has been formulated.

4 EHRI history, RI legal needs & specific objectives

The Holocaust is a formative European experience and the importance of supporting trans-national Holocaust documentation, research, education and commemoration has long been recognised for scientific, social, cultural, and indeed, political reasons.

Meaningful scientific inquiry into, and commemoration of, the Holocaust that positively contributes to contemporary discourse is critically dependent on the existence of state-of-the-art RIs. Since 2010 EHRI has stood at the forefront of such efforts by developing an integrated, pan-European home for Holocaust research. In the context of two EU-funded integrating activities, EHRI-1 (FP7, 2010-2015) and EHRI-2 (Horizon 2020, 2015-2019), EHRI has developed an inter-disciplinary consortium that brought together major existing large-scale European RIs in Holocaust studies (e.g. archives, libraries, research centres, museums and memorial sites), a host of smaller players that nevertheless hold vitally important collections and expertise particularly in Eastern Europe, as well as the two largest Holocaust RIs outside the European space: Yad Vashem in Israel, and the United States Holocaust Memorial Museum in Washington D.C., United States.

In the past ten years, the EHRI consortium through its integrating activities has tackled the two big challenges which characterised Holocaust documentation, research, education and commemoration: the enormous dispersal and fragmentation of relevant source material across Europe and beyond, and the uneven capacity of Holocaust RIs in parts of Europe.

EHRI overcame these challenges by developing several online services comprised in the EHRI Virtual Observatory: an innovative data integration infrastructure in the form of EHRI Online Portal; Online Digital Edition Platform, the Document Blog, and the Online Training courses. Providing free access, these online services cover the needs of diverse users and their success is revealed by the continuous increase of usage sessions and users base.

The trans-national access program successfully complements the virtual access services. The Conny Kristel Fellowship programme provides grants to successful applicants to undertake research at participating institutions. Holocaust researchers, archivists, librarians,

museum curators, participated in this program by accessing archival sources, and acquiring expertise in the field.

Moreover, the EHRI training programme (i.e. methodological seminars, workshops, regional conferences etc) has helped equip early career researchers and professionals in the field with new research questions, innovative research methods and knowledge and skills to succeed in the digital age.

In the course of ten years one of the most significant achievement of EHRI 1 & 2 projects was the creation of a human network and facilitate its cooperation beyond institutional, geographical, and disciplinary boundaries.

The EHRI community numbers today more than 157k people (e.g. EHRI team, fellows, and seminar participants; social media, project website and virtual observatory visitors, etc) and it will continue to grow within the premises of EHRI's new projects: EHRI 3 and EHRI PP.

EHRI 3 will continue to substantially and sustainably advance the integration and opening up of existing Holocaust archives and collections by: enhancing EHRI's digital infrastructure and services; networking new research and archival communities; expanding EHRI's access programmes and user bases; undertaking localisation and capacity building activities; and establishing new trans-national thematic layers across the integrated data content. Particular attention will be set on vital "hidden" holdings of very small, local, and micro-archives.

Moreover, EHRI 3 will continue the development of new digital tools to connect Holocaust sources and to perform Holocaust research; will run training and education activities for professionals in the field and will continue and develop the Conny Kristel Fellowship Programme.

EHRI-3 will thereby set new impulses in trans-national Holocaust research, facilitate the study and remembrance of the Holocaust as a shared European experience, and contribute to the emerging permanent EHRI RI which will absorb and sustain the project's results.

The EHRI-PP project is a direct outcome of EHRI's adoption as a project in the 2018 update of the European Strategy Forum for Research Infrastructures (ESFRI) Roadmap. By adopting EHRI, ESFRI has recognised its importance for the future of the European Research Area, and recommended its implementation as a new, long-term European RI. The aim of the EHRI-PP project is to bring EHRI to the level of legal, financial, and technical maturity required for its implementation and operation as a European RI by respecting EHRI's objectives in the field of Holocaust documentation, research, education and commemoration as described below.

EHRI Research Infrastructure legal needs and specific objectives

Legal needs

The general objectives of EHRI-PP are to: ensure the long-term sustainability of EHRI through the drafting of a sound business plan based on a cost-benefit analysis that links EHRI's scientific case, user and access policy and value proposition to a robust governance structure; decide on a legal framework and a financial plan analysing EHRI's funding requirements and sources; and to ensure the timely and efficient implementation of EHRI by developing a detailed implementation plan and by negotiating firm financial commitments for the implementation and long-term operation of EHRI by its founding members (expected to be at least six European union member states and associated countries); and to identify a legal framework which enables the existence of an EHRI distributed RI consisting of a Central Hub and interlinked National Nodes.

Therefore, the main aim of this Deliverable is to advise on the legal framework solution to establish EHRI as a RI with legal personality which best answers to respective legal needs: internal organisation and durable cooperation with relevant stakeholders from EU member states, associate and third countries; policies of a proper functioning (e.g. users access, dissemination, intellectual property, employment, data); a sound business securing long-term funding, through firm financial commitments from its founding members, as well as donations, allowing a RI build around central hub and national nodes.

Specific objectives

Moreover, this legal framework should support EHRI core's mission and objectives in the field of Holocaust documentation, research, education, and commemoration (listed below) and EHRI 1 & 2 services & achievements be institutionalised through their integration into a permanent, sustainable research infrastructure with a legal personality. The type of legal entity must be chosen in such a way that the tasks of the future research infrastructure can be reflected as adequately as possible in the statutes.

Access services to user communities: The legal framework under which the future EHRI RI will be set-up must allow the definition of Statutes' provisions which will secure the institutional achievements of EHRI's core missions: policies to improve access to Holocaust documentation (thereby overcoming the enormous fragmentation and dispersal of the relevant source material), to initiate new trans-national and comparative approaches to Holocaust; to supplement EHRI's access programme through a comprehensive training programme (implemented both through physical seminars and online learning); and to allow institutional cooperation that will fill the gaps in existing national training provisions and to equip early

career researchers and archivists with the necessary skills to excel in the digital world and to take full advantage of the trans-national integration of sources.

The future EHRI RI access policy provisions must support the creation of an institutionalised pan-European (and beyond) access to EHRI's services (i.e. training, trans-national access) and resources (i.e. archival integrated data, methodological expertise), and the continuous development of the future EHRI RI (i.e. access to new archival sources, researchers and knowledge mobility).

The Promotion of inter-disciplinarily, trans-nationalism, methodological innovation, and research excellence: EHRI has been jointly developed by two consortia that have closely integrated three core communities: Holocaust studies, archival science, and digital humanities, and will be developed further in the context of EHRI-3. The legal framework under which the future EHRI RI will be established must allow the definition of membership and partnership provisions which will assure the integration of these communities into a permanent RI and their collaborations into permanent trans-disciplinary communities of practice. Moreover, the RI's Statutes policies must set the premises to integrate researchers from closely related fields of enquiry (studies of non-Jewish victims of Nazi crimes, war, and genocide studies) and also their collaboration across geographic borders, including extra-European space.

The future EHRI RI must create the premises of a permanent and continuous development of the state-of-art of Holocaust theoretical, and methodological research and successfully integrate it into ERA.

National integration, synergies, and capacity building: EHRI RI must continue its work of promoting the further development of local, regional, and national centres of excellence, and of enabling the optimal exploitation of synergies between existing institutions. Therefore, the EHRI RI legal framework must permit a future EHRI institutional infrastructure which includes a central hub which will coordinate activities of the national nodes, promote standards, interoperability and state-of-the-art approaches to collection management, curation, and preservation of sources undertaken at the national-nodes. Moreover, the membership provisions should secure the development of the innovation capacity of linked, smaller Holocaust-related institutions, and overcoming capacity imbalances with regard to Holocaust research currently existing between different European regions. Furthermore, to secure the successful implementation of EHRI services & achievements, it is essential that the legal framework of EHRI RI must be opened not only to EU member states, but also to associated countries and third countries to ensure the participation of EHRI long-term partner institutions in Israel, the United States of America, and the United Kingdom (depending on the outcome

of Brexit negotiations). The legal provisions of the forthcoming EHRI RI should also favour the addition of new members within or outside the European Union.

Open Science, democratisation of knowledge and public resonance: EHRI's strategy is built upon the open science paradigm. Therefore, the legal framework of EHRI RI must allow the definitions of policies which will permit the resources integrated into the EHRI digital infrastructure to continue to be open access and curated according to the findable, accessible, interoperable, reusable principles. The future EHRI RI legal provisions must allow the maximal accessibility, trustworthiness and visibility of Holocaust sources and research. EHRI showcases how humanities research that is geared towards a democratisation of knowledge can maximise its impact by amplifying its public resonance, including in education.

5 Review of existing Legal Frameworks under which a Research Infrastructure can be established

This chapter is dedicated to a review of the existing legal frameworks under which a research infrastructure can be established.

These legal frameworks can be divided in three groups, and each of them will be further discussed:

- International legal forms
- European legal forms
- National legal forms

5.1 The international legal form

The international legal framework allows the establishment of an international organisation. An international organisation (understood as an intergovernmental organisation, or international governmental organisation – IGO) is composed primarily of sovereign states or of other intergovernmental organisations. International nongovernmental organisations (i.e. international nonprofit organisations, multinational corporations) are also considered international organisations.⁵

IGOs are established by intergovernmental agreements following the process of ratification procedure by states lawful representatives (i.e. governments). These intergovernmental agreements, known also as treaties, will provide IGO with an international legal personality⁶ and will create the space for lawfully run activities.

⁵ <https://www.library.ucdavis.edu/guide/government-information-international-organizations/>

⁶ <https://www.spacelegalissues.com/the-differences-between-international-and-supranational-organizations/>

IGOs are used for very big RIs (e.g. CERN – European Organization for Nuclear Research, ITER – International nuclear fusion research and engineering megaproject, EMBL – The European Molecular Biology Laboratory), they secure equal saying and participation rights in the decision-making process for member states; and they can benefit from an independent functioning supported by its international status, from privileges and immunities commonly granted to IGOs, and from specific tax and procurement regulations.⁷

However, it is important to mention that the establishment of these RI's took place before the ERIC legal framework existed, with IGO being the most logical solution in terms of a legal entity.

The establishing process of an IGO is a considerably lengthy one. Treaties ratification by governments requires a long time of preparation, negotiation and member states approval often by Parliaments.⁸

For example, although the initial design talks started in 1988 it is only nineteen years after, in October 2007, that the ITER Agreement entered into force and ITER International Organisation legally came into existence.⁹

Moreover, the budgetary contribution of member states needs to be decided via a formula of scales of assessment¹⁰, while staff tends to be very costly due to their status (i.e. international personnel) with significant financial benefits.

5.2 The European legal form

Under European legislation there are several options for creating a legal entity: the European Economic Interest Group (EEIG), the European Company (Societas Europaea – SE), the European Grouping of Territorial Cooperation (EGTC) and the European Research Infrastructure Consortium (ERIC).

Considering the main aim of EHRI-PP: to develop EHRI to the point that it can be implemented as a permanent European RI with its own legal personality, the last legal option is the most relevant one and shall be discussed in detail (see section 5.2.4 below), while the other three forms will be discussed in summary (sections 5.2.1 to 5.2.3).

5.2.1 European Economic Interest Group (EEIG)

A European Economic Interest Grouping (EEIG) is a legal entity created in 1985 under the European Community Council Regulation 2137/85. It introduces a legal instrument at EU level in the form of a European Economic Interest Grouping (EEIG) designed to minimise the legal,

⁷ https://en.wikipedia.org/wiki/Intergovernmental_organization

⁸ https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml

⁹ https://en.wikipedia.org/wiki/ITER#Organization_history

¹⁰ <https://www.un.org/en/ga/contributions/budget.shtml>

fiscal and psychological difficulties that natural persons, companies, firms and other bodies face in cooperating across borders. The purpose of an EEIG is to facilitate the development of the economic activities of its members by offering the legal framework under which resources, activities or skills can be merged and used. This is intended to produce better results than the members acting alone. An EEIG can be formed by companies, firms and other legal entities governed by public/private law which have been formed in accordance with the law of an EU country and which have their registered office in the EU. It can also be formed by individuals carrying on an industrial, commercial, craft or agricultural activity or providing professional or other services in the EU. An EEIG must have at least two members from different EU countries.¹¹

5.2.2 European Company (Societas Europaea – SE)

The European Company (in Latin Societas Europaea – SE) is a legal entity created in 2001 under the Council of the European Union Regulation No 2157/2001, which sets up a European public limited-liability company aimed for companies with economic orientation. The SEs can be created under the law of one of the EU member states, being registered and holding headquarters in one of the EU countries. A SE's activities can be run under the legislation of at least two different EU member states.¹²

5.2.3 European Grouping of Territorial Cooperation (EGTC)

A European Grouping of Territorial Cooperation (EGTC) is a legal entity established by the European Community Regulation No. 1082/2006 and amended by the European Union Council Regulation No. 1302/2013 which allows public entities (i.e. Member States, regional and local authorities, associations, public bodies) to be established as a new entity with full legal personality.¹³ The EGTC is designed for the management and implementation of territorial cooperation programmes or projects which are co-financed by the European Community through the European Regional Development Fund (ERDF), the European Social Fund (ESF) and/or the Cohesion Fund. An EGTC holds the advantage of a high support from the European Union Member States, however there are several restrictions for the participation of non-European member states.

5.2.4 European Research Infrastructure Consortium (ERIC)

This sub-chapter will discuss in more detail the ERIC legal framework. The first part approaches the ERIC legal framework from its historical background, emphasizing the

¹¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A26015>

¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R2157>

¹³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1302>

reasoning behind its adoption. The second part focusses on the principles of the ERIC legislation and how they should be implemented in practice.

5.2.4.1 Background information

The legal framework for a European Research Infrastructure Consortium (hereafter ERIC) entity was adopted by the EU Council on the proposal of the EC.¹⁴ Regulation No. 723/2009 (amended in December, 2013) provides the specific legal form to establish and operate a RI with European interest between several Member States on a non-economic basis.

The ERIC legal framework provides: the legal capacity recognized in all EU Member States; a faster process to create an international, Europe-based, RI than establishing an IGO; the legal context for the participation of EU associated and third countries, as well as international organizations; a flexible infrastructure for budgetary options and procurement decisions.¹⁵

The support and development of RIs has been an ongoing objective of the EU as reflected in the several Decisions¹⁶ taken to fulfill this aim. In recent years, Member States, the EU institutions, representatives of the European research community, and the European Strategy Forum on Research Infrastructure (ESFRI) have expressed the political need to create an appropriate legal framework to facilitate the establishment and operation of RIs at the level of the EU.¹⁷

Several reasons drove the creation of a specific European legal framework for RIs. The increasing competition between European RIs and the EU's global partners; the subsequent considerable investment in large-scale RIs; the increasing complexity RIs are facing often go beyond the reach of a Member State or even the continent. This new legal framework complements other legal forms existing under national, international or EU law, while the ERIC established under its provisions should be a legal entity of which the EU is not necessarily a member.¹⁸

Member States should be interested in establishing RIs in this legal format since it fully supports research and technological development activities. An ERIC also contribute to the scientific excellence of the EU; to its economic competitiveness; it should be opened to the European research community at large and it should enhance the European scientific capabilities beyond the current state of that art by actively contributing to the development of the European Research Area (ERA).¹⁹

¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723>

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723>

¹⁶ Decision 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community , Council Decision 2006/974/EC of 19 December 2006 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723>

¹⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 2.

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 3.

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> pp. 3-4.

5.2.4.2 The ERIC in practice

This section briefly analyses each article of the ERIC legislation by summarising the Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) and the European Commission Practical Guidelines on Legal framework for a European Research Infrastructure Consortium – ERIC

Article 1 - Subject-matter Regulation No. 723/2009²⁰ (amended in December, 2013) establishes the legal framework laying down the requirements, procedures, and the effects of setting-up an (ERIC).

Article 2 - Definitions The European Research Infrastructure Consortium (ERIC) is a specific legal form that facilitates the establishment and operation of Research Infrastructures with European interest.²¹ The legal form ERIC is the most appropriate legal form to coordinate a RI. The RIs can be 'single-sited' or 'distributed'. RIs can have facilities located in different sites and operated by one legal entity only or through a central hub coordinating several distributed facilities.²²

Article 3 - Principle task and other activities A permanent RI set up under an ERIC regulation should have as its principle task the establishment and operation of an RI. The operation of an RI means the complete management of the facility. The central hub holds the responsibility for the operation of the whole infrastructure: definition of the overall strategy and of common standards; support of transfer and training activities; provision and support for access to the infrastructure, etc. In case of a distributed RI, the operational responsibilities may be distributed between the central hub and the individual nodes in an agreed and coordinated way. Privileges regarding VAT, excise duty and procurement only apply to the ERIC. The agreements between the ERIC and other legal entities should clearly identify the activities and resources under the responsibility of the ERIC.²³

The RI shall be operated on a non-economic basis. The RI should not offer goods/services on a given market.²⁴ Limited economic activities are allowed when they are closely related to its principal task.²⁵ To the extent that ERIC's objectives imply the cooperation with industries, economic activities are allowed with a secondary character and should not prevail over the main tasks of the ERIC. If the ERIC develops a successful economic activity, then a spin-off company should be considered.²⁶

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 6.

²¹ https://ec.europa.eu/info/research-and-innovation/strategy/european-research-infrastructures/eric_en

²² https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 11.

²³ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 12.

²⁴ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 13.

²⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> pp.3-4.

²⁶ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 13.

Article 4 - Requirements relating to infrastructure ERICs have no restriction concerning the development of activities in any scientific area as long as it supports Europe's capacities in knowledge creation and innovation. Beyond helping Europe to pool its resources and leveraging national efforts towards developing an efficient ERA, the ERIC should advance state-of-the-art research, create unique opportunities to carry out advanced researches, attract the best researchers from across the world and train highly qualified professionals in the field. The ERIC must be opened to users from all European countries, and this openness should be extended to all international users, not necessarily for free, while this access should contribute to the mobility of knowledge and/or researchers within the ERA and increase the intellectual potential throughout Europe. This should be performed through an optimal use and exploitation of project results: management of knowledge and intellectual property; open access to data; communication of results and dissemination of activities.²⁷

Article 5 - Application for the setting-up of an ERIC The application to set-up an ERIC is a process between members (i.e. EU Member States, associated countries, third countries other than associated countries, intergovernmental organisations) to agree to establish and operate a new RI. The decisions at the national levels are followed by the official formalization of the agreements on the content of the application which is eventually submitted to the EC to set up the ERIC, in one of the official languages of the EC institutions.²⁸ The application must contain the following documents: the request, the proposed Statutes, a technical and scientific description of the RI to be established as an ERIC, a declaration by the host Member State recognizing the ERIC and an international body and as an international organisation.²⁹ The EC will evaluate the application with the help of independent experts and experts who are involved in preparing the ESFRI roadmap. Before deciding on the setting up of a new ERIC the EC takes into account the opinion of a management committee composed of representatives of the EU Member States.³⁰

Article 6 - Decision on the application Given to the outcome of the evaluation, the EC can either adopt a decision setting up the ERIC or reject the application if the EC concludes that the requirements laid down in the ERIC Regulation are not met. The decision on the establishment of a new ERIC will be published in the Official Journal of the European Union in all the official languages of the EU, together with the essential elements of the Statutes as

²⁷ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none pp. 14-16.

²⁸ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 16.

²⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 8.

³⁰ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 16.

annexes.³¹ The proposed new RI will have a legal personality under the EU law as from the date of the decision setting up the ERIC takes effect.³²

Article 7 - Status of an ERIC Legal personality and full legal capacity are the most fundamental elements of any legal activity. The ERIC shall have in each Member State the most extensive legal capacity accorded to legal entities under the law of that Member State. Furthermore, it may acquire, own and dispose movable, immovable and intellectual property, conclude contracts and be party of legal proceedings.³³ The ERIC is also free to decide on its own procurement policy respecting the principles of transparency, non-discrimination and competition. Basic principles on these matters should be mentioned in the Statutes, especially when the procurement is done from public money. These principles should be reflected in the operation of the ERIC.³⁴

Article 8 - Seat and name The ERIC shall have a statutory seat located on the territory of either a Member State or an associated country.³⁵ The name of the new RI should contain “ERIC” as a separate term to be easily recognized as a description of the legal term. The term is identical in all language versions, without regard to translation of its full name “European Research Infrastructure Consortium”.³⁶

Article 9 - Requirements for membership ERIC membership should be opened to: European Union Member States, associated countries, third countries other than associated countries and IGOs. The ERIC shall have at least three Member States. These entity categories can further join the ERIC as either members or observers without voting rights under the terms and conditions specified in the Statutes.³⁷ The ERIC membership is opened to subjects of international public law only and the procedures and conditions for becoming a new member must be defined in the Statutes. The conditions of joining an ERIC must be fair and reasonable for Member States, and a matter of bona fide negotiations also. Furthermore, the Statutes shall also draw the conditions and procedures for the joining of the ERIC for the other entities. To secure a sufficient EU dimension the Member States shall hold the majority of the voting rights in the assembly of members. The Statutes can stipulate various qualified majorities or unanimity to decide specific issues.

Members can be represented in an ERIC by one or more public entities or private entities with a public service mission. The member is free to give specific mandates to one or several such entities and this should be clearly communicated to the other ERIC members. Associated

³¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> pp. 8-9.

³² https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none pp. 16-17.

³³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 9

³⁴ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 18

³⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p.9.

³⁶ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 18.

³⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 9.

countries, third countries and IGOs applying for establishing an ERIC should make sure that EU legislation provisions are applicable on their territory.³⁸

Article 10 - Statutes The Statutes of an ERIC shall contain at least: a list of members, observers and, of entities representing members and the conditions of and the procedure for changes in membership and representation; the tasks and activities of the ERIC; the statutory seat the name of the ERIC; the duration, and the procedure for the winding-up; the liability regime; the basic principles (e.g. the access policy for users; the scientific evaluation policy; the dissemination policy; the intellectual property rights policy; the employment policy, including equal opportunities; the procurement policy respecting the principles of transparency, non-discrimination and competition; a decommissioning, if relevant; the data policy); the rights and obligations of the members (e.g. financial and voting rights); the bodies of the ERIC, their roles and responsibilities, their establishment and decision principles; the amendment of the Statutes; the identification of the working language(s). The Statutes shall be publicly available on the website of the ERIC and at its statutory seat.³⁹

Article 11 - Amendments of the Statutes Certain essential elements giving the main directions for an ERIC should be made public, attached to the decision setting up the ERIC and published in the Official Journal of the European Union. They should remain in place over the ERIC's existence. Changes to the principles of these essential elements are subject to the same procedure as the one of ERIC itself set-up. Less important amendments are subject to a lighter procedure.⁴⁰

Article 12 - Organisation of an ERIC The Statutes shall specify the provisions for at least the following bodies: an assembly of members as the body having full decision-making powers, including the adoption of the budget; a director or a board of directors, appointed by the assembly of members, as the executive body and legal representative of the ERIC. However, each ERIC is free to choose its own internal organisation. The Statutes shall specify the manner in which the members of the board of directors legally represents the ERIC. Any national rules applicable to legal entities and complementing legal representation by the director or board of directors applies.⁴¹

Article 13 - Budgetary principles, accounts and audit 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 members of an ERIC shall ensure that the appropriations are used in accordance with the principles of sound financial management. The budget shall be established and implemented, and the accounts presented in compliance with the principle of

³⁸ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none pp.19-20.

³⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> pp.10-11.

⁴⁰ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 24.

⁴¹ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 24.

transparency. The accounts of an ERIC shall be accompanied by a report on budgetary and financial management of the financial year. An ERIC shall be subject to the requirements of the applicable national 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.⁴²

Article 14 - Liability and insurance An ERIC is liable for its debts, with a financial liability of its members limited only to their respective contribution to the ERIC, which can be fixed or unlimited, while the contribution can be financial or in-kind. If the financial liability is limited, the ERIC shall take appropriate insurance to cover the risks specific to the construction and operation of the RI. The EC is not liable for any debt of the ERIC.⁴³ The ERIC has no immunity from: seizure of its assets in case of forced recovery of debts and from insolvency proceedings. This will be specified in the law of the statutory seat, complementary to the applicable national insolvency law. The maximum liability can be set by an absolute amount or a share of debt.⁴⁴

Article 15 - Applicable law and jurisdiction The setting up and internal functioning of an ERIC shall be governed by: the Community law, specifically the ERIC Regulations; the law of the State where the ERIC has its statutory seat and by the Statutes and their implementing rules. The Court of Justice of the EU has jurisdiction over litigation involving the ERIC and its members, and the EU law shall apply to disputes between an ERIC and third parties.⁴⁵ The statutory seat law is relevant for requirements concerning preparation, filing, auditing and publication of accounts. The social security provisions are governed by the EC regulations on coordination of social security schemes and determine the relevant legislation on this case. The ERIC is governed by the same provisions as any other employer; therefore, the employment contract should specify which national law is applicable.⁴⁶

Article 16 - Winding-up and insolvency The winding up procedure, including transfer of activities to another legal entity, shall be mentioned in the Statutes. This decision shall be taken by the assembly of members and the EC shall be notified. After the closure of the winding – up procedure, the EC will publish an appropriate notice in the Official Journal of the EU. The ERIC shall cease to exist on the day of publication of the notice. In the case of payment incapacity, the ERIC shall notify the EC.⁴⁷

⁴² https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 25.

⁴³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 12.

⁴⁴ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 25.

⁴⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 12.

⁴⁶ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none pp. 26-27.

⁴⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 13.

Article 17 - Reporting and control An ERIC shall transmit to the EC and relevant public authorities the annual reports on its scientific, operation and financial aspects. This should be approved by the members assembly and be made publicly available. An ERIC and the Member States shall inform the EC about any circumstances which threaten the completion of the task of the ERIC or hinder the ERIC from fulfilling the requirements stipulated in this Regulation. The EC shall request explanations from the ERIC and/or its members, it can propose remedial action to the ERIC and its members, or it may repeal the decision establishing the ERIC if no remedial action is taken. This late decision which shall trigger the winding-up of the ERIC shall be published in the Official Journal of the EU.⁴⁸

Article 18 - Appropriate provisions Member States shall take appropriate measures to ensure the effective application of this Regulation.⁴⁹

Article 19 - Report & review Not later than July 2014, the EC shall forward to the EP and the EU Council a report on its application and proposals for amendments, when appropriate.⁵⁰

Article 20 - Committee procedure The EC shall be assisted by a management committee, which gives its opinion after the assessment of each application by the EC.⁵¹

Article 21 - Entry into force This Regulation is into force since August 28, 2009.⁵²

5.3 National legal forms

This section investigates which national law of four selected countries is eligible to provide a RI with a legal personality. First, the relevant national law(s) will be outlined. Secondly an evaluation will be made from the perspective of the needs of an RI. Depending on the peculiarities of the national legal framework, the possibilities offered by the legal framework to provide a RI with a legal personality and the links between branches of the law, the analysis will be more detailed for some countries as compared to other countries.

5.3.1 Belgium

Introduction. In Belgian national law, the *Internationale Vereniging zonder winstoogmerk/Association Internationale sans but lucratif (IVZW/AISBL)* - international association without lucrative purpose (hereafter AISBL) – is a potentially relevant legal form for a RI.

⁴⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 13.

⁴⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 13.

⁵⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 13.

⁵¹ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p. 29.

⁵² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0723> p. 14.

The AISBL is a legal person, governed by the law of 23 March 2019 which introduces the 'code of companies and associations'⁵³. The AISBL as a legal form has already existed since 2002⁵⁴. However, as early as 1919, it was possible for an international association with a scientific purpose to become a legal person under the Belgian law. This 1919 law was related to the fact that the country has hosted many international scientific conferences since the end of the 19th century. This law made it possible for international or foreign scientific associations to acquire legal personality. In 1954 the law was extended, enabling international associations with philanthropic, religious artistic or pedagogical purposes to obtain a legal personality as well. Conversely, international associations serving other purposes could not acquire a legal personality under this legislation. The AISBL broadens the scope even more: every association of international utility without lucrative purpose, can become a legal person if the conditions laid down in the law are met⁵⁵. Belgium is a federal state. Civil law and the legislation on associations is federal law, no specific legal provisions exist at a regional level and neither are there differences in the implementation of the code of companies and associations at a regional level. In the Flemish region, the legal form of the research infrastructure is not mentioned as a criterion for research institutions to participate in research infrastructures⁵⁶.

The AISBL according to the law of 23 March 2019

Definition

An AISBL is an association with a non-lucrative purpose of international utility. Scientific research is generally considered to be of international utility since science serves all people⁵⁷. Non-lucrative means that, in contrast to a company, the aim of an association is not to provide its members with a direct or indirect patrimonial benefit⁵⁸. However, this does not exclude an AISBL from delivering services for which it is to be paid or to generate financial incomes to fund its activities. Normal tax legislation applies in principle⁵⁹.

⁵³ *Moniteur belge*, 4 April 2019.

⁵⁴ *Law of 2 May 2002*, *Moniteur belge*, 11 December 2002.

⁵⁵ Dirk Van Gerven, *Handboek Verenigingen. De vereniging zonder winstoogmerk, de internationale vereniging zonder winstoogmerk, de beroepvereniging en de buitenlandse vereniging*, Kalmthout, Biblio, 2002, pp. 346-347. This book is based on the 2002 law, which has not been changed in a fundamental way in 2019, so the doctrinal comment of this author, an authority in the field, remains valid.

⁵⁶ « Besluit van de Vlaamse Regering tot regeling van de Vlaamse deelname aan en/of subsidiëring van internationale onderzoeksinfrastructuren » 19.01.2018 (Decision of the Flemish Government to regulate the Flemish participation in and / or subsidization of international research infrastructures). *Moniteur belge*, 23.02.2018.

⁵⁷ Article 1:2; article 10:1 Law of 23 March 2019. We use the text of the law as published in the coordination by Marleen Deneff, Coralie Matelaer (eds.), *Asbl, fondation, aisbl et coopérative. Le nouveau Code des sociétés et des associations et modèles de statuts adaptés*, Bruxelles, La Chartre, 2019, p. 119, p. 183. Dirk Van Gerven, *Handboek*, p 351.

⁵⁸ Article 1:1 Law of 23 March 2019, Marleen Deneff, Coralie Matelaer (eds.), *Asbl, fondation, aisbl et coopérative*, p. 119.

⁵⁹ Dirk Van Gerven, *Handboek*, pp. 407-412.

The basis of an AISBL is an agreement between at least two persons. This agreement should meet the minimum requirements defined by the law and must be laid down in writing. This agreement is the founding act. The founding act must be an authentic act, so the intervention of a notary is necessary. Other members can accede later⁶⁰.

From the perspective of its membership, the AISBL is an open type of legal personality⁶¹. With two, the minimum number of members is low, moreover, legal persons can become members as well⁶². There is no nationality requirement – members can have other nationalities than the Belgian nationality, but the registered office (headquarters) must be on Belgian territory⁶³. Members who have acquired legal personality on the basis of non-Belgian law can become a member of an AISBL as well. In that case, the statutes will have to deal with legal issues following the combination of different legal systems⁶⁴.

By size, the law makes a distinction between an AISBL, a ‘small AISBL’ and a ‘micro-AISBL’.

A small AISBL is an AISBL that does not exceed more than one out of the following three criteria:

- 50 employees on average per year;
- a yearly turnover (VAT excluded) of 9.000.000 €;
- a total balance sheet of 4.500.000 €.

A micro-AISBL is a small AISBL that does not exceed more than one out of the following three criteria:

- 10 employees on average per year
- a yearly turnover (VAT excluded) of 7.000.000 €
- a total balance sheet of 350.000 €⁶⁵.

This distinction has an effect on obligations to be met in the realm of financial control, which is more extensive for big AISBLs as compared to small or micro-AISBLs⁶⁶. It seems likely that if EHRI would opt for the AISBL legislation to become a legal person, it would start as a small or even a micro-AISBL, so provisions for financial control would be limited.

⁶⁰ *Ibidem*, p. 357.

⁶¹ *Ibidem*, p. 350

⁶² *Ibidem*, p. 357.

⁶³ https://justitie.belgium.be/nl/themas_en_dossiers/vennootschappen_verenigingen_en_stichtingen/verenigingen_ivzw consulted on 5 March 2020.

⁶⁴ Dirk Van Gerven, *Handboek*, p. 350.

⁶⁵ Article 1:28, 1:29, Law of 23 March 2019 Marleen Deneff, Coralie Matelaer (eds)., *Asbl, fondation, aisbl et coopérative*, pp. 319-320.

⁶⁶ Dirk Van Gerven, *Handboek*, p. 412.

The acquisition of a legal personality

Different steps have to be taken to obtain legal personality.

- The association has to be founded by its members. In this founding act some elements have to be mentioned such as: the identity of the founding members, the name of the AISBL, its registered office, a precise description of the aim of the AISBL and the activities it will develop, the conditions to become a member and to end membership, the rights and obligations of the members, the powers and organization of the general assembly and the administrative body, the procedure to change the statutes, the procedure to dissolve the AISBL and the identity of the administrators and the persons who can represent the AISBL with third parties⁶⁷.

- The statutes have to be drafted and submitted to the Minister of Justice with the founding act, thirty days after the date of the founding act⁶⁸. The Ministry of Justice examines the statutes and verifies if the AISBL meets the criteria laid down in article 10:1 (non-lucrative purpose of international utility) and shall consider whether the founding act and the statutes do not conflict with Belgian legislation and that members are treated equally. Legal personality is awarded by Royal Decree⁶⁹. When the aim or activities of the AISBL change, a new Royal Decree is needed⁷⁰. The procedure to obtain legal personality may take some months. In practice a dossier is made for the Ministry of Justice containing all the necessary documents. Often a first draft of the statutes will be submitted to the Ministry and, if necessary, adapted to meet the legal requirements before the final application to obtain legal personality will be submitted to the minister of Justice⁷¹.

- The statutes have to be published in the annexes to the *Moniteur belge* (the Belgian official gazette); the cost is limited.

- Since the Belgian legislation on the use of languages applies, the statutes and the founding act have to be drafted in Dutch or in French⁷². This also applies to all documents imposed by the law as the invitations for the general assembly or the minutes of the meetings⁷³. For EHRI, this implies that all the documents imposed by the law must be available in at least two languages: Dutch or French (to comply with the Belgian law) and English (for internal use in the research infrastructure).

⁶⁷ Article 2.10 & 2, art. 10. 2 Law of 23 March 2019 Marleen Deneef, Coralie Matelaer (eds)., *Asbl, fondation, aisbl et coopérative*, p. 183, p. 126.

⁶⁸ Article 2:6 § 2; Law of 23 March 2019 *Ibidem*, p. 124.

⁶⁹ Article 2.6 § 3, art. 2.10 § 1; Law of 23 March 2019 *Ibidem*, p. 124-125, Dirk Van Gerven, *Handboek*, p. 365.

⁷⁰ https://justitie.belgium.be/nl/themas_en_dossiers/vennootschappen_verenigingen_en_stichtingen/verenigingen/ivzw Consulted 5 March 2020.

⁷¹ Dirk Van Gerven, *Handboek*, pp. 364-365.

⁷² Or alternatively in German, if the registered office is located in the German speaking community (Ostbelgien), but this will be less frequent.

⁷³ Dirk Van Gerven, *Handboek*, p. 357.

- Once the legal personality obtained, 'AISBL' must be mentioned on all the external documents produced by the association such as letters, folders and on the website⁷⁴.

The internal organization of an AISBL

The law does not impose many obligations on the internal organization of an AISBL. This is a deliberate choice of the legislator to enable the integration of requirements of non-Belgian legislation, since legal persons established based on a non-Belgian law can become member of an AISBL as well.

An AISBL needs only two bodies to comply with the law: the general assembly and the administrative body. The tasks of both shall be determined in the statutes. The general assembly is the supreme body of an AISBL. It consists of the members of the AISBL. It is possible to differentiate the voting rights of members, but the criteria have to be laid down in the statutes, as well as the tasks of the general assembly. As far as the powers of the general assembly are concerned, the law only imposes two obligations: the general assembly has to be convened once a year to endorse the annual account and the budget. If there is a commissioner - in Belgian law, an independent controller of the accounting of a company or association - he or she is appointed and dismissed by the general assembly⁷⁵. The statutes can assign other powers to the general assembly or conversely assign all powers except the endorsement of annual account and budget and the appointment and dismissal of the commissioner to other bodies.

The law assigns the task to draw up the budget to the administrative body. Other powers can be determined in the statutes. The statutes also have to mention how the members of the administrative body are designated or dismissed. Natural persons as well as legal persons can be a member of the administrative body, Belgians as well as foreigners, but the latter should elect domicile at the company's registered office for the time of their mandate.

Next to the general assembly and the administrative body, other bodies can be established. The most common is a daily administration. Moreover, the bodies of an AISBL can delegate tasks to one or more persons. Other bodies as an advisory board can exist as well, but they cannot engage the AISBL towards third parties. Composition, membership, powers of the different bodies and persons allowed to represent the AISBL has to be determined in the statutes of the AISBL and to be made public⁷⁶.

⁷⁴ *Ibidem*, p. 365.

⁷⁵ A commissioner is not obligatory for a small AISBL or a micro AISBL.

<https://www.nbb.be/nl/balanscentrale/jaarrekeningen-neerleggen/stukken-neer-te-leggen-bij-de-jaarrekening/verslag-van-de#wanneer-moet-een-vereniging-of-stichting-een-commissaris-aanstellen> Consulted on 16 March 2020.

⁷⁶ Article 2 :147, art. 10. 5- 10.10 ; Law of 23 March 2019 Marleen Deneff, Coralie Matelaer (eds)., *Asbl, fondation, aisbl et coopérative*, p.140, 183-183. Dirk Van Gerven, *Handboek*, pp. 383-392.

Next to the statutes, an AISBL has the possibility of making house rules. Such rules must not, however, conflict with the statutes, the law or the rights of the members and the rules of operation of the general assembly⁷⁷.

It is permitted to make a distinction between members and acceding members. The latter have no voting rights at the general assembly⁷⁸. Members of an AISBL are not liable in their assets for the engagements made by the AISBL. Members of the administrative body – natural or legal persons- are liable for possible management errors only⁷⁹.

Financing of an AISBL

An AISBL can be financed by means of a yearly membership fee, a one-off contribution, and donations. To receive a donation of more than 100.000 euro, an authorization of the Ministry of Justice is required. An AISBL can moreover receive subsidies and sponsoring, can contract loans and generate incomes by offering services for which it is to be paid⁸⁰.

The dissolution of an AISBL

An AISBL can be dissolved voluntarily following a procedure laid down in the statutes, by a decision of a judge at the initiative of the public prosecutor or a privy in the cases determined by the law. An AISBL can also be dissolved by operation of law by expiry of the term for which the AISBL has been established, or when a cancellation clause determined explicitly in the statutes is fulfilled⁸¹.

Evaluation from a RI-perspective

The AISBL is a relatively open type of legal person, from the perspective of membership as well as from the perspective of the internal organization. Natural persons as well as legal persons, regardless of type and nationality, can be a member or participate in the governance body of an AISBL. The minimum number of founding members is low, which would enable a prospective “EHRI-AISBL” to start with a minimum of partners if necessary. Legal requirements are few, leaving much liberty to the members to draw the statutes and to determine its internal organization. This implies that the statutes have to be drawn carefully, including pro-actively all the aspects of the internal organization of the AISBL. Changes to the statutes are possible,

⁷⁷ Article 2:59; Law of 23 March 2019 Marleen Deneff, Coralie Matelaer (eds)., *Asbl, fondation, aisbl et coopérative*, p. 134.

⁷⁸ Dirk Van Gerven, *Handboek*, p. 376.

⁷⁹ Article 10:1 Law of 23 march 2019 Marleen Deneff, Coralie Matelaer (eds)., *Asbl, fondation, aisbl et coopérative*, p.183. Dirk Van Gerven, *Handboek*, p. 403.

⁸⁰ Article 10:11; Law of 23 march 2019 Marleen Deneff, Coralie Matelaer (eds)., *Asbl, fondation, aisbl et coopérative*, p. 184. Dirk Van Gerven, *Handboek*, p. 407.

⁸¹ Article 2:111; Law of 23 march 2019 Marleen Deneff, Coralie Matelaer (eds)., *Asbl, fondation, aisbl et coopérative*, p. 134. Dirk Van Gerven, *Handboek*, p. 413.

but the internal procedures have to be respected and all changes have to be published in the *Moniteur belge*. More generally, one has to be well acquainted with the Belgian law and Belgian legal traditions and procedures. The association without lucrative purpose is a widespread legal person in Belgium, so specialized non-profit organizations are providing practical support and legal advice to draw the statutes and to run an association without lucrative purpose such as the *Vlaams Studie- en documentatiecentrum voor vzw's* (Flemish Study and Documentation Centre for associations without lucrative purpose – VSDC).⁸²

Two elements in the code of companies and associations induce some rigidity: the central hub (the registered office) of the research infrastructure must be based on Belgian territory and cannot be established elsewhere. There are no provisions to build a legal person that is decentralized over different countries (central hub + national nodes). This implies that the national nodes if these are legal persons have to be based on different national legislations. From the perspective of the AISBL this is not a principled objection: the open structure of the AISBL is designed to deal with this issue, but possible conflicts between legal systems have to be settled in the statutes.⁸³ This will complicate the drafting of the statutes. Conversely, an AISBL does not need to have activities in countries outside Belgium; an 'international activity' is sufficient. This might apply to EHRI: it is possible to develop the key activities of EHRI with one AISBL based in Belgium, but the question is to what extent this would conflict the concept of central hub and national nodes. The AISBL legislation can be used on the other hand to provide the Belgian node if necessary, with a legal personality in the hypothesis of a central hub with a legal personality based on non-Belgian legislation

The consequence of the obligation for an AISBL to be based in Belgium is that the legislation on the use of languages applies, which is, as explained above, a complicating factor.

Even if the authorization of the Belgian Ministry of Justice is necessary to obtain a legal personality, the grounds on which the Ministry of Justice can refuse to grant legal personality are limited by the AISBL legislation and an appeal with the *Conseil d'Etat* (the administrative court) is possible. As far as the dissolution of an AISBL at the initiative of the state is concerned, the intervention of a judge is always necessary.

The procedure to have the authorization of the Ministry of Justice to obtain legal personality takes time and the intervention of a notary is necessary to draw the statutes, implying a cost. The fact that the Belgian state has to agree before legal personality can be granted implies that one EU-member state prevails over other EU-member states, which might be considered undesirable by certain other member states.

⁸² www.vsdc.be

⁸³ Dirk Van Gerven, *Handboek*, p. 350.

5.3.2 Czech Republic

In Czech law one legal framework that can be used to provide a research infrastructure with a legal personality exists: the Public Research Institution (Act 341/2005).⁸⁴

Definition and tasks

The Act on Public Research Institutions regulates the foundation, activity and dissolution and termination of a public research institution. A public research institution is a legal person under Czech law, whose principal activity is research, including the provision of a research infrastructure. A public research institution works on the non-profit principle and is supported mainly by public funds. This type of legal entity allows both to join an internationally distributed research infrastructure and to create a national research infrastructure.

The establishment of a public research institution

A public research institution can be established by a Czech Ministry, a Czech central state administration body or the Academy of Sciences of the Czech Republic. The public research institution must be operational without external support, which means that the Czech state must guarantee the basic functionality of the legal entity, including its funding. The granting of legal personality is a decision of the Czech government.

Statutes, bodies, budget principles

The registered office of the public research institution must be located in the Czech Republic. The statutes of the public research institution need governmental approval. A public research institution is headed by a statutory director and management includes a supervisory and management board. The criteria for the composition of the management board are not laid down in the law. As a consequence, these organs can be adapted to the needs of the research infrastructure. The public research institution works on a non-profit principle, but nevertheless financial results must be audited.

Evaluation from a RI-perspective

In the Czech legal system, it is possible to provide a scientific research institution with a legal personality and enable this institution to participate in international scientific infrastructures, such as RI's. Any approval of a Public Research Institution would have to be preceded by negotiations with the Czech government, which would have to commit to funding such an entity.

⁸⁴ https://www.avcr.cz/opencms/export/sites/avcr.cz/.content/galerie-souboru/zakony-pravni-predpisy/zak-o-vvi-neofic_uplne_zneni341_aktualiz.pdf

On the other hand, the legal form of a Public Research Institution cannot be used to build a consortium with non-Czech partners or a distributed structure with branches in other countries.

The Czech Public Research Institution is not a possible legal form to build an RI as a consortium with non-Czech partners or as a distributed structure with branches in other countries, since it is not possible to include non-Czech partners. Conversely, the Public Research Institution is for the Czech government, the preferred legal form for a Czech partner to be involved in a European legal structure such as an ERIC.

5.3.3 Germany

For Germany, the *eingetragener Verein (e.V.)* (registered association) as a legal form can be used to provide a RI with legal personality.

Legislation

The legal condition for the founding of associations is based on the freedom to associate, §9 of the German Civil Code (BGB), i.e. civil law.⁸⁵ The legal regulations for the associations, as the e.V. are laid down in §§ 21 to 79 of the same Code.⁸⁶

Why found a registered association?

The registered association (e.V.) is one of the most common types of legal persons in Germany, where about 600,000 registered associations exist. Almost without exception these are so-called ideal associations, which therefore do not pursue any economic purposes. The legal form of the e.V. is regularly chosen when a larger number of natural persons join together for a non-economic purpose, and admission/resignation of members should be uncomplicated.

Other possible legal forms

The German law recognises several firmly defined forms of associations and companies. These include for example the GbR (*Gesellschaft bürgerlichen Rechts* – civil law partnership), the association, the GmbH (*Gesellschaft mit beschränkter Haftung* - company with limited liability) the cooperative and others. Whenever a group of persons is formed, either a legal form is deliberately chosen or it is created automatically (e.g. the GbR, which can come into existence even without writing).

In the context of a RI, a *Verband* is a relevant example. A *Verband* is similar to a *Verein* but can have other associations or companies as members. To provide a *Verband* with legal personality, usually an e.V. is established. Here, natural persons represent the member

⁸⁵ https://www.gesetze-im-internet.de/gg/art_9.html

⁸⁶ Detailed guidelines can be found here: Leitfaden zum Vereinsrecht (in German): [https://www.bmjv.de/SharedDocs/Publikationen/DE/Leitfaden_Vereinsrecht.pdf? blob=publicationFile&v=14](https://www.bmjv.de/SharedDocs/Publikationen/DE/Leitfaden_Vereinsrecht.pdf?blob=publicationFile&v=14)

associations or companies in the *Verband* (since an association cannot have legal persons as members).⁸⁷

Since a registered association may not be predominantly economically active, it is generally not suitable for commercial purposes. The simplest alternative here is a partnership under civil law (GbR or BGB-Gesellschaft). The disadvantage of the GbR, however, is the personal liability of the members. If the organisation is to be non-profit, partnerships like the GbR are not possible. An alternative would be a non-registered association, a GmbH, or an *Unternehmergesellschaft* (UG or "Mini-GmbH"). A "mini-GmbH" can be founded with only one euro of share capital. However, the costs of setting up a non-profit Mini-GmbH are considerably higher (around 800 euros) because standard formation with model articles of association is not possible.

It is not uncommon for double structures to arise. In addition to the association, there is an economic organisation (e.g. GbR, (mini)GmbH), which serves the income acquisition of the initiators or is the carrier of the economic activity (e.g. catering in a cultural association).

The cost of the foundation of a registered association

The costs for the foundation of an e.V are limited (about 90 to 140 €), consisting of: the notary fee for the certification of the registration, the registration fee for registration with the according district court and the publication of the registration. In some *Länder*, the total cost is even lower since the courts waive the registration fee for non-profit associations. It should be noted, however, that belated registrations are also associated with costs.

Procedure of the founding of an e.V.

At least two members (natural persons) are required for the foundation of an association, seven for registration. The other members necessary for registration can join between foundation and registration. If the association is registered, the number of members may not fall below three. Next to German citizens, citizens of an EU-member state can become member of an e.V. as well as of the other organs of the e.V. For non-EU citizens, some restrictions or conditions may apply.⁸⁸

First of all, statutes must be drawn up and discussed with the founding members. Statutes contain the most important regulations concerning the organisational matters and the purpose of the association. If the association is to become a non-profit organisation, the statutes of the association should be submitted to the tax office for examination before the registration. If the tax office has reservations about granting non-profit status, amendments to the statutes of the

⁸⁷ See DARIAH-DE DeISU Satzung, 10.4.2016, §4.

⁸⁸ <https://www.buergergesellschaft.de/praxishilfen/arbeit-im-verein/rechtsgrundlagen/mitglieder/exkurs-auslaendische-buerger-im-deutschen-vereinswesen>

association and thus further organisational work are necessary and additional costs (notary, register of associations) may apply.

In addition, association rules (e.g. financial regulations, contribution regulations, honorary regulations) can be drawn up, which include detailed regulations for the day-to-day functioning of the e.V. A founding meeting with at least two persons is called up to decide on the foundation of the association and the statutes (and possibly further association regulations) and to elect the executive committee. At least 7 members must sign the foundation charter to register the association. In addition, a protocol of the founding meeting has to be provided, which must be signed in accordance with the statutes.

The Statutes

Mandatory components of the statutes are⁸⁹:

- Association name
- Seat (only indicate the town, not the street)
- Regulation for the registration of the association
- Purpose of the association

If one of these elements of the articles of association is missing, the registration court refuses the registration.

Contrary to what is often assumed, the legislation on associations offers a wide range of possibilities for structuring an e.V. If organisational regulations are planned that deviate significantly from the standard model articles of association, it is wise to seek expert advice. Not all possibilities of structuring are legally permissible while some of them prove to be unsuitable in practice. Above all, central provisions for the association can only be made by including them in the statutes of the association. Resolutions of the board of directors or general meeting are not sufficient. This applies, for example, to the definition of categories of members (and membership fees) with different rights and duties (such as supporting members, honorary members); assigning special rights to some categories of members; obligations regarding contributions to be paid or the provisional appointment of board members.

Registration of the Association

The application to the register of associations (which is located at the local district court - in some cases a particular district court is responsible for several districts) must be certified by a notary in most *Länder*. In addition to the registration letter, the original articles of association and the founding protocol must be submitted to the register court.

⁸⁹ Leitfaden zum Vereinsrecht, pp. 16-17.

The notarial registration is carried out by the executive board (i.e. by the members authorised to represent the company - so-called BGB executive board). All BGB board members must appear at the initial registration.

After registration, the association is a legal person and will receive an extract from the register to prove the registration. The register excerpt serves as proof of the e.V. status, which is required, for example, when opening a bank account and at the tax office.

The General Assembly

The general assembly is the main organ of an association. It can issue instructions to the Board of Directors and decides on all matters that are not expressly assigned (by statute) to the Board of Directors. In particular, this includes the election of the executive committee, amendments to the statutes or the discharge of the executive committee. Besides, the general assembly has extensive rights of information vis-à-vis the executive committee.

Only general assemblies to which invitations have been issued following the provisions of the statutes (form and deadline) are quorate. The invitation needs to include the agenda. Effective resolutions can only be passed on agenda items named in the invitation (unless otherwise provided for in the articles of association).

Other organs of the Association

Only the general assembly and the executive committee are obligatory organs of the association required by the law. Further organs can be determined in the statutes. The association is largely free to decide which tasks these have. However, it is strongly recommended to clearly define composition and tasks of these organs in the statutes.

An advisory board can have the task of advising or supervising the executive board. How it is composed must be regulated within the statutes.

Cash auditors (*Revisoren*) are - contrary to what is often assumed - not compulsory, but the association has to keep an orderly record of income and expenditure. There is also no duty to audit the cash. As a rule, the general assembly appoints the cash auditor(s). They may not be members of the executive committee.

Non-profit Status

An association is not per se non-profit and the non-profit status has nothing to do with the registration of the association. Rather, the non-profit status is purely tax-related, as a consequence, non-profit status is granted and certified by the tax office upon application.

Accordingly, non-profit status above all offers tax advantages. The most important ones are: some of the association's revenues remain exempt from corporate and trade tax; for certain services the reduced VAT rate (7%) applies; the association can issue donation receipts: donations (and partly also membership fees, admission fees and levies) can then be tax

deducted by the donor/member as special expenses. This donation deduction increases the motivation to donate and thus the donation income of the association. In addition to the tax advantages, the non-profit status has an image effect (public welfare orientation, cultural and social contribution to society) and certain grants are awarded exclusively or preferentially to charitable organisations.

However, a number of conditions are attached to the non-profit status like restrictions on the use of funds and on economic activity, strict limitations on donations to members, and extended bookkeeping obligations. Therefore, it should be carefully examined in advance whether the non-profit status is really worthwhile for the association or whether the disadvantages outweigh the benefits. Due to the tying up of assets, a later renunciation of non-profit status is problematic. If the tax office later withdraws the non-profit status this can lead to considerable tax refunds to be paid by the association.

Employees in the Association (e.V)

e.V. associations can be employers but have to comply with German labour law as well as with tax and social security regulations. Only certain activities are regarded as self-employed and are then not subject to wage tax and social security contributions. In non-profit associations, too, those involved do not have to work exclusively voluntarily. Members and also the board of directors can be paid for their work. Remuneration for members of the board of directors must be expressly permitted by the statutes of the association. Care must be taken to ensure that there are clear contractual regulations (type and scope of activity) and that the remuneration is not excessive but in line with regional, profession-based tariffs or collective labour agreements.

Evaluation from a RI-perspective

To build a RI with a legal personality, the e. V. legislation offers some obvious advantages. The e.V. is a legal person for which the internal and external legal rules are well defined, though it provides room to establish a tailor-made internal organisation. An e.V. has extensive legal capacities and can make any necessary legal actions for a RI. An e.V. can have a non-profit character, a minimum capital is not required, and the board of directors is protected against contractual liability (i.e. the typical economic risks) and members are not liable for the association. An e.V. is a democratic type of organisation in three respects: core members have the same rights and duties, the control of the state over the organisation is limited and start-up costs are relatively low.

The e.V. as a legal form has some drawbacks, however. The minimum number of members for registration, a precondition to obtain legal personality is 7, which might be relatively high in the start-up phase, all the more since for members who are not EU-member state citizens,

specific requirements may apply, which might be an issue for institutions from an associate or third country. Integration of legal persons (as research institutes) as member of an e.V. can only in an indirect way since legal persons cannot be a member of an e.V. and should be represented by a natural person. Obtaining the non-profit status may lead to a negotiation process with the tax administration, since the RI might develop some economic activities and the criteria to be a non-profit organisation are not always clear-cut. This will lead in any case to an additional organisational effort and may even result in a dual legal structure (e.g. e.V. + 'mini GmbH'), and duplication of work to create and manage this dual structure.

5.3.4 The Netherlands

In the Dutch law, the three most prevalent legal entities for non-profit organizational bodies such as a RI are a *stichting* (foundation), a *vereniging* (association) and – to a lesser extent – a *coöperatie* (cooperative).

Stichting (foundation)⁹⁰

A *stichting* is one of the legal persons defined in art 2 : 3 of the Dutch civil code⁹¹. This legal structure is often used for non-profit causes. Procedurally, setting up a *stichting* is not complicated. A *stichting* can be created by one or more natural or legal persons. A notarial deed (under civil law) and statutes have to be drafted and the *stichting* has to be registered with the Dutch Chamber of Commerce (KvK). While a board of directors needs to be installed, the legal entity does not allow members.⁹² Additionally, under specific circumstances, a foundation can demonstrate that it is an “institution for general benefit” (ANBI – “*Algemeen nut beogende instelling*”). If this status is granted, tax advantages apply.

Successful examples of foundations that were developed under the umbrella of European projects exist. One such project is the Archives Portal Europe Foundation. The organisation was built under the APENet project (2009-2012) and the APEx project (2012-2015), which were both funded by the European Commission.

⁹⁰<https://business.gov.nl/starting-your-business/choosing-a-business-structure/foundation/>;
<http://www.archivesportaleuropefoundation.eu/>

⁹¹ <https://wetten.overheid.nl/BWBR0003045/2020-01-01> consulted 10 April 2020.

⁹² Dutch civil law lists some restrictions when it comes to appointing a director. See: *Article 2:297a Persons who cannot be appointed as Director of a particular Foundation in:* <http://www.dutchcivillaw.com/civilcodebook022.htm>

*Vereniging (association)*⁹³

This form of organisation is established when natural and/or legal persons unite to work on the same goal(s) and want to take care of shared resources collectively. Contrary to a *stichting*, a *vereniging* must have members: a minimum of two members are necessary to build a *vereniging*.⁹⁴ Conditions for a *vereniging* to acquire legal personality are a deed with a notary and registration with the Dutch Chamber of Commerce. A *vereniging* can exist with full and with limited legal capacity. In the former, members are not personally liable. Limited legal capacity means that the legal person cannot perform certain legal acts as taking loans but implies that members are personally liable.

*Coöperatie (cooperative)*⁹⁵

Persons or existing legal entities can also merge in a *coöperatie*. The perceived advantage of this is mostly economy of scale. The bigger Dutch cooperatives are almost uniquely for-profit organisations. The capital of a cooperative can be divided into shares.⁹⁶ However, examples of non-profit cooperatives also exist.

Evaluation from a RI-perspective

The *stichting*, the *vereniging* and – to a lesser degree – the *coöperatie* are the most plausible forms of a future EHRI RI, were it to become a Dutch legal entity. The most likely option of the three for a non-profit organisation with multiple international partners is, however, the *stichting*. Therefore, this type of legal person will be analyzed more in depth.

EHRI as an international stichting

Articles 285 to 307 of the Dutch Civil Code which describes the legal framework of a *stichting*, do not specify additional rules for integrating non-Dutch bodies⁹⁷. Interestingly, contrary to the Belgian AISBL, the Netherlands does not have an alternative to a *stichting*, specifically geared towards international collaboration. This, however, does not mean that the law does not allow non-Dutch legal bodies to be integrated in a *stichting*. As long as they comply to the requirements set for directors, they can be part of a *stichting*. This means that:

- International bodies need to subscribe to the Dutch trade register;

⁹³ <https://business.gov.nl/starting-your-business/choosing-a-business-structure/association/>

⁹⁴ Dutch civil law defines the condition of becoming a member. See: *Article 2:33 Admission of members*: <http://www.dutchcivillaw.com/civilcodebook022.htm>

⁹⁵ <https://business.gov.nl/starting-your-business/choosing-a-business-structure/cooperative/>

⁹⁶ See: *Article 2:62c Specific provisions for a Mutual Insurance Society* <http://www.dutchcivillaw.com/civilcodebook022.htm>

⁹⁷ https://wetten.overheid.nl/BWBR0003045/2020-01-01_consulted_10_April_2020

- International bodies “need to deposit a certified copy or an authentic extract of the notarial deed of incorporation at the office of that register (Chamber of Commerce)”.⁹⁸

As the *stichting* is a rather flexible organizational model, which can serve different purposes, it is not easy to apply it to EHRI’s specific situation without a deeper legal assessment. One aspect that would need a more elaborate study, is how contributions of partners would be perceived by Dutch tax authorities. They could be considered a form of subsidy, which means that the obligation to pay VAT may apply. However, as mentioned above, an ANBI-status (recognition as an organisation for public benefit) also exempts such an organisation from having to pay specific taxes (e.g. gift tax), which could also mean that a future EHRI-RI is exempted from this obligation.⁹⁹

The ANBI-status however also comes with restrictions, more specifically when it comes to the payment of the members of the board of directors. In an ANBI, no form of remuneration is allowed other than declared expenses and “non-excessive vacation money” for attending meetings. As this poses a problem to the installment of paid positions (contracts with payroll) for the board of directors, an ANBI-status might not be desirable.

Statutes and governance

As outlined above, one of the fundamental things a *stichting* has to do, is the drafting of statutes. The following should be included: the name of the *stichting*, (with *stichting* included in the name)¹⁰⁰; the purpose of the *stichting*; a procedure regarding the appointment and firing of directors; the address where the seat of the *stichting* is located - this has to be in The Netherlands¹⁰¹; a model for decision making within the *stichting*; information on whether the *stichting* has a supervisory board; a description of where the money will go once the *stichting* is disbanded¹⁰²;

Rules the organisation has set out for itself, are usually included in the statutes too.

The organizational structure of a *stichting* is however not set in stone. A board can even be formed by one individual. Usually however, the following roles are specified: chair, secretary, treasurer and, possibly, more general administrative roles. This however is entirely up to the *stichting*.¹⁰³ As far as its organization is concerned, the *stichting* is a rather flexible type of legal person, which might be an advantage to build a permanent research infrastructure with specific needs as is the case for EHRI.

⁹⁸ See: <http://www.dutchcivillaw.com/civilcodebook022.htm>

⁹⁹ See: https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/business/other_subjects/public_benefit_organisations/tax_advantages_pbo/which_tax_advantages_are_available_to_a_pbo

¹⁰⁰ The following site contains more information regarding which names are allowed: <https://www.kvk.nl/advies-en-informatie/bedrijf-starten/een-bedrijfsnaam-kiezen/>

¹⁰¹ See: <https://birdbuzz.nl/wp-content/uploads/2015/08/Incorporation-and-checklist-2015.pdf> p.2.

¹⁰² See: <https://ondernemersplein.kvk.nl/de-stichting/>

¹⁰³ For inspiration on how these roles can be organized, see:

<https://knowhow.ncvo.org.uk/governance/governance-structure-and-roles/roles-on-the-board>

A *stichting* may be subject to, what is called “directors’ liability”. This applies when the *stichting* can no longer pay its taxes and when this is likely caused by negligence that can be attributed to directors’ mismanagement. If such a situation occurs, all director can be held liable, also if they fail to report timely that they will not be able to pay taxes later when this can be reasonably foreseen.¹⁰⁴

An example of an RI which has opted for a *stichting* as legal form is APEF (the Archives Portal Europe Foundation). At the governmental level, it consists of two decision-making bodies: Assembly of Associates, which oversees the strategic course of the organisation and its policy, and the Governing Board, which oversees day-to-day work. These regular, more operational activities are mostly carried out by the Foundation Office.¹⁰⁵ The statutes of the foundation provide useful information on how the organisation is set up, especially on its underlying financial model.¹⁰⁶ One (out of five) form(s) of capital APEF receives, comes in the form of contributions paid by associates.¹⁰⁷ For archives who wish to participate in APEF, the fee depends on the annual operating expenses of the institution. This is in principle similar to the idea of asking a membership fee based on the GDP in the sense that the parties involved contribute proportionally. When it comes to geographic limitations to participation, APEF does not pose any boundaries. The website states that the organisation welcomes European archival (research) institutions.¹⁰⁸ The approval process takes place in the Assembly of Associates. Additionally, also extra-European organisations are considered “under special circumstances”. Given the close involvement of USHMM and Yad Vashem in EHRI over the years, the fact that institutions outside Europe can enter a *stichting* is good news, were EHRI to become one.

¹⁰⁴ See:

https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/aangifte_betalen_en_toezicht/aansprakelijkheid/bestuurdersaansprakelijkheid/bestuurdersaansprakelijkheid

¹⁰⁵ See: <http://www.archivesportaleuropefoundation.eu/index.php/get-involved>

¹⁰⁶ See:

http://www.archivesportaleuropefoundation.eu/images/docs/Statutes_Archives_Portal_Europe_Foundation.pdf

¹⁰⁷ The other forms being: income from the foundation’s activities, subsidies and endowments, that which is acquired through testamentary dispositions and specific legacies, and other incomes.

¹⁰⁸ See: <http://www.archivesportaleuropefoundation.eu/index.php/get-involved>

6 The ERIC as compared to national legal frameworks

As compared to the national legal frameworks, some advantages can be identified for the ERIC as a legal form. An ERIC has a European scope and is designed to enable research institutes from different countries (EU as well as non-EU) to jointly build and run a research infrastructure.

Such a joint structure is possible as well starting from national law (except in the Czech Republic), but it is subject to some limitations regarding for instance the domicile of members of the board of administrators or as in the German case the specific regulation of having legal persons represented in an e.V.

More generally, as explained in the judicial doctrine on the AISBL, an RI based on a national legislation will have to anticipate problems resulting from conflicting national legislations or might even be brought to go to court to resolve specific issues of conflicting national legislations. An ERIC will mostly avoid these issues, since the legal form is precisely designed to overcome difficulties originating in the combination of different national legislations. Another advantage of the ERIC legal form is the implicit policy coordination between the EU and national levels which is built in. National (and regional) authorities have set up standard procedures for research institutes to participate in an ERIC. Similar procedures may exist for participation in RI's with legal forms based on national law, but they tend to be more complicated since the legal form is less tailor-made as compared to an ERIC.

An important advantage of an ERIC is that it has, as a European legal person, full legal capacity ('the most extensive legal capacity') in EU member states and that as a consequence, there is less risk of possible private international law issues resulting from the combination of different legal systems.

From the perspective of political legitimacy, an ERIC avoids that foreign partners will have to work under a Dutch, Belgian or German umbrella. This might be an obstacle to some institutions to join a national law-based RI, especially when, as in the Belgian case, granting of legal personality depends on a political decision. From the perspective of legitimacy, it can be argued that an ERIC, as a tailor-made legal form for RI's already has a reputation and has more prestige as compared to a RI as a legal person under national law.

The legal framework of an ERIC is tailor-made for the construction of a RI whereas the legal frameworks such as a *stichting*, an e.V., or an AISBL can potentially be used to provide a RI with legal personality. However, their scope is more general and can be used for different purposes and not only research. The ERIC-legislation is more specific and provides for the main aspects to be dealt with in the statutes when setting up a RI. Conversely, more aspects should be anticipated when drawing up the statutes based on interpreting either widely defined or non-specified rules for a national legal entity.

An ERIC is based on an agreement between (EU-member) states. Part of the submission to the EC is a declaration of the host country. In the different member states, the relevant body or bodies that can sign this declaration have to be identified, as well as the specific procedures (and if relevant the alignment with strategies of national/regional funding bodies for research) have to be identified. This procedure takes time. Moreover, timelines in the countries may differ, meaning that the country where the procedure is most time-consuming determines the speed of the procedure. From this perspective, national law may enable a swifter procedure to build a legal person as compared to an ERIC. The national law under which the RI would be granted legal personality should be selected carefully, however. Even if there are similarities at the level of judicial principles between the German, Dutch and Belgian laws we have analyzed, the procedure to acquire legal personality may be subject to additional formalities: the more formalities have to be fulfilled the longer the procedure might take. The procedure for the Belgian AISBL is potentially the longest since a Royal Decree is required. The procedure in the Netherlands seems to be more expedite than the procedure in Germany. Whereas in Germany, the statutes of an e.V. have to be submitted to a court before obtaining legal personality, in the Netherlands a deed with a notary and simple registration with the Dutch Chamber of Commerce are sufficient to obtain legal personality. The procedure with the notary takes some weeks rather than some months.

In the hypothesis that we consider a transitory phase to an ERIC a Dutch *stichting* might be preferred as a legal form, since the procedure to create a *stichting* is less cumbersome and shorter as compared to an AISBL or an e.V.

7 ERICs and Research Infrastructures of European interest in Social Sciences and Humanities

Since the creation of European Research Infrastructure Consortium legal framework in 2009, twenty-one legal entities have been established under its umbrella covering almost all scientific fields: astronomy and particle physics, environmental research, life sciences, multidisciplinary scientific research, social sciences and the humanities.¹⁰⁹ Five out of these ERICs were set - up for the research field of social sciences and humanities domain¹¹⁰: CESSDA The Consortium of European Social Science Data Archives, CLARIN: European Research Infrastructure for Language Resources and Technology, DARIAH: Digital Research Infrastructure for the Arts and Humanities , ESS: European Social Survey ,SHARE Survey of Health, Ageing and Retirement in Europe.

The ERICs in Social sciences and Humanities cover a wide range of SSH subdomains and offer a diversity of services: CESSDA provides large-scale, integrated and sustainable data services to the Social Sciences¹¹¹: CLARIN, makes digital language resources available to scholars, researchers, students and citizen-scientists from all disciplines, especially in humanities and Social Sciences through single sign-on access¹¹²; DARIAH is a pan-European infrastructure for arts and humanities scholars working with computational methods, and it supports digital research as well as the teaching of digital research methods¹¹³; the European Social Survey is an academically driven cross-national survey that measures the attitudes, beliefs and behaviour patterns of diverse populations in more than thirty nations¹¹⁴ ; SHARE is a multidisciplinary & cross-national panel database of micro data on health, socio-economic status & social & family networks of more than 120,000 individuals¹¹⁵.

The option for the legal framework of European Research Infrastructure Consortium is made clear in all these ERICs statutes, Article 1, and the official name of the legal entities contain the ERIC acronym. The Statutes structure follow the basic internal structure, which is very flexible to leave to each ERIC legal entity to define the memberships rights and obligations, the bodies of the ERIC, their competences and funding schemes.¹¹⁶

¹⁰⁹ <https://www.eric-forum.eu/the-eric-landscape/>

¹¹⁰ <https://www.eric-forum.eu/the-eric-landscape/>

¹¹¹ <https://www.cessda.eu/>

¹¹² <https://www.clarin.eu/>

¹¹³ <https://www.dariah.eu/>

¹¹⁴ <https://www.europeansocialsurvey.org/about/>

¹¹⁵ <http://www.share-project.org/organisation/share-eric.html>

¹¹⁶ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p.5.

Designed to facilitate the establishment and operation of research infrastructures of European interest with the involvement of several European countries, the ERIC regulation provides a common legal framework which complements national and inter-governmental schemes.¹¹⁷

As in the case of EHRI-PP, the current ERICs made a clear and sustained decision based on their own research during the preparatory phases.

After evaluating the legal frameworks existing at the international, European, and national levels, the Management Board of CESSDA¹¹⁸ considered that the European Research Infrastructure Consortium (ERIC) should be the preferred model. Being one of the first ERICs to be established, CESSDA opted for this legal framework during its preparatory phase, funded under FP7, even though at that time, August 2010, this legal model has not yet been tested.¹¹⁹

CLARIN – ERIC was another among the first ERICs to be established by the EC. In 2009, ERIC legal form was considered as the best solution for covering RIs communities' problems. During its Preparatory Phase¹²⁰, funded by the EC under FP7, CLARIN evaluated the ERIC as the best solution to secure its funding. Since the countries know that funding is expected from them for the phases following the preparatory phase, ERIC represents the common framework for operation when they grant national funding to research infrastructures. CLARIN's dedicated deliverable lists in 2009 several other advantages for ERIC: important component of ERA; the European Research Infrastructure label; possible financial support from the EC; governments commitments for RIs; a full framework, with guidelines, VAT exemption. Disadvantages are also identified: difficulties with the integration of institutions from countries which are not partners in the consortium; fixed system with strict rules, reporting and control; having governments as members instead of researchers or research managers may introduce more overhead.¹²¹

DARIAH was listed on the first publication of ESFRI and between 2008 and 2011 received funding under FP7 to prepare DARIAH -ERIC.¹²² Among the advantages of opting for the ERIC legal framework, DARIAH identified: the ERIC legal personality in the entire territory of the EU without the need for separate formalities in different countries, an aspect extremely important for distributed research infrastructures. This allows the possibility to operate in different locations under a simple, single form and organisation. Another advantage identified by DARIAH is the tax exemptions and the exemption from any other tax included in the agreement between its members. This is of major importance for the procurement of the necessary

¹¹⁷ https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf#view=fit&pagemode=none p.5

¹¹⁸ <https://ppp.cessda.eu/deliverables.html>

¹¹⁹ https://ppp.cessda.eu/doc/D3.3_Recommendations_on_legal_structure.pdf

¹²⁰ <https://www.clarin.eu/content/about-clarin-preparatory-phase>

¹²¹ <https://office.clarin.eu/pp/D8S-1.2.pdf>

¹²² <https://www.dariah.eu/about/history-of-dariah/>

material and equipment for the construction and operation of the ERIC. Moreover, each ERIC is entitled to create its own procurement policy, which allows the procurement of goods and services in an easy and fast way. Therefore, at the end of the Preparatory Phase, DARIAH proposed to create DARIAH ERIC.¹²³

The ESS preparatory phase project run between February 2008 and November 2011 and was funded under EC FP7.¹²⁴ In November, 2013, the EC implemented the decision on setting up the ESS-ERIC.¹²⁵

SHARE Preparatory Phase project started in January 2008 and ended in December 2009 and was funded also by EC FP7.¹²⁶ Aims of the preparatory phase was to bring the SHARE prototype to the level of financial, legal, governance and technical maturity required to fill important knowledge gaps in individual and population ageing.¹²⁷ In March 2011, SHARE became an ERIC. The option for this legal framework was based on the fact that it offers legal personality and capacity in all EU Member State and other partner countries; it provides some tax exemptions (e.g. VAT) enjoyed by international organisations; the possibility to establish a firm governance structure and to build procurement procedures for subcontracts.¹²⁸

In Europe there are also RIs of European interest established under national legislation. For the purpose of this Deliverable, in the area of Social Sciences and Humanities we have identified and reviewed an international consortium that eventually formed as a Dutch *stichting*, the Archives Portal Europe Foundation (APEF)¹²⁹. After two successive European projects, APENet (2009-2012) and APEx (2012-2015), this organisation works financially independent from the EU and is currently supported by its members, the national archives of the countries involved. This is of course a significant difference from the ERIC-model, which does not consist of institutions, but of member states. The reasoning behind the organisation becoming a *stichting* instead of an ERIC is not easy to deduct.

¹²³ <https://cordis.europa.eu/project/id/211583/reporting>

¹²⁴ <https://cordis.europa.eu/project/id/212331>

¹²⁵ <https://www.europeansocialsurvey.org/docs/about/ERIC-ESS-OJ-30-November-2013.pdf>

¹²⁶ <https://cordis.europa.eu/article/id/86444-the-eu-prepares-to-understand-ageing>

¹²⁷ <https://cordis.europa.eu/project/id/211909/reporting>

¹²⁸ <http://www.share-project.org/organisation/share-eric.html>

¹²⁹ <http://www.archivesportaleuropefoundation.eu/>

8 Conclusions

The purpose of Deliverable 2.2 *Deliverable on the Selection and Analysis of the Legal frameworks for distributed Research Infrastructures and the preferred model for European Holocaust Research Infrastructure* was to study the different legal frameworks best suited for the establishment of EHRI as a permanent Research Infrastructure with legal personality.

To conclude on what is the most appropriate legal framework for EHRI to be set up as research infrastructure with legal personality several steps have been taken: identify and review the relevant legal forms available at the international, EU and national levels; to study their advantages and disadvantages for a research infrastructure with a focus on EHRI needs; other RIs of European interests have been identified and the legal framework under which they have been established have been reviewed.

8.1 EHRI as IGO

The international legal frameworks allow the establishment of International Governmental Organisations – IGO. Several RIs opted for this: CERN – European Organization for Nuclear Research, ITER - International nuclear fusion research and engineering megaproject or EMBL - The European Molecular Biology Laboratory.

The analysis performed revealed that establishing EHRI as an IGO would be a considerably lengthy process. IGOs gain an international legal personality only after the states lawful representatives, usually governments, complete the process of ratification procedures of their agreements (i.e. treaties). However, reaching this stage requires a significant time of preparation, negotiation, and member states approval by the Parliaments. Moreover, the RI budget needs to be decided via a formula of scales of assessment, and staffing will be very costly.

8.2 EHRI as RI under national legal frameworks

National legislation in Belgium, Germany and the Netherlands have types of legal personality which could be used for the purpose of a European RI. They need careful assessment, however, since there are often specific provisions, even limitations, which might not facilitate international cooperation as required in a European RI. Moreover, these laws are broad in scope and not tailor-made for an RI, implying that statutes have to be drawn carefully to integrate proactively all the legal and organisational requirements to make an RI work efficiently. Legislation pertaining to the acquisition of legal personality status has in most cases to be combined with tax legislation, since the latter may have a direct effect on the internal organisation of the legal person and may lead to restrictions on the internal functioning of the legal entity.

Regarding principles, the choice for a national legal form implies that one national legal system prevails and in some cases an intervention of the political authority is needed to acquire legal personality. Using one national law to provide an RI with a legal personality will lead to combination of national legislations with a risk of judicial conflicts. Having said that, a less formalistic national legal framework (as the Dutch *stichting*) may be used as a transitional legal form.

8.3 EHRI - ERIC

At the European level, several legal framework options have been identified. the European Economic Interest Group (EEIG), the European Company (Societas Europaea – SE), the European Grouping of Territorial Cooperation (EGTC) and the European Research Infrastructure Consortium (ERIC). While all of them are discussed, only the last one received more attention because for the purposes of an RI only the last legal option ERIC can be considered.

Analyzing the ERIC legal framework from EHRI legal needs and specific objectives in the field of Holocaust documentation, research, education, and commemoration revealed several advantages. Therefore, the recommendation is to opt for an ERIC as the future legal form for an EHRI-RI.

Legal needs

Since 2010, in the context of two EU-funded integrating activities, the EHRI project brought together archives, libraries, research centers, museum and memorial sites, from Western and Eastern Europe, as well as Israel and United States of America in its efforts to build a pan-European home for Holocaust research. Implementing a long-term European RI, with entities located in the EU member states, as well as in the extra-European space requires a legal framework that allows this. The ERIC legal framework is opened to European Union Member States, associated countries (Israel) and third countries (USA).

Moreover, the ERIC legislation allows the building of an institutional infrastructure which will integrate a central hub and several national nodes.

Furthermore, members can be represented in an ERIC by one or more public entities or private entities with a public service mission. This is important for EHRI considering the variety of entities which were brought under its umbrella in the context of EHRI's integrated activities.

Another important objective of the EHRI-PP project is to ensure the sustainability of EHRI through the drafting of a sound business plan which will secure its long-term funding, through firm financial commitments from its founding members. The ERIC legal framework allows the future EHRI RI to decide on its budget and members' contributions, as well as on the funding model to determine its Members and Observers annual contributions. The ERIC legal

framework allows the funding of an EHRI-ERIC (e.g. donations) but only in accordance with Title VI of the Financial Regulations. Moreover, by employing the ERIC legal framework, EHRI RI can benefit from privileges regarding VAT, and excise duty. Furthermore, the EHRI-ERIC is also free to decide on its own procurement policy, which principles should be mentioned in the Statutes and reflected in the operation of the ERIC. The future EHRI RI should be operated on a non-economic bases; however, the ERIC legal framework allows economic activities as a secondary character. The agreements between the EHRI - ERIC legal entity and other legal entities should clearly identify the activities and resources which fall under the responsibility the ERIC.

Specific objectives

Considering EHRI's core mission to improve access to Holocaust documentation, thereby overcoming the enormous fragmentation and dispersal of the relevant source material within and outside the European space, the ERIC legal framework offers some advantages by allowing to create a RI which can be either single-sited, distributed, or virtual. Moreover, the ERIC legal framework is flexible enough to allow the construction of the future EHRI RI either as: one legal entity operating different entities locally, or in several sites, or as a central hub coordinating several distributed facilities. Furthermore, the ERIC legal framework allows the addition of new members and considering its objectives and the current political changes this should be of high importance for the future EHRI RI. The procedures and conditions for becoming a new member must be defined in the Statutes, while the ERIC legal entity must secure a sufficient EU dimension (i.e. Member States voting rights in the assembly of members).

Other important elements of EHRI's core mission are to promote inter-disciplinary, trans-national, methodologically innovative activities; to contribute to the development of local, regional, and national centres of excellence, and to enable synergies between existing institutions. To this it adds to develop and promote open, inter-operable and replicable standards and methods, and to ensure maximal accessibility, trustworthiness and visibility of Holocaust sources and research holds.

Created as a response to the increasing competition between the European RIs and the EU's global partners, the need to support the investment in RIs which increase in complexity often beyond the EU Member States or even the European continent, the ERIC legal framework will support EHRI RI: to advance the state-of-art of Holocaust research through much needed innovative activities; to create opportunities to carry out advanced research also in areas where it needs further support (e.g. Central and Eastern Europe). The ERIC legal framework will support the EHRI RI to also increase the visibility of Holocaust sources and to ensure their accessibility to all international users, to secure the mobility of knowledge and

researchers, and the growth of intellectual potential in Europe and beyond. The future EHRI-ERIC legal entity should secure this through the management of knowledge and intellectual property, open access to data, communication of results and dissemination of activities.

To transform EHRI into an ERIC, tailor-made statutes have to be drawn in accordance with the ERIC-legislation, covering not only its internal organisation but also establishing durable bonds with relevant stakeholders from EU member states, associate and third countries. Moreover, the basic principles of policies of proper functioning (e.g. user access, dissemination, intellectual property, employment, data) have to be laid down. A preliminary step before drafting the statutes, however, is to elaborate a governance structure for the future RI, which will serve as the starting point to draw the statutes of the legal person.