

marinerg-i

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Final model for the overall legal framework of MARINERG-i

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Abbreviations

D5.5 Questionnaire	has the meaning given to it in the Introduction
ERIC	European Research Infrastructure Consortium
ERIC Regulations	Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium
Hague Meeting	has the meaning given to it in the Introduction
MARINERG-i	Marine Renewable Energy Research Infrastructure
Node	A local operating entity, separate from the core elements of the MARINERG-i ERIC entity
ORE	Offshore Renewable Energy
RI	Research Infrastructure

Table of Contents

1. INTRODUCTION.....	6
2. BACKGROUND ON EUROPEAN RESEARCH INFRASTRUCTURE CONSORTIUM (ERIC)6	6
2.1 General.....	6
3. GENERAL PROVISIONS	9
3.1 Name, seat and working language.....	9
3.2 Objectives	9
3.3 Tasks and Activities.....	10
4. MEMBERSHIP.....	11
4.1 Membership and admission of new Members	11
4.2 Observers and admission of new Observers	13
4.3 Minimum Period for Membership.....	14
4.4 Termination of membership or Observer status	15
5. RIGHTS AND OBLIGATIONS OF THE MEMBERS	15
5.1 Voting rights	15
5.2 Contributions.....	16
5.3 Liability and insurance.....	16
6. MANAGEMENT AND GOVERNANCE OF THE ERIC	17
6.1 Governing bodies.....	17
7. FINANCE.....	18
7.1 Resources of the ERIC	18
7.2 Budgetary principles, accounts and audit	19
8. POLICIES	19
8.1 General.....	19
8.2 Access policy for Users	20
8.3 Scientific Evaluation Policy	21
8.4 Dissemination Policy.....	21
8.5 Intellectual property rights policy.....	22
8.6 Employment Policy.....	23
8.7 Procurement Policy	24
8.8 Data Policy.....	25
9. DURATION, APPLICABLE LAW	25
9.1 Duration	25
9.2 Procedure for the winding-up	25
9.3 Applicable Law	26
9.4 Disputes	26

EXECUTIVE SUMMARY

This report (Deliverable 5.6) sets out the blueprint for the legal structure of the future MARINERG-i ERIC.

The legal structure of the MARINERG-i ERIC was discussed in considerable detail at a General Assembly meeting held in The Hague on 23 March 2018, where the Consortium Members discussed the possible models set out in Deliverable 5.5 for the operation of the MARINERG-i ERIC. Comments on the issues have also been received from Consortium Members following the circulation of a draft version of Deliverable 5.6.

The MARINERG-i ERIC will be operated in accordance with the Statutes and a set of accompanying Implementing Rules. This Deliverable reviews the blueprint for the overall legal framework of the MARINERG-i ERIC. The Statutes for the MARINERG-i ERIC will be prepared on the basis of this Deliverable 5.6 and will be set out in a future Deliverable (Deliverable 5.7) under this Work Stream (WP5).

As a blueprint for the overall legal framework of the MARINERG-i ERIC, Deliverable 5.6 will be used to guide the drafting of the MARINERG-i ERIC's Statutes. However, whilst this Deliverable should be a guideline for drafting of the Statutes, the Consortium Members may decide to take different approaches to those set out in this Deliverable 5.6 in the Statutes for the MARINERG-i ERIC (which will be contained in Deliverable 5.7).

Future deliverables in this Work Stream relate to the preparation of draft legal documentation needed to implement the MARINERG-i ERIC.

1. INTRODUCTION

The purpose of this Deliverable 5.6 is to reflect and document:

- the responses received from the members of the MARINERG-I ERIC Consortium (the "**Consortium Members**") to the Deliverable 5.5 Questionnaire issued by this Work Stream (the "**D5.5 Questionnaire**");
- the discussions of the Consortium Members which took place at a workshop in The Hague on 23 March 2018 (the "**Hague Meeting**") to discuss the possible models for the overall legal framework of the MARINERG-i ERIC (set out in Deliverable 5.5) in more detail; and
- comments received from the Consortium Members following circulation of a draft of this Deliverable 5.6.

In doing so, this Deliverable 5.6 sets out the blueprint for the legal structure of the future MARINERG-I ERIC and will be used to guide the drafting of the MARINERG-i ERIC's Statutes as part of a future Deliverable (Deliverable 5.7) under this Work Stream (WP5). However, the Consortium Members may decide to take different approaches to those identified in this Deliverable 5.6 in the Statutes for the MARINERG-i ERIC which will be set out in Deliverable 5.7.

2. BACKGROUND ON EUROPEAN RESEARCH INFRASTRUCTURE CONSORTIUM (ERIC)

2.1 General

- 2.1.1 In this Section, we explain what an ERIC is, in order to give some context and background to the discussions of the members of the MARINERG-I ERIC relating to its legal structure and organisation.
- 2.1.2 The overall legal framework for ERICs has been designed by the European Union to facilitate the establishment and operation of high profile RI of European interest on a non-economic basis with the involvement of several EU Member States.¹
- 2.1.3 An ERIC is a legal entity with full legal personality and full legal capacity. It is recognised in all EU Member States. ERICs are governed by both EU law and the laws of the EU Member State in which it has its statutory seat. ERICs can also have places of operation in other EU Member States.
- 2.1.4 ERICs must include at least three EU Member States as members. The members of the ERIC must be countries but EU Member States can be represented in the activities of the ERIC by public entities or private entities with a public service mission. Publicly funded research institutes and higher education establishments that perform research in

¹ See "Legal framework for a European Research Infrastructure Consortium – ERIC Practical Guidelines", EU Commission, April 2010

accordance with objectives agreed by the state can qualify as representatives of the member country.

- 2.1.5** Non-EU Member States and intergovernmental organisations can also be members of an ERIC. However, the EU Member States that are members of an ERIC should jointly hold the majority of votes in the assembly of members of that ERIC. This demonstrates the clear EU emphasis that is placed on this legal structure.
- 2.1.6** With respect to any non-EU Member States which may wish to be part of an ERIC, provisions will need to be made by each relevant non-EU Member State to ensure that the ERIC: (i) will have legal personality and legal capacity in their country; (ii) will be governed by EU law; and (iii) will be exempted from VAT, excise duties and public procurement rules in their country.
- 2.1.7** ERICs are allowed to carry out some limited economic activities in order to promote innovation and knowledge and technology transfer if these are closely related to, and do not jeopardize the achievement of, its principal tasks.
- 2.1.8** In order to be established as an ERIC, an RI must meet the following five specific requirements:
 - 2.1.8.1** it is necessary for the carrying out of European research programmes and projects, including for the efficient execution of Community research, technological development and demonstration programmes;
 - 2.1.8.2** it represents an added value in the strengthening and structuring of the European Research Area (ERA) and a significant improvement in the relevant scientific and technological fields at international level;
 - 2.1.8.3** effective access, in accordance with the rules established in its Statutes, is granted to the European research community, composed of researchers from EU Member States and from associated countries;
 - 2.1.8.4** it contributes to the mobility of knowledge and/or researchers within the ERA and increases the use of intellectual potential throughout Europe; and
 - 2.1.8.5** it contributes to the dissemination and optimisation of the results of activities in Community research, technological development and demonstration.
- 2.1.9** The procedure for setting up an ERIC involves an application to the Commission. The Commission will then assess, with the help of experts (which may include ESFRI), whether or not the proposed RI meets the requirements of an ERIC as described in the ERIC Regulation. Following

the application process, the applicants will be required to submit a formal request to the Commission, which will allow the Commission to prepare its decision setting up the ERIC (which will take account of the opinion of the ERIC Committee, composed of representatives of all EU Member States).

- 2.1.10 An ERIC can be either "single-sited" or "distributed" (an organised network of resources). The latter ranges between:
 - 2.1.10.1 an infrastructure having facilities located in different sites, operated by one legal entity solely; and
 - 2.1.10.2 an infrastructure set up as a central hub which is responsible for the coordinated operations of several closely coordinated distributed facilities, which might however retain their legal personality.
- 2.1.11 ERICs have been designed to be very flexible to the extent that its members have the freedom to define both the members' rights and obligations within the Statutes of the ERIC. No two ERICs will therefore be identical in the way they operate, which means that ERICs have the flexibility to adapt to the specific requirements of each RI.
- 2.1.12 As well as considering an application for an ERIC from the proposed members before that ERIC is set up, the Commission will have the opportunity to review the ERIC's Statutes before the ERIC is formed, and, following registration of the ERIC, the Commission's approval will need to be sought before any material changes to the Statutes can be implemented. Any non-material changes to the Statutes should always be notified to the Commission. In extreme cases (where the ERIC is in breach of the ERIC Regulation and does not remedy this after being notified of this breach by the Commission), the Commission is entitled to repeal the decision setting up the ERIC, which would mean that the ERIC would need to be wound-up.
- 2.1.13 Although, as mentioned above, the ERIC does benefit from a large amount of flexibility in terms of how it operates, the ERIC Regulation lists a number of topics which the Statutes must address as a minimum as set out in Appendix 1. (This covers lists of members, tasks and activities of the ERIC, etc.).
- 2.1.14 The ERIC qualifies as an international organisation for the purposes of (for example): (i) the VAT Directive; (ii) the excise duty Directive; and (iii) the public procurement Directive.
- 2.1.15 With respect to members' financial liability, the default position is that this is limited to their respective contributions provided to the ERIC, although members can provide for a different liability regime going above the contribution of the members in the Statutes. It is worth noting that members' contributions may be either financial or "in kind".

- 2.1.16 Finally, the ERIC shall at least consist of: (i) an assembly of members as the body having full decision-making competency, including the adoption of the budget; and (ii) a director or a board of directors, appointed by the assembly of members, as the executive body and legal representative of the ERIC.

3. GENERAL PROVISIONS

3.1 Name, seat and working language

- 3.1.1 The ERIC Statutes must identify the members of the ERIC when it is first established.
- 3.1.2 The discussions at the Hague Meeting indicated that, out of the fourteen current Consortium Members of the MARINERG-I project, [x] are most likely to be the founding members of the MARINERG-i ERIC. A firm commitment from these countries will be needed in time for any application to the EU Commissions to set up an ERIC. It is not necessary to identify the founding members for the purposes of this Deliverable. The founding members can be identified at a later stage.
- 3.1.3 The Consortium Members have agreed that the host Member will be Ireland, and that the statutory seat and territory of the MARINERG-I ERIC will be Ireland.
- 3.1.4 The working language used for the MARINERG-I ERIC and its members will be English.

3.2 Objectives

- 3.2.1 The MARINERG-i ERIC's key value and mission statement, which is derived from its objectives, is that it will be comprised of "*distributed testing infrastructures united to create an integrated centre for delivering Offshore Renewable Energy*".
- 3.2.2 The ERIC Regulations do not require a statement of its objectives to be included in the Statutes. However, a number of the ERICs that have been approved by the EU Commission include a statement of their objectives within their Statutes. There are pros and cons to the inclusion of a statement of objectives within the Statutes. It can be beneficial to clarify the objectives of the ERIC on a formal basis so that there is a good public understanding of these issues. However, there is a mandatory requirement to include a statement setting out the "Tasks and Activities" of the ERIC in its Statutes. In practice, it can be hard to distinguish between the Objectives of an organisation and its Tasks and Activities, leading to a risk of overlap and confusion between these two concepts.
- 3.2.3 It is recommended and the Consortium Members have decided that in order to avoid confusion between a statement of objectives and the

statement of the "Tasks and Activities" (see below) a statement of objectives should not be included in the Statutes.

3.3 Tasks and Activities

3.3.1 As set out above, there is a mandatory requirement under the ERIC Regulations to include a statement setting out the "Tasks and Activities" of the ERIC in its Statutes.

A provisional list of the "Tasks and Activities of the MARINERG-i ERIC is set out below. This provisional list is based on information provided during Consortium meetings up to the date of this Deliverable and on the Statutes of other similar ERICs. This provisional list will need further development and refinement prior to the Statutes being fully drafted. The Business Plan is likely to be a very useful source document to identify the "Tasks and Activities" of the MARINERG-i ERIC. The provisional list of the "Tasks and Activities" of the MARINERG-i ERIC is as follows:

3.3.1.1 facilitation and mediation exchange of knowledge and expertise, data, and human capital between the nodes, and externally to the MARINERG-i ERIC;

3.3.1.2 inform and update of ORE policy and market development in Member countries;

3.3.1.3 maintaining the links with both research and operational user communities;

3.3.1.4 supporting access to the MARINERG-i ERIC by the European and international scientific and operational communities;

3.3.1.5 the support to the leadership of Europe in marine energy technologies, by partnering with industries and other relevant stakeholders;

3.3.1.6 facilitation of the user access process through a common web portal; and

3.3.1.7 providing other services as determined by the MARINERG-i ERIC Board.

3.3.2 It should be noted that the primary activities of the MARINERGI-i ERIC must be non-economical. Some limited economic activities may still occur provided that these are closely related to the principal task of the ERIC and do not jeopardise the achievement thereof². Any income generated by any such limited economic activities should be used to further the purpose of the MARINERG-i ERIC. A statement to this effect will be inserted into the Statutes

² Article 3(2) of the ERIC Regulations.

4. MEMBERSHIP

4.1 Membership and admission of new Members

4.1.1 The Consortium Members have agreed that membership to the MARINERG-i ERIC will be open to the following entities:

4.1.1.1 Member States of the European Union;

4.1.1.2 Associated Countries³;

4.1.1.3 Third countries other than Associated Countries⁴; and

4.1.1.4 Intergovernmental organisations.

4.1.2 The Consortium Members have provisionally agreed to the following list of duties of the Members:

4.1.2.1 participate in the activities of the MARINERG-i ERIC;

4.1.2.2 participate in the Assembly of Members meetings with the right to vote;

4.1.2.3 elect and be elected for the bodies of the MARINERG-i ERIC through their representatives;

4.1.2.4 propose the admission of new Members or Observers who will be subject to the approval of the Assembly of Members;

4.1.2.5 examine the account, documents and books concerning the activities of the MARINERG-i ERIC;

4.1.2.6 request and obtain information on the activities of the MARINERG-i ERIC; and

4.1.2.7 withdraw from the MARINERG-i ERIC in accordance with the withdrawal provisions of the Statute.

4.1.3 Each member (being a country) will be able to appoint a representing entity in accordance with its own rules and procedures.

³ Article 2 of the ERIC Regulations state that an Associated Country means a country which is: (i) not a Member State of the European Union; and (ii) a party to an International Agreement with the European Commission and makes a financial contribution to all or part of the European Commission's research, technological development and demonstration programmes. Article 7 of the Horizon 2020 Regulation lists, as of 1 January 2017, Associated Countries as including: Iceland, Norway, Switzerland, Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, Turkey, Israel, Moldova, Faroe Islands, Ukraine, Tunisia, Georgia and Armenia.

⁴ Article 2 of the ERIC Regulations state that a third country is a country that is not a Member State of the European Union.

- 4.1.4** The process for the admission of new Members needs to be set out in the Statutes. The process needs to ensure that there is an opportunity for the suitability of new members to be carefully considered by the executive function of the ERIC and that existing Members at the time of the application have a right for their views on the suitability of the proposed new member to be taken into account.
- 4.1.5** The recommended process for the admission of new Members is as follows:
- (a) a written request should be made by the applicant members no later than three months prior to the next meeting of the Assembly of Members;
 - (b) a dialogue process should be carried out between the applicant and at least three Members who will be appointed by the Executive Committee. The aim of the dialogue should be to establish the applicant's ability to contribute to the MARINERG-i ERIC. Only then should the decision to formally submit the applicant's application to the Assembly of Members be made. It is possible that additional procedural requirements could be implemented in the Statutes relating to the admission of new Members. If so, these additional procedural requirements could be introduced into the Statutes during the detailed drafting stage for the Statutes;
 - (c) If a decision is made to submit the applicant's application to the Assembly of Members, the decision of the Assembly could either be unanimous approval of the Assembly (i.e. ECCSEL model) or by a decision (not unanimous) by the Assembly (i.e. EMSO model).

At the stage of drafting this Deliverable there does not appear to be a consensus of the Consortium Members on this issue. The draft Statutes (Deliverable 5.7) will include both of these options for review and consideration by the Consortium Members.

Another solution may be to include a two-stage process depending on the overall numbers of members of the ERIC: unanimous decisions for up to [x] members, and if the number of members exceeds [x], then non-unanimous decision. Clearly, any concerns about the suitability of a new member are likely to be less significant in an organisation that has a larger number of members. If the organisation has a very small number of members then there could be real issues of compatibility and it could be appropriate in these circumstances for each existing member to have – in effect – a veto over the appointment of any new member. However, against this, if the number of members is very small the ERIC

will not be very secure and it may not be preferable for a single member to have a veto right over the appointment of new members.

4.2 Observers and admission of new Observers

- 4.2.1** The ERIC Regulations refer to Observers as entities with legal personality and capacity and which are subject to the ERIC's Statutes and Implementing Rules. Observers have the right to attend and participate in the Assembly of Members' meeting and in other bodies of the ERIC, but do not have voting rights⁵.
- 4.2.2** It is clear from the Consortium Members' responses to the D5.5 Questionnaire and the Hague Meeting that Consortium Members consider it important for the MARINERG-i ERIC to have the ability to appoint Observers, as these could also represent an important opportunity for the MARINERG-i ERIC and to encourage participation in the ERIC below the level of full membership. There is also a clear desire that Observers should be encouraged to apply for full Membership if possible in due course, as the status of Member will bring a higher financial contribution from the relevant entity, and permit the MARINERG-i ERIC to ensure its legitimacy and sustainability. Potentially, Observers should be appointed for a limited time period. At the Hague Meeting a time period of 3 years was discussed and, at this stage, this appears to be the consensus approach of the Consortium Members.
- 4.2.3** The MARINERG-i ERIC Statutes will therefore provide for the possibility for entities to be appointed as Observers. The Consortium Members will need to discuss in further detail whether Observers will be appointed: (a) for a limited period of time (and if so, what this period will be); (b) whether they will be required to pay any fees (and if so, what these fees will be); and (c) whether they should be appointed by a unanimous or a majority vote of the members.
- 4.2.4** It is recommended that (a) the period of appointment for Observers is three years with the option, at the discretion of the Assembly of Members, to renew for further periods of three years; (b) there is a fee payable by Observers but such fee should not be so high as to risk deterring potential Observers; and (c) appointment is made by means of a majority of the Members at a meeting of the Assembly, as the appointment of Observers is not as significant as that of Members.
- 4.2.5** The recommended process for the admission of new Observers is as follows:

⁵ Article 9(2) of the ERIC Regulations.

- (a) a written request should be made by the applicant Observer no later than three months prior to the next meeting of the Assembly of Members;
- (b) the applicant's application should be presented to the Assembly of Members and the Assembly will decide on the application - either by unanimous approval of the Assembly (i.e. ECCSEL model) or by a decision (not unanimous) by the Assembly (i.e. EMSO model);
- (c) the Chair of the Assembly of Members should have responsibility of informing the applicant in writing about their admittance or rejection and any associated conditions.

4.3 Minimum Period for Membership

- 4.3.1 The ERIC Regulations are "silent" on the minimum duration (if any) of membership. In practice, most ERICs impose a minimum duration for Membership but there is a wide variation on the length of this minimum period. For example, the Euro-Argo ERIC has a minimum period of Membership of 4 years, EMSO has two years after the completion of the initial set up phase, and EATRIS has a 5 year minimum period.
- 4.3.2 It is recommended that Members be permitted to withdraw at any time after giving a reasonable period of notice to the ERIC after an initial minimum commitment period. A suggestion might be that the Members be tied in to a minimum period of time. For example the MARINERG-i ERIC may consider it appropriate for withdrawals to take effect after a minimum period of three to five years after the initial phase of work has been completed. The final decision on the Members' minimum commitment period will be taken during the detailed drafting of the Statutes.
- 4.3.3 An associated issue is the required notice period that should be given to the Chair of the Assembly of Members for any withdrawal. It is recommended that the notice period should be not less than one year in advance of the date of the proposed withdrawal.
- 4.3.4 Another issue is whether a withdrawing Member will be entitled to receive back any sums paid. It is recommended that a withdrawing Member would only be entitled to receive back as a maximum amount a sum which equates to no more than they contributed whilst a Member.
- 4.3.5 The Statutes should also make clear that a withdrawing Member will still be liable for any Contributions which relate to the period until the Membership expires.

4.4 Termination of membership or Observer status

- 4.4.1** The Statutes should set out the circumstances in which it will be possible for a Member or an Observer to be expelled from the ERIC.
- 4.4.2** The usual trigger for termination would be a serious or material breach of at least one of the obligations imposed on the Member or Observer under the Statutes. Most ERIC Statutes provide for a rectification period before a Member or an Observer can be expelled. The usual rectification period is 6 months.
- 4.4.3** The MARINERG-i ERIC should consider whether there are any other circumstances in which membership or Observer status may be terminated. For example, the Euro-Argo ERIC provides that a Member or Observer can be expelled if it "causes or threatens to cause a serious disruption to the operation" of the ERIC. Whilst this approach gives somewhat more control over the Members and Observers there are risks in this approach as there are inevitable subjectivities on what may amount to a "serious disruption". The concept of a significant or material breach is rather better understood from a legal perspective.
- 4.4.4** Given the serious nature of an expulsion of a Member or Observer, it is recommended to limit expulsion to situations where a Member or Observer is in significant or material breach of the Statutes
- 4.4.5** In each instance of an expulsion, the Assembly should decide upon the extent of the return of financial contributions to any Member or Observer that has been expelled.

5. RIGHTS AND OBLIGATIONS OF THE MEMBERS

5.1 Voting rights

- 5.1.1** The ERIC Regulation provides that EU Member States must jointly hold the majority of the voting rights in the Assembly of Members.
- 5.1.2** This provision does not prevent the Statutes from stipulating that issues must be decided upon by a specific majority or unanimity to decide specified issues. It also does not refer to individual meetings but to the general distribution of votes – as long as, for example, 51 % of the members of a specific ERIC are EU member states, it would not constitute a violation of Article 9(3) if at one meeting not all EU member states were represented and those represented would constitute less than 50% of the participants.
- 5.1.3** Most ERIC Statutes provide that each Member has a single vote and that resolutions in the Assembly of Members shall be passed by a simple majority of the votes of the Members in attendance, except for those matters that have been specified as requiring either a two-thirds majority or unanimity of the votes cast.

- 5.1.4** Unless there are specific reasons why the voting system of MARINERG-i should not follow this arrangement it is recommended that this approach should be adopted.

5.2 Contributions

- 5.2.1** Feedback received from a number of the Consortium Members by way of responses to the D5.5 Questionnaire indicate that the preferred contribution model would be as set out below:

5.2.1.1 initial monetary contribution from each Member;

5.2.1.2 recurring annual monetary contribution from each Member – how this number is determined and amended is yet to be determined, however this will most likely be through a decision of the General Assembly;

5.2.1.3 possibility for in-kind contributions, although one Consortium Member expressed that these should not replace monetary contributions, but should be in addition to these – this should be discussed further as this doesn't appear to be the opinion of all of the Consortium Members.

- 5.2.2** Another Consortium Member indicated that there is a risk that annual monetary fees would risk deterring stakeholders from becoming Members in the MARINERG-i ERIC. They suggested that the fee payable by Members may therefore need to be relatively small, with the income of the ERIC augmented by a commission on testing fees gained through testing arrangements organised by MARINERG-i.

- 5.2.3** Further work needs to be carried out in WP5, and in other WP (particularly WP 8) relating to the Business Plan in order to give greater clarity on the initial and on-going funding of MARINERG-i ERIC. Once there is greater clarity on this issue the relevant Statutes can be drafted up.

- 5.2.4** It is recommended that there is sufficient flexibility in the Statutes to cover the possible scenarios at paragraph 5.2.1 above.

- 5.2.5** The monetary contributions of both Members and Observers will be made in Euros.

5.3 Liability and insurance

- 5.3.1** Under the ERIC Regulations the MARINERG-i ERIC must be liable for its debts⁶.

- 5.3.2** The Consortium Members' responses to the D5.5 Questionnaire indicate that they are in agreement that the Members' liability for the

⁶ Article 14(1) of the ERIC Regulations.

MARINERG-i's debts will be limited to the value of each Member's contribution.

- 5.3.3 The MARINERG-i ERIC should consider taking out and maintaining appropriate insurance to cover any risk relating to its implementation and operation.

6. MANAGEMENT AND GOVERNANCE OF THE ERIC

6.1 Governing bodies

- 6.1.1 The ERIC regulation provides that each ERIC must have at least: (a) an assembly of members as the body having full decision-making powers, including the adoption of the budget; and (b) a director or a board of directors, appointed by the assembly of members, as the executive body and legal representative of the ERIC. Apart from these relatively limited mandatory requirements, each ERIC is free to establish its own internal organisation. In general, the guidance recommends that the provision in the Statutes dealing with the legal representation of the ERIC by its Director/Board of Directors should be as simple as possible in order not to confuse third parties as to the validity of the ERIC's representation.
- 6.1.2 The Consortium Members agreed at the Hague Meeting that, initially at least, the governance structure for the MARINERG-i ERIC will be composed of an Assembly of Members and a Director General. However, the Statutes will include a procedure to create an Executive Committee and a Central Management Office if required.
- 6.1.3 The Consortium Members were supportive of a rather lean initial governance structure (the Assembly of Members and a Director General) but also to make provision in the Statutes so that the governance structure can be amended by the Assembly of Members, which should have the ability to create additional Advisory Bodies, including Advisory Bodies which would support the Director General.
- 6.1.4 In their responses to the Bird & Bird Questionnaire, a number of the Consortium Members expressed an interest in the initial governance structure of the MARINERG-i ERIC including a Scientific, Technical and Ethics Advisory Committee. It is not mandatory to include the Scientific, Technical and Ethics Advisory Committee within the Statutes as a governance body. The Scientific, Technical and Ethics Advisory Committee could be established by the Assembly of Members after the MARINERG-i ERIC has been set up.
- 6.1.5 Consortium Members consider that the Scientific, Technical and Ethics Advisory Committee is sufficiently important to be specifically referred to in the Statutes. The Consortium Members will then have assurance that the Scientific, Technical and Ethics Advisory Committee will be established. No other advisory committees will be referred to in the

Statutes but we will ensure there is sufficient flexibility to enable the creation of further advisory committees if required.

7. FINANCE

7.1 Resources of the ERIC

7.1.1 The Statutes must contain binding agreements between the Members to provide their contributions to a balanced budget for the ERIC.

7.1.2 At the Hague Meeting, the Consortium Members expressed a desire to for the Statutes to distinguish between:

7.1.2.1 funding for administrative costs (e.g. running of the central secretariat and day to day operations), which should be comprised of the Members' [and Observers'] annual financial contributions; and

7.1.2.2 funding for specific projects, which should be funded on a project by project basis.

7.1.3 Having looked at the Statutes of a number of existing ERICs, this type of distinction does not appear to be made in the Statutes. It may be that this type of distinction is made in the Business Plans for these ERICs. There is a risk that if this type of stipulation were to be included in the Statutes it could become overly restrictive during the lifetime of the ERIC. The Consortium Members should be cautious and to take care that this approach would continue to be appropriate for the ERIC throughout its lifetime before it is included in the MARINERG-I Statutes.

7.1.4 It is recommended that the Statutes provide for the possibility of the types of funding at paragraph 7.1.2 but do not stipulate that the MARINERG-I ERIC must take this approach.

7.1.5 Feedback received from Consortium Members (both by way of responses to the D5.5 Questionnaire and at the Hague Meeting) envisages that the MARINERG-i ERIC will have the following revenue streams:

7.1.5.1 annual Member and Observer monetary and in-kind contributions;

7.1.5.2 additional voluntary contributions from Members or Observers;

7.1.5.3 income from services provided by MARINERG-i ERIC to third parties;

7.1.5.4 income derived from the exploitation by third parties of intellectual property rights owned and/or licensed by the MARINERG-i ERIC⁷; and

7.1.5.5 grants and other resources.

7.1.6 At the Hague Meeting there appeared to be a clear desire for Observers to make some form of financial contribution to the operation of the MARINERG-I ERIC. However, it was recognised that the level of financial contribution by Observers would need to be relatively low so that potential Observers would not be deterred from signing up by a high level of financial commitment.

7.2 Budgetary principles, accounts and audit

7.2.1 The financial year for the MARINERG-i ERIC will begin on 1 January and end on 31 December each year.

8. POLICIES

8.1 General

8.1.1 The ERIC Regulation requires that each ERIC Statutes must contain basic principles covering:

(i) the access policy for users;

(ii) the scientific evaluation policy;

(iii) the dissemination policy;

(iv) the intellectual property rights policy;

(v) the employment policy, including equal opportunities;

(vi) the procurement policy respecting the principles of transparency, non-discrimination and competition;

(vii) a decommissioning, if relevant; and

(viii) the data policy.

8.1.2 In practice, the statements relating to policies set out in Statutes of existing ERICS are quite high-level. Quite frequently, the Statutes do not set out policies as such but instead refer to the relevant Advisory Body that will have responsibility for developing the policy. For example, the Euro-Argo ERIC Statutes refer to the scientific evaluation policy for as being the responsibility of the Scientific and Technical Advisory Group

⁷ ERICs are allowed to carry out some limited economic activities in order to promote innovation and knowledge and technology transfer if these are closely related to, and do not jeopardize the achievement of, its principal tasks.

but do not identify any principles as such for the scientific evaluation policy.

8.1.3 Where there are clear principles that it is well-accepted will underpin these policies these should be stated in very general terms in the Statutes. In other circumstances, it is preferable to establish a process in the Statutes for the policies to be developed. For example, in respect of the procurement policy there are a number of principles which underpin procurement procedures that are regulated by the EU procurement rules, including principles of transparency, equal treatment, non-discrimination and open competition. MARINERG-I ERIC will be exempt from the EU procurement rules⁸, but as a public sector purchaser the ERIC should accept that its purchasing activities will be subject to the procurement principles.

8.2 Access policy for Users

8.2.1 The policy relating to access for Users needs to be considered both in terms of access to facilities to be managed by MARINERG-I ERIC and access to data.

8.2.2 Most ERICs provide in their Statutes that access to facilities will be on an open basis for qualified and appropriate users (eg. scientific researchers) but subject to controls by the ERIC, such as through open competition and peer review of applications after a fair and transparent procedure.

8.2.3 The ECCSEL ERIC Statutes also provide that users of facilities that are managed by the ERIC will pay for the use of these facilities. The Statutes provide that users will "bear all access costs and all costs related to materials including samples and equipment belonging to such users".

8.2.4 For the MARINERG-I ERIC Statutes it may be sensible to include a statement providing that the expectation is that users will bear the costs of the use of the but it may be overly restrictive to include a statement that requires users to pay for "all access costs".

8.2.5 Access to data that is produced and managed by MARINERG-I ERIC is likely to follow the model that has been used by a number of existing ERICs that data access should be open and free of charge, taking into account third party IPR and license restrictions and any other pre-existing arrangements relating to such data.

8.2.6 The MARINERG-I ERIC Statutes ought to clarify that in certain circumstances there may be secrecy and confidentiality constraints which may have an impact on access to data which is produced and managed by MARINERG-I ERIC.

⁸ See Deliverable 5.3, page [].

8.3 Scientific Evaluation Policy

8.3.1 The Consortium Members need to consider if it possible at the stage of the formation of the ERIC to identify clear principles that govern the Scientific Evaluation Policy of the MARINERG-I ERIC?

8.3.2 The approach taken in the statutes of a number of existing ERICs in their statutes is not set out any policies as such but to establish a procedure for regularly reviewing the scientific activities of the ERIC. The approaches taken include:

- (a) EMSO – an annual scientific evaluation of the EMSO ERIC activities will be carried out by the Scientific, Technical and Ethics Advisory Committee and the report will be submitted to the Assembly of Members for approval;
- (b) ECCSEL – the Director is required to consult the Scientific Advisory Board at least once a year on the scientific quality of the services offered by EXCCSEL ERIC, the organisation's scientific policies, procedures and future plans;
- (c) EURO-ARGO – the scientific evaluation of the annual activities will be the responsibility of the Scientific and Advisory Group;

8.3.3 At this stage as the ERIC is at an early stage of development it is recommended that the MARINERG-i ERIC statutes should require an annual scientific evaluation of the MARINERG-i ERIC activities to be carried out by the Scientific, Technical and Ethics Advisory Committee and the report will be submitted to the Assembly of Members for approval.

8.4 Dissemination Policy

8.4.1 There is quite a wide variation in the approach taken in the statutes of a number of existing ERICs on their dissemination policies. For example, the CLARIN ERIC statutes state that the "The dissemination policy shall describe the various target groups, and CLARIN shall use several channels to reach the target audiences, such as web portal, newsletter, workshops, presence in conferences, articles in magazines and daily newspapers"

- (a) The EURO-ARGO ERIC statutes provide that users are encouraged to publish their results in peer-reviewed scientific literature, to present communications in scientific conferences, as well as in other media targeted at larger audiences including without limitation the general public, the press, citizen groups, education.
- (b) The dissemination provision in the ECCSEL ERIC statutes are similar to the CLARIN ERIC provision referring to policy

describing various target groups, and using several channels to reach the target audiences,

- 8.4.2 It is recommended that the MARINERG-i ERIC statutes should follow the general approach taken in the CLARIN ERIC statutes and the ECCSEL ERIC statutes.
- 8.4.3 The description of the MARINERG-i ERIC dissemination policy in the MARINERG-i ERIC statutes should state quite generally that the policy shall describe the various target groups, and shall use several channels to reach the target audiences, such as web portal, newsletter, workshops, presence in conferences, articles in magazines and daily newspapers.

8.5 Intellectual property rights policy

- 8.5.1 As with the dissemination policy. The statutes of the existing ERICS are quite varied in their approach to the description of their intellectual property rights policy.
- 8.5.2 The ECCSEL ERIC statutes include quite a detailed provision which clarifies that intellectual property that Members provide to the ERIC shall remain the property of the original holder and that where intellectual property originates from ECCSEL ERIC funded work, the intellectual property shall belong to the ERIC, unless there is an agreement that the Member that created the intellectual property shall own it. More generally, the ECCSEL ERIC statutes include a provision stating that a detailed Intellectual Property Rights Policy, approved by the General Assembly shall be separately agreed by the parties operating the facilities that participate in the ECCSEL ERIC infrastructure.
- 8.5.3 The EATRIS ERIC statutes include a less specific statement on intellectual property right policies and set out a process for agreeing a more detailed intellectual property right policy. The EATRIS ERIC statutes state that the Board of Directors shall provide for common principles and policies for Intellectual Property as laid down in Rules of Procedure and that these common principles and policies shall be approved by the Board of Governors. Also, the Board of Directors may recommend agreements with the national centres and infrastructure consortia within the EATRIS research infrastructure in order to ensure that these entities as well as third parties have access to the scientific knowledge of the EATRIS research infrastructure.
- 8.5.4 A number of ERIC statutes refer to a preference for open source and open access principles. For example, the CLARIN ERIC statutes provide, "Generally Open Source and Open Access Principles shall be favoured."

- 8.5.5 It has been suggested by a Consortium Member that, in general, existing intellectual property rights should continue to belong to their existing owners, and the MARINERG-i ERIC should not acquire ownership or access rights. For new intellectual property rights, the MARINERG-i ERIC should only become co-owner or get access rights to these rights if an employee from the MARINERG-i ERIC is involved in the generating the rights. The MARINERG-i ERIC should not acquire ownership or access rights newly generated intellectual property rights just because the rights are generated using the MARINERG-i ERICs facilities.
- 8.5.6 At this stage, as the Consortium Partners have not had any significant opportunity to consider these intellectual property right principles in any detail, it is recommended that the intellectual property right policy as set out in the MARINERG-i ERIC statutes should be a general as possible and to retain as much flexibility as possible so that the MARINERG-i ERIC can determine these issues at the appropriate time when it has a better understanding of the practical and operational arrangements for the MARINERG-i ERIC.
- 8.5.7 The MARINERG-i ERIC Statutes should contain a description of a process for agreeing a more detailed intellectual property right policy. The Director General shall develop principles and policies for the ownership and licensing of Intellectual Property Rights and these principles and policies shall be approved by the Assembly of Members.
- 8.5.8 If it is clear that there is a preference for open source solutions and open access principles, a statement can be included on this basis.

8.6 Employment Policy

- 8.6.1 The Employment Policies statements in the statutes of existing ERICs tend to refer to specific principles rather than processes and procedures for determining the policy.
- 8.6.2 It is common for ERIC statutes to contain a statement that the ERIC in question will be an equal opportunities employer. For example, the EMSO ERIC, ECCSEL ERIC and ECRIN ERIC statutes contain such a statement. Beyond the statements on equal opportunities, the statutes also tend to include a statement relating to recruitment policies. For example, the EMSO ERIC and ECCSEL ERIC statutes include a statement relating to the recruitment procedures such that "the procedures for selecting applicants for EMSO ERIC staff positions shall be transparent, non-discriminatory and respect equal opportunities". The ECCSEL ERIC statutes also contain a statement that vacancies will be advertised internationally.
- 8.6.3 It is also common for ERIC statutes to state that employment contracts entered into by the ERIC will be subject to the applicable law and regulations of the country where the staff are employed or the laws of

the country where the activities are carried out. These statements are probably no more than a restatement of general legal principles that would apply in any case but they do make clear that the employees of the ERIC will not have any form of special status by virtue of the employment by the ERIC.

8.6.4 Many ERIC statutes contain a statement that "subject to the requirements of national legislation, each Member shall within its jurisdiction facilitate the movement and residence of nationals of Members involved in the tasks of the ERIC and of the family members of such nationals".

8.6.5 There do not appear to be any specific reasons for the MARINERG-i ERIC to depart from these established practices. This section of the statutes should read as follows:

- *MARINERG-i ERIC shall be an equal opportunity employer. The procedures for selecting applicants for MARINERG-i ERIC staff positions shall be transparent, non-discriminatory and respect equal opportunities. MARINERG-i ERIC vacancies shall be published internationally in an appropriate manner.*
- *Employment contracts shall be subject to applicable laws and regulations of the country in which the staff is employed or to the laws of the country where the activities of MARINERG-i ERIC are conducted.*
- *Subject to the requirements of national legislation, each Member shall within its jurisdiction facilitate the movement and residence of nationals of Members involved in the tasks of MARINERG-i ERIC and of the family members of such nationals.*

8.7 Procurement Policy

8.7.1 As with the Employment Policies, the Procurement Policy statements in the statutes of existing ERICS also tend to refer to specific principles rather than processes and procedures for determining the policy.

8.7.2 It is very common for statements to be included that the ERIC will abide by the general procurement law principles that have been identified by the EU Courts as underpinning the EU procurement rules. The EMSO ERIC and ARGO ERIC statutes state that the "procurement policy shall be governed by principles of transparency, equal treatment, non-discrimination and open competition".

8.7.3 Beyond this very general statement of principle a number of ERIC statutes simply provide that "the procurement policy shall be defined in detail in the Implementing Rules". Unless MARINERG-i ERIC has good grounds to make additional statements there is no reason to be more specific in the statutes,

8.7.4 As an example, the CLARIN ERIC statutes state that

The Executive Director shall be responsible for all CLARIN ERIC procurement. All tenders shall be publicised effectively on the CLARIN ERIC website and in the members' and observers' territories. For procurement amounts higher than EUR 200 000 CLARIN ERIC shall follow the principles of the EU Public Procurement Directives and subsequent applicable national legislation. The decision to award procurement shall be publicised and include a full justification. The General Assembly shall adopt Implementing Rules defining all necessary details on exact procurement procedures and criteria.

8.7.5 However, there do not appear to be any compelling reasons for the MARINERG-i ERIC to be constrained on this basis at this stage.

8.8 Data Policy

8.8.1 The issues relating to the Data Policy of the MARINERG-i ERIC have been discussed under the sections relating to dissemination and intellectual property (see sections 8.4 and 8.5 (above)).

9. DURATION, APPLICABLE LAW

9.1 Duration

9.1.1 The MARINERG-i ERIC will be established for an unlimited duration.

9.2 Procedure for the winding-up

9.2.1 The ERIC Regulations state that the procedure for the winding-up of the MARINERG-i ERIC shall be set by the Statutes.⁹

9.2.2 We recommend the initial decision to wind-up the MARINERG-i ERIC will come from a decision of the Assembly of Members, taken with a two thirds majority.

9.2.3 We also recommend that any assets remaining after payment of the MARINERG-i ERIC's debts on winding up should be apportioned among the Members in proportion to their accumulated contribution to the MARINERG-i ERIC at the time of dissolution.

9.2.4 Within 10 days after the adoption of the decision by the Assembly of Members to wind up the ERIC, the ERIC is to notify the Commission¹⁰. Additionally, if at any time the MARINERG-i ERIC is unable to pay its debts it will immediately notify the Commission¹¹. We recommend that these notifications be made by the Director General.

⁹ Article 10(e) of the ERIC Regulations

¹⁰ Article 16(3) of the ERIC Regulations.

¹¹ Article 16(4) of the ERIC Regulations.

9.3 Applicable Law

9.3.1 The MARINERG-i ERIC will be governed by:

9.3.1.1 European Union law and in particular the ERIC Regulations;

9.3.1.2 the law of [Ireland]; and

9.3.1.3 the ERIC's Statutes and Implementing Rules¹².

9.4 Disputes

9.4.1 We recommend that any dispute or disagreement between the Members in connection with the Statutes, including issues relating to the Members' performance of their obligations under the Statutes, or the activities of the MARINERG-i ERIC, be initially referred to the Assembly of Members, which will attempt to settle the dispute in good faith.

9.4.2 The European Court of Justice will have jurisdiction over the following types of litigation: (i) amongst the Members in relation to the MARINERG-i ERIC; (ii) between the MARINERG-i ERIC and Members; and (iii) over any litigation to which the European Union is a party.

9.4.3 European Union legislation on jurisdiction will apply to disputes between the MARINERG-i ERIC and third parties. In situations which are not covered by European Union legislation the law of the Host State will determine the competent jurisdiction for the dispute to be resolved in.

¹² Article 15(1) of the ERIC Regulations.

Appendix 1

Mandatory Content of ERIC Statutes

The following items are required to be included in each ERIC Statutes:

- (a) a list of members, observers and, where applicable, of entities representing members and the conditions of and the procedure for changes in membership and representation;
- (b) the tasks and activities of the ERIC;
- (c) the statutory seat of the ERIC;
- (d) the name of the ERIC;
- (e) the duration, and the procedure for the winding-up;
- (f) the liability regime;
- (g) the basic principles covering:
 - (i) the access policy for users;
 - (ii) the scientific evaluation policy;
 - (iii) the dissemination policy;
 - (iv) the intellectual property rights policy;
 - (v) the employment policy, including equal opportunities;
 - (vi) the procurement policy respecting the principles of transparency, non-discrimination and competition;
 - (vii) a decommissioning, if relevant;
 - (viii) the data policy;
- (h) the rights and obligations of the members, including the obligation to make contributions to a balanced budget and voting rights;
- (i) the bodies of the ERIC, their roles and responsibilities and the manner in which they are constituted and in which they decide, including upon the amendment of the Statutes;
- (j) the identification of the working language(s);
- (k) references to rules implementing the Statutes.¹³

¹³ See ERIC Regulation, Article 10