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COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL REGULATION

on the Community legal framework for a European Research Infrastructure (ERI)

{SEC(2008) 2278}
{SEC(2008) 2279}

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

The legal framework for a European Research Infrastructure is designed to facilitate the joint establishment and operation of research facilities of European interest between several Member States and countries associated to the Community R&D Framework Programme. It is being developed in response to requests from the Member States and the scientific community, because the available national and international legal forms are not fully adequate.

- **General context**

Since the EU Commission published its Communication "Towards a European Research Area" in January 2000, the idea of a common European Research Area (ERA) has been the guiding principle for all Community R&D measures and a central pillar in attaining the research goals of the Lisbon Strategy. The 2007 ERA Green Paper "The European Research Area: New Perspectives" identified a number of key areas where effective action through partnerships between Member States would have the potential to deliver significant gains for Europe's research system and help to create a "fifth freedom" - the free movement of knowledge - in Europe.

In this context, one of the pillars of the ambitious ERA concept that was put forward concerns "Developing world class research infrastructures", which in turn provides growth, jobs and the basis for a dynamic and knowledge-based European economy.

Research infrastructures are playing an increasing role in the advancement of knowledge and technology. For example, observatories for environmental sciences, data banks in genomics and data bases in social science, imaging systems or clean rooms for nano-electronics, irradiation facilities for materials research or super-computers, are essential tools for knowledge development. By offering unique research services, by attracting young people to science and through networking of facilities, research infrastructures help in structuring the scientific community and therefore play a key role in the construction of an efficient research and innovation environment. Because of their ability to assemble a 'critical mass' of people and investment, they contribute to national, regional and European economic development. They are therefore at the core of the "knowledge triangle" of research, education and innovation.

As the frontiers of research evolve and advance, and as our technologies progress, research infrastructures are becoming increasingly complex and more expensive, often placing them beyond the reach of a single research group, region, nation or even continent. This was recognised by the Competitiveness Councils of 1-3 July 2004 and of 25-26 November 2004 when the Council agreed that, as part of the further development of the ERA, there was a need for the reinforcement of competitive research, prevention of fragmentation, and cooperation in the field of research infrastructures. The Council emphasized the necessity of developing a European strategy in the field of research infrastructures and mandated ESFRI, - the European Strategy Forum for Research Infrastructure- , to develop a strategic roadmap for Europe for the next generation of research infrastructures.

The Competitiveness Council of 30 May 2008 reiterated the need to develop research infrastructures at European level, on the basis of, among other things, an efficient coordination and an appropriate legal framework. In October 2006, ESFRI released the first ever European Roadmap for Research Infrastructures containing 35 key projects of European interest to be developed in the next 10-20 years. The challenge now is the implementation of these projects.

However, a major difficulty for setting up new European research infrastructures, apart from scarcity of resources and the complexity of technical and organisational issues, is the lack of an adequate legal framework allowing the creation of appropriate partnership with partners from different countries.

- **Existing provisions in the area of the proposal**

Recent work carried out under the auspices of ESFRI has recognised that existing legal forms under national law (e.g. the French société civile, the German Gesellschaft mit beschränkter Haftung (GmbH), the UK limited liability company (Ltd) or the Dutch stichting (foundation)) do not fulfil the needs of these new research infrastructures. The analysis is similar for existing legal forms under international or Community law (e.g. international/intergovernmental organisations, European Economic Interest Groupings). ESFRI thus identified a need to develop a dedicated Community legal framework for setting-up European research infrastructures involving several Member States.

The proposed legislation is therefore designed to facilitate the joint establishment and operation of research facilities of European interest among several Member and countries associated to the Community R&D Framework Programme, and to help develop further the European policy for research infrastructures. This should complement the advances already achieved since 2004, in particular through ESFRI. A wide-ranging consultation has been carried out to prepare this initiative, including analysis conducted by experts and consultation of stakeholders.

- **Consistency with the other policies and objectives of the Union**

The rapid setting-up of new European research infrastructures - as identified for example by ESFRI - would enable an easier and quicker achievement of the horizontal objectives of the European Union:

Growth and Jobs: The construction, operation and maintenance of such facilities create important supply and demand effects. For example, the generation of today's CCD cameras (consumer products), or the use of specific software for ophthalmological examinations have their roots in the technological developments done in the last twenty years in the large optical astronomy observatories;

"Sustainable Europe": European research infrastructures help to better understand our environment or to develop new approaches to energy. As identified by the Energy Council of 28 February 2008, research infrastructures help to improve and enlarge the Community's knowledge base of researchers and research institutes. They reduce barriers to mobility, attract world-class human capital, and improve science education in the field of renewable energy technologies (SET plan);

"Knowledge Society": European research infrastructures are key for the efficient access to world-level scientific knowledge by large communities of researchers and users. It should be remembered that the Internet was born in CERN many years ago. Today, millions of kilometres of optic fibres link the different scientific centres of competences, research centres and universities, as the backbone of an efficient, quick and reliable scientific communication and information system.

Europe as a world partner: The rapid development of European research infrastructures will significantly affect the attractiveness of the European Research Area. Already Australia, India, Russia and the USA have shown considerable interest in a participation in the development of the projects identified by ESFRI.

Better regulation (and simplification): Finally, through an optimisation of the legal framework at European level, the Council could allow a quicker and efficient process for the management of the different files related to the setting-up of new European research facilities using a single legal base instead of several national ones.

The regulation is complementary to other Community initiatives developed in the context of ERA, such as the Communication on Joint Programming in Research¹. It also complements the European Institute of Innovation and Technology (EIT), which will create Knowledge and Innovation Communities (KICs) bringing together the best resources from higher education, research and business players in partnerships.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

• Consultation of interested parties and use of expertise

In the preparation of this proposal, the Commission took into account the views expressed by many stakeholders. ESFRI organised, in collaboration with DG Research, two workshops with key stakeholders in 2006. The two workshops showed the limitations of the existing legal forms at national, Community or international levels for European research infrastructures.

A feasibility study on the creation of a European legal instrument for European research infrastructures was carried out in 2007 by a group of legal experts. The group concluded that a solution could be an EC Regulation based on Article 171 of the EC Treaty.

A Stakeholders Meeting was organised on 3 March 2008. Participants included representatives of the projects in the ESFRI roadmap, representatives of European research facilities and legal experts with in-depth knowledge of the subject.

A vast majority of experts agreed on the usefulness of a new legal form at Community level and on the broad orientation of the project of the Commission.

¹ COM (2008) ***, of **.**.2008

The Commission also set up and consulted an advisory expert group (Sounding Board) in 2008. The Sounding Board showed strong support to the option of developing a new Community legal instrument for European research infrastructures. In their view, such a legal instrument, complementing other existing legal forms, would facilitate and speed up the decision making process for new infrastructures.

- **Impact assessment**

This proposal for a Council Regulation has been subject to a Commission Impact Assessment which compared the potential impact of the proposed framework regulation with the alternatives, including the 'Business as Usual' situation and 3 other :

Option 1: The "no specific EU action" option corresponds to the present situation, where, each consortium, through an ad hoc process, tries to identify among existing legal forms the one which could be the most appropriate for their project;

Option 2 corresponds to a "light" form of intervention from the European Commission, helping those involved in building European infrastructures to identify problems and needs, to exchange information about how to tackle these problems and to establish best practices.

Option 3 corresponds to the setting-up of Joint Undertakings by the Community, according to Article 171 of the EC-Treaty, on a case by case basis, every time that such a need occurs;

Option 4 is a more direct response to the problem at hand. It proposes a legislative action to provide a new legal instrument adapted to the needs of European research infrastructures, complementing existing forms at national and European level; it also considers the empowerment by the legislator of the European Commission to confer the "European Research Infrastructure" status.

A comparative assessment of the different policy options clearly identifies Option 4 as the most effective and efficient way to achieve the policy objectives of the proposal. In particular the proposed framework regulation has clear advantages over other alternatives. It would provide an easier, faster and more cost-efficient process of setting-up new European research infrastructures. It would provide all the features that a legal form should have for European research infrastructures. It would thus increase the number of European research infrastructures and contribute to the achievement of socio-economic, environmental and societal impacts.

It would also contribute to further development of a European policy for research infrastructures. Ultimately the proposed framework regulation would increase the attractiveness of the European Union at international level as a place to do research through the reinforcement of the ERA.

However, Member States in setting-up new research infrastructures of European dimension could also use relevant existing international, national or European legal forms (for instance the EGCT and the EEIG).

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

Complementing national or inter-governmental schemes, the proposed framework regulation will provide a common legal framework based on Article 171 EC Treaty. It will set out the main characteristics of European Research Infrastructures (ERIs), as well as clear procedures by which this status will be conferred by the legislator.

An ERI is a legal entity with legal personality and full legal capacity recognised in all Member States. It is based on membership: its members (Member States, third countries and intergovernmental organisations) jointly contribute to the achievement of the objectives of an ERI, primarily the establishment and operation of a research infrastructure of European importance. Its internal structure is very flexible, allowing the members to define, in the Statutes, their member rights and obligations, the organs and their competences and other internal arrangements. The liability of the members for the debts of the ERI will in principle be limited to their respective contributions; flexibility will however be allowed in the statutes to modify such arrangements. The applicable law is Community law, the law of the State of the statutory seat or of the State of operation regarding certain safety and technical matters. The Statutes and their implementing rules must comply with such applicable law. The ERI shall also be considered as an international body or organisation in the sense of the directives on value-added tax, on excise duties and on public procurement; it shall be thus exempted from VAT and excise duties and its procurement procedures shall be out of the scope of the directive on public procurement.

An ERI shall be set up, in conformity with the legal basis of Article 171 EC Treaty, by a decision of the Commission acting on the basis of implementing powers conferred by the Council (Article 202 EC Treaty). The Commission shall act upon an application submitted by those who wish to become founding members of the ERI. The decision setting up the ERI shall be taken following the advisory procedure. This procedure should stimulate the setting-up of structures necessary for the efficient execution of European research, including those supported by the research, technological development and demonstration Community programmes. It would also allow a quicker process than if individual decisions were taken by the Council, simplifying the complex process of development of international research infrastructures, and avoiding uncoordinated activities.

The European Commission will ensure the overall management of the new legal framework and monitoring of compliance of the ERIs with the Regulation. Five years after its adoption, the Commission shall carry out, through a panel of experts, an evaluation of this legal framework and shall report it to the European Parliament and the Council.

- **Legal basis**

The legal basis of the proposal is Article 171 of the Treaty establishing the European Community.

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community.

In order for Community action to be justified, it is also necessary for the subsidiarity principle to be respected. This involves assessing two aspects. Firstly, it is important to be sure that the objectives of the proposed action could not be achieved sufficiently by Member States in the framework of their national constitutional system (necessity test). Three options are proposed to tackle the identified problem, i.e. that no appropriate legal framework for European Research Infrastructures exists: (1) Coordination action at European level for the development of best practices; (2) Development of Joint Undertakings and (3) Development of a dedicated legal framework at Community level. The Community is best placed to implement these options, on the basis of Article 165 for the first one, and through Article 171 for the two others.

The second aspect to consider is whether and how the objectives could be better achieved by action on the part of the Community (test of European value-added). The rationale for a European action stems from the trans-national nature of the problem (setting-up of legal frameworks between Member States). Alternative solutions exist through the setting up of inter-governmental agreements, however the administrative and legal processes which typically have to be followed under such intergovernmental schemes are considered as too lengthy, difficult and cumbersome.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The draft Regulation is very short and leaves most of the internal arrangements for the planned infrastructure up to the members of the European Research Infrastructure, i.e. Member States, third States and intergovernmental organisations.

The applicable law will be mostly the national law of the country of statutory seat or of operation.

The amount of information that the ERI and its members have to present to the Commission is kept to the minimum necessary so as to allow the Commission to examine its compliance with the framework regulation.

For these reasons, the proposal complies with the proportionality principle.

- **Choice of instruments**

The framework that will be generally applicable to a potentially large number of legal entities, the ERIs, which are set up under Article 171 EC Treaty as legal basis, requires a regulation.

4. BUDGETARY IMPLICATION

The proposed regulation will facilitate the joint establishment and operation of European research facilities among several Member States and Associated States. This is an activity additional to the implementation of the research infrastructures action foreseen in the legal base for the 7th Framework Programme for Research.

5. ADDITIONAL INFORMATION

- **Simplification**

The proposal provides for simplification of administrative procedures for public authorities (Community and national).

Through an optimisation of the legal framework at European level, the Council could allow a quicker and more efficient process for the management of the different files related with the setting-up of new European research facilities using a single legal base instead of several national ones.

Proposal for a

COUNCIL REGULATION

on the Community legal framework for a European Research Infrastructure (ERI)

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Parliament³,

Having regard to the opinion of the European Economic and Social Committee⁴,

Whereas:

- (1) Pursuant to Article 171 of the Treaty the Community may set up joint undertakings or any other structure necessary for the efficient execution of Community research, technological development and demonstration programmes.
- (2) The support and development of research infrastructures in Europe has been an ongoing objective of the Community, as last reflected in Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013)⁵ and in particular in Council Decision No 2006/974/EC of 19 December 2006 on the specific programme "Capacities"⁶.
- (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

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ C , , p. .

⁵ OJ L 412 of 30 December 2006, p. 1.

⁶ OJ L 54 of 22.2. 2007, p. 101.

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, as well as by the various actors within the European research community such as undertakings, research centres and universities.
- (5) While the central role of world-class scientific research infrastructures for the attainment of the Community's RTD objectives set out in Title XVIII of Part Three of the Treaty has thus long been recognised under Community RTD Framework Programmes, the rules governing establishment, financing and operation of these structures are still fragmented and regionalised. Considering that European research infrastructures are in competition with those of the Community's global partners which are and will be strongly investing in modern large-scale research infrastructures, and that these infrastructures are becoming increasingly complex and expensive, often placing them beyond the reach of a single Member State or even continent, it is now necessary to exploit and develop the full potential of Article 171 of the Treaty by establishing a framework containing the procedures and conditions for the setting-up and operation of European Research Infrastructures at Community level which are necessary for the efficient execution of the Community's RTD programmes. This new legal framework would complement other, less specialised, legal forms existing under national, international or Community law (such as the European Economic Interest Grouping (EEIG) or the European Grouping for Territorial Cooperation (EGCT)).
- (6) The term research infrastructure refers to facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields. This definition covers: major scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structured scientific information; enabling ICT-based infrastructures such as Grid, computing, software and communications; any other entity of a unique nature essential to achieve excellence in research. Such research infrastructures may be "single-sited" or "distributed" (an organised network of resources).
- (7) 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 (hereinafter referred to as "ERI") should not be conceived as a Community body within the meaning of Article 185 of the Financial Regulation⁷, 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), point (f), of the Financial Regulation.
- (8) 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

⁷ OJ L 248 of 16.9. 2002, p. 1. Regulation as amended by Regulation (EC, Euratom) No 1995/2006 (OJ L 390 of 30.12.2006, p.1).

for interested Member States, on their own or in conjunction with other qualified entities, to define their needs for the establishment of research infrastructures based on their research and technological development activities and on the requirements of the Community. For the same reasons, membership of an ERI should be open for interested Member States with the possible participation of qualified third countries and specialised intergovernmental organisations.

- (9) A European Research Infrastructure (hereinafter referred to as "ERI") set up under this Regulation should have as its task the establishment and operation of a research infrastructure. It should do so on a non-economic basis in order to prevent distortions of competition. In order to promote innovation and knowledge and technology transfer, the ERI should be allowed to carry out some limited economic activities on certain conditions. The establishment of research infrastructures as ERIs does not exclude that research infrastructures of pan-European interest that have another legal form can equally be recognised as contributing to the implementation of the roadmap developed by the European Strategy Forum for Research Infrastructure (ESFRI) and to the progress of European research. The Commission will ensure that ESFRI members and other interested parties are informed about these alternative legal forms.
- (10) Research infrastructures should help to safeguard scientific excellence of Community research and the competitiveness of its 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 and have the ambition to enhance the European scientific capabilities beyond the current state of the art and thereby contribute to the development of the European Research Area.
- (11) In order to permit an efficient procedure for the setting-up of an ERI, it is necessary for the entities willing to set up an ERI to submit an application to the Commission which has to assess, with the help of independent experts, whether the proposed research infrastructure is in conformity with this Regulation.
- (12) For reasons of transparency, the decision of setting up an ERI should be published in the *Official Journal of the European Union*. For the same reasons, an extract from the Statutes, providing their essential elements, should be annexed to that decision.
- (13) In order to carry out its tasks in the most efficient way, the ERI should have legal personality and 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, on the territory of a member of an ERI which is a Member State or a country associated to a Community framework programme for research, technological development and demonstration.
- (14) Membership of an ERI must comprise at least three Member States and may include qualified third countries and specialised intergovernmental organisations. Therefore, an ERI should qualify as an international body or organisation for the purpose of the application of the Council Directive 2006/112/EC of 28 November 2006 on the

common system of value added tax⁸, 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 products⁹ and 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 contracts¹⁰, in conformity with State aid rules. In order to support more effectively the research activities of the ERI, Member States and participating third countries should take all possible measures to accord to such ERI the most extensive exemption from other taxes.

- (15) In line with the Community dimension of this legal instrument, Member States should jointly hold the majority of votes in the assembly of members of an ERI.
- (16) 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.
- (17) It is necessary to ensure that, on the one hand, an ERI has flexibility to amend its Statutes and, on the other hand, that the Community which sets up the ERI retains control over certain essential elements. If an amendment concerns a matter covered in the extract from the Statutes annexed to the decision setting up the ERI, such amendment has to be approved, prior to taking effect, by a Commission decision taken following the same procedure as the one for setting up the ERI, since the information contained therein is considered as essential. Any other amendment should be notified to the Commission which has an opportunity to object if it considers it contrary to this Regulation. If no objection is raised, an appropriate notice accompanied by a concise summary of the amendment should be published.
- (18) It is necessary for an ERI to equip itself with its own bodies for the effective management of its activities. The Statutes should determine the manner in which these bodies legally represent the ERI.
- (19) It is necessary for the ERI to carry out its activities according to sound budgetary principles for the exercise of its financial responsibility.
- (20) ERIs may receive co-funding from Cohesion Policy financial instruments in conformity with Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999¹¹.
- (21) In order to carry out its tasks in the most efficient way and as a logical consequence of its legal personality, an ERI should be liable for its debts. In order to allow the

⁸ OJ L 347, 11.12.2006, p. 1. Directive as last amended by VAT Council Directive 2008/8/EC of 12 February 2008 (OJ L 44, 20.2.2008, p. 11)

⁹ OJ L 76, 23.3.1992, p. 1. Directive as last amended by Council Directive 2004/106/EC of 16 November 2004 (OJ L 359, 4.12.2004, p. 30)

¹⁰ OJ L 134, 30.4.2004, p. 114. Directive as last amended by Commission Regulation (EC) No 213/2008 of 28 November 2007 (OJ L 74, 15.3.2008, p. 1)

¹¹ OJ L 210 of 31.7.2006, p.25

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.

- (22) As the ERI is established under Community law, it should be governed by Community law, next to the law of the country where it has its statutory seat. However, the ERI could have a place of operation in another country. In that case, the law of that country should apply as regards public and occupational health and safety, environmental protection, treatment of hazardous substances and issuance of permits required. Further, an ERI should be governed by its Statutes adopted in compliance with the preceding sources of law, and by implementing rules complying with the Statutes.
- (23) In order to ensure sufficient control of compliance with this Regulation, an ERI should submit to the Commission the annual report of the ERI and any information about circumstances threatening to seriously jeopardise the achievement of the tasks of the ERI. If the Commission obtains indications, through the annual report or otherwise, that the ERI acts in serious breach of this Regulation or other applicable law, it shall request explanations and/or actions from the ERI and/or its members. In extreme cases and if no remedial action is taken, the Commission may repeal the decision setting up the ERI; this will trigger the winding up of the ERI.
- (24) Since the objectives of the action to be taken; 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, therefore, by reason of the trans-national nature of the problem, these objectives can better be achieved at Community level. The Community may therefore adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (25) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedure for the exercise of implementing powers conferred on the Commission.¹²

HAS ADOPTED THIS REGULATION:

Article 1
Subject-matter and scope

- 1. This Regulation establishes a framework laying down the requirements and procedures for and the effects of setting up a European Research Infrastructure (hereinafter referred to as "ERI").
- 2. It shall apply to research infrastructures of pan-European interest.

¹² OJ L 184, 17.7.1999, p.23.

Article 2
Task and other activities

1. The task of an ERI shall be to establish and operate a research infrastructure.
2. An ERI shall pursue its task on a non-economic basis. However, it may carry out limited economic activities closely related to its task provided that they do not jeopardise the achievement of that task.
3. The ERI shall record costs and revenues of its economic activities separately and shall charge market prices for them, or, if these cannot be ascertained, full costs plus a reasonable margin.

Article 3
Requirements relating to infrastructure

The research infrastructure to be established by an ERI shall meet the following requirements:

- (a) it is necessary for the carrying out of European research activities and in particular for the efficient execution of Community research, technological development and demonstration programmes;
- (b) it represents an added value in the development of the European Research Area and a significant improvement in the relevant scientific and technological fields at international level;
- (c) the European research community, composed of researchers from Member States and from countries associated to the Community research, technological development and demonstration programmes can effectively have access to it; and
- (d) it contributes to the dissemination and optimisation of the results of activities in Community research, technological development and demonstration.

Article 4
Application for the setting-up of an ERI

1. The entities applying for the setting up of an ERI (hereinafter referred to as "applicants") shall submit an application to the Commission. The application shall be submitted in writing in one of the official languages of the Community and shall contain the following:
 - (a) a request to the Commission to set up the ERI;
 - (b) the proposed Statutes of the ERI referred to in Article 9;
 - (c) a technical and scientific description of the research infrastructure to be established and operated by the ERI, addressing in particular the requirements set out in Article 3.

- (d) an extract from the Statutes which contains the information listed in the Annex.
- 2. The Commission shall assess the application. During the assessment it may obtain the views of independent experts in particular in the field of the intended activities of the ERI. The result of such assessment shall be communicated to the applicants who shall be, if necessary, invited to complete or amend the application within a reasonable time.

Article 5 *Decision on the application*

- 1. The Commission shall, taking into account the results of the assessment referred to in Article 4(2) and in accordance with the procedure referred to in Article 21:
 - (a) adopt a decision setting up the ERI after it has satisfied itself that the requirements laid down in this Regulation are met; or
 - (b) reject the application if it concludes that the requirements laid down in this Regulation are not met.
- 2. The decision on the application shall be notified to the applicants. The decision setting up the ERI shall also be published in the L series of *the Official Journal of the European Union*.
- 3. The extract from the Statutes contained in the application shall be annexed to the decision setting up the ERI.

Article 6 *Status of an ERI*

- 1. An ERI shall have legal personality as from the date on which the decision setting up the ERI takes effect.
- 2. An ERI shall have in each Member State the most extensive legal capacity accorded to legal entities under the law of that Member State. It may, in particular, acquire, own and dispose of movable, immovable and intellectual property, conclude contracts and be a party to legal proceedings.
- 3. The ERI is an international body within the meaning of Article 151(1)(b) of Directive 2006/112/EC, and an international organisation within the meaning of the second indent of Article 23(1) of Directive 92/12/EEC and of Article 15, point (c), of Directive 2004/18/EC.
- 4. Member States shall take all possible measures to accord the ERI the most extensive exemption from taxes further to those referred to in paragraph 3, in conformity with State aid rules.

Article 7
Seat and name

1. An ERI shall have a statutory seat, which shall be located on the territory of a member which shall be a Member State or a country associated to a Community research, technological development and demonstration programme.
2. An ERI shall have a name containing the words "European Research Infrastructure" or the abbreviation "ERI".

Article 8
Membership

1. The following entities may become members of an ERI:
 - (a) Member States;
 - (b) third countries;
 - (c) inter-governmental organisations.
2. An ERI must at all times have at least three Member States as members. Further Member States may join as members at any time on fair and reasonable terms specified in the Statutes.
3. Member States shall jointly hold the majority of the voting rights in the assembly of members referred to in Article 12 (a).
4. Any Member State or third country may be represented by one or more public entities, including regions, or private entities with a public-service mission as regards the exercise of specified rights and the discharge of specified obligations as a member of the ERI.
5. Third countries and intergovernmental organisations applying for a membership of an ERI shall recognise that that ERI shall have legal personality and capacity in accordance with Article 6(1) and (2) and that it shall be subject to rules determined in application of Article 16.
6. Third countries applying for a membership of an ERI shall accord to such ERI a treatment equivalent to that referred to in Article 6(3) and (4).

Article 9
Statutes

The Statutes shall contain at least the following:

- (a) a list of members, and where applicable, of entities representing them and the conditions of and procedure for changes in membership and representation in compliance with Article 8;
- (b) tasks and activities of the ERI;

- (c) statutory seat in compliance with Article 7(1);
- (d) name of the ERI in compliance with Article 7(2);
- (e) rights and obligations of the members, including the obligation to make contributions to a balanced budget;
- (f) bodies of the ERI, their competencies and the manner in which they are constituted and in which they decide, including upon the amendment of the Statutes, in compliance with Articles 10, 11 and 12;
- (g) duration, and the procedure for the winding-up in compliance with Article 17;
- (h) basic principles covering:
 - (i) access policy for users;
 - (ii) data policy;
 - (iii) scientific evaluation policy;
 - (iv) intellectual property rights policy;
 - (v) dissemination policy;
 - (vi) employment policy;
 - (vii) procurement policy respecting the principles of transparency, non-discrimination and competition;
 - (viii) decommissioning, if relevant;
- (i) identification of the working language(s);
- (j) references to rules implementing the Statutes.

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

Article 10

Amendments of the Statutes requiring an amendment of the extract from the Statutes

1. Any amendment of the Statutes which requires an amendment of the extract from the Statutes shall be submitted to the Commission by the ERI for approval. Such amendment shall not take effect before the decision granting approval has come into force. The Commission shall apply, *mutatis mutandis*, Articles 4(2) and 5.

2. The application for the amendment shall contain the following:
 - (a) the text of the amendment as proposed, including the date on which it enters into force;
 - (b) the amended consolidated version of the Statutes;
 - (c) the amended extract from the Statutes.

Article 11
Other amendments of the Statutes

1. Any amendment of the Statutes other than that referred to in Article 10 shall be submitted to the Commission by the ERI within ten days after its adoption.
2. The Commission may raise an objection to such amendment within sixty days from submission giving reasons why the amendment does not meet the requirements of this Regulation.
3. If no objections are raised, the Commission shall publish a notice of the amendment accompanied by the concise summary of the amendment in the C series of the *Official Journal of the European Union*.
4. The amendment shall not take effect before the period for objecting has expired or has been waived by the Commission or before an objection raised has been lifted.
5. The application for the amendment shall contain the following:
 - (a) the text of the amendment as adopted, including the date on which it enters into force;
 - (b) the amended consolidated version of the Statutes;
 - (c) the concise summary of the amendment.

Article 12
Organisation of the ERI

The Statutes shall provide for at least the following bodies having the following competencies:

- (a) an assembly of members as the body having full decision-making competency, including the adoption of the budget;
- (b) a director or a board of directors, appointed by the assembly of members, as the executive body and legal representative of the ERI.

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

Article 13
Budgetary principles, accounts, audit and insurance

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

Article 14
Community funding

Community funding to an ERI may be awarded solely in accordance with Title VI 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. Funding under Cohesion Policy shall also be possible, in conformity with the relevant Community legislation.

Article 15
Liability

1. An ERI shall be liable for its debts.
2. The financial liability of the members for the debts of the ERI shall be limited to their respective contributions provided to the ERI. The members may specify in the Statutes that they will assume a fixed liability above their respective contributions or unlimited liability.
3. The Community shall not be liable for any debt of the ERI.

Article 16
Applicable law and jurisdiction

1. An ERI shall be governed:

- (a) by Community law, in particular this Regulation and the decisions referred to in Articles 5(1)(a) and 10(1);
 - (b) by the law of the State, where the ERI has its statutory seat in the case of matters not, or only partly, regulated by acts referred to in point (a);
 - (c) by its Statutes, adopted in conformity with the sources of law referred to in points (a) and (b);
 - (d) by its implementing rules complying with its Statutes.
 - (e) In derogation from point (b), an ERI shall be governed by the law of the States in which the ERI operates as regards
 - (i) public and occupational health and safety;
 - (ii) environmental protection;
 - (iii) treatment of hazardous substances;
 - (iv) issuance of permits required for its operation.
2. The Court of Justice of the European Communities shall have jurisdiction over litigation among the members, between the members and the ERI and over any litigation where the Community is a party.
 3. Community legislation on jurisdiction shall apply to disputes between an ERI and third parties. In cases not covered by such Community legislation, the law of the State, where the ERI has its statutory seat shall determine the competent jurisdiction for the resolution of such disputes.

Article 17 *Winding-up, insolvency*

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

Article 18
Reporting and control

1. An ERI shall produce an annual activity report and submit it to the Commission within six months from the end of the corresponding financial year. This report shall be made publicly available.
2. An ERI and the Member States concerned shall inform the Commission of any circumstances which threaten to seriously jeopardise the achievement of the task of the ERI.
3. Where the Commission obtains indications that an ERI is acting in serious breach of this Regulation, the decisions adopted on the basis thereof or other applicable law, it shall request explanations from the ERI and/or its members.
4. If the Commission concludes, after having given the ERI and/or its members a reasonable time to provide their observations, that such ERI is acting in serious breach of this Regulation, the decisions adopted on the basis thereof or other applicable law, it may propose remedial action to the ERI and its members.
5. If no remedial action is taken, the Commission may repeal the decision establishing the ERI. Such decision shall be notified to the ERI and be published in the L series of the *Official Journal of the European Union*. This shall trigger the winding-up of the ERI.

Article 19
Appropriate provisions

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

Article 20
Report and Review

Five years from the entry into force of this Regulation, the Commission shall forward to the European Parliament and the Council a report on its application and proposals for amendments, where appropriate.

Article 21
Committee procedure

1. The Commission shall be assisted by an advisory committee.
2. Where reference is made to this Article, Articles 3 and 7 of Decision 1999/468/EC shall apply.

Article 22
Entry into force

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

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

Done at Brussels,

For the Council
The President

ANNEX

EXTRACT FROM THE STATUTES

- (1) Name of the ERI (Articles 7(2) and 9, letter (d)): [name according to the Statutes, including the words "European Research Infrastructure" or the abbreviation "ERI"]
- (2) Task (Articles 2(1) and 9, letter (b)): [task according to the Statutes consisting in the establishment and operation of a research infrastructure]
- (3) Statutory seat (Articles 7(1) and 9, letter (c)): [reference preferably to the smallest administrative or self-governing territorial unit, such as a commune]
- (4) Duration (Article 9, letter (g)): [e.g. "indeterminate", or a final date or number of years from setting-up]
- (5) Basic principles of access policy for users (Article 9, letter (h), first indent): [according to the Statutes]
- (6) Basic principles of scientific evaluation policy (Article 9, letter (h), third indent): [according to the Statutes]
- (7) Basic principles of dissemination policy (Article 9, letter (h), fifth indent): [according to the Statutes]
- (8) Basic principles of employment policy (Article 9, letter (h), sixth indent): [according to the Statutes]
- (9) Basic principles of procurement policy respecting the principles of transparency, non-discrimination and competition (Article 9, letter (h), seventh indent): [according to the Statutes]
- (10) Liability regime (Article 15(2)): [according to the Statutes and/or first sentence of Article 15(2)]

LEGISLATIVE FINANCIAL STATEMENT

1. NAME OF THE PROPOSAL:

Council Regulation on the Community legal framework for a European Research Infrastructure (ERI)

2. ABM / ABB FRAMEWORK

Policy Area(s) concerned and associated Activity/Activities:

Research - Research infrastructures

3. BUDGET LINES

3.1. Budget lines (operational lines and related technical and administrative assistance lines (ex- B..A lines)) including headings:

- 08.01.05.01 : Officials and Temporary Staff of Research
- 08.01.05.02 : External Staff (contractual, END, etc.)

3.2. Duration of the action and of the financial impact:

Long term action, since the proposed legislation is designed to facilitate the joint establishment and operation of research facilities among several Member and Associated States, and since, through an empowerment to the European Commission, this regulation will allow a simpler process than if individual decisions would be taken by the Council.

In the short term, this would not necessitate more resources than those presently used to follow the preparatory phase of the new research infrastructures projects (FP7 resources). In the medium to long term, however, additional human resources should be needed to follow the political development of the regulation, leading e.g. to a possible revision of the regulation after 5 years.

3.3. Budgetary characteristics:

Budget line	Type of expenditure		New	EFTA contribution	Contributions from applicant countries	Heading in financial perspective
08.01 05 01	Non-comp	Non-Diff	NO	YES	YES	No 1A
08.01 05 02	Non-comp	Non-diff	NO	YES	YES	No 1A
08.01.05.03	Non-comp	Non-diff	NO	YES	YES	No 1A

4. SUMMARY OF RESOURCES

4.1. Financial Resources

4.1.1. Summary of commitment (CA) and payment appropriations (PA)

EUR million (to 3 decimal places)

Expenditure type	Section no.		2009	2010	2011	2012	2013	2014 and later
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Administrative expenditure not included in reference amount

Human resources / associated expenditure (NDA)	8.2.5.	a	0.423	0.657	0.711	0.828	0.828	1.062
Administrative costs (NDA)	8.2.6.	b	0.080	0.250	0.280	0.250	0.250	0.250

Total indicative financial cost of intervention

TOTAL CA including cost of Human Resources		a+b	0.503	0.907	0.991	1.078	1.078	1.312
TOTAL PA including cost of Human Resources		a+b	0.503	0.907	0.991	1.078	1.078	1.312

4.1.2. Compatibility with Financial Programming (heading 1)

- ☒ Proposal is compatible with existing financial programming.
- ☐ Proposal will entail reprogramming of the relevant heading in the financial perspective.
- ☐ Proposal may require application of the provisions of the Inter-institutional Agreement (i.e. flexibility instrument or revision of the financial perspective).

4.1.3. Financial impact on Revenue

- ☒ Proposal has no financial implications on revenue
- ☐ Proposal has financial impact – the effect on revenue is as follows:

4.2. Human Resources FTE – see detail under point 8.2.1.

Not applicable

5. CHARACTERISTICS AND OBJECTIVES

5.1. Need to be met in the short or long term

As the frontiers of research evolve and become more advanced and as our technologies progress, research infrastructures are becoming increasingly complex and more expensive, often placing them beyond the reach of a single research group, region, nation or even continent. However, a major difficulty for setting up new

European research infrastructures is the lack of an adequate legal framework allowing the creation of appropriate partnership with partners from different countries. The need to be met is therefore the provision of a Community legal framework for the setting-up and operation of research infrastructures of pan-European interest.

5.2. Value-added of Community involvement and coherence of the proposal with other financial instruments and possible synergy

The proposed legislation is designed to facilitate the joint establishment and operation of research facilities among several Member and Associated States, and to help develop further the European policy for research Infrastructures. Complementing national or inter-governmental schemes, the proposed framework regulation will provide a common legal framework based on Article 171 EC. It will set out the main characteristics of European Research Infrastructures (ERI), as well as clear procedures by which this status will be conferred by the legislator. Through an empowerment to the European Commission, this regulation will also allow a simpler process than if individual decisions would be taken by the Council, and avoiding uncoordinated activities.

5.3. Objectives, expected results and related indicators of the proposal in the context of the ABM framework

The overall objective of this proposal is to help Europe address the various challenges it is confronted with through the timely development of efficient European research infrastructures (ERI) which would in turn:

- Help strengthen the development of an efficient European Research Area by better integrating national efforts, avoiding sub-critical facilities, and placing Europe as a world leader for high-level research services;
- Help Europe to pool its resources for a new generation of large-scale facilities which are indispensable for staying at the forefront of research over the next decades, providing researchers with the research facilities they need, increasing therefore European attractiveness and potential;
- Help to better tackle social and environmental challenges such as climate change, energy production, water supplies, quality of the environment, or quality of life, through excellent research services provided by such new European Research Infrastructures, including e-infrastructures;
- Contribute to long-term economic competitiveness, through the acceleration of scientific advances in Europe favoured by such new European facilities and knowledge-based growth.

The expected result of this regulation is to help the development of more *favourable conditions for the development of basic research in Europe*. Through the development of more favourable legal conditions at Community level, this work will indeed support the timely implementation of new European research infrastructures (such as those identified by ESFRI). This will in addition help develop further the European policy for research infrastructures. Related indicators will be:

- the number new European research infrastructures (such as those identified by ESFRI) being set-up through Europe wide partnerships;
- the speed for these setting-up;
- the resources needed for such process;
- the strengthening and increased recognition of the European policy for research Infrastructures.

5.4. Method of Implementation

- ☐ Centralised Management (directly by the Commission or indirectly by delegation to executive Agencies, bodies set up by the Communities or national public-sector bodies/bodies with public-service mission)
- X Shared or decentralised management
 - X with Member states
 - ☐ with Third countries
- ☐ Joint management with international organisations (please specify)

Comments: The membership of ERIs will be limited to Member States, third countries and intergovernmental organisations with the possibility of participating countries to mandate public or private entities with a public-service mission to exercise their rights and duties on their behalf. The European Commission will ensure the overall coordination of this initiative. A Committee will support the European Commission in the management of the new legal framework.

6. MONITORING AND EVALUATION

6.1. Monitoring system

A monitoring and evaluation system will be put in place to monitor the European research infrastructures that are set up, and to assess the extent to which the new legal framework has met its objectives.

Whereas the European Commission will ensure the overall coordination of this initiative, an advisory Committee will support the European Commission in the management of the new legal framework.

In addition, whenever they are officially approved, each ERI will be asked to provide annual reports and to send them to the European Commission and the financing Member States. These reports will provide an overview of activities for the year in the question, as well as detail of budgetary issues, and should allow the European Commission and Member States to verify that the infrastructure is still complying with the conditions necessary for the European status.

6.2. Evaluation

6.2.1. Ex-ante evaluation

An ex-ante assessment report has been drawn up

6.2.2. *Terms and frequency of future evaluation*

Five years after the adoption of the legal framework, an evaluation will be carried by a panel of experts reporting to the Member States and the European Commission in order to assess:

- The take-up of the legal framework (i.e. number of new or upgraded European infrastructures using the framework);
- To what extent it delivered its anticipated benefits, and, in particular, its ease of use, and how far it has helped to speed up the creation of European research infrastructures;
- The need to review or adapt the legal framework.

7. **ANTI-FRAUD MEASURES**

Whenever they are officially approved, each ERI will be asked to provide annual reports and to send them to the European Commission and the financing Member States. These reports will provide an overview of activities for the year in the question, as well as detail of budgetary issues, and should allow the European Commission and Member States to verify that the infrastructure is complying with the conditions necessary for the European status. In addition, while providing research services, each ERI will automatically be monitored through the recurrent research activities supported by national, European or international programmes.

8. **DETAILS OF RESOURCES**

8.1. **Objectives of the proposal in terms of their financial cost**

No operational budget is linked with this regulation

8.2. **Administrative Expenditure**

8.2.1. *Number and type of human resources*

Not applicable

8.2.2. *Description of tasks deriving from the action*

The political follow-up of this regulation will necessitate a few staff of "AD" type for political tasks which will encompass from 2010 onwards the follow-up of the use - and possible revision after 5 years - of the regulation.

8.2.3. *Sources of human resources (statutory)*

- ☐ posts currently allocated to be replaced or extended
- ☐ Posts pre-allocated within the APS/PDB exercise for year n
- ☐ Posts to be requested in the next APS/PDB procedure
- ☒ Posts to be redeployed using existing resources within the managing services (internal redeployment)
- ☐ Posts required for year n although not foreseen in the APS/PDB exercise of the year in question

8.2.4. *Other Administrative expenditure included in reference amount (XX 01 04/05 – Expenditure on administrative management)*

Not applicable

8.2.5. *Financial cost of human resources and associated costs not included in the reference amount*

EUR million (to 3 decimal places)

Type of human resources	2009	2010	2011	2012	2013	2014 and later
Officials and temporary staff (08 01 05 01) - existing	0.234	0.468	0.585	0.702	0.702	0.936
Staff financed Art 08 01 05 02 (e.g. END, contract) - existing	0.189	0.189	0.126	0.126	0.126	0.126
Total cost of HR and associated costs (NOT in reference amount)	0.423	0.657	0.711	0.828	0.828	1.062

	2009	2010	2011	2012	2013	2014 and later
08 01 02 11 01 + 08 01 05 03 – Missions	0.03	0.03	0.03	0.03	0.03	0.03
08 01 02 11 02 + 08 01 05 03 – Meetings & Conferences	0.02	0.1	0.1	0.06	0.06	0.06
08 01 02 11 03 + 08 01 05 03 – Committees	0	0.06	0.09	0.09	0.09	0.09
08 01 02 11 04 + 08 01 05 03 – Studies & consultations	0.03	0.03	0.03	0.05	0.06	0.06
08 01 02 11 05 + 08 01 05 03 - Information systems	0	0.03	0.03	0.02	0.01	0.01
Total Administrative expenditure, other than human resources and associated costs (NOT included in reference amount)	0.08	0.25	0.28	0.25	0.25	0.25

Calculation– *Officials and Temporary agents as well as for staff financed under art. 08 01 02*

The cost of an official, per year, is calculated on the basis of 117.000 €

The cost of the other staff (contractual agent, SNE) is calculated on the basis of 63.000 € per year

Description of tasks deriving from the action:

The first months following the adoption of the regulation will be devoted to the development of the procedures and guidelines for applying for an ERI.

Later on, from mid 2009, the regular work will be gradually devoted to:

- the follow-up of potential applications from founding members (Member States),
- the treatment of files (eligibility, scientific evaluation, analysis of administrative, legal and financial data),
- the interservice consultations and Committee meetings,
- the preparation of the possible decisions from the EC,
- the registration and future annual follow-up of the ERI.

The number of staff needed would be in the short term supported by the current resources. However, from 2010, few posts of officials (redeployment) should reinforce the political work which would be delegated by the Council to the Commission (i.e. Committee meetings, follow-up of files for Commission decision, follow-up and possible revision of the regulation after 5 years):

	2009	2010	2011	2012	2013	2014 and later
AD* / AST (ref. 8.2.5)	2	4	5	6	6	8
END / contract staff* (ref. 8.2.5)	3	3	2	2	2	2
Total	5	7	7	8	8	10

* of which one A/AD and one END lawyer