Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC)

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THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Having regard to the opinion of the Committee of the Regions[(3)],

Whereas:

(1) Pursuant to Article 171 of the Treaty the Community may set up joint undertakings or any other structure necessary for the efficient execution of Community research, technological development and demonstration programmes.

(2) The support and development of research infrastructures in Europe has been an ongoing objective of the Community, as last reflected in Decision 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007 to 2013)[(4)] and in particular in Council Decision 2006/974/EC of 19 December 2006 on the specific programme 'Capacities'[(5)].

(3) While traditional support for the use and development of European research infrastructures has essentially taken the form of grants in favour of established research infrastructures in the Member States, the need for additional efforts has become apparent in recent years in order to stimulate the development of new structures by creating an appropriate legal framework which should facilitate their establishment and operation at the level of the Community.

(4) This need has been expressed on numerous occasions both at political level by the Member States and the Community institutions, and by the various actors within the European research community such as undertakings, research centres and universities and, in particular, the European Strategy Forum on Research Infrastructures (ESFRI).

(5) While the central role of world-class scientific research infrastructures for the attainment of the Community's RTD objectives set out in Article 163 of the Treaty has thus long been recognised under Community RTD Framework Programmes,

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the rules governing establishment, financing and operation of these structures are still fragmented and regionalised. Considering that European research infrastructures are in competition with those of the Community's global partners which are and will be strongly investing in modern large-scale research infrastructures, and that these infrastructures are becoming increasingly complex and expensive, often placing them beyond the reach of a single Member State or even continent, it is now necessary to exploit and develop the full potential of Article 171 of the Treaty by establishing a framework containing the procedures and conditions for the setting-up and operation of European Research Infrastructures at Community level which are necessary for the efficient execution of the Community's RTD programmes. This new legal framework would complement other legal forms existing under national, international or Community law.

(6) In contrast to Joint Technology Initiatives (JTI) constituted as Joint Undertakings of which the Community is a member and to which it makes financial contributions, a European Research Infrastructure Consortium (hereinafter referred to as 'ERIC') should not be conceived as a Community body within the meaning of Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities[(6)] (the Financial Regulation), but as a legal entity of which the Community is not necessarily a member and to which it does not make financial contributions within the meaning of Article 108(2)(f), of the Financial Regulation.

(7) Given the close cooperation between Member States and the Community in programming and implementing their respective research activities in a complementary manner, as set out in Articles 164 and 165 of the Treaty, it should be for interested Member States, on their own or in conjunction with other qualified entities, to define their needs for the establishment of research infrastructures in this legal format, based on their research and technological development activities and on the requirements of the Community. For the same reasons, membership of an ERIC should be open to interested Member States with the possible participation of qualified associated countries in the Community framework programme for research, technological development and demonstration (hereinafter referred to as 'associated states') and third countries and specialised intergovernmental organisations. In addition to full membership, Member States should be able to become observers of an ERIC on the conditions specified in its Statutes.

(8) An ERIC set up under this Regulation should have as its principal task the establishment and operation of a research infrastructure on a non-economic basis and should devote most of its resources to this principal task. In order to promote innovation and knowledge and technology transfer, the ERIC should be allowed to carry out some limited economic activities if they are closely related to its principal task and they do not jeopardise its achievement. The establishment of research infrastructures as ERICs does not exclude that research infrastructures of pan-European interest that have another legal form can equally be recognised as contributing to the progress of European research, including to the implementation of the roadmap developed by

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ESFRI. The Commission should ensure that ESFRI members and other interested parties are informed about these alternative legal forms.

(9) Research infrastructures should help to safeguard the scientific excellence of Community research and the competitiveness of the Community's economy, as based on medium-term to long-term forecasts, through the efficient support of European research activities. To achieve this they should be effectively open to the European research community at large in accordance with the rules established in their Statutes and should have the aim of enhancing European scientific capabilities beyond the current state of the art and should thereby contribute to the development of the European Research Area.

(10) In order to permit an efficient procedure for the setting-up of an ERIC, it is necessary for the entities willing to set up an ERIC to submit an application to the Commission which should assess, with the help of independent experts, which may include ESFRI, whether the proposed research infrastructure is in conformity with this Regulation. Such an application should contain a declaration of the host Member State recognising the ERIC as an international body or organisation for the purpose of the application of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[(7)] and Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products[(8)], as of its setting up. The ERIC should also benefit from certain exemptions as an international organisation for the purpose of applying Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[(9)], in conformity with State aid rules.

(11) For reasons of transparency, the decision setting-up an ERIC should be published in the *Official Journal of the European Union*. For the same reasons, the essential elements of its Statutes should be annexed to such decisions.

(12) In order to carry out its tasks in the most efficient way, an ERIC should have legal personality and the most extensive legal capacity as from the day on which the decision setting it up takes effect. It should have a statutory seat, in order to determine the applicable law, within the territory of a member of that ERIC which is a Member State or an associated country.

(13) Membership of an ERIC should comprise at least three Member States and may include qualified associated countries and third countries other than associated countries as well as specialised intergovernmental organisations.

(14) In line with the Community dimension of this Regulation, Member States should jointly hold the majority of votes in the assembly of members of an ERIC.

(15) For the implementation of this framework, more detailed provisions should be laid down in Statutes, on the basis of which the Commission should examine the compliance of an application with the framework established in this Regulation.

(16) It is necessary to ensure that, on the one hand, an ERIC has the necessary flexibility to amend its Statutes and, on the other hand, that the Community which sets up the ERIC

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retains control over certain essential elements. If an amendment concerns an essential element of the Statutes annexed to the decision setting up the ERIC, such amendment should be approved, prior to taking effect, by a Commission decision taken following the same procedure as that for setting up the ERIC. Any other amendment should be notified to the Commission, which should have an opportunity to object if it considers the amendment contrary to this Regulation.

(17) It is necessary for an ERIC to equip itself with its own bodies for the effective management of its activities. The Statutes should determine the manner in which those bodies legally represent the ERIC.

(18) It is necessary for an ERIC to carry out its activities according to sound budgetary principles for the exercise of its financial responsibility.

(19) An ERIC could qualify for funding in accordance with Title VI of the Financial Regulation. Funding under the Cohesion Policy could also be possible, in conformity with the relevant Community legislation.

(20) In order to carry out its tasks in the most efficient way and as a logical consequence of its legal personality, an ERIC should be liable for its debts. In order to allow the members to find appropriate solutions regarding their liability, the option should be given to provide in the Statutes for different liability regimes going above the liability limited to the contributions of the members.

(21) Since an ERIC is established under Community law, it should be governed by Community law, in addition to the law of the State where it has its statutory seat. However, the ERIC could have a place of operation in another State. The law of that latter State should apply in respect of specific matters defined by the Statutes of the ERIC. Furthermore, an ERIC should be governed by implementing rules complying with the Statutes.

(22) Member States are free to apply or to adopt any laws, regulations or administrative measures which do not conflict with the scope or objectives of this Regulation.

(23) In order to ensure sufficient control of compliance with this Regulation, an ERIC should transmit to the Commission and relevant public authorities its annual report and any information about circumstances threatening to seriously jeopardise the achievement of its tasks. If the Commission obtains indications, through the annual report or otherwise, that the ERIC acts in serious breach of this Regulation or other applicable law, it should request explanations and/or actions from the ERIC and/or its members. In extreme cases and if no remedial action is taken, the Commission could repeal the decision setting up the ERIC; thus triggering the winding-up of the ERIC.

(24) Since the objective of this Regulation; i.e. the establishment of a framework for European Research Infrastructures between Member States, cannot be sufficiently achieved by the Member States in the framework of their national constitutional systems, by reason of the trans-national nature of the problem, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty.

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In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(25) Since this Regulation is primarily established for the efficient execution of Community research, technological development and demonstration programmes, and since the measures necessary for its implementation are essentially management measures, they should therefore be adopted by the management procedure provided for in Article 4 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred to the Commission[(10)],

HAS ADOPTED THIS REGULATION:

Article 1

Subject-matter

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

Article 2

Definitions

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

(a) 'research infrastructure' means facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields and covers major scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structures for scientific information; enabling Information and Communications Technology-based infrastructures such as Grid, computing, software and communication, or any other entity of a unique nature essential to achieve excellence in research. Such infrastructures may be 'single-sited' or 'distributed' (an organised network of resources);

(b) 'third country' means a State that is not a Member State of the European Union;

(c) 'associated country' means a third country which is party to an international agreement with the Community, under the terms or on the basis of which it makes a financial contribution to all or part of the Community research, technological development and demonstration programmes.

Article 3

Task and other activities

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

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